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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1219

[Document Number AMS-FV-10-0007]

#### Hass Avocado Promotion, Research, and Information Order; Section 610 Review

**AGENCY:** Agricultural Marketing Service.

**ACTION:** Confirmation of regulations.

**SUMMARY:** This document summarizes the results of an Agricultural Marketing Service (AMS) review of the Hass Avocado Promotion, Research, and Information Order (Order) under criteria contained in section 610 of the Regulatory Flexibility Act (RFA).

**ADDRESSES:** Interested persons may obtain a copy of the review on the Internet at: <http://www.regulations.gov> or request copies from the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 0632-S, Stop 0244, Washington, DC 20250-0244; facsimile: (202) 205-2800 or electronic mail:

[Maureen.Pello@ams.usda.gov](mailto:Maureen.Pello@ams.usda.gov).

**FOR FURTHER INFORMATION CONTACT:**

Maureen T. Pello, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 831, Beavercreek, Oregon 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: [Maureen.Pello@ams.usda.gov](mailto:Maureen.Pello@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** The Order (7 CFR part 1219) is authorized under the Hass Avocado Promotion, Research and Information Act of 2000 (Act) (7 U.S.C. 7801-7813).

The Order became effective on September 9, 2002. The Order is administered by the Hass Avocado Board (Board) with oversight by AMS. The program is funded by assessments

on fresh domestic and imported Hass avocados. Domestic producers and importers pay the assessments. The producer assessment is remitted by first handlers, and the importer assessment is remitted by the U.S. Customs and Border Protection. Exports of domestic Hass avocados are exempt from assessments. The purpose of the program is to increase consumption of Hass avocados in the United States.

Under the Order, a State association of avocado producers receives 85 percent of the assessments paid by domestic producers, and certified importer associations receive 85 percent of the assessments paid by their members. The State and importer associations use these funds to conduct State-of-origin and country-of-origin promotions, respectively.

The Board is composed of 12 members, 7 who are producers and 5 who are importers. Each member has an alternate. The members and alternates are appointed to the Board by the Secretary of Agriculture (Secretary) and serve a term of 3 years.

Currently, there are approximately 6,000 producers of Hass avocados in the United States, approximately 115 importers, and approximately 100 first handlers subject to the provisions of the Order. The majority of domestic producers and importers of Hass avocados may be classified as small entities, while most first handlers would not.

AMS published in the **Federal Register** on March 24, 2006 (71 FR 14827), its plan to review certain regulations, including the Order, under criteria contained in section 610 of the RFA (5 U.S.C. 601-612). Because many AMS regulations impact small entities, AMS decided, as a matter of policy, to review certain regulations which, although they may not meet the threshold requirement under section 610 of the RFA, warrant review.

AMS published a notice of review and request for written comments in the **Federal Register** on February 23, 2010 (75 FR 7986) on its plan to review certain regulations, including the Order. The comment period ended on April 26, 2010. Three comments were received in response to the notice and are discussed later in this document.

The purpose of the review was to determine whether the Order should be continued without change, amended, or

rescinded (consistent with the objectives of the Act) to minimize the impact on small entities. AMS considered the following factors: (1) The continued need for the Order; (2) the nature of complaints or comments received from the public concerning the Order; (3) the complexity of the Order; (4) the extent to which the Order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local regulations; and (5) the length of time since the Order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order.

Based upon its review, USDA has concluded that there is a continued need for the Order. The total volume of Hass avocados produced domestically and imported into the United States has grown significantly since the inception of the Order. From 2003 through 2005, Hass avocado domestic production and imports averaged about 712 million pounds annually. From 2007 through 2009, Hass avocado domestic production and imports averaged about 1 billion pounds annually. Through the efforts of the Board and State and importer associations which receive assessments funds from the Board, the industry has worked together to successfully grow the demand for Hass avocados. Between 1998 and 2007, the average annual growth for U.S. consumption for avocados was 13.2 percent with producer prices remaining fairly constant.<sup>1</sup> The Board and State and importer association promotion programs have significantly helped to increase demand and maintain orderly marketing since the Order's inception.

Regarding the nature of complaints or comments received from the public concerning the Order, as previously mentioned, three comments were received. They are discussed in the following paragraphs.

One comment supported the marketing efforts under the program, but expressed concern with the rising costs that California growers are experiencing, especially costs for water. The comment suggested that the Order be revised to provide for a sliding scale for assessments so that avocados up to a

<sup>1</sup> Carmen, C., L. Li, R. Sexton, An Economic Evaluation of the Hass Avocado Promotion Order's First Five Years, p. 72.

certain threshold amount would be assessed at a lower rate than avocados over the threshold. However, the Act authorizes only uniform assessment rates.

Two comments expressed concern with the Board's composition. They stated that, on the 12 member Board, 7 seats are for domestic producers and a maximum of 5 seats are for importers, regardless of shifts in the volume of Hass avocados produced domestically or imported into the United States. They also expressed concern that foreign producers and packers are not represented on the Board as in some other research and promotion programs.

The composition of the Board is set forth in the provisions of the Act and Order which provide that the Board shall consist of seven members who are domestic producers of Hass avocados who are subject to assessment under the Order and two members who represent importers of Hass avocados who are subject to assessment under the Order. The Board shall also consist of three members who are either domestic producers or importers to reflect the proportion of domestic production and imports supplying the United States market, depending on the average volume of domestic production of Hass avocados proportionate to the average volume of imports of Hass avocados in the United States over the previous 3 years. While the initial Board consisted of eight domestic producer members and four importer members, the current Board's membership consists of seven members who are domestic producers and five members who are importers, the maximum number of seats authorized for importers.

Two comments expressed concern that the importer associations under the Order cannot use assessment funds to pay administrative expenses incurred by the associations while the Board can spend up to 10 percent of the projected level of assessments and other income received by the Board for a fiscal period to pay administrative expenses. The commenters argue this is unfair and that other Federal promotion boards can use assessment funds to pay administrative expenses. However, the Act and Order specify that assessment funds shall not be used by importer associations to pay administrative expenses for such associations, which is also consistent with the provision for the domestic State association.

Two comments expressed concern that the existing State association under the Order receives the full 85 percent of the assessments paid by domestic producers while the importer associations receive 85 percent of the

assessments paid by their respective association members.

The Act and Order specify that a State organization of avocado producers established pursuant to State law shall receive an amount equal to the product obtained by multiplying the aggregate amount of assessments attributable to the pounds of Hass avocados produced in such State by 85 percent. The State organization (association) under the Order is authorized under the California Food and Agricultural Code.

The Act and Order also specify that an association of Hass avocado importers established or certified under the Order shall receive an amount of assessment funds equal to 85 percent of the assessments paid on Hass avocados imported by its members. However, not all Hass avocado importers have joined or are affiliated with an importers association. Additionally, the Order's promulgation rulemaking record indicated that requiring all importers to join an association is not authorized under the Act. USDA believes that additional dialogue with the industry may be appropriate to consider possible solutions that would be consistent with the Act in order to address this issue.

One comment expressed concern that the Board is required to enter into a contract with the State association under the Order to manage its promotional program that is funded primarily by assessments from importers.

The Act and Order specify that the Board, with approval of the Secretary, shall enter into a contract or an agreement with an avocado organization established by State statute in a State with the majority of Hass avocado production in the United States, for the implementation of a plan or project for promotion, industry information, consumer information, or related research with respect to Hass avocados, and/or the payment of the costs of the contract or agreement with funds received by the Board under the Order.

One comment expressed concern with the referendum criteria specified in the Act and Order. The comment argues that, although a majority of the assessments are paid by importers of Hass avocados, the referendum procedures were designed to give domestic producers a permanent majority in a referendum. Further, the comment contends that, even if a referendum were held to address some of their concerns, no relief would be provided to importers.

The Act and Order specify that the Order, or an amendment thereto, must be approved by a simple majority of all votes cast in a referendum. Changing the

referendum criteria is not authorized under the Act.

One commenter expressed concern that the Board's composition violates the North American Free Trade Agreement (NAFTA), and that the 85 percent provision violates the NAFTA and the General Agreement on Tariff and Trade. USDA continues to view these provisions as consistent with applicable trade obligations.

In considering the complexity of the Order, USDA also continues to believe the Order is not unduly complex. It provides authority for the Board to collect assessments from Hass avocado domestic producers and importers to fund programs to help increase the consumption of Hass avocados in the United States.

Regarding whether the Order overlaps, duplicates, or conflicts with other Federal rules and State and local regulations, there is a Federal marketing order for avocados grown in south Florida (7 CFR part 915). According to the National Agricultural Statistics Service, there is little or no production of Hass avocados in Florida. Since California is the source for more than 95 percent of avocados produced in the United States and Florida does not produce Hass avocados, there is no duplication between this Order and the Federal marketing order.

As previously mentioned, there is also a State avocado program in California, which is administered by the State association. The chief objective of the program is to increase consumer awareness of and demand for avocados on behalf of the State's 6,000 producers. Under the program, producers pay a percentage-of-revenue fee to fund a variety of market development programs. The State assessment may not exceed 6.5 percent of the gross dollar value of the year's sales of avocados by all producers to handlers, or which are sold by handlers on behalf of producers. The assessments are collected from the producers by handlers, who remit the money to the association. Section 1212(c) of the Act states that nothing may be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a state. The Federal program compliments the State program but does not overlap, duplicate or conflict with it.

Regarding evaluations of the Order or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order, section 1205(c)(7) of the Act and

§ 1219.38(k) of the Order require the Board to evaluate on-going and completed programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research and to comply with the independent evaluation provisions of the Federal Agricultural Improvement and Reform Act of 1996 (FAIR). The Board routinely evaluates its programs to ensure their effectiveness, and a formal evaluation was conducted under the FAIR in 2009.

Accordingly, USDA has determined that the Hass avocado Order should be continued. The Order was established to help increase the consumption of domestic and imported Hass avocados in the United States. Concerns raised in the comments received were to a great extent changes that would require congressional action. AMS will continue to work with the Hass avocado industry in maintaining an effective program.

Dated: October 1, 2010.

**Rayne Pegg,**

*Administrator.*

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

RIN 3245-AF70

#### Small Business Size Standards; Other Services.

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The United States Small Business Administration (SBA) is increasing the small business size standards for 18 industries in North American Industry Classification System (NAICS) Sector 81, Other Services, and retaining the current standards for the remaining 30 industries in the Sector. As part of its ongoing initiative to review all size standards, SBA has evaluated every industry in NAICS Sector 81 to determine whether the existing size standards should be retained or revised.

**DATES:** This rule is effective November 5, 2010.

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Program Analyst, Office of Size Standards, (202) 205-6618 or [sizestandards@sba.gov](mailto:sizestandards@sba.gov).

**SUPPLEMENTARY INFORMATION:**

#### Introduction

To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (referred to as size standards) for private sector industries in the United States. SBA's existing size standards use two primary measures of business size—receipts and number of employees. Financial assets, electric output and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy and, in particular, that they do not reflect changes in the Federal contracting marketplace. The last overall review of size standards occurred during the late 1970s and early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

SBA recognizes that changes in industry structure and the Federal marketplace over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, SBA has begun a comprehensive review of its size standards to determine whether existing size standards have supportable bases relative to the current data, and, where necessary, to make revisions to current size standards. Rather than review all size standards at one time, SBA has taken a more manageable approach to reviewing a group of related industries within an NAICS Sector in phases. SBA expects to complete its review of all NAICS Sectors in two years.

As part of its ongoing effort to review all small business size standards, SBA

evaluated every industry in NAICS Sector 81, Other Services, to determine whether the existing size standards should be retained or revised, and published a proposed rule for public comment in the October 21, 2009 issue of **Federal Register** (74 FR 53941) to increase the standards for 18 industries in that Sector. The proposed rule was one of a series of proposals that will examine industries grouped by an NAICS Sector. SBA also published concurrently in the same October 21, 2009 issue of the **Federal Register** proposed rules to increase 47 small business size standards in NAICS Sector 44-45, Retail Trade, (74 FR 53924) and five standards in NAICS Sector 72, Accommodation and Food Services (74 FR 53913). Similarly, SBA is publishing final rules on NAICS Sector 44-45 and NAICS Sector 72 elsewhere in this issue of the **Federal Register**.

In addition, SBA established its "Size Standards Methodology" for reviewing small business size standards and modifying them, where necessary. SBA published in the October 21, 2009 issue of the **Federal Register** (74 FR 53940) a notice of its availability, for public comments, on SBA's Web site at <http://www.sba.gov/contractingopportunities/officials/size/index.html>. In addition, SBA has placed a copy of its "Size Standards Methodology" in the electronic docket of this rule on <http://www.regulations.gov> and is available there as well.

In evaluating an industry's size standard, SBA examines the industry's characteristics (such as average firm size, startup costs, industry competition and distribution of firms by size), Federal government contracting trends, impact on SBA financial assistance programs, and dominance in field of operations. SBA analyzed the characteristics of each industry in NAICS Sector 81 mostly using a special tabulation obtained from the U.S. Bureau of the Census from its 2002 Economic Census (the latest available). SBA evaluated Federal contracting trends in that Sector using the data from the Federal Procurement Data System—Next Generation (FPDS-NG) for fiscal years 2006-2008. To evaluate the impact of changes to size standards on its loan programs, SBA analyzed internal data on its guaranteed loan programs for fiscal years 2006-2008.

SBA's "Size Standards Methodology" provides a detailed description of analyses of various industry and program factors and data sources and derivation of size standards using the results. In the proposed rule itself, SBA detailed how it applied its "Size