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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 920

[Docket No. AMS-FV-08-0095; FV09-920-1 FIR]

#### Kiwifruit 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 Kiwifruit Administrative Committee (Committee) for the 2008-09 and subsequent fiscal periods from \$0.045 to \$0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee locally administers the marketing order which regulates the handling of kiwifruit grown in California. Assessments upon kiwifruit handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins on August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** *Effective Date:* April 22, 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](mailto:Debbie.Wray@ams.usda.gov), or [Kurt.Kimmel@ams.usda.gov](mailto: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](mailto:Jay.Guerber@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

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 kiwifruit handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable kiwifruit beginning on August 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 Committee for the 2008-09 and subsequent fiscal periods from \$0.045 to \$0.035 per 9-kilo volume-fill container or equivalent of kiwifruit.

The California kiwifruit marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers of California kiwifruit. They are familiar with the Committee's needs and 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 in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2005-06 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on October 14, 2008, and unanimously recommended 2008-09 expenditures of \$76,492 and an assessment rate of \$0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. In comparison, last year's budgeted expenditures were \$99,302. The assessment rate of \$0.035 per 9-kilo volume-fill container or equivalent is \$0.010 per 9-kilo volume-fill container or equivalent less than the rate previously in effect. The decreased assessment rate is primarily due to a decrease in management expenditures for the 2008-09 fiscal year.

The following table compares major budget expenditures recommended by the Committee for the 2007-08 and 2008-09 fiscal periods:

Budget expense categories	2007-08	2008-09
Staff Salaries/Management .....	\$65,150	\$56,700
Financial Management Services .....	12,000	1,000
Audit Expense .....	5,000	3,500
Vehicle Maintenance/Insurance .....	3,180	.....
Travel .....	3,300	3,500
Office Expenses .....	2,830	4,500

The assessment rate recommended by the Committee was derived by using the following formula: Anticipated 2008-09 expenses (\$76,492), minus the difference between the 2008 beginning reserve (\$62,647) and the desired 2009 ending reserve (\$54,311), divided by the total estimated 2008-09 shipments (1,944,444 9-kilo volume-fill containers). This formula results in the assessment rate of \$0.035 per 9-kilo volume-fill container or equivalent. As mentioned earlier, kiwifruit shipments for the year are estimated at 1,944,444 9-kilo volume-fill containers which should provide \$68,056 in assessment income. An additional \$100 in penalty and interest income is also anticipated, bringing the total projected 2008-09 revenue to \$68,156. Income generated through this rate, plus interest income and reserve funds, will provide sufficient funds to meet the anticipated expenses of \$76,492 and should result in a July 2009 ending reserve of \$54,311 which is within the maximum reserve of approximately one fiscal year's expenses permitted by the order (\$920.42).

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

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings

are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2008-09 budget and those for subsequent fiscal periods 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 approximately 31 handlers of California kiwifruit subject to regulation under the marketing order and approximately 220 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. None of the 31 handlers subject to regulation have annual kiwifruit sales of \$7,000,000. Dividing average crop value for 2007-08 reported by the National Agricultural Statistics Service (NASS) of \$22,517,000 by the number of producers (220) yields an average annual producer revenue estimate of about \$102,350, which is well below the SBA threshold of \$750,000. Based on the foregoing, it may be concluded that all kiwifruit handlers and the majority of producers may be classified as small entities.

This rule continues in effect the action that decreased the assessment rate established for the Committee and collected from handlers for the 2008-09 and subsequent fiscal periods from \$0.045 to \$0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee unanimously recommended 2008-09 expenditures of \$76,492 and an assessment rate of \$0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The assessment rate of \$0.035 is \$0.010 lower than the 2007-08 rate. The quantity of assessable kiwifruit for the 2008-09 fiscal period is estimated at 1,944,444 9-kilo volume-fill containers or equivalent of kiwifruit. Thus, the rate should provide \$68,056 in assessment income. Income derived from handler assessments, along with penalty and interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses.

The following table compares major budget expenditures recommended by the Committee for the 2007-08 and 2008-09 fiscal years:

Budget expense categories	2007-08	2008-09
Staff Salaries/Management .....	\$65,150	\$56,700
Financial Management Services .....	12,000	1,000
Audit Expense .....	5,000	3,500
Vehicle Maintenance/Insurance .....	3,180	.....
Travel .....	3,300	3,500
Office Expenses .....	2,830	4,500

The Committee reviewed and unanimously recommended 2008-09 expenditures of \$76,492 which included a reduction in management expenses.

Prior to arriving at this budget, the Committee considered alternative expenditure levels, but ultimately decided that the recommended levels

were reasonable to properly administer the order. The assessment rate recommended by the Committee was derived by using the following formula:

Anticipated 2008–09 expenses (\$76,492), minus the difference between the 2008 beginning reserve (\$62,647) and the desired 2009 ending reserve (\$54,311), divided by the total estimated 2008–09 shipments (1,944,444 9-kilo volume-fill containers). This formula results in the assessment rate of \$0.035 per 9-kilo volume-fill container or equivalent. As mentioned earlier, kiwifruit shipments for the year are estimated at 1,944,444 9-kilo volume-fill containers which should provide \$68,056 in assessment income. An additional \$100 in penalty and interest income is also anticipated, bringing the total projected 2008–09 revenue to \$68,156. Income generated through this rate, plus interest income and reserve funds, will provide sufficient funds to meet the anticipated expenses of \$76,492 and should result in a July 2009 ending reserve of \$54,311 which is within the maximum reserve of approximately one fiscal year's expenses permitted by the order (§ 920.42).

According to NASS, the season average grower price for years 2006 and 2007 were \$911 and \$950 per ton, respectively. These prices provide a range within which the 2008–09 season average grower price could fall. Dividing these average grower prices by 2,000 pounds per ton provides a price per pound range of \$0.46 to \$0.48. Multiplying these per-pound prices by 19.8 pounds (the weight of a 9-kilo volume-fill container) yields a 2008–09 price range estimate of \$9.11 to \$9.50 per 9-kilo volume-fill container of assessable kiwifruit.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of \$0.035 per 9-kilo volume-fill container is divided by the low and high estimates of the price range. The estimated assessment revenue for the 2008–09 fiscal year as a percentage of total grower revenue would thus likely range between 0.368 and 0.384 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 Committee's meeting was widely publicized throughout the California kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 14, 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 kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. 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 the 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 12, 2008 (73 FR 75537). Copies of that rule were also mailed or sent via facsimile to all kiwifruit 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 10, 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 Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

#### PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ Accordingly, the interim final rule amending 7 CFR part 920, which was published at 73 FR 75537 on December

12, 2008, is adopted as a final rule without change.

Dated: March 18, 2009.

**Craig Morris**,

*Acting Associate Administrator.*

[FR Doc. E9–6249 Filed 3–20–09; 8:45 am]

**BILLING CODE 3410-02-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. AMS–FV–08–0066; FV08–930–2 FIR]

#### Tart Cherries Grown in the States of Michigan, et al.; Change to Fiscal Period

**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 changing the fiscal period prescribed under the tart cherry marketing order (order). The order regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin and is administered locally by the Cherry Industry Administrative Board (Board). This rule continues in effect an action that changed the fiscal period from July 1 through June 30 to October 1 through September 30. This will improve the administration and the fiscal operation of the Board.

**DATES:** Effective date April 22, 2009.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, Unit 155, 4700 River Road, Riverdale, Maryland 20737, *telephone:* (301) 734–5243; *Fax:* (301) 734–5275 or e-mail at [Patricia.Petrella@usda.gov](mailto:Patricia.Petrella@usda.gov) or [Kenneth.Johnson@usda.gov](mailto:Kenneth.Johnson@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:** This rule is issued under Marketing Order No. 930 (7 CFR part 930) (order) regulating the handling of tart cherries grown in the States of Michigan, New York,