

Proposed Rules

Federal Register

Vol. 74, No. 166

Friday, August 28, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS-FV-09-0020; FV09-984-3 PR]

Walnuts Grown in California; Increased Assessment Rate and Changes to Regulations Governing Reporting and Recordkeeping

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the California Walnut Board (Board) for the 2009–10 and subsequent marketing years from \$0.0131 to \$0.0177 per kernelweight pound of assessable walnuts. This rule would also change reporting and recordkeeping regulations in conformance with amendments made on March 3, 2008, to the marketing order that regulates the handling of walnuts grown in California. The Board locally administers the marketing order. 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 would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by September 28, 2009.

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 document 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 submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided 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@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.”

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 proposed herein would be applicable to all assessable walnuts beginning on September 1, 2009, 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 would increase the assessment rate established for the Board for the 2009–10 and subsequent marketing years from \$0.0131 to \$0.0177 per kernelweight pound of assessable walnuts. It would also make conforming changes to reporting and recordkeeping regulations, which are needed to reflect recent marketing order amendments.

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 growers and handlers of California walnuts. They are familiar with the Board’s needs and with 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 2008–09 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of \$0.0131 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 USDA.

The Board met on May 18, 2009, and unanimously recommended 2009–10 expenditures of \$5,894,100 and an assessment rate of \$0.0177 per

kernelweight pound of assessable walnuts. In comparison, last year's budgeted expenditures were \$3,809,000. The assessment rate of \$0.0177 is \$0.0046 per pound higher than the rate currently in effect. The increased

assessment rate is necessary to cover increased expenses for domestic market promotion, research activities, and administrative expenses. The higher assessment rate should generate

sufficient income to cover anticipated 2009–10 expenses.

The following table compares major budget expenditures recommended by the Board for the 2008–09 and 2009–10 marketing years:

Budget expense categories	2008–09	2009–10
Employee Expenses	\$410,500	\$535,000
Travel/Board Expenses	100,000	120,000
Office Costs/Annual Audit	142,500	164,750
Program Expenses Including Research:		
Controlled Purchases	5,000	5,000
Crop Estimate	110,000	120,000
Production Research *	805,000	805,000
Contingency-Research Issues	30,000	100,000
Domestic Market Development	2,135,000	4,030,500
Reserve for Contingency	71,000	13,850

* Includes Research Director's compensation.

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 333,000,000 kernelweight pounds, which should provide \$5,894,100 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 an average of the three prior years' production of 370,000 tons (inshell). Pursuant to § 984.51(b) of the order, this figure was converted to a merchantable kernelweight basis using a factor of .45 (370,000 tons × 2,000 pounds per ton × .45).

The proposed assessment rate would 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 would be in effect for an indefinite period, the Board would 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 would 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 2009–10 budget and those for subsequent marketing years would be reviewed and, as appropriate, approved by USDA.

Recent amendments to the order (73 FR 11328, March 3, 2008) changed the Board's name to "California Walnut Board" (CWB), changed the Board's marketing year from August 1 through July 31 to September 1 through August 31, and replaced the term "handler carryover" with the term "handler inventory." To reflect these changes, the Board unanimously recommended conforming changes to the order's reporting and recordkeeping regulations at a meeting on February 27, 2009.

Section 984.456(a) would be revised to specify that beginning on September 1 of any marketing year, a handler may become an agent of the Board to dispose of reserve walnuts in that marketing year. Section 984.471 would be revised by changing the term "carryover" to "inventory", by requiring handlers to report September 1 inventory information by September 15, and by changing the names of the related inventory forms to "CWB Form No. 4" and "CWB Form No. 5." Section 984.476 would be revised to require that handlers file reports of walnut import receipts with the Board by December 5 for receipts between September 1 and November 30, by March 5 for receipts between December 1 and the end of February, by June 5 for receipts between March 1 and May 31, and by September

5 for receipts between June 1 and August 31; and to change the name of the reporting form to "CWB Form No. 7." Section 984.480(d) would be revised to specify that inventories of all walnut quantities held on September 1 must be reported to the Board. The acronym "WMB" would be replaced with "CWB" in form names described in the following sections not previously listed above: §§ 984.456(b), 984.464(c), 984.472(a), and 984.472(b). Finally, in order to update the regulations, gender-specific language would be changed in §§ 984.456(b) and 984.472(a) to replace "he" and "his" with "he/she" and "his/her."

Initial 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 action 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 58 handlers of California walnuts subject to regulation under the marketing order, and there are approximately 4,500 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 growers 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 1.50 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 \$2,290 per ton, which is considerably higher than the previous five-year average of \$1,384 per ton.

At the time of the 2007 Census of Agriculture, which is the most recent information available, approximately 89 percent of California's walnut farms were smaller than 100 acres. Fifty-four percent were between 1 and 15 acres. A 100-acre farm with an average yield of

1.50 tons per acre would have been expected to produce about 150 tons of walnuts during 2007–08. At \$2,290 per ton, that farm's production would have had an approximate value of \$344,000. 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 \$344,000 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 would increase the assessment rate established for the Board and collected from handlers for the 2009–10 and subsequent marketing years from \$0.0131 to \$0.0177 per kernelweight pound of assessable walnuts. The Board unanimously recommended 2009–10 expenditures of \$5,894,100 and an assessment rate of \$0.0177 per kernelweight pound. The proposed assessment rate of \$0.0177 is \$0.0046 higher than the 2008–09 rate. The quantity of assessable walnuts for the 2009–10 marketing year is estimated at 370,000 tons. Thus, the \$0.0177 rate should provide \$5,894,100 in assessment income and be adequate to meet this year's expenses. The increased assessment rate is primarily due to increased budget expenditures.

The following table compares major budget expenditures recommended by the Board for the 2008–09 and 2009–10 marketing years:

Budget expense categories	2008–09	2009–10
Employee Expenses	\$410,500	\$535,000
Travel/Board Expenses	100,000	120,000
Office Costs/Annual Audit	142,500	164,750
Program Expenses Including Research:		
Controlled Purchases	5,000	5,000
Crop Estimate	110,000	120,000
Production Research *	805,000	805,000
Contingency-Research Issues	30,000	100,000
Domestic Market Development	2,135,000	4,030,500
Reserve for Contingency	71,000	13,850

* Includes Research Director's compensation.

The Board reviewed and unanimously recommended 2009–10 expenditures of \$5,894,100. 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 333,000,000 kernelweight pounds, which should provide \$5,894,100 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 prices for the years 2006 and 2007 were \$1,630 and \$2,290 per ton, respectively. Although no official NASS data is yet available regarding the 2008 average grower price, the 2006 and 2007 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 \$1.15. 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 \$2.56 per kernelweight pound of assessable walnuts.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of \$0.0177 per kernelweight pound is divided by the low and high estimates of the price range. The estimated assessment revenue for the 2009–10 marketing year

as a percentage of total grower revenue would thus likely range between 0.691 and 0.978 percent.

As a result of amendments to the order on March 3, 2008 (73 FR 11328), the Board unanimously recommended conforming changes to the order's reporting and recordkeeping regulations at its meeting on February 27, 2009. These conforming changes reflect amendments to the marketing year, terminology, and Board name. The conforming changes include the date when a handler may become an agent of the Board to dispose of reserve walnuts. Conforming changes would also change the term "carryover" to "inventory" and modify the first of three dates in a marketing year when handlers are required to report their inventory to the Board. Further conforming changes include the dates that handlers must report to the Board their receipts of walnuts from outside of the United States and for what periods. Another conforming change would modify the first of three dates in a marketing year

wherein handlers must indicate in their books and records the quantity of walnuts they held. Finally, there would be conforming changes to replace the Board name acronym "WMB" with "CWB" in form numbers. In addition to these conforming changes, gender-specific language would also be changed from "he" and "his" to "he/she" and "his/her". There are no viable alternatives to these proposed conforming changes.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Board's meetings were widely publicized throughout the California walnut industry, and all interested persons were invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the May 18, 2009, and February 27, 2009, meetings were public meetings, 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 proposed rule, including the regulatory and informational impacts of this action on small businesses.

This proposed rule would require minor conforming changes to several Board forms currently approved by the Office of Management and Budget (OMB), under OMB No. 0581-0178, Vegetable and Specialty Crops. These changes will not affect the burden currently approved under that collection. The revised forms are being submitted to OMB through a change of worksheet. This action would impose 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 the 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.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2009-10 marketing year begins on September 1, 2009, and the marketing order requires that the rate of assessment for each marketing year apply to all assessable walnuts handled during the year; (2) the Board needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; (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) conforming changes made to the reporting and recordkeeping regulations should be implemented as quickly as possible to assure program continuity.

List of Subjects in 7 CFR Part 984

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

For the reasons set forth in the preamble, 7 CFR part 984 is proposed to be 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, 2009, an assessment rate of \$0.0177 per kernelweight pound is established for California merchantable walnuts.

3. Amend § 984.456 by revising paragraphs (a) and (b) to read as follows:

§ 984.456 Disposition of reserve walnuts and walnuts used for reserve disposition credit.

(a) Beginning September 1 of any marketing year, a handler may become an agent of the Board to dispose of reserve walnuts of such marketing year. The agency shall be established upon execution of an "Agency Agreement for Reserve Walnuts" setting forth the terms and conditions specified by the Board

for the sale of reserve walnuts in authorized outlets.

(b) Any handler who desires to transfer disposition credit in excess of his/her reserve obligation to another handler shall submit a request to the Board for such transfer on CWB Form No. 17 signed by both handlers and the Board shall credit such transfer.

* * * * *

4. Amend § 984.464 by revising paragraph (c) to read as follows:

§ 984.464 Disposition of substandard walnuts.

* * * * *

(c) Each handler who disposes of substandard walnuts to an approved crusher, livestock feed manufacturer or livestock feeder shall upon shipment report to the Board on CWB Form No. 20, the quantities disposed of or shipped.

5. Section 984.471 is revised to read as follows:

§ 984.471 Reports of handler inventory.

Reports of handler inventory as of September 1, January 1, and April 1 of each marketing year shall be submitted to the Board on CWB Form No. 4 for inshell walnuts and on CWB Form No. 5 for shelled walnuts, on or before September 15, January 15, and April 15 respectively, of that marketing year.

6. Section 984.472 is revised to read as follows:

§ 984.472 Reports of merchantable walnuts shipped.

(a) Reports of merchantable walnuts shipped during a month shall be submitted to the Board on CWB Form No. 6 not later than the 5th day of the following month. Such reports shall include all shipments during the preceding month and shall show for inshell and shelled walnuts the quantity shipped, whether they were shipped into domestic or export channels, and for exports, the quantity by country of destination. If a handler makes no shipments during any month he/she shall submit a report marked "None." If a handler has completed his/her shipments for the season, he/she shall mark the report "Completed," and he/she shall not be required to submit any additional CWB Form No. 6 reports during the remainder of that marketing year.

(b) Reports of walnuts purchased directly from growers by handlers who are manufacturers or retailers shall be submitted to the Board on CWB Form No. 6, not later than the 5th day of the month following the month in which the walnuts were purchased. Such reports shall show the quantity of

walnuts purchased and the quantity inspected and certified as merchantable walnuts.

7. Section 984.476 is revised to read as follows:

§ 984.476 Report of walnut receipts from outside of the United States.

Each handler who receives walnuts from outside of the United States shall file with the Board, on CWB Form No. 7, a report of the receipt of such walnuts. The report shall be filed as follows: On or before December 5 for such walnuts received during the period September 1 to November 30; on or before March 5 for such walnuts received during the period December 1 to February 28 (February 29 in a leap year); on or before June 5 for such walnuts received during the period March 1 to May 31; and on or before September 5 for such walnuts received during the period June 1 to August 31. The report shall include the quantity of such walnuts received, the country of origin for such walnuts, and whether such walnuts are inshell or shelled. With each report, the handler shall submit a copy of a product tag issued by a DFA of California inspector for each receipt of such walnuts that includes the name of the person from whom such walnuts were received, the date such walnuts were received by the handler, the number of containers and the U.S. Custom's Service entry number, whether such walnuts are inshell or shelled, the quantity of such walnuts received, the country of origin for such walnuts, the name of the DFA of California inspector who issued the product tag, and the date such tag was issued.

8. Amend § 984.480 by revising paragraph (d) to read as follows:

§ 984.480 Books and other records.

* * * * *

(d) The quantities held on September 1, January 1, and April 1 of each marketing year.

Dated: August 24, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9-20770 Filed 8-27-09; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Docket No. AMS-FV-09-0045; FV09-987-2 PR]

Domestic Dates Produced or Packed in Riverside County, CA; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the California Date Administrative Committee (Committee) for the 2009-10 and subsequent crop years from \$0.60 to \$0.75 per hundredweight of dates handled. The Committee locally administers the marketing order which regulates the handling of dates grown or packed in Riverside County, California. Assessments upon date handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year begins October 1 and ends September 30. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by September 28, 2009.

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 submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT:

Terry Vawter, Senior 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:

Terry.Vawter@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. 987, as amended (7 CFR part 987), regulating the handling of dates grown or packed in Riverside County, 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 date handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable dates beginning October 1, 2009, 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 would increase the assessment rate established for the Committee for the 2009-10 and