

## DEPARTMENT OF AGRICULTURE

## Agricultural Marketing Service

## 7 CFR Part 1214

[FV-96-708FR]

**Kiwifruit Research, Promotion, and Consumer Information Order; Referendum Procedures**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This rule provides procedures which the Department of Agriculture (Department) will use in conducting the referendum to determine whether the issuance of the proposed Kiwifruit Research, Promotion, and Consumer Information Order (Order) is approved by a majority of the producers and importers voting in the referendum and that the producers and importers favoring approval produce and import 50 percent of the total volume of kiwifruit produced and imported by persons voting in the referendum.

**EFFECTIVE DATE:** This rule is effective November 17, 1997.

**FOR FURTHER INFORMATION CONTACT:**

Sonia N. Jimenez, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456, telephone (202) 720-9916 or (888) 720-9917.

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Kiwifruit Research, Promotion, and Consumer Information Act [7 U.S.C. 7461-7473], hereinafter referred to as the Act.

This rule provides the procedures under which the referendum will be conducted.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 558 of the Act [7 U.S.C. 7467], after an Order is implemented, a person subject to the Order may file a petition with the Secretary stating that the Order or any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with law and requesting a modification of the Order or an exemption from the Order.

The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

**Executive Order 12866 and Regulatory Flexibility Act**

This rule has been determined not significant for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act [5 U.S.C. 601 *et seq.*], the Agency has examined the impact of this rule on small entities. Accordingly, we have performed this Final Regulatory Flexibility Analysis.

Legislation to create a generic program of promotion and research for kiwifruit became effective on April 4, 1996.

Section 561 of the Act [7 U.S.C. 7470] provides that the Secretary of Agriculture (Secretary) shall conduct a referendum during the 60-day period immediately preceding the proposed effective date of an Order to determine whether the issuance of an Order is favored by a majority of the producers and importers voting in the referendum. Paragraph (a)(2) of Section 561 of the Act [7 U.S.C. 7470] requires that the Order be approved by a majority of producers and importers voting in the referendum and that the producers and importers favoring approval produce and import 50 percent or more of the volume of kiwifruit produced and imported by persons voting in the referendum.

There are approximately 650 producers, 45 importers, and 65 handlers of kiwifruit that would be covered by the program. Small agricultural service firms, which will include the handlers and importers who would be covered under the Order, have been defined by the Small Business Administration (SBA) [13 CFR 121.601] as those whose annual receipts are less than \$5 million and small agricultural producers, those who would be required to pay assessments, as those having annual receipts of \$500,000. Only one handler has been identified to have \$5 million or more in annual sales. In addition, there are 10 producers at or over the \$500,000 annual sales receipts threshold. The Department does not

have specific information regarding the size of importers. However, it could be concluded that the majority of kiwifruit producers and importers may be classified as small entities.

The Department is aware of kiwifruit producers in California, Oregon, Pennsylvania, South Carolina, and importers that import kiwifruit from Chile, New Zealand, and Italy. The Department believes that these individuals would include a majority of the producers and importers that would be covered under the program. The Department is also aware that some individuals may be producers of "hardy kiwifruit," a different species of kiwifruit, known as *Actinidia arguta*, which would not be covered under the proposed program. However, the Department does not have specific information regarding how many individuals produce only the "hardy kiwifruit" versus the "fuzzy" most common kiwifruit species, known as *Actinidia deliciosa*. Therefore, the total number of producers believed to be covered by the program is the same as in the proposed rule on this action.

Other names for the species *Actinidia arguta* (hardy kiwifruit) are baby kiwifruit, kiwifruit grape, and kiwiberry. There are no official statistics on this commodity because it is such a small and new crop. According to comments received on the Order published on October 2, 1996, in the **Federal Register**, this species is grown in California, Oregon, Pennsylvania, Washington, Virginia, and British Columbia. The production in Virginia and Pennsylvania is not commercially marketed. Oregon production on 5 acres was a total of 216,000 pounds over the last 3 years. It takes 3 to 5 years to harvest the first crop. The hardy kiwifruit is hand-harvested and packed in 6-ounce berry baskets like raspberries. The harvesting, storage, handling, consumer recognition, and marketing of this species is completely different from the most common fuzzy kiwifruit or *Actinidia deliciosa*. Accordingly, we changed the definition of kiwifruit in the proposed order to mean all varieties of fresh kiwifruit classified under the species *Actinidia deliciosa* or the genus *Actinidia*. That definition of kiwifruit is added in this rule as well. All references to "kiwifruit" in this document, therefore, mean the *Actinidia deliciosa* species.

California is the source for practically all (99.7 percent) of the kiwifruit produced in the United States. The California kiwifruit industry consists of approximately 600 producers and 65 handlers. Production rose by 75 percent between 1984 and 1996, increasing from

18 thousand tons to 31.5 tons. In the period from 1984 through 1996, the value of production fell by 26 percent.

Most U.S. kiwifruit is utilized fresh. Fresh utilization increased by 123 percent between 1984 and 1996, growing from 11.7 thousand tons to 26.1 thousand tons. The season average price during 1984 through 1996 fell by 53 percent, declining from \$1,070 per ton to \$502 per ton. Exports accounted for about 30 percent of U.S. fresh utilization during that period.

Between 1992 and 1996, the average annual production per producer, including kiwifruit for processing, was 99 tons or 28,286 7-pound trays of kiwifruit. The average price was \$406 per ton, giving an average return of about \$40,000 per producer per year. A typical tray price during this period was \$1.42 per tray, and the average amount shipped per handler was about 148,276 trays, yielding an average annual revenue per handler of \$210,552. U.S. importers handled an average of 184,857 trays per year per importer. During this period, the average value of total imports per year was \$18.3 million (f.o.b. country of origin). The majority of kiwifruit came from Chile, with the remaining coming from New Zealand and Italy. In 1996, imports totaled 87.9 million pounds, up 5 percent from 1995. The value of imports in 1996 was \$26.5 million.

The proposed rule published in the **Federal Register** on October 2, 1996, provided statistics on production, value of production, fresh utilization, average price, average return per producer, average annual revenue per handler, and other related statistics that are different from the statistics provided in this rule. These changes are due to the fact that the October 2, 1996, rule relied on statistics from 1985 through 1995 because 1996 crop year statistics were not available. When 1996 statistics are added to the averages, the final averages change because the domestic 1996 crop statistics are considerably lower in terms of production, and fresh utilization. For example, production from 1985 to 1995 increased an average of 119 percent. However, when adding 1996 production, the average from 1985 to 1996 shows an average increase of only 75 percent. Therefore, adding the 1996 statistics to the averages provided in the October 2 proposed rule changes the statistical averages, in some cases considerably, making the statistics for production and fresh utilization lower than previously indicated.

This rule provides the procedures under which kiwifruit producers and importers may vote on whether they want the kiwifruit research and

promotion program to be implemented. Kiwifruit producers of 500 pounds or more and importers of 10,000 pounds or more annually can vote in the referendum. There are approximately 700 eligible voters.

The Department will keep all these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the program implementation process. In addition, trade associations and related industry media will receive news releases and other information regarding the implementation and referendum process.

There is a federal marketing order program and a California state program for kiwifruit. The marketing order regulations for grade, size, maturity, and containers are designed to assure consumers of consistently good quality California kiwifruit. The marketing order and its regulations allow small farmers to compete effectively in an increasingly competitive marketplace. The California Kiwifruit Commission (CKC) administers the California state program for kiwifruit. The CKC is composed of kiwifruit producers, packers, and handlers.

In 1996-97 it is estimated that producers would pay \$1.15 million in assessments at a rate of 17 cents per kiwifruit tray or tray equivalent. Handlers collect the assessments and remit the money to the CKC.

Voting in the referendum is optional. However, if producers and importers choose to vote, the burden of voting will be offset by the benefits of having the opportunity to vote on whether they want the program or not.

The Department considered requiring eligible voters to vote in person at various Department offices across the country. However, conducting the referendum from one central location by mail ballot is more cost effective for this program. Also, the Department will provide easy access to information for potential voters through a toll free telephone line.

#### **Paperwork Reduction Act**

In accordance with the Office of Management and Budget (OMB) regulations [5 CFR Part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the referendum ballot has been approved by the Office of Management and Budget (OMB) and has been assigned OMB number 0581-0093.

*Title:* National Research, Promotion, and Consumer Information Programs.

*OMB Number:* 0581-0093.

*Expiration Date of Approval:* October 31, 1997.

*Type of Request:* Revision of a currently approved information collection for research and promotion programs.

*Abstract:* The information collection requirements in this request are essential to carry out the intent of the Act.

The burden associated with the ballot is as follows:

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .25 hours per response for each producer and importer.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 700.

*Estimated Number of Responses per Respondent:* 1 every 6 years (.16).

*Estimated Total Annual Burden on Respondents:* 29 hours.

No comments were received concerning the collection of information, the accuracy of the estimated burden, or ways to enhance or minimize the collection of information.

#### **Background**

The Act authorizes the Secretary to establish a national kiwifruit research, promotion, and consumer information program. The program would be funded by an assessment levied on producers and importers not to exceed 10 cents per 7-pound tray of kiwifruit. Producers who produce less than 500 pounds annually, importers who import less than 10,000 pounds annually, and kiwifruit sold directly to a consumer by a producer for a purpose other than resale and domestic and imported kiwifruit for processing are exempt from assessments.

Assessments would be used to pay for: research, promotion, and consumer information; administration, maintenance, and functioning of the Board; and expenses incurred by the Secretary in implementing and administering the Order, including referendum costs.

Section 561 of the Act [7 CFR part 7470] requires that a referendum be conducted among eligible producers and importers of kiwifruit to determine whether they favor implementation of the Order. The Order shall become effective if it is approved by a majority of producers and importers voting in the referendum and the producers and importers favoring approval produce and import more than 50 percent of the total volume of kiwifruit produced and imported by persons voting in the referendum.

A proposed rule containing the proposed Order was published in the October 2, 1996, issue of the **Federal Register** [61 FR 51378]. A proposal containing that proposed order that will be subject to referendum is being published separately in this issue of the **Federal Register**.

This final rule provides the procedures under which kiwifruit producers and importers may vote on whether they want the kiwifruit research and promotion program to be implemented. Kiwifruit producers of 500 pounds or more and importers of 10,000 pounds or more annually can vote in the referendum. There are approximately 700 eligible voters.

This final rule will add a new subpart which establishes procedures to be used in the referendum. This subpart covers definitions, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

A proposed rule with a request for comments on the referendum procedures was published in the October 2, 1996, issue of the **Federal Register** [61 FR 51391]. No comments were received on the proposal.

However, comments were received on the proposed Order regarding the definition of kiwifruit. The commenters expressed that some individuals may be producers of "hardy kiwifruit," a different species of kiwifruit, known as *Actinidia arguta*. Other names for this species (hardy kiwifruit) are baby kiwifruit, kiwifruit grape, and kiwiberry. There are no official statistics on this commodity because it is such a small and new crop. According to comments received on the proposed Order this species is grown in California, Oregon, Pennsylvania, Washington, Virginia, and British Columbia. The production in Virginia and Pennsylvania is not commercially marketed. Oregon production on 5 acres was a total of 216,000 pounds over the last 3 years. It takes 3 to 5 years to harvest the first crop. The hardy kiwifruit is hand-harvested and packed in 6-ounce berry baskets like raspberries. The harvesting, storage, handling, consumer recognition, and marketing of this species is completely different from the most common fuzzy kiwifruit or *Actinidia deliciosa*. Accordingly, we changed the definition of kiwifruit in the proposed order to mean all varieties of fresh kiwifruit classified under the species *Actinidia deliciosa* or the genus *Actinidia*. That definition of kiwifruit is added in this rule as well. All references to "kiwifruit" in this document, therefore, mean the *Actinidia deliciosa* species.

Accordingly, no changes to the text of the regulation as proposed are made in this final rule, except for the addition of the definition of kiwifruit that appears in the proposed order. After consideration of all relevant material presented, it is found that this final rule effectuates the declared policy of the Act.

#### List of Subjects in 7 CFR Part 1214

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Kiwifruit, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Title 7, chapter XI of the Code of Federal Regulations is amended as follows:

1. Part 1214 is added to read as follows:

#### PART 1214—KIWIFRUIT RESEARCH, PROMOTION, AND CONSUMER INFORMATION ORDER

##### Subpart A—Reserved

##### Subpart B—Reserved

##### Subpart C—Procedure for the Conduct of Referenda in Connection With the Kiwifruit Research, Promotion, and Consumer Information Order

Sec.

1214.200	General.
1214.201	Definitions.
1214.202	Voting.
1214.203	Instructions.
1214.204	Subagents.
1214.205	Ballots.
1214.206	Referendum report.
1214.207	Confidential information.

**Authority:** 7 U.S.C. 7461-7473.

##### Subpart C—Procedure for the Conduct of Referenda in Connection With the Kiwifruit Research, Promotion, and Consumer Information Order

###### § 1214.200 General.

A referendum to determine whether eligible producers and importers favor the issuance of a proposed Kiwifruit Research, Promotion, and Consumer Information Order shall be conducted in accordance with this subpart.

###### § 1214.201 Definitions.

Unless otherwise defined in this section, the definition of terms used in this subpart shall have the same meaning as the definitions in the Order.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Order* means the Kiwifruit Research, Promotion, and Consumer Information Order.

(c) *Referendum agent* or agent means the individual or individuals designated by the Secretary to conduct the referendum.

(d) *Representative period* means the period designated by the Secretary.

(e) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and wife who has title to, or leasehold interest in, kiwifruit production facilities and equipment as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property, and

(2) So-called "joint ventures," wherein one or more parties to the agreement, informal or otherwise, contributed capital and others contributed labor, management, equipment, or other services, or any variation of such contributions by two or more parties so that it results in the production or importation of kiwifruit and the authority to transfer title to the kiwifruit so produced or imported.

(f) *Eligible producer* means any person or entity defined as a producer who produced 500 pounds or more of kiwifruit during the representative period and who:

(1) Owns or shares in the ownership of kiwifruit production facilities and equipment resulting in the ownership of the kiwifruit produced;

(2) Rents kiwifruit production facilities and equipment resulting in the ownership of all or a portion of the kiwifruit produced;

(3) Owns kiwifruit production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the kiwifruit produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce kiwifruit who share the risk of loss and receive a share of the kiwifruit produced. No other acquisition of legal title to kiwifruit shall be deemed to result in persons becoming eligible producers.

(g) *Eligible importer* means any person or entity defined as an importer who imported 10,000 pounds or more during the representative period. Importation occurs when commodities originating outside the United States are entered or withdrawn from the U.S. Customs

Service for consumption in the United States. Included are persons who hold title to foreign-produced kiwifruit immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or broker, to secure the release of kiwifruit from the U.S. Customs Service when such kiwifruit are entered or withdrawn for consumption in the United States.

(h) *Kiwifruit* means all varieties of fresh kiwifruit classified under the species *Actinidia deliciosa* or the genus *Actinidia*, whose fruit is a large berry, oval in shape, with a brown skin covered in hairs, which are grown in or imported into the United States.

#### § 1214.202 Voting.

(a) Each person who is an eligible producer or importer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce kiwifruit, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate producer or importer, or an administrator, executor, or trustee of an eligible producing or importing entity may cast a ballot on behalf of such producer or importer entity. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible producer or importer, or an administrator, executor, or trustee of an eligible producing or importing entity, and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) All ballots are to be cast by mail.

#### § 1214.203 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this subpart, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions of this section, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the time of commencement and termination of the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information including that needed for ascertaining:

(1) Whether the person voting, or on whose behalf the vote is cast, is an eligible voter;

(2) The total volume of kiwifruit produced by the voting producer during the representative period; and

(3) The total volume of kiwifruit imported by the voting importer during the representative period.

(c) Give reasonable advance public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible producers and importers, whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in presence of an agent of the Office of Inspector General.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

#### § 1214.204 Subagents.

The referendum agent may appoint any individual or individuals deemed necessary or desirable to assist the agent in performing such agent's functions in this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

#### § 1214.205 Ballots.

The referendum agent and subagents shall accept all ballots cast; but, should they, or any of them, deem that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

#### § 1214.206 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to analysis of the referendum and its results.

#### § 1214.207 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Act and the voting list shall be held confidential and shall not be disclosed.

Dated: October 8, 1997.

**Robert C. Keeney,**

*Deputy Administrator, Fruit and Vegetable Programs.*

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