

organic under the NOP; and who operates under an approved NOP system plan and is not a split operation.

(b) To apply for an exemption under this section, the person shall submit the request to the Board—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the person continues to be eligible for the exemption.

(c) The request shall include the following: the person's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(d) If the person complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) An exempt producer shall provide a copy of the Certificate of Exemption to each person to whom the producer sells ovine animals or lamb and lamb products. The Certificate of Exemption must accompany the ovine animals through the production chain to the person responsible for remitting the assessment to the Board.

(f) The person shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(g) The exemption will apply at the first reporting period following the issuance of the exemption.

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer, seed stock producer, or feeder from exemption under this section, except that persons producing or feeding both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated

use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

Dated: January 5, 2005.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 900

[Docket No. FV03-900-1 FR]

#### Exemption of Organic Handlers From Assessments for Market Promotion Activities Under Marketing Order Programs

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements the provisions of section 10607 of the 2002 Farm Bill and exempts handlers subject to marketing order requirements from paying assessments for market promotion activities, including paid advertising, to marketing order committees and boards. To obtain an exemption, the handler must operate under an approved organic process system plan authorized by the National Organic Program (NOP), and handle or market only products that are eligible for a 100 percent organic product label under the NOP. The Agricultural Marketing Service (AMS), that oversees and works with the committees and boards in administering the programs, has identified 28 marketing order programs for which assessment exemptions may be established. A separate final rule to exempt any person producing and marketing solely 100 percent organic products from paying assessments to any national research and promotion program administered by AMS also is being published in today's **Federal Register**.

**DATES:** Effective February 14, 2005.

**FOR FURTHER INFORMATION CONTACT:**

George Kelhart or Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., STOP 0237, Room 2525-South, Washington, DC 20250-0237; Telephone: (202) 720-

2491; Fax: (202) 720-8938; or E-mail: [George.Kelhart@usda.gov](mailto:George.Kelhart@usda.gov).

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250-0237; telephone: (202) 720-2491; Fax: (202) 720-8938; or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding:

Proposed rule; Published in the **Federal Register** December 2, 2003 (68 FR 67381).

Proposed rule; Extension of comment period; Published in the **Federal Register** December 30, 2003 (68 FR 75148).

#### Executive Order 12866

This final rule is being issued by the Department of Agriculture (USDA) in conformance with Executive Order 12866.

#### Executive Order 12988

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

The Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601-674)(Act or AMAA), under which the 28 marketing order programs are established, provides that administrative proceedings must be exhausted before parties may file suit in court. Under the Act, any person subject to an order may file a petition with USDA 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. The petitioner is afforded the opportunity for a hearing on the petition. After the hearing, USDA would make a ruling on the petition. The Act provides that the district court of the United States in any district in which the person is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling, provided a complaint is filed within 20 days from the date of the entry of the ruling.

#### Background

Section 10607 of the Farm Security and Rural Investment Act (Pub. L. 107-171; 2002 Farm Bill) was enacted May 13, 2002. Section 501 of the Federal

Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401; FAIR Act) was amended by the 2002 Farm Bill. This amendment exempts any person that produces and markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, from paying assessments under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502; OFPA). USDA has implemented National Organic Program (NOP) requirements at 7 CFR part 205 to carry out the provisions of the OFPA.

USDA is amending the general regulations (7 CFR part 900) with respect to 28 marketing order programs established under the Act for which it has oversight. These amendments establish provisions for handlers who handle or market solely 100 percent organic products to be exempt from paying assessments for market promotion activities, including paid advertising.

Currently, the FAIR Act amendment covers 28 marketing order programs established under the Act: Texas citrus—7 CFR part 906; Florida avocados—7 CFR part 915; California nectarines—7 CFR part 916; California peaches and pears—7 CFR part 917; Washington apricots—7 CFR part 922; Washington sweet cherries—7 CFR part 923; Washington/Oregon fresh prunes—7 CFR part 924; Southeastern California grapes—7 CFR part 925; Oregon/Washington winter pears—7 CFR part 927; Cranberries grown in States of Massachusetts, *et al.*—7 CFR part 929; Tart cherries grown in States of Michigan, *et al.*—7 CFR part 930; Oregon/Washington Bartlett pears—7 CFR part 931; California olives—7 CFR part 932; Oregon/California potatoes—7 CFR part 947; Colorado potatoes—7 CFR part 948; Georgia Vidalia onions—7 CFR part 955; Washington/Oregon Walla Walla onions—7 CFR part 956; Idaho-Eastern Oregon onions—7 CFR part 958; Texas onions—7 CFR part 959; Florida tomatoes—7 CFR part 966; Texas melons—7 CFR part 979; California almonds—7 CFR part 981; Oregon-Washington hazelnuts—7 CFR part 982; California walnuts—7 CFR part 984; Far West spearmint oil—7 CFR part 985; California dates—7 CFR part 987; California raisins—7 CFR part 989; and California dried prunes—7 CFR part 993. In addition, § 900.700(a) provides that the assessment exemption also shall apply to any additional marketing orders for fruits, vegetables, or specialty

crops that may be established or amended to include market promotion.

These marketing order programs allow for promotion programs designed to assist, improve, or promote the marketing, distribution, or consumption of the commodity covered under the marketing order program. Some of these programs also authorize market promotion in the form of paid advertising. Promotion activities, including paid advertising, are paid for by assessments levied on handlers regulated under the various marketing orders.

Notice of this action was published in the **Federal Register** on December 2, 2003 (68 FR 67381). The period for written comments initially ended on January 2, 2004. However, at the request of the Organic Trade Association, the comment period was extended until February 2, 2004 (68 FR 75148; December 30, 2003).

During the comment period, 147 comments were received from a member of Congress, producers of organic commodities, marketers of organic commodities, organic producer and trade organizations, the management of the tart cherry and almond marketing order boards, cooperative marketing organizations, and interested consumers. About 85 of the commenters used a form letter that discussed eligibility and administrative issues. Another 80 comments were received after the comment period, but they did not introduce any new issues. AMS has considered each comment timely submitted, and they are discussed below.

#### Summary of Changes From the Proposed Rule

This final rule clarifies that, for the purpose of obtaining an assessment exemption for market promotion activities, a handler (*i.e.*, assessment payer) must operate under a NOP-approved organic process system plan. Further, that handler may handle or market only commodities eligible for a 100 percent organic label under the NOP (7 CFR part 205.300–205.311). This applies to all commodities handled or marketed by the handler, not only those covered by the marketing order programs. Such handlers are considered to be the persons that handle or market solely 100 percent organic commodities for the purposes of the 2002 Farm Bill. The application form has been changed to reflect this as appropriate.

The final rule also clarifies that a handler who handles or markets products produced on buffer zones or chemically-treated products from certified NOP producers is not eligible

for an assessment exemption. Moreover, a handler, who is a split operation handling both organic and conventionally-produced product, is not eligible for an assessment exemption. Further, if an NOP handler is also a certified NOP producer, that handler would not be eligible for exemption unless the non-organic production from his or her production operation is handled by another handler.

The final rule provides that the exemption will apply at the beginning of the next assessable period following notification to the applicant of approval of the assessment exemption, in writing, by the committee or board. The final rule requires marketing order committees and boards to grant or deny exemption requests within 30 days. However, for the first 6 months following the final rule's effective date, committees and boards will have 60 days to grant or deny exemption requests. After 6 months, the deadline will revert to 30 days.

The final rule also provides that persons denied the exemption will be notified in writing. The procedures for handlers to follow in the event they are denied exemption status and desire further review are explained in this final rule.

#### Summary of Comments Received

The comments largely fall into two broad categories. One category addresses issues of assessment exemption eligibility. The other category addresses administrative and procedural issues.

#### Issues of Eligibility

Numerous commenters, including those that submitted the form letter, stated that the proposed rule changed the eligibility requirements fixed by Congress. They assert that the eligibility criteria for an organic exemption were established by Congress in the exemption statute and are easily implemented using the definitions (*e.g.*, producer, handler, 100 percent organic, *etc.*) of the FAIR Act and the OFPA.

The assessment exemption statute amends section 501 of the FAIR Act to provide that persons that produce and market solely 100 percent organic products shall be exempt from the payment of assessments under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm (as defined in section 2103 of the OFPA). This exemption from assessments applies to a number of programs, including marketing orders that include marketing promotion provisions under section 8c(6)(I) of the AMAA. Marketing

orders established under the AMAA regulate the handling of the commodity, not the production; handlers, not producers, pay assessments under marketing order programs. Thus, relevant definitions established under the AMAA for the marketing order programs should apply and not those specified under other statutes.

Other commenters, including those that submitted the form letter, stated that the term "100 percent organic" should refer to 100 percent of a specific commodity, not all commodities. This would mean that a person that handles or markets an organic commodity regulated under a marketing order would be eligible for an exemption even if that person handled other commodities that are not organic. Other commenters stated that the term "100 percent organic" means nothing more than produced on a certified organic farm, and certified organic farms include split operations (*i.e.*, those that produce and market both organic and conventionally-grown commodities). Other commenters stated that rendering a certified organic grower who produces any non-organic commodity ineligible for exemption would conflict with the OFPA and Congressional intent.

USDA considered these comments. Such an interpretation, however, would make the additional statutory qualifications of "solely" and "does not produce any conventional or non-organic products" meaningless. The statutory language of the 2002 Farm Bill provides that to be exempt, a person must produce and market solely 100 percent organic products, and not produce any conventional or non-organic products. Therefore, the interpretation urged by the commenters is not consistent with the statute.

Furthermore, to eliminate uncertainty in interpreting exemption eligibility for programs authorized under the AMAA, the reference to a "person that produces and markets solely 100 percent organic commodities" in the 2002 Farm Bill is the person that handles or markets (*i.e.*, the person that pays assessments) on the commodities under the marketing order. Therefore, for a handler to qualify for an exemption, that handler must handle or market only 100 percent organic products under an approved NOP handler organic process system plan and all of the products handled or marketed by the handler must be eligible for a 100 percent organic label under the NOP.

Handlers handling non-organic products are not eligible for an exemption. For example, NOP recognizes split farm operations and certain NOP permitted practices in

which an organic grower produces conventionally-grown product, but maintains his or her organic grower status. Under the NOP, an organic grower may be required to sell a commodity conventionally due to Federal or State emergency chemical spray programs to eliminate pests or diseases. Similarly, the NOP requires an organic operation to maintain a buffer area between the organic crop and the conventional growing areas, and any commodity grown in that buffer area may not be sold as organic. Even if the handler is an organic producer who produces a conventional product consistent with NOP practices (*i.e.*, product from a buffer zone), that handler would only be eligible for an exemption if the conventionally-produced commodity produced by that handler was handled or marketed by another handler.

As defined in the proposed rule, "produce means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock or fiber and alter that product by means of feeding, slaughtering, or processing." Commenters, including those who submitted the form letter, noted that there is nothing in the 2002 Farm Bill to require that handlers perform more than their normal activities for the exemption to apply. They assert that the exemptions should apply whether or not the handler alters the commodity.

To address the concerns of the commenters and because the AMAA only authorizes regulation of handlers (the entities required to pay assessments), the exemption eligibility has been modified by removing the requirements for alteration or other forms of processing so all handlers are treated similarly.

In response to the form letter comment, this final rule clarifies that, as long as the handler meets the requirements in § 900.700(b), it is not necessary that the handler label all products as organic. In other words, if the products were produced organically, the fact that they were marketed as conventional products would not nullify a handler's exemption from assessment status. Under the NOP, product produced under an approved system of organic management does not lose its status as the product of a certified organic farm when transacted in the conventional marketplace. Thus, persons who market organic products in conventional markets will not lose their exempt status.

As revised, § 900.700(b) provides that a handler who operates under an NOP-approved organic process system plan; handles or markets under an applicable

marketing order or outside the marketing order solely 100 percent organic products produced on a certified organic farm as defined in § 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502) and NOP regulations; is not a split operation; and is subject to assessments, shall be exempt from the portion of the assessments applicable to marketing promotion.

#### Examples Illustrating the Application of Handling and Marketing Solely 100 Percent Organic Products

- A handler who handles or markets solely 100 percent organic products under an NOP-approved organic process system plan, and pays marketing order assessments to the board or committee, is eligible for an exemption for the portion of the assessments used for marketing promotion on all products handled or marketed under the applicable marketing order.

- A handler receives products from a certified grower who grows 20 acres organically and 20 acres of another product conventionally. If the handler handles or markets any of the conventionally-produced products, the handler is not eligible for an exemption. Conversely, if the handler receives and markets only 100 percent organic products, the handler is eligible for an exemption even if the producers who grew the product also produced conventional product.

- If a handler produces products organically and conventionally, the conventionally-grown products must be handled or marketed by another handler to be eligible for an exemption from the portion of the assessments used for marketing promotion.

#### Administrative and Procedural Issues

The proposed rule limited the exemption to that portion of the assessment funds allocated for marketing promotion, including paid advertising. Some commenters, including those who submitted the form letter, said that all eligible persons should be exempt from all of the marketing order assessments collected, not just those assessments used for market promotion activities. The commenters asserted that the intent of Congress was to bar all assessments that might be imposed under generic commodity promotion laws on commodities originating from certified organic farms, not only those earmarked for marketing promotion, including paid advertising.

The assessment exemption only applies to assessments that are spent for market research, market development,

market promotion, or paid advertising. Section 501 of the FAIR Act covers all promotion programs and all marketing orders with market research and promotion activities, including industry information and consumer information activities funded by assessments on handlers. Limiting the exemption to such activities is consistent with section 501 of FAIR Act and the marketing orders with market research and promotion activities.

Several commenters requested that USDA list examples of eligible activities in the final rule to help the committees and boards administer the organic assessment exemption program. Others requested that exempt activities be broadened to include all of the activities authorized in section 8c(6)(I) of the AMAA. If this were done, the activities would also include production research. Production research encompasses a whole array of activities including, but not limited to, research on growing techniques, disease control, the development of new varieties, and similar activities relating to the efficient production of the commodity. Production research activities are not within the scope of the 2002 Farm Bill, because they do not directly promote the marketing of the commodity.

To provide guidance to those commenters who requested examples of eligible market promotion activities, market promotion includes a full range of activities designed to assist, improve, or promote the marketing, distribution, and consumption of the applicable commodity. Research related to the traditional market research activities (*e.g.*, surveys of consumer and institutional users, product development, and taste studies) would be covered. Assessments used for the promotion of the nutritional and health benefits of the particular commodity, recipe development, informational packets, and other types of publicity also would be eligible for exemption.

Market development projects would cover the full range of promotional activities generally included in that category, which include—but are not limited to—participation in trade shows, the development and use of internet websites to inform the trade and the public of the uses (*e.g.*, recipes) and/or nutritional value of the regulated commodity, point of purchase materials, publication of promotional materials, the development and dissemination of materials to the media promoting the commodity's uses and benefits, and paid advertising when authorized under a marketing order.

Another commenter objected to the exemption, mentioning that promotion

activities implemented under their program promote their commodity and do not distinguish between organic and non-organic. As a consequence, organic producers and handlers would benefit from the industry's investment in market research and trade promotion, without contributing to the cost. The enabling legislation requires the organic assessment exemption to be implemented.

#### Administrative Costs Involving Market Promotion

Commenters said that the final rule should clarify what portion of administrative costs on exempted activities should be eligible for exemption, because there are administrative costs associated with market promotion activities. Section 900.700(d) has been clarified to provide that the exempted costs include the portion of committee/board administrative costs incurred in implementing market promotion activities. For example, such administrative costs could include prorated amounts for salaries, rents, supplies, and other overhead costs associated with the market promotion activities, as recommended by the committees or boards, and approved by USDA.

The proposed rule specified a calculation of the exemption rate based on the portion of funds allocated for market promotion activities. Some commenters said that the proposed method of calculation of the rate of assessment for exempt handlers, and its implementation, are too complicated and burdensome and should be simplified.

USDA continues to conclude that the method of calculation specified in the proposed rule is necessary to administer the assessment exemption under the applicable marketing orders and should not be changed. Moreover, the assessment formula establishes a uniform method of calculation for all of the committees and boards and should not be overly complicated or burdensome.

One commenter said that USDA should allow committees/boards to certify annually to AMS if they are not planning to conduct any market promotion activities. This process would eliminate the need for administering the exemption authority for the particular marketing order for a given assessment period. Based on this comment, USDA has modified § 900.700(d) to provide that if a committee or board does not plan to conduct any market promotion activities during an assessment period, the

committee or board may submit a certification to that effect to AMS. In such a situation, the committee or board would assess all handlers, regardless of their organic status, the full assessment rate applicable to the assessment period.

A commenter suggested that the assessment exemption calculations be based on the previous year's promotion related expenses so that a producer is not required to pay for such activities. All marketing orders require assessments to be computed at the beginning of the assessment period, but the assessments may be modified as necessary during the applicable assessment period. Assessments are paid by handlers.

Commenters, including those that submitted the form letter, stated that USDA seems to be implying that 100 percent organic producers are not exempt from promotion expenses until they are "approved." They contend that approval processes beyond those of the OFPA and the NOP are not necessary. Under marketing orders, handlers pay assessments, and committees and boards administer the assessment provisions with USDA oversight. It is the responsibility of the committees and boards to assure that all persons who handle or market the regulated commodities pay assessments to cover program expenses. Therefore, committees and boards must approve any exemptions for the payment of assessments under the marketing order programs, and approval procedures must be implemented. In turn, persons meeting the exemption criteria will be granted assessment exemptions.

According to the commenters, the application process duplicates the paperwork certified organic producers and handlers submit to their accredited certification agency to demonstrate that certified organic products maintain their organic integrity. They contend that it would be simpler to have the handler operating under the NOP require documentation of organic certification from the producer and verify that the commodity was organic. They further contend that the standard audit processes for the payment of assessments could be applied to determine that the handler properly assessed or exempted producers.

The certificate from a USDA-accredited certifying agent under the OFPA and the NOP indicates whether a farm or operation is certified for organic production. However, the application submitted by handlers requests additional information necessary for committees or boards to determine whether a handler qualifies for an exemption. The information requested

is discussed in the **Paperwork Reduction Act** section of this final rule.

This information is necessary to provide information to committees or boards to determine an applicant's eligibility and to verify compliance. Inclusion of this information on the form will assist the applicants in making their certifications and the committees or boards in properly administering the assessment exemption under the various marketing order programs.

The role of the committees and boards has been clarified in this rule to specify that they will approve the applications of persons who meet the specified criteria. With USDA oversight, committees and boards will administer the exemption as they do all other aspects of their programs. Information confirming that an applicant is 100 percent organic for all commodities will be provided to the committees and boards by applicants and will be verified through routine compliance efforts. As discussed previously, to be "100 percent organic", a handler must operate under an NOP-approved organic process system plan and handle or market only products that can be labeled as 100 percent organic under the NOP.

Commenters said that an appeals process should be fully described in the final rule to help the committees or boards and applicants better operate under the exemption program.

A few marketing orders specify provisions allowing handlers to appeal committee or board decisions before seeking review by USDA, but such provisions are not necessary for interested persons to appeal any committee or board decision. Safeguards and avenues for appeal exist and operate without specified order-provided appeal processes. Handlers may request committees or boards to review the decisions with which the handlers question. Further, if the handlers still are not satisfied, they may ask USDA to conduct a final review of the matter. Accordingly, no change to the regulatory text is necessary.

Also, in the proposed rule, provisions were included in § 900.700(c) specifying that USDA may review any decisions made by the committees or boards at its discretion. Because USDA routinely oversees committee or board actions under these programs, these provisions are not necessary in the regulatory text and have been removed.

A commenter requested that a producer who does not agree that the assessment rate is fair, based on the calculation of promotion expenses, be accorded the right of due process, to be

exercised through appeal to the National Appeals Division (NAD). The NAD is responsible for all administrative appeals arising from program activities of USDA's Farm Service Agency, Risk Management Agency, Natural Resources Conservation Service, Rural Business-Cooperative Development Service, Rural Housing Service, and the Rural Utilities Service. However, the NAD has no jurisdiction over the programs of AMS, including the administration of the assessment exemption process.

Another commenter said the proposal implements an exemption from assessment and must not require a producer payment followed by a refund. Further, the commenter stated that if the operator provides an affidavit from a USDA-accredited certifying agent that shows the operation has been 100 percent organic during the course of the assessment period, the committee or board must not assess the producer. The commenter also stated that if a producer provides an affidavit demonstrating that the commodity has been 100 percent organically-produced during the assessment period, for which the producer has already paid in full, not having an affidavit at the time of payment, the committee or board must grant a refund of any promotion assessment money paid by the operator during the assessment period. Producers are not assessed under the 28 specified marketing orders. Handlers of the commodities are assessed. The committees and boards have procedures in place to make pro rata adjustments in assessment overpayments when necessary consistent with marketing order procedures.

One commenter stated that the words "application" and "certification" used in the proposed rule should be changed to "affidavit" to avoid confusion with the term "certification" as used in the NOP. USDA believes that the language in § 900.700(c) is clear in the context used and that no change is needed. In fact, it is customary under marketing order programs for handlers to certify that the information they provide to the committees and boards is factually correct.

A few commenters also contended that the proposed rule unnecessarily requires an exempt person to reapply to the committee or board each assessment period. All marketing order programs operate on an annual assessment period basis and annual applications are necessary for the committees and boards to maintain compliance and to ensure that the exemption program is implemented equitably among the eligible persons.

A commenter contends that it is up to USDA not to assess 100 percent organic producers; if USDA questions someone's status, it is up to USDA to prove otherwise. Committee and Board application and review systems are intended to assure that assessment exemptions are properly applied. Moreover, under the various marketing order programs, the payment of assessments is one of a number of requirements applied to handlers, not to producers, and a detailed application process is necessary to oversee handler compliance with these requirements.

Section 900.700(f) of the proposed rule requires a handler to immediately notify the committee or board when the handler is no longer eligible for an exemption. A commenter recommended that the word "immediately" be changed to "within 30 days" to lessen the burden on industry participants. This change has been made and paragraph (f) has been redesignated as paragraph (e).

A commenter requested USDA to clarify that the organic assessment exemption did not apply to State marketing orders. The exemption only applies to the 28 specified Federal marketing orders under the AMAA. The exemption does not apply to assessments under any State marketing order or similar program.

The same commenter requested USDA to specify, in the Small Business Guide for Complying with Marketing Agreements and Orders for Fruits, Vegetables, and Specialty Crops, the activities to which the exemption applies and does not apply. We have provided previously in this document examples of such activities and will do so in the Small Business Guide.

Some commenters said that the effective date and initial coverage (*e.g.*, which assessment period) for the exemption should be clarified, because an initial exemption period was not specified in the proposed rule. Under the proposal, a person can apply for an exemption at any time initially and must reapply every year after that on a specific date.

There is a wide variation among programs in the collection of assessments. For example, in some programs, assessments are collected every month. In others, assessments are collected at the end of the assessable period; *i.e.*, fiscal period, marketing year, crop year, *etc.* Accordingly, to treat the various marketing order programs uniformly, the exemption should be made effective at the beginning of the next assessable period for each marketing order program following the effective date of this final rule. This

means that organic assessment exemptions for some applicants will become effective sooner for some marketing orders than others, depending on the beginning of the respective assessable periods.

In the proposed rule, the term "marketing promotion expenditures" was defined in § 900.700(a). This term is not needed because it is not used in § 900.700. The term "marketing promotion" is used and is defined to mean marketing research and development projects, and marketing promotion, including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of the applicable commodity.

### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), 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 business 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. Thus, both statutes have small entity orientation and compatibility.

As previously mentioned, assessments under the 28 marketing order programs are paid by handlers regulated under the various marketing orders. There are approximately 850 handlers regulated under the 28 marketing orders. USDA does not have precise numbers, but believes there may be approximately 84 persons who handle or market solely 100 percent organic products that might be exempt from paying assessments for market promotion, including paid advertising, under the 28 marketing order programs administered by AMS. Thus, the estimated number of prospective applicants eligible for the assessment exemption may represent approximately 10 percent of the total handler population.

Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those whose annual receipts are less than \$5,000,000. Although the exact size of the potential applicants is not known, USDA believes that the majority of persons who might qualify for an

exemption may be classified as small entities.

Section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) was amended on May 13, 2002 (7 U.S.C 7401). The amendment provides that, notwithstanding any provision of a commodity promotion law, a person that produces and markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, shall be exempt from paying assessments under a commodity promotion law with respect to any agricultural commodity that is produced on a certified organic farm, as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502). The amendment further requires USDA to amend any research and promotion regulations to reflect this exemption.

USDA is issuing amendments to the general regulations (7 CFR part 900) affecting 28 of the 34 active marketing order programs established under the Act for which it has oversight. As defined in this final rule, these amendments will establish provisions to exempt any person subject to marketing order requirements who handles and markets solely 100 percent organic products from paying assessments for market promotion activities, including paid advertising.

The 28 marketing order programs allow for promotion activities that are designed to assist, improve, or promote the marketing, distribution, or consumption of the commodity covered under the marketing order. Some of the marketing orders also include authority for paid advertising activities. Market promotion, including paid advertising, activities are paid for by assessments levied on handlers regulated under the various marketing orders.

Under this rule, a new subpart is added in 7 CFR part 900 General Regulations to identify persons eligible to obtain an assessment exemption for marketing promotion, including paid advertising; procedures for applying for an exemption; procedures for calculating the assessment exemption; and other procedural details for the applicable marketing orders. The rule imposes certain reporting and recordkeeping requirements on persons that handle or market solely 100 percent organic products. This form requires the minimum information necessary to effectively administer the exemption from assessment provisions and for compliance purposes.

Regarding the impact of this final rule on affected entities, this rule imposes minimal additional costs incurred in filing the exemption application and in

maintaining records for two years needed to verify the applicant's exemption status during the applicable assessment period. Such applicants will be required to submit an application and receive approval from the applicable committee or board to obtain the assessment exemption. USDA estimates that each applicant will submit one application annually. The annual burden for all of the marketing order industries is estimated to total about 42 hours.

The cost burden associated with the information collection is \$420 for all applicants, or \$5.00 per applicant. The total cost has been estimated by multiplying the burden hours associated with the exemption application by \$10.00 per hour, a sum deemed reasonable should the applicants be compensated for their time.

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.

Since this action potentially exempts from assessments handlers who handle or market solely 100 percent organic products, AMS believes that this rule will have a beneficial economic effect on exempted entities by reducing their assessment payments. During the 2001–2002 marketing season, assessments for the 28 marketing orders totaled \$44,400,000. Of that amount, about \$29,900,000 (or 67 percent) was made available for marketing promotion, including paid advertising, activities. USDA does not have precise information, but believes that about 1 percent on average of the total assessments are for certified organic commodities. Thus, assessments on organic commodities could total about \$444,000, and about \$300,000 for marketing promotion, including paid advertising, might be exempt under this final rule if all of the approximately 84 handlers of the regulated commodities were eligible for the assessment exemption.

Based on our estimate that there might be a total of 84 handlers exempt from assessments for marketing promotion activities conducted under the various marketing orders, the assessments for each eligible person could be reduced by an average of almost \$3,600 (\$300,000 divided by 84) on an annual basis.

There is some variation among the 28 marketing orders on the percentage of assessments used for marketing

promotion, including paid advertising, as well as the number of handlers handling or marketing solely 100 percent organic commodities. Thus, the actual reduction in assessments will vary among the various orders. In fact, the amounts allocated for marketing promotion, as a percentage of the total marketing order budgets, range from less than 5 percent to over 75 percent.

With regard to alternatives, the FAIR Act requires USDA to take this action, which will lessen the assessment costs for persons who handle and market solely 100 percent organic products. In drafting the exemption procedures, every effort has been made to minimize the burden on the persons impacted, and to simplify the process. The anticipated assessment reductions for eligible persons are expected to greatly outweigh the additional costs related to the reporting required.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping provisions generated by this rule have been approved by the Office of Management and Budget (OMB) as a reinstatement, with change, of previously-approved OMB No. 0581-0216, which has expired. This action is intended to provide relief to handlers of solely 100 percent organic products.

This action will enable handlers that operate under an NOP-approved organic process system plan, and handle or market only organic product that can be labeled "100 percent organic" to apply for exemptions from paying market promotion assessments under the following 28 Federal marketing orders: 7 CFR parts 906, 915, 916, 917, 922, 923, 924, 925, 927, 929, 930, 931, 932, 947, 948, 955, 956, 958, 959, 966, 979, 981, 982, 984, 985, 987, 989, and 993, and such other marketing orders for fruits, vegetables, and specialty crops as may be established or amended to include market promotion.

*Title:* Organic Handler Market Promotion Assessment Exemption under 28 Federal Marketing Orders  
*OMB Number:* 0581-0216.

*Type of Request:* Approval of reinstatement, with change, of a previously-approved collection for which approval has expired.

*Abstract:* Marketing order programs provide an opportunity for producers of fresh fruits, vegetables and specialty crops to solve marketing problems that cannot be solved individually. Marketing order regulations help ensure adequate supplies of high quality products for consumers and adequate returns to producers. Under the Act,

orders may authorize marketing research and development, including paid advertising, activities. Such activities to promote the various commodities are paid for with assessments levied on handlers regulated under the 28 Federal marketing orders.

On May 13, 2002, section 501 of the FAIR Act was amended (7 U.S.C. 7401) to exempt any person that handles or markets solely 100 percent organic products, and that does not produce any conventional or non-organic products, from paying assessments under a commodity promotion law, with respect to any agricultural commodity that is produced on a certified organic farm as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

To be exempt from paying assessments for marketing promotion, including paid advertising expenses, under the specified marketing orders, the handler who operates under an NOP-approved organic process system plan should submit an application, FV-649, "Certified Organic Handler Application for Exemption from Market Promotion Assessments Paid under Federal Marketing Orders" to the applicable marketing order committee or board. The application needs to be submitted to the committee or board prior to or during the applicable assessment period, and annually thereafter, as long as the applicant continues to be eligible for the exemption.

This application has been changed slightly from the previously approved form to reflect differences in the provisions between the proposed and final rules. The information requested includes (changes from the proposed application are noted): Introductory text explaining who may request an organic assessment exemption, the purpose of the form, and where the application should be submitted has been added; the applicable Marketing Committee/Board and Federal marketing order number has been added; the date; handler's name (applicant); telephone and fax numbers, an optional e-mail address has been added; name and address of the company; certification that the applicant operates under an approved organic process system plan authorized by the National Organic Program (NOP) and handles or markets products that are eligible to be labeled as 100 percent organic, that the applicant is not a split operation as defined by the Organic Foods Production Act of 1990 (OFPA) and the NOP, and that the applicant is subject to assessments under the Federal

marketing order program for which this exemption is requested.

A table has been added for the applicant to list *all* commodities handled or marketed and to indicate whether each commodity handled or marketed is eligible to be labeled as 100 percent organic. As revised, the application requires the applicant to list the number of producers for whom the applicant handles or markets products. The applicant also is required to attach a copy of their organic handling operation certificate provided by a USDA-accredited certifying agent under the OFPA and the NOP, and a copy of the applicant's NOP producer certificate, if applicable. An NOP certificate for each producer for whom the applicant handles or markets also must be attached.

The form continues to include language for the applicant to certify that their firm meets the requirements and is eligible for an organic assessment exemption under the applicable Federal marketing order. Language has been added cautioning applicants that any false statement or misrepresentation may result in a fine of not more than \$10,000, or imprisonment for not more than five years, or both (18 U.S.C. 1001). Lastly, the form continues to include a section for the committee or board to fill out, indicating whether the application has been approved or disapproved. If disapproved, the reason(s) for denial must be listed.

When the requirements for exemption no longer apply to a handler, the handler shall inform the committee or board within 30 days and pay the full assessment on all remaining assessable product for all committee or board assessments from the date the handler no longer is eligible to the end of the assessment period. The notification by the handler can be made in any manner the handler desires (telephone, fax, e-mail, *etc.*).

This information is necessary to help the committees or boards to determine an applicant's eligibility and to verify compliance. Inclusion of this information on the form will assist the applicants in making their certifications and the committees or boards in properly administering the assessment exemption. The burdens associated with obtaining the certifications under the Organic Foods Production Act of 1990 have already been approved by OMB under OMB Control No. 0581-0191.

In the proposed rule, AMS estimated that this application would take 30 minutes to complete. With the application modifications, the estimated average per response time will remain at

30 minutes, resulting in no change to the total burden hours.

If the applicant complies with these requirements and is eligible for a market promotion assessment exemption, the committee or board will approve the exemption and notify the applicant, in writing, within 30 days of receiving the applicant's application, by filling out the bottom portion of the application. If the application is disapproved, the committee or board will notify the applicant, in writing, of the denial and the reason(s) for denial.

The respective marketing orders (e.g., 7 CFR 932.61 and 7 CFR 981.70) also provide that handlers maintain, and make available, all records necessary to demonstrate compliance with order requirements for two years. The burdens on handlers for such recordkeeping requirements are included in the information collection requests previously-approved by OMB for the respective marketing orders under the following OMB Control Numbers: OMB No. 0581-0178 for Marketing Order Nos. 947, 948, 955, 956, 958, 959, 966, 979, 981, 982, 984, 987, 989, and 993; OMB No. 0581-0189 for Marketing Order Nos. 906, 915, 916, 917, 922, 923, 924, 925, 927, 929, 930, and 931; OMB No. 0581-0142 for Marketing Order No. 932; and OMB No. 0581-0065 for Marketing Order No. 985.

The information collection will be used only by authorized representatives of USDA, including AMS, Fruit and Vegetable Programs' regional and headquarters staff, and authorized Committee and Board employees. Authorized Committee and Board employees will be the primary users of the information, and AMS will be the secondary user.

The request for OMB approval of the reinstatement, with change, of OMB No. 0581-0216 under the 28 Federal marketing orders is as follows:

*Form FV-649, Certified Organic Handler Application for Exemption From Marketing Promotion Assessments Paid Under Federal Marketing Orders*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 30 minutes per response.

*Respondents:* Eligible Certified Organic Handlers.

*Estimated Number of Respondents:* 84.

*Estimated Number of Responses per Respondent:* 1

*Estimated Total Annual Burden on Respondents:* 42 hours.

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/fv/moab.html>. As previously discussed, AMS intends to revise the guide to list examples of the activities to which the exemption applies and does not apply. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR OTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information submitted by the commenters and other information, it is hereby found that this rule, as hereinafter set forth, tends to effectuate declared policy of the AMAA and 2002 Farm Bill.

#### List of Subjects in 7 CFR Part 900

Administrative practices and procedures, Freedom of information, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 900 is amended to read as follows:

#### PART 900—GENERAL REGULATIONS

■ 1. The authority citation for part 900 is revised to read as follows:

**Authority:** 7 U.S.C. 601-674 and 7 U.S.C. 7401.

■ 2. In part 900, a new subpart heading "Assessment Exemptions" is added after § 900.601, and a new § 900.700 is added to read as follows:

#### Subpart—Assessment of Exemptions

##### § 900.700 Exemption from assessments.

(a) This section specifies criteria for identifying persons eligible to obtain an assessment exemption for marketing promotion, and procedures for applying for an exemption under 7 CFR parts 906, 915, 916, 917, 922, 923, 924, 925, 927, 929, 930, 931, 932, 947, 948, 955, 956, 958, 959, 966, 979, 981, 982, 984, 985, 987, 989, 993, and such other parts (included in 7 CFR parts 905 through 998) covering marketing orders for fruits, vegetables, and specialty crops as may be established or amended to include market promotion. For the purposes of this section, the term "assessment period" means fiscal period, fiscal year, crop year, or marketing year as defined under these parts; the term "marketing promotion" means marketing research and development projects, and marketing promotion, including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of the applicable commodity.

(b) Any handler who operates under an approved National Organic Program (7 CFR part 205)(NOP) process system plan, only handles or markets organic products that are eligible to be labeled 100 percent organic under the NOP, and are produced on a certified organic farm as defined in § 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502) and the NOP regulations issued under that Act, is not a split operation, and is subject to assessments under a part or parts specified in paragraph (a) of this section, shall be exempt from the portion of the assessment applicable to marketing promotion, including paid advertising. Any handler so exempted shall be obligated to pay the portion of the assessment for other authorized activities under such part or parts.

(c) To be exempt from paying assessments for these purposes under a part or parts, the handler shall submit an application to the committee or board established under the applicable part or parts prior to or during the assessment period. This application, FV-649, "Certified Organic Handler Application for Exemption from Market Promotion Assessments Paid Under Federal Marketing Orders," shall include: The applicable committee or board and Federal marketing order number; the date; handler's name; company name and address; telephone and fax numbers; an optional e-mail address; certification that the applicant is not a split operation, as defined by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6502) and the NOP; certification that the applicant only handles and markets organic products eligible to be labeled 100 percent organic under the NOP, and that the applicant is subject to assessments under the Federal marketing order program for which the exemption is requested. The applicant shall list all commodities handled or marketed. The applicant shall list the number of producers for whom they handle or market. The applicant shall attach a copy of their organic handler operation certificate and all applicable producer certificates provided by a USDA-accredited certifying agent under the OFPA and the NOP. The applicant shall certify that the handler meets all of the applicable requirements for an assessment exemption as provided in this section. The handler shall file the application with the committee or board, prior to or during the applicable assessment period, and annually thereafter, as long as the handler continues to be eligible for the exemption. If the person complies with the requirements of this section and is

eligible for an assessment exemption, the committee or board will approve the exemption and notify the applicant, in writing, within the applicable timeframe as follows: For exemption requests received on or before August 15, 2005, the committee or board will have 60 days to approve the exemption request; after August 15, 2005, the committee or board will have 30 days to approve the exemption request. If the application is disapproved, the committee or board will notify the applicant, in writing, of the reason(s) for disapproval within the same timeframes.

(d) The applicable assessment rate for any handler approved for an exemption shall be computed by dividing the committee's or board's estimated non-marketing promotion expenditures by the committee's or board's estimated total expenditures approved by the Secretary and applying that percentage to the assessment rate applicable to all persons for the assessment period. The committee's or board's estimated non-marketing promotion expenditures shall exclude the direct costs of marketing promotion and the portion of committee's or board's administrative

and overhead costs (*e.g.*, salaries, supplies, printing, equipment, rent, contractual expenses, and other applicable costs) to support and administer the marketing promotion activities. If a committee or board does not plan to conduct any market promotion activities in a fiscal year, the committee or board may submit a certification to that effect to the Secretary, and as long as no assessments for such fiscal year are used for marketing promotion projects, or the administration of projects funded by a previous fiscal period's assessments, the committee or board may assess all handlers, regardless of their organic status, the full assessment rate applicable to the assessment period. For each assessment period, the Secretary shall review the portion of the assessment rate applicable to marketing promotion for persons eligible for an exemption and, if appropriate, approve the assessment rate.

(e) When the requirements of this section for exemption no longer apply to a handler, the handler shall inform the committee or board within 30 days and pay the full assessment on all remaining

assessable product for all committee or board assessments from the date the handler no longer is eligible to the end of the assessment period.

(f) Within 30 days following the applicable assessment period, the committee or board shall re-compute the applicable assessment rate for handlers exempt under this section based on the actual expenditures incurred during the applicable assessment period. The Secretary shall review, and if appropriate, approve any change in the portion of the assessment rate for market promotion applicable to exempt handlers, and authorize adjustments for any overpayments.

(g) The exemption will apply at the beginning of the next assessable period following notification of approval of the assessment exemption, in writing, by the committee or board.

Dated: January 5, 2005.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

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