

# Rules and Regulations

Federal Register

Vol. 73, No. 234

Thursday, December 4, 2008

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 984

[Docket No. AMS-FV-08-0093; FV09-984-2 IFR]

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

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule decreases 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 begins September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective December 5, 2008. Comments received by February 2, 2009, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the

Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at the Web site referenced above.

**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@usda.gov](mailto:Debbie.Wray@usda.gov), or [Kurt.Kimmel@usda.gov](mailto:Kurt.Kimmel@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. 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."

The Department of Agriculture (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 on 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 decreases 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 currently 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 established in this rule 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.

**Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial 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 decreases 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 currently 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 decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. 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. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

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.

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.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because (1) the 2008–09 marketing year began on September 1, 2008, and the marketing order requires that the rate of assessment for each year apply to all assessable walnuts handled during the year; (2) the action decreases the assessment rate for assessable walnuts beginning with the 2008–09 marketing year; (3) handlers are aware of this action which was unanimously recommended by the Board at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim final rule

provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

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

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

■ For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

#### PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

##### § 984.347 Assessment rate.

On and after September 1, 2008, an assessment rate of \$0.0131 per kernelweight pound is established for California merchantable walnuts.

Dated: November 26, 2008.

**James E. Link,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–28766 Filed 12–2–08; 11:15 am]

BILLING CODE 3410–02–P

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1430

RIN 0560–AH83

#### Milk Income Loss Contract Program and Price Support Program for Milk

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the regulations for the Milk Income Loss Contract (MILC) Program, as authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), to extend the program from October 1, 2007, through September 30, 2012. This rule also increases the percentage rate for the payment calculation after fiscal year (FY) 2008 and increases the payment quantity limitation of eligible pounds of milk per operation beginning in FY 2009. This rule also provides for an adjustment to the MILC payment rate if feed costs increase above a specified level. This rule is needed to extend the MILC program, which is designed to stabilize and generally enhance milk producer revenue, through FY 2012 and

to make changes to that program authorized by the 2008 Farm Bill. This rule also adjusts the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers.

**DATES:** *Effective Date:* December 1, 2008.

#### FOR FURTHER INFORMATION CONTACT:

Danielle Cooke, Special Programs Manager, Price Support Division, FSA, USDA, STOP 0512, 1400 Independence Ave., SW., Washington, DC 20250–0512; telephone: (202) 720–1919; fax: (202) 690–1536; e-mail:

*Danielle.Cooke@wdc.usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

##### Background

This final rule implements changes in the MILC program enacted in section 1506 in Title I of the 2008 Farm Bill (Pub. L. 110–246, 7 U.S.C. 8773). It, in effect, permits new contracts to extend the old MILC program first provided for in Section 1502 of the Food Security and Rural Investment Act of 2002 (Pub. L. 107–171, 7 U.S.C. 7982). That program, as amended by subsequent enactments, ended its coverage with milk marketed in September of 2007. The 2008 Farm Bill permits coverage starting with October 2007 marketings carrying through September 2012 marketings. The “old” program, regulations were codified in 7 CFR part 1430. This rule, to provide for the “new” program, modifies 7 CFR part 1430 to:

- Cover marketings during the new period and make changes to the payment rate formula used to calculate payments;
- Change the production limits for payments during specific periods;
- Add applicability of Adjusted Gross Income (AGI) provisions to eligibility requirements; and
- Add provisions to adjust the payment rate if feed costs exceed a specified level.

With certain per year per operation eligibility pound limits, the MILC program provides payments to dairy operations when milk prices fall below a set benchmark. What constitutes an “operation” for purposes of the “new” program, including poundage limits, will be determined as before. All prior participants in the “old” program must sign new contracts. New participants (those not in the “old” program) cannot be affiliated with prior participants.

Also, the rule, as required by the 2008 Farm Bill, beginning in FY 2009, sets new eligibility limits tied to the AGI of persons or entities seeking payment. Payees for the relevant year cannot have nonfarm income in excess of \$500,000. AGI rules will cover multi-program regulations to be issued separately.

As indicated, there is a per-operation per year pound limit to the MILC payment eligibility of operations. For FY 2009 (October 1, 2008, through September 30, 2009), FY 2010 (October 1, 2009, through September 30, 2010), FY 2011 (October 1, 2010, through September 30, 2011), and FY 2012 (October 1, 2011, through September 30, 2012), the limit for each fiscal year is 2.985 million pounds. Further, no payments will be made for September 2012 marketings, as specified in the 2008 Farm Bill, if the operation’s cumulative total for FY 2012 is over 2.4 million pounds and if the operation is under that amount the payable marketings for September will be limited to those that will not bring the total over 2.4 million pounds. Payments are computed, however, on a monthly basis. They are made only when the official Federal class I milk marketing order milk price per cwt. for Boston, Massachusetts is less than \$16.94. When the Boston price is under the target, the payment for eligible production will be, for FYs 2009 through 2012, 45 percent of the difference. Otherwise, for September 2012 marketings the percentage will be 34 percent. The pay rate can be raised, by command of the 2008 Farm Bill; however, if the National Average Feed Dairy Feed Ration Cost as officially computed exceeds \$7.35 per cwt. (\$9.50 per cwt. for September 2012 marketings). If the triggering feed ration amount is exceeded, the benchmark \$16.94 figure for the MILC payment rate calculation will be increased by the percentage amount which is 45 percent of the percentage amount by which the Feed Ration Cost exceeded its own benchmark (\$7.35 or \$9.50, depending on the month involved). Feed Ration Cost is calculated using the same procedures used to calculate the feed components of the estimated price of 16 percent Mixed Dairy Feed per pound as reported in the USDA Agricultural Prices publication. Entire month prices used to calculate feed price ratios for each month will be used. As to the calculation, if for example, the May 2009 Feed Ration Cost exceed by 14 percent the \$7.35 per cwt. benchmark, then the MILC payment benchmark for May 2009 marketings would be increased by 6.3 percent (45% of 14%)