

the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).

■ 5. Section 1201.22 is amended by revising paragraph (b)(2) to read as follows:

**§ 1201.22 Filing an appeal and responses to appeals.**

(b) \* \* \*

(2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests.

\* \* \* \* \*

**PART 1210—[REMOVED AND RESERVED]**

■ 6. Part 1210 is removed and reserved.

**William D. Spencer,**

*Clerk of the Board.*

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 984**

[Doc. No. AMS-FV-08-0093; FV09-984-2 FIR]

**Walnuts Grown in California; Decreased Assessment Rate**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule which decreased the assessment rate established for the California Walnut Board (Board) for the 2008-09 and subsequent marketing years from \$0.0158 to \$0.0131 per kernelweight pound of assessable

walnuts. The Board locally administers the marketing order which regulates the handling of walnuts grown in California. Assessments upon walnut handlers are used by the Board to fund reasonable and necessary expenses of the program. The marketing year began September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** *Effective Date:* April 3, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Debbie Wray, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or e-mail: *Debbie.Wray@ams.usda.gov*, or *Kurt.Kimmel@ams.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@ams.usda.gov*.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts beginning September 1, 2008, and continue until amended, suspended, or terminated. 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 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with

the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule continues in effect the action that decreased the assessment rate established for the Board for the 2008-09 and subsequent marketing years from \$0.0158 to \$0.0131 per kernelweight pound of assessable walnuts.

The California walnut marketing order provides authority for the Board, 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 Board are producers and handlers of California walnuts. They are familiar with the Board's needs and the costs for 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 at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2008-09 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of \$0.0158 per kernelweight pound of assessable walnuts that would continue in effect from year to year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to the USDA. The Board recommended this rate in May 2008 along with expenditures of \$4,594,300 for 2008-09.

The Board met on September 12, 2008, and unanimously recommended reducing its 2008-09 expenditures to \$3,809,000 and reducing the assessment rate to \$0.0131 per kernelweight pound of assessable walnuts. The assessment rate of \$0.0131 per kernelweight pound of assessable walnuts is \$0.0027 per kernelweight pound lower than the rate previously in effect. The decreased assessment rate is primarily due to an \$800,000 decrease in domestic market development expenditures previously recommended for the 2008-09 marketing year.

The following table compares major budget expenditures recommended by the Board in May 2008 and September 2008 for the 2008–09 marketing year:

| Budget expense categories            | Original 2008–09 | Revised 2008–09 |
|--------------------------------------|------------------|-----------------|
| Employee Expenses .....              | \$410,500        | \$410,500       |
| Travel/Board Expenses .....          | 100,000          | 100,000         |
| Office Costs/Annual Audit .....      | 142,500          | 142,500         |
| Program Expenses Including Research: |                  |                 |
| Controlled Purchases .....           | 5,000            | 5,000           |
| Crop Acreage Survey .....            |                  |                 |
| Crop Estimate .....                  | 110,000          | 110,000         |
| Production Research * .....          | 835,000          | 835,000         |
| Domestic Market Development .....    | 2,935,000        | 2,135,000       |
| Reserve for Contingency .....        | 56,300           | 71,000          |

\* Includes Research Director's compensation and a contingency for production research issues.

The assessment rate recommended by the Board was derived by dividing anticipated expenses by expected shipments of California walnuts certified as merchantable. Merchantable shipments for the year are estimated at 290,773,800 kernelweight pounds which should provide slightly over \$3,809,000 in assessment income and allow the Board to cover its expenses. Unexpended funds may be retained in a financial reserve, provided that funds in the financial reserve do not exceed approximately two years' budgeted expenses. If not retained in a financial reserve, unexpended funds may be used temporarily to defray expenses of the subsequent marketing year, but must be made available to the handlers from whom collected within 5 months after the end of the year, according to § 984.69 of the order.

The estimate for merchantable shipments is based on historical data, which is the prior year's production of 323,082 tons (inshell). Pursuant to § 984.51(b) of the order, this figure was converted to a merchantable kernelweight basis using a factor of 0.45 (323,082 tons × 2,000 pounds per ton × 0.45).

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

Although this assessment rate is effective for an indefinite period, the Board will continue to meet prior to or during each marketing year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Board recommendations and other available information to

determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Board's 2008–09 budget and those for subsequent marketing years will 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 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.

There are currently 55 handlers of California walnuts subject to regulation under the marketing order, and there are approximately 4,000 growers in the production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

USDA's National Agricultural Statistics Service (NASS) reports that California walnuts were harvested from a total of 218,000 bearing acres during 2007–08. The average yield for the 2007–08 crop was 1.49 tons per acre, which is slightly lower than the 1.53 tons per acre average for the previous five years. NASS reported the value of the 2007–08 crop at \$2,320 per ton, which is considerably higher than the

previous five-year average of \$1,384 per ton.

At the time of the 2002 Census of Agriculture, which is the most recent information available, approximately 83 percent of California's walnut farms were smaller than 100 acres. Forty-seven percent were between 1 and 15 acres. A 100-acre farm with an average yield of 1.49 tons per acre would have been expected to produce about 149 tons of walnuts during 2007–08. At \$2,320 per ton, that farm's production would have had an approximate value of \$345,000. Assuming that the majority of California's walnut farms are still smaller than 100 acres, it could be concluded that the majority of the growers had receipts of less than \$345,000 in 2007–08. This is well below the SBA threshold of \$750,000; thus, the majority of California's walnut growers would be considered small growers according to SBA's definition.

According to information supplied by the industry, approximately two-thirds of California's walnut handlers shipped merchantable walnuts valued under \$7,000,000 during the 2007–08 marketing year and would therefore be considered small handlers according to the SBA definition.

This rule continues in effect the action that decreased the assessment rate established for the Board and collected from handlers for the 2008–09 and subsequent marketing years from \$0.0158 per kernelweight pound of assessable walnuts to \$0.0131 per kernelweight pound of assessable walnuts. The Board unanimously recommended 2008–09 expenditures of \$3,809,000 and an assessment rate of \$0.0131 per kernelweight pound of assessable walnuts. The assessment rate of \$0.0131 is \$0.0027 lower than the rate previously in effect. The quantity of assessable walnuts for the 2008–09 marketing year is estimated at 323,082 tons. Thus, the \$0.0131 rate should provide slightly over \$3,809,000 in

assessment income and be adequate to meet the year's expenses. The decreased assessment rate is primarily due to an

\$800,000 decrease in domestic market development expenditures.  
The following table compares major budget expenditures recommended by

the Board in May 2008 and September 2008 for the 2008–09 marketing year:

| Budget expense categories            | Original 2008–09 | Revised 2008–09 |
|--------------------------------------|------------------|-----------------|
| Employee Expenses .....              | \$410,500        | \$410,500       |
| Travel/Board Expenses .....          | 100,000          | 100,000         |
| Office Costs/Annual Audit .....      | 142,500          | 142,500         |
| Program Expenses Including Research: |                  |                 |
| Controlled Purchases .....           | 5,000            | 5,000           |
| Crop Acreage Survey .....            |                  |                 |
| Crop Estimate .....                  | 110,000          | 110,000         |
| Production Research * .....          | 835,000          | 835,000         |
| Domestic Market Development .....    | 2,935,000        | 2,135,000       |
| Reserve for Contingency .....        | 56,300           | 71,000          |

\* Includes Research Director's compensation and a contingency for production research issues.

The Board reviewed and unanimously recommended 2008–09 expenditures of \$3,809,000. Prior to arriving at this budget, the Board considered alternative expenditure levels but ultimately decided that the recommended levels were reasonable to properly administer the order. The assessment rate recommended by the Board was derived by dividing anticipated expenses by expected shipments of California walnuts certified as merchantable. Merchantable shipments for the year are estimated at 290,773,800 kernelweight pounds which should provide \$3,809,000 in assessment income and allow the Board to cover its expenses. Unexpended funds may be retained in a financial reserve, provided that funds in the financial reserve do not exceed approximately two years' budgeted expenses. If not retained in a financial reserve, unexpended funds may be used temporarily to defray expenses of the subsequent marketing year, but must be made available to the handlers from whom collected within 5 months after the end of the year, according to \$ 984.69 of the order.

According to NASS, the season average grower price for years 2006 and 2007 were \$1,630 and \$2,320 per ton, respectively. These prices provide a range within which the 2008–09 season average price could fall. Dividing these average grower prices by 2,000 pounds per ton provides an inshell price per pound range of \$0.815 to \$1.16. Dividing these inshell prices per pound by the 0.45 conversion factor (inshell to kernelweight) established in the order yields a 2008–09 price range estimate of \$1.81 to \$2.58 per kernelweight pound of assessable walnuts.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of \$0.0131 per kernelweight pound is divided by the low and high estimates of the price

range. The estimated assessment revenue for the 2008–09 marketing year as a percentage of total grower revenue would thus likely range between 0.508 and 0.724 percent.

This action continues in effect the action that decreased 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. In addition, the Board's meeting was widely publicized throughout the California walnut industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 12, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

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

AMS is committed to complying with the E-Government Act, to promote the use of Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

An interim final rule concerning this action was published in the **Federal Register** on December 4, 2008 (73 FR 73761). Copies of that rule were also mailed or sent via facsimile to all

walnut handlers. Finally, the interim final rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period was provided for interested persons to respond to the interim final rule. The comment period ended on February 2, 2009, and no comments were 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/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber 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 Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 984**

Walnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

**PART 984—WALNUTS GROWN IN CALIFORNIA**

■ Accordingly, the interim final rule amending 7 CFR part 984, which was published at 73 FR 73761 on December 4, 2008, is adopted as a final rule without change.

Dated: February 26, 2009.

**Robert C. Keeney**,  
Acting Associate Administrator, Agricultural Marketing Service.

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**BILLING CODE 3410-02-P**