

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1214****[FV-96-705-PR2]****Proposed Kiwifruit Research, Promotion, and Consumer Information Order****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish an industry-funded research, promotion, and consumer information program for fresh kiwifruit. Under the proposed Kiwifruit Research, Promotion, and Consumer Information Order (Order), producers and importers would pay an assessment not to exceed 10 cents per 7-pound tray of kiwifruit to the proposed National Kiwifruit Board (Board). Composed of producers and importers or exporters, the Board would use the assessments collected to conduct a generic program of research, promotion, and consumer information to maintain, expand, and develop markets for kiwifruit.

**DATES:** A referendum order establishing the voting period for the referendum and the representative period for voter eligibility will be published at a later date in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Sonia N. Jimenez, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, STOP Code 0244, 1400 Independence Ave, SW, Washington, DC 20250-0244, fax (202) 205-2800, telephone (202) 720-9916 or (1)(888) 720-9917.

**SUPPLEMENTARY INFORMATION:** This proposed Order is issued under the National Kiwifruit Research, Promotion, and Consumer Information Act, Subtitle V of the Federal Agricultural Improvement and Reform Act of 1996 [Pub. L. 104-127], enacted April 4, 1996, hereinafter referred to as the Act.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule would 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 558 of the Act [7 U.S.C. 7467], after an Order is implemented, a person subject to the Order may file a petition

with the Secretary stating that the Order or any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with law and requesting a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

**Executive Order 12866 and Regulatory Flexibility Act**

This rule has been determined not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act [5 U.S.C. 601 *et seq.*], the Agency has examined the impact of the proposed rule on small entities.

The kiwifruit industry initiated this program by asking the U.S. Congress (Congress) to pass legislation to create a generic program of promotion and research for kiwifruit. Congress found that this program is vital to the welfare of kiwifruit producers and other persons concerned with producing, marketing, and processing kiwifruit.

This program is intended to: develop and finance an effective and coordinated program of research, promotion, and consumer information regarding kiwifruit; strengthen the position of the kiwifruit industry in domestic and foreign markets and maintain, develop, and expand markets for kiwifruit; and to treat domestically produced kiwifruit and imported kiwifruit equitably.

The industry support for the program will be determined during the referendum to be conducted by the Department. Dates for the referendum will be announced by the Secretary no later than 60 days before the referendum.

This program was initiated by industry, industry must approve the program in a referendum in advance of its implementation, and industry members would serve on the promotion board that would administer the program under the Department's supervision. In addition, any person subject to the program may file with the Secretary a petition stating that the order or any provision is not in

accordance with law and requesting a modification of the order or an exemption from the order.

Administrative proceedings were discussed earlier in this proposed rule.

In this program, handlers would be required to collect assessments from producers, file reports, and submit assessments to the promotion board. Importers would be required to remit to the promotion board assessments not collected by the U.S. Customs Service (Customs) and to file reports with the promotion board. In addition, exempt producers and importers would be required to file an exemption application. While the proposed Order would impose certain recordkeeping requirements on handlers and importers, information required under the proposed Order could be compiled from records currently maintained. The forms require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. The estimated cost in providing information to the promotion board by the 760 respondents would be \$7,842.50 or \$10.32 per respondent per year.

The Department would oversee program operations and, if the program is implemented, every 6 years would conduct a referendum to determine whether the kiwifruit industry supports continuation of the program.

There are approximately 650 producers, 45 importers, and 65 handlers of kiwifruit that would be covered by the program. Small agricultural service firms, which would include the handlers and importers who would be covered under the Order, have been defined by the Small Business Administration (SBA) [13 CFR 121.601] as those whose annual receipts are less than \$5 million and small agricultural producers, those who would be required to pay assessments, as those having annual receipts of \$500,000. Only one handler has been identified to have \$5 million or more in annual sales. In addition, there are 10 producers at or over the \$500,000 annual sales receipts threshold. Accordingly, the majority of handlers and producers may be classified as small entities. While the Department does not have specific information regarding the size of importers, it may be concluded that the majority of importers may be classified as small entities.

The Department is aware of producers in California, Oregon, Pennsylvania, and South Carolina, and importers that import kiwifruit from Chile, New Zealand, and Italy. The Department believes that these individuals would include a majority of the producers and

importers that would be covered under the program. The Department is also aware that some individuals may be producers of "hardy kiwifruit," a different species of kiwifruit, known as *Actinidia arguta*, which would not be covered under the proposed program. However, the Department does not have specific information regarding how many individuals produce only the "hardy kiwi" versus the "fuzzy" most common kiwifruit species, known as *Actinidia deliciosa*. Therefore, the total number of producers believed to be covered by the program is the same as in the first proposed rule.

Other names for the species *Actinidia arguta* (hardy kiwifruit) are baby kiwifruit, kiwifruit grape, and kiwiberri. There are no official statistics on this commodity because it is such a small and new crop. According to comments received, this species is grown in California, Oregon, Pennsylvania, Washington, Virginia, and British Columbia. The production in Virginia and Pennsylvania is not commercially marketed. Oregon production on 5 acres was a total of 216,000 pounds over the last 3 years. It takes 3 to 5 years to harvest the first crop. The hardy kiwifruit is hand-harvested and packed in 6-ounce berry baskets like raspberries. The harvesting, storage, handling, consumer recognition, and marketing of this species is completely different from the most common fuzzy kiwifruit or *Actinidia deliciosa*. All references to "kiwifruit" in this document, therefore, mean the *Actinidia deliciosa* species.

California is the source for practically all (99.7%) of the kiwifruit produced in the United States. The California kiwifruit industry consists of approximately 600 producers and 65 handlers. Production rose by 75 percent between 1984 and 1996, increasing from 18 thousand tons to 31.5 thousand tons. In the period from 1984 through 1996, the value of production fell by 26 percent.

Most U.S. kiwifruit is utilized fresh. Fresh utilization increased by 123 percent between 1984 and 1996, growing from 11.7 thousand tons to 26.1 thousand tons. The season average price during 1984 through 1996 fell by 53 percent, declining from \$1,070 per ton to \$502 per ton. Exports accounted for about 30 percent of U.S. fresh utilization during that period.

Between 1992 and 1996, the average annual production per producer, including kiwifruit for processing, was 99 tons or 28,286 7-pound trays of kiwifruit. The average price was \$406 per ton, giving an average return of about \$40,000 per producer per year. A

typical tray price during this period was \$1.42 per tray, and the average amount shipped per handler was about 148,276 trays, yielding an average annual revenue per handler of \$210,552. U.S. importers handled an average of 184,857 trays per year per importer. During this period, the average value of total imports per year was \$18.3 million (f.o.b. country of origin). The majority of kiwifruit came from Chile, with the remaining coming from New Zealand and Italy. In 1996, imports totaled 87.9 million pounds, up 5 percent from 1995. The value of imports in 1996 was \$26.5 million.

The proposed rule published in the **Federal Register** on October 2, 1996, provided statistics on production, value of production, fresh utilization, average price, average return per producer, average annual revenue per handler, and other related statistics that are different from the statistics provided in this rule. These changes are due to the fact that the October 2, 1996, rule relied on statistics from 1985 through 1995 because 1996 crop year statistics were not available. When 1996 statistics are added to the averages, the final averages change because the domestic 1996 crop statistics are considerably lower in terms of production, and fresh utilization. For example, production from 1985 to 1995 increased an average of 119 percent. However, when adding 1996 production, the average from 1985 to 1996 shows an average increase of only 75 percent. Therefore, adding the 1996 statistics to the averages provided in the October 2 proposed rule changes the statistical averages, in some cases considerably, making the statistics for production and fresh utilization lower than previously indicated.

The proposed kiwifruit Order would authorize assessment fees on producers (to be collected by first handlers) and on importers (collected by the U.S. Customs Service) of up to 10 cents per 7-pound tray. The Board, which will be composed of kiwifruit producers, importers, and, possibly, exporters, must recommend the assessment rate, which is subject to oversight by the Secretary, as are the other rules and regulations. At the maximum rate of assessment, the promotion board would collect \$2.1 million to administer the program. Assessments on domestic production are expected to represent 45 percent of the income under the program.

The effect of the assessments will depend on the actual rate recommended by the Board. At the maximum rate, it is expected that the effect on producers would be approximately 8 percent of their average return. However, the Order

would exempt producers of less than 500 pounds of kiwifruit a year, importers of less than 10,000 pounds a year, and kiwifruit sold for processing and sold directly to consumers. Furthermore, under the proposed program, the promotion board could authorize different reporting schedules based on different marketing practices. This could be of benefit specially to small businesses for whom a less frequent reporting period would diminish the reporting burden.

The Department would keep all of these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the implementation process. In addition, trade associations and related industry media would receive news releases and other information regarding the implementation and referendum process. Furthermore, all the information would be available through e-mail.

If the program is implemented, the promotion board would develop guidelines for compliance with the program.

In addition, the kiwifruit industry would nominate individuals to serve as members of the promotion board. These individuals would recommend the assessment rate, programs and projects, a budget, and any other rules and regulations that might be necessary for the administration of the program. The Department would ensure that the nominees represent the kiwifruit industry as specified in the Act.

There is a federal marketing order program for kiwifruit in California which is administered by the Kiwifruit Administrative Committee (KAC), under the Department's supervision. KAC is composed of California producers. The marketing order regulations for grade, size, maturity, and containers are designed to assure consumers of consistently good quality California kiwifruit. The marketing order and its regulations allow small farmers to compete effectively in an increasingly competitive marketplace. Under the marketing order, handlers are required to submit information pertaining to and pay assessments on kiwifruit shipments. The assessment rate recommended by the KAC is derived by dividing anticipated expenses by expected shipments of kiwifruit. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the KAC's expected expenses. The 1996-97 assessment rate was set at 1.75 cents per tray or tray equivalent of kiwifruit. The 1995-96 rate of assessment was 1.5 cent

per tray or tray equivalent of kiwifruit. Each handler pays an average of \$2,000 per year in assessments. The estimated reporting burden per year on individual handlers is estimated at 4.2 hours or \$42.00 per handler under the marketing order.

The California Kiwifruit Commission (CKC) administers a California state program for kiwifruit. The CKC is composed of kiwifruit producers, packers, and handlers. In 1995–96 producers paid \$1.4 million in assessments at a rate of 17 cents per tray or tray equivalent. In 1996–97 it is estimated that producers would pay \$1.15 million in assessments at a rate of 17 cents per tray or tray equivalent. Handlers collect the assessments and remit them to the CKC.

The collection of information required under the proposed order for the research and promotion program would be similar to the marketing order program. However, the KAC and the promotion board would keep their information separate to comply with confidentiality requirements under the programs. Furthermore, using the same source of information would reduce the burden on producers and handlers of all sizes.

In the past, the CKC participated in a voluntary promotional program with Chilean kiwifruit growers to jointly advertise kiwifruit in the United States. This program, however, does not provide enough resources to be as effective as a national generic program could be. In addition, other importing countries and private companies spend considerable amounts of resources in kiwifruit advertising. The purpose of this proposed program is not to restrict the individual promotions but to add a generic promotion program for kiwifruit where industry segments pull together resources for the benefit of the whole industry.

The absence of a generic program for kiwifruit may have a negative impact on the industry because other commodity groups, specifically for competing fruits, conduct promotion activities to maintain and expand their markets. The kiwifruit industry would be at a disadvantage because individual producers, handlers, and importers would not be able to implement and finance such a program without cooperative action. In addition, Agricultural Issues Forum, a group of 15 California commodity organizations, conducted a study in mid-1995 and reported in early 1996 that consumers strongly support the concept of farmers working together to promote their products, conduct product research, engage in consumer education

programs, and set quality standards and inspect products. Consumers said that they benefitted from these activities and were more inclined to buy those products. Eighty-one percent of the farmers surveyed said that mandated programs were either very important or important in promoting products. The survey was conducted among farmers, public policy leaders, consumers, retailers, and allied industries.

In order to conduct the Regulatory Flexibility Analysis regarding the impact of this proposed Order on small entities, the proposed rule that was published in the **Federal Register** on October 2, 1996 [61 FR 51378] invited comments concerning the potential effects of the proposed Order. No comments were received concerning the impact of the proposed order on small entities. However, as explained earlier in this rule, “hardy kiwifruit” producers would not be covered under the program because the species *Actinidia arguta* is considerably different from the most common “fuzzy kiwifruit” species *Actinidia deliciosa*. This would have a positive impact on small businesses since most of the producers of “hardy kiwifruit” are considered small businesses.

In addition, it is expected that the proposed order would be very beneficial to the kiwifruit industry, especially small businesses who would not be able to afford a nationwide comprehensive program individually.

It is estimated that there are approximately 700 kiwifruit producers and importers that would be eligible to vote in the referendum. It would take an average 15 minutes for each voter to read the voting instructions and complete the referendum ballot. The total burden on the total number of voters will be 29 hours.

#### **Paperwork Reduction Act**

In accordance with the Office of Management and Budget (OMB) regulations [5 CFR Part 1320] which implement the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that would be imposed by this proposed Order were approved by OMB on December 16, 1996.

*Title:* National Research, Promotion, and Consumer Information Programs.

*OMB Number:* 0581–0093, except for the Promotion Board nominee background statement form which is assigned OMB number 0505–0001.

*Expiration Date of Approval:* October 31, 1997.

*Type of Request:* Revision of a currently approved information

collection for research and promotion programs.

*Abstract:* The information collection requirements in this request are essential to carry out the intent of the Act.

While the proposed Order would impose certain recordkeeping requirements on handlers and importers, information required under the proposed Order could be compiled from records currently maintained. The proposed Order's provisions have been carefully reviewed and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already maintained by handlers under the federal marketing order program in California and the CKC. The information needed would be taken from financial reports or sales receipts already maintained.

The forms require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the promotion board. The forms would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly coincides with normal business practices. Collecting information less frequently would hinder the promotion board from effectively carrying out the provisions of its program. Requiring reports less frequently than monthly would impose additional recordkeeping requirements by requiring information from several months to be consolidated prior to filling out the form rather than just copying end-of-month figures already available onto the forms. The timing and frequency of collecting information is intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers, importers, and handlers who are subject to or exempted from the provisions of the Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

The estimated cost in providing information to the promotion board by the 760 respondents would be \$7,842.50

or \$10.32 per respondent. This total has been estimated by multiplying 784.25 (total burden hours requested) by \$10.00 per hour, a sum deemed to be reasonable should the respondents be compensated for their time.

Information collection requirements that are included in this proposal include:

(1) *A periodic report by each handler who handles kiwifruit.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .50 hours per each handler reporting on kiwifruit handled.

*Respondents:* Handlers.

*Estimated Number of Respondents:* 65.

*Estimated Number of Responses per Respondent:* 12.

*Estimated Total Annual Burden on Respondents:* 390 hours.

(2) *A periodic report by each importer who imports kiwifruit.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .25 hours per each importer reporting on kiwifruit imported.

*Respondents:* Importers.

*Estimated Number of Respondents:* 45.

*Estimated Number of Responses per Respondent:* 12.

*Estimated Total Annual Burden on Respondents:* 135 hours.

(3) *An exemption application for producers and importers of kiwifruit producing less than 500 pounds and importing less than 10,000 pounds of kiwifruit a year respectively, persons which sell directly to consumers or sell kiwifruit for processing who will be exempt from assessments and reporting requirements.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .25 hours per response for each exempt producer and importer.

*Respondents:* Exempt producers and importers

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

(4) *A referendum ballot to be used to determine whether producers and importers covered by the Order favor implementation or continuance of the Order.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .25 hours per response for each producer and importer.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 700.

*Estimated Number of Responses per Respondent:* 1 every 6 years (.16).

*Estimated Total Annual Burden on Respondents:* 29 hours.

(5) *Nominations.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .5 hours per response.

*Respondents:* Producers and importers.

*Estimated number of Respondents:* 700.

*Estimated Number of Responses per Respondent:* 1 every 3 years (.33)

*Estimated Total Annual Burden on Respondents:* 115.5 hours.

(6) *A request for refund of assessments collected by Customs for exempt importers.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .25 hours per response for each exempt importer requesting a refund of assessments collected by Customs.

*Respondents:* Exempt importers.

*Estimated number of Respondents:* 5

*Estimated Number of Responses per Respondent:* 1

*Estimated Total Annual Burden on Respondents:* 1.25 hours.

(7) *A background questionnaire for nominees.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average .5 hours per response for each producer, importer, and public member nominated to the Board.

*Respondents:* Producers, importers, and public member.

*Estimated Number of Respondents:* 22 for the initial nominations to the Board and approximately 12 respondents annually thereafter.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 22 hours for the initial nominations to the Board and 12 hours annually thereafter.

(8) *A requirement to maintain records sufficient to verify reports submitted under the Order.*

*Estimate of Burden:* Public recordkeeping burden for keeping this information is estimated to average .5 hours per recordkeeper maintaining such records.

*Recordkeepers:* Handlers and importers.

*Estimated number of Recordkeepers:* 160.

*Estimated Total Recordkeeping Hours:* 80 hours.

No comments were received on the recordkeeping requirements.

## Background

The Act authorizes the Secretary to establish a national kiwifruit research, promotion, and consumer information program. The program would be funded by an assessment levied on producers and importers not to exceed 10 cents per 7-pound tray of kiwifruit. Kiwifruit sold directly to a consumer by a producer for a purpose other than resale and domestic and imported kiwifruit for processing would be exempt from assessments.

Assessments would be used to pay for: Research, promotion, and consumer information; administration, maintenance, and functioning of the Board; and expenses incurred by the Secretary in implementing and administering the Order, including referendum costs.

The first handler would be responsible for the collection of assessments from the producer and payment to the promotion Board. Handlers would be required to maintain records for each producer for whom kiwifruit is handled, including kiwifruit produced by the handler. In addition, handlers would be required to file reports regarding the collection, payment, or remittance of the assessments. All information obtained through handler reports would be kept confidential.

Customs would collect assessments on imported kiwifruit and would remit those assessments to the promotion Board for a fee.

The Act requires the Department to conduct a referendum during the 60-day period preceding the proposed Order's effective date. Kiwifruit producers of 500 pounds or more and importers of 10,000 pounds or more annually would vote in the referendum to determine whether they favor the Order's implementation. The proposed Order must be approved by a majority of eligible producers and importers voting in the referendum, and producers and importers favoring approval must produce and import more than 50 percent of the total volume of kiwifruit produced and imported by persons voting in the referendum. Subsequent referenda would be conducted every 6 years after the program is in effect or when requested by 30 percent of kiwifruit producers and importers covered by the Order. The Secretary would give serious consideration to requests for referendum when requested by a group representing a considerable amount of the volume covered by the program.

Since the Department has incurred costs in connection with implementing this national research, promotion, and consumer information program for fresh kiwifruit, the Department is requesting the proponents to post, prior to the referendum, a bond or other collateral to cover the Department's costs prior, during, and after referendum. The current estimate for implementation, including the referendum, is \$150,000. The Secretary will issue a referendum order, which establishes the voting period, representative period, method of voting, and designates the referendum agents, soon after the bond is posted.

A final rule on the referendum procedures which will be used to conduct the referendum will be published separately.

The Act provides for the submission of proposals for a kiwifruit research, promotion, and consumer information Order by industry organizations or any other interested person affected by the Act. The Act requires that such a proposed Order provide for the establishment of a promotion Board. The promotion Board would be composed of 11 voting members: 6 producers, 4 importers or exporters, and 1 public member. Each member would have an alternate. Members would serve a three-year term of office. No member may serve more than two consecutive three-year terms.

The Act provides that any person subject to the Order may file with the Secretary a petition stating that the Order or any of its provisions is not in accordance with law and requesting a modification of the Order or an exemption from the Order. The individual would be given the opportunity to a hearing on the petition.

The Department issued a news release on May 6, 1996, requesting proposals for an initial Order or portions of an initial Order by May 17, 1996. A second news release, extending the deadline for submission of proposals to June 3, 1996, was issued on May 24, 1996.

An entire proposed Order was submitted by the CKC. The CKC is an industry group created by the State of California to promote California kiwifruit. In addition, a partial proposal was submitted by the New Zealand Kiwifruit Marketing Board (NZKMB). The NZKMB represents all New Zealand exporters of kiwifruit into the United States.

In addition to minor editorial changes, the Department modified the CKC's proposed text by: adding the power and duty to investigate violations of the Act and Order; deleting a definition for industry information because it is not authorized under the

Act; revising definitions to make them in accordance with the Act; clarifying that the collection of assessments from imports would be performed through Customs; clarifying that the promotion board would have control over voluntary contributions made to the promotion board; clarifying that the assessment rate may only be changed prior to a fiscal year; clarifying that the assessment rate may only be changed by regulation rather than in the budget; and adding a provision regarding federal debt collection procedures. The CKC also submitted referendum procedures. The final rule on the referendum procedures will be published separately.

A proposed rule seeking comments on a proposed kiwifruit research, promotion, and consumer information order was published on October 2, 1996, in the **Federal Register** [61 FR 51378]. Comments were invited on the CKC proposal for an entire Order (Proposal I), the NZKMB proposals regarding board membership and limiting promotions to the U.S. market (Proposal II), and the NZKMB alternate proposal regarding board membership (Proposal III). The deadline for comments was December 2, 1996. Seventy-five comments were received. Comments were received from eight Chilean kiwifruit growers or grower associations, 31 Chilean kiwifruit exporters or exporter associations, one international exporter association, 26 importers of Chilean kiwifruit, two U.S. growers, the CKC (which represents California growers), four universities, and the embassies of Australia and New Zealand.

The National Kiwifruit Growers Association from Chile submitted a comment in opposition to the proposed order. The same comment was submitted by Fedefruta, a trade association of Chilean fruit growers; the Chilean Fresh Fruit Association (CFFA), a trade association composed of Chilean fruit exporting companies; and the Chilean Exporters Association (CEA), a trade association comprised of Chilean fruit exporting companies. Twenty-nine comments were received from exporters of kiwifruit from Chile that opposed the proposed order and adopted the reasons explained in the comment submitted by the CFFA. Twenty-six comments were received from importers of kiwifruit from Chile that opposed the proposed order. These comments also adopted the rationale in the comment submitted by the CFFA. In addition, six comments were received from growers of kiwifruit from Chile that opposed the proposed order. Three of these comments adopted the reasons explained in the comment submitted by CFFA while the remaining three comments adopted the comment

submitted by Fedefruta. Accordingly, in discussing these 59 comments in the preamble, for ease of reference we will refer to them collectively as the Chilean commenters or comments.

The Chilean commenters provided six reasons for their opposition to the proposed order. They were of the view that the proposed program: (1) Was unnecessary to achieve legitimate marketing objectives; (2) would be ineffective in achieving legitimate marketing objectives; (3) was inherently biased against imported kiwifruit; (4) would violate the First Amendment and the Foreign Commerce Clause of the U.S. Constitution; (5) would contravene international principles of free trade embodied in the General Agreement on Tariffs and Trade (GATT); and (6) would violate provisions of the Chilean Constitution that prohibit monopolistic practices.

With regard to the first reason presented, the Chilean commenters argued that the proposed program was unnecessary because the CFFA had been coordinating its promotional activities for kiwifruit in the U.S. market with the CKC by participating in a voluntary funded program; that there was no substantive difference in the objective of the voluntary program and the proposed program; that a trade case brought by the CKC against New Zealand kiwifruit [*California Kiwifruit Commission v. Moss*, 53 Cal. Rptr. 2d 138 (Cal. App. 3d Dist. 1996)] demonstrated that a mandatory program such as the proposed program could lead to significant abuses and the pursuit of non-marketing objectives; and finally that AMS does not have sufficient data at hand to warrant the imposition of a mandatory order. We disagree with the commenters.

It is the Department's understanding that the voluntary program funded by the CKC and the CFFA was not funded this past year. For a program to be effective, it is necessary that promotional activities be conducted on a regular basis and with no interruptions. Furthermore, it is not the intention of the proposed research and promotion program to obstruct the activities of other promotional activities for kiwifruit. The promotional activities of the CFFA and the CKC could continue independently of the proposed research and promotion program if the parties so desire.

In addition, the proposed program is authorized under the Act and is consistent with the intent and provisions of Act. The program as proposed herein contains all of the necessary and appropriate provisions under the Act needed to conduct a

national program. This program would be subject to similar oversight and supervision as is currently provided for research and promotion programs administered by the Department.

The activities of the proposed Board would be closely monitored by the Department to assure that only authorized activities are funded by the proposed Board. In addition, section 556(e) of the Act [7 U.S.C. 7465] and § 1214.53 of the proposed Order prohibit the use of funds for the purpose of influencing legislation or governmental policy or action. Furthermore, under Title V, Subtitle A of the 1996 Farm Bill (Commodity Promotion and Evaluation), research and promotion program are required to evaluate the accomplishments of their programs. The Department is working with current programs to develop guidelines for the programs to meet the objectives of the required evaluations. If, as a result of the evaluations, a program is determined to not have a positive impact in the industry, those covered by the program would have the necessary information to make a determination on whether to continue the program. Furthermore, a referendum would be conducted to determine the level of support for the program.

The Chilean commenters also argue that the Department should not proceed with a referendum on the proposed order until a decision of the Supreme Court in *Daniel Glickman, Secretary of Agriculture v. Wileman Brothers & Elliot, Inc. et al.* (Wileman) [Supreme Court case 95-1184] so that the Department has the benefit of that opinion and is able to conform any proposed order to its requirements.

On June 25, 1997, the Supreme Court decided the case and upheld the constitutionality of generic advertising funded by growers of California nectarines and peaches. The case sought review of First Amendment issues raised in generic advertising programs under Federal marketing orders for California nectarines and peaches. The U.S. Court of Appeals for the Ninth Circuit had previously found that mandatory assessments implicated handlers' First Amendment right because they were compelled to provide financial support for particular generic commercial advertisements. The Supreme Court held that the requirement that growers finance generic advertising does not violate the First Amendment of the Constitution. Consequently, there is no reason to delay the current rulemaking because this program as proposed is consistent with applicable law.

In its second reason for opposing the proposed program, the Chilean commenters argued that a mandatory promotional program could only be successful if a general consensus exists in the affected industry and was of the view that no such consensus exists; that the proposed Order should be substantially altered to conform to GATT principles as are more reflected in the Commodity Promotion, Research, and Information Act of 1996 (generic statute) [7 U.S.C. 7411 *et seq.*]; that the mandatory objectives and the market for domestic kiwifruit producers in the United States were not necessarily the same as that for Chilean kiwifruit; and that the proposed order does not have the necessary safeguards to prevent potential misallocation or biased allocation of funds. We disagree with the commenters' arguments and conclusions. The Order as proposed herein is consistent with applicable law and will be subject to a referendum vote of kiwifruit producers and importers who will be subject to assessments under the Order to determine whether such producers and importers approve and support the implementation of the Order. In addition, the industry has the option of amending the proposed program consistent with the Act in order to reflect the industry's needs at anytime. Furthermore, this program, as are other similar commodity research and promotion programs, will be subject to Department oversight and supervision.

The third reason argued by the Chilean commenters was that the proposed program is inherently biased and discriminates against imported kiwifruit. The comment asserted that this bias is evident throughout the regulation but is most obvious in proposed provisions for adoption of the Order, composition of the board, voting procedure for adopting of assessment and subsequent referenda. The comment went on to conclude that the biases render the proposed Order invalid under the Constitution. We disagree. The proposed program is consistent with the enabling statute.

The commenters then discussed what they view as the most objectionable provisions of the proposed Order that must be modified before a referendum takes place.

The first proposed provision cited was § 1214.30 *Establishment, adjustment, and membership*. The comments asserted that the composition of the Board does not bear any rational relationship to the interests that are subject to assessments. However, the proposed provision is consistent with the relevant statutory provisions that

provide for a diverse 11-member Board consisting of six producer members not exempt from assessment; four importer members not exempt from assessment or exporters; and one member appointed from the general public. The Act also provides that, subject to the 11-member limit, the Secretary may adjust membership on the Board to accommodate changes in production and import levels of kiwifruit. However, the proposed order reflects provisions in the Act requiring 51 percent or more of the members of the promotion Board to be domestic producers.

Arguing that unfairness could result from a program controlled by a domestic board representing a minority of the market, the Chilean commenters asserted that in order to avoid a potential for abuse, the provisions of the generic statute concerning geographic representation and provisions concerning periodic reappointment should be invoked. However, these statutory provisions in the generic statute are not part of and do not apply to the kiwifruit statute, the authority for the program proposed herein.

With regard to proposed § 1214.36, *Procedure*, the commenters noted that the voting procedures provide that all motions need only a simple majority vote of a quorum to pass except for approval of an assessment rate which requires a two-thirds vote of a quorum to pass. The commenters pointed out that the Act in § 556(a)(2) [7 U.S.C. 7465] requires a two-thirds vote of a quorum of the board for approval of a budget. We agree, and § 1214.36(b)(2) is revised to reflect the need of a two-thirds vote of a quorum of the board for approval of a budget. The commenters also expressed concern that the four importer members would have a less effective role in setting an assessment rate and budget based on the composition of the Board and the number of votes needed to approve these items. The proposed four importer or exporter members on the Board is consistent with the membership provisions in the Act. A two-thirds vote of a quorum of the board further assures agreement by all parties on budget and assessment rate issues. In addition, the assessment rate would be recommended by the promotion Board and § 556 of the Act [7 U.S.C. 7465] specifies that a budget and assessment rate must be approved by the Secretary before becoming effective. Rulemaking and public comments would be sought by the Department before a final decision is made on the assessment rate.

The Chileans also commented on proposed §§ 1214.39 *Duties, 1214.40 Programs, Plans, and Projects*, and

1214.50 *Budget and expenses.* The Chilean commenters argued that, while the specific controls established in these sections are needed to prevent fraud, waste, or abuse in the promotional program, the bureaucratic layer of supervision and expense of a mandatory government-supervised program cause it to be necessarily less efficient than a voluntary program. We disagree and believe that such safeguards contribute to a sound and effective program for the industry. The commenters also stated that the meaning of the term administrative expenses in § 1214.50(f) should be clearly specified. We disagree and believe that the term does not need further clarification in the proposed order. Further, USDA has developed guidelines to identify administrative costs and ensure consistency between programs. These guidelines are being used in other programs.

In commenting on § 1214.51, the Chilean comments asserted that the assessment provisions on imports could operate either as a disguised tariff or as a trade barrier. The commenters argued that domestic producers may default on the payment of assessments whereas importers never will because Customs collects the assessments on imports at the time of entry into the United States. The comments went on to state that, if an initial assessment was set at 10 cents per tray, it would diminish returns to growers in Chile under existing market conditions by 30 percent. The commenters then concluded that a program that uses up 30 percent of a foreign grower's return, without demonstrated market share or price increases, is protectionist. We again disagree with the comment. The statute itself provides for collection of import assessments by Customs. This method of collection is efficient and cost effective and has been used successfully in similar research and promotion programs. We also note that the assessment is imposed on each importer of kiwifruit and not upon the foreign grower.

The comments also expressed concern regarding the board's authority to enter into agreements authorizing state-mandated organizations to collect assessments on its behalf. The comments raised concern about abuse and self-dealing. Any such agreement would be subject to approval of the Secretary and to supervision and oversight. In addition, the proposed promotion Board may or may not decide to utilize a state mandated organization to administer the proposed program. The final issue raised by the comments regarding § 1214.51 was concerning the permitted level of administrative

expenses which cannot exceed 30 percent of the budget except in the first year of operation. This provision reflects § 556(c)(3) of the Act [7 U.S.C. 7465] which provides for just such a limitation in the case of assessments.

The CKC commented that the current organization takes great pride in keeping administrative costs at a minimum and that combining the operations of the CKC and the Board would result in substantial savings for all segments of the industry. In addition, the CKC stated that limiting administrative costs would ignore the reality of start-up costs and would tie the hands of future Boards.

The CKC indicated in its comment that it would support a limitation or cap on administrative expenses. The Act provides in § 556(c)(3) [7 U.S.C. 7465] that the level of administrative expenses cannot exceed 30 percent of the budget except in the first year of assessments. The proposed Order reflects that provision of the Act, and, accordingly, no change is made to the proposal as a result of this comment.

The last section discussed by the Chilean comments was § 1214.71 *Suspension or termination.* The commenters were of the view that the provision reflected a structural and discriminatory bias in the regulation against imported kiwifruit. The comments suggested that to correct this problem the votes should be weighted to reflect the number of growers that each importer represents. We disagree. The voting levels provided for in the proposed order concerning suspension or termination reflect the provisions of § 561 of the Act [7 U.S.C. 7470]. Not only does suspension or termination have to be favored by a majority of the producers and importers voting in the referendum, but those producers and importers must also produce or import more than 50 percent of the total volume of kiwifruit produced or imported by persons voting in the referendum. Further, the Secretary is authorized to suspend or terminate the operation of an order or provision if the Secretary finds that it obstructs or does not tend to effectuate the purposes of the Act.

In their fourth, fifth, and sixth reasons for opposing the proposed order, the Chilean commenters argued that the proposed program would violate several provisions of the United States Constitution, provisions of GATT, and lastly principles embodied in the Constitution and laws of Chile.

With regard to the U.S. Constitution, the comments identified not only violations of the First Amendment and Foreign Commerce Clause but also argued violations of the Import-Export

Clause, the Interstate Commerce Clause, the Equal Protection Clause, and the Separation of Powers Principle. The comments argued that the proposed order violated the national treatment provision of the GATT by treating imported kiwifruit less favorably than domestic kiwifruit. We disagree and are of the view that the proposed program is consistent with its authorizing statutory provisions and the applicable law. Under the proposed program, producers and importers of kiwifruit would pay an equal assessment to support a generic program of research and promotion for kiwifruit.

The commenters also argued that the proposed program is contrary to free market principles embodied on the Constitution of Chile, noting that mandatory assessments for generic promotion are not legal in Chile. The commenters stated that without appropriate credit for voluntary contributions, Chilean interests may be forced to mount legal challenges. We do not believe that this rulemaking action raises any pertinent legal issues with regard to the Constitution and laws of Chile. Furthermore, the Act does not authorize credit for voluntary or mandatory contributions to other programs.

In conclusion, the Chilean commenters state that the Department should not submit the proposed Order to a referendum. However, if it is submitted to referendum, the commenters stated that the proposed Order should conform to GATT principles and the statutory limitations for programs under the generic statute and should be modified to address the concerns raised in the comment. The comment goes on to state that the Department should refrain from further action on this rulemaking until opinions are rendered in the Wileman and Moss cases.

In response to the Chilean commenters, for the reasons previously discussed, the Department is continuing with this rulemaking but has modified the proposed rule in § 1214.36 (b)(1) and (b)(2), based on the comments.

A comment was received from the New Zealand Embassy on behalf of the New Zealand Government. That comment supported Proposal II and the alternate Proposal III. Proposal II, in part, stated that two of the four importer/exporter seats on the promotion Board should be filled with New Zealand exporters since this country has been the major exporting country into the U.S. for the past 10 years. Proposal III stated that promotional expenditures of the exporting countries for the last 10 years



should be considered when assigning seats on the promotion Board. In addition, the comment expressed strong reservations concerning the proposed Order, and other similar schemes, on the grounds that: (1) New Zealand exporters and their import agents would have to contribute to funding domestic promotions with their related administrative costs; (2) funds collected from New Zealand exporters would be used to fund U.S. exports of kiwifruit to third markets in direct competition with New Zealand's interests; (3) the proliferation of checkoff schemes such as the proposed order would encourage other countries to levy importers in order to introduce similar schemes; and (4) there appears to be some question about the World Trade Organization (WTO) consistency of the checkoff schemes in general, particularly in relation to the discrimination involved in using foreign contributions to fund the marketing of domestic products.

We disagree with the commenter. All producers and importers under the proposed Order would contribute to generic program of research, promotion, and consumer information. Such a program is intended to maintain, expand, and develop markets for kiwifruit. The proposed Order does specifically provide that all promotions are to be generic in nature without attribution to origin. Further, an amendment to the proposed Order to address concerns raised by the Government of Australia and the NZKMB would add a provision to the Order to limit promotions to the U.S. domestic market. Accordingly, we believe that the proposed Order would benefit both domestic and imported kiwifruit alike, consistent with applicable law including the WTO. With regard to the commenters concern regarding actions of other countries to levy importers in order to introduce similar scheme, we believe that such a view is speculative and as such we cannot offer an opinion of what a particular country might do. Accordingly, we disagree with this part of the comment.

The New Zealand Embassy also stated that representation of importers on the Board should be based on promotion expenditures by the exporting countries in the United States. In its comment concerning this issue, the CKC stated that there is no reasonable way to verify foreign countries' expenditures on advertising and marketing in the U.S. Further, the CKC expressed its views opposing the NZKMB proposal to provide in the Order that the Secretary ensure that at least two of the four importers/exporters member seats be

selected from nominees nominated by importers and/or exporters of New Zealand kiwifruit. It also expressed concern regarding any proposal to limit the importer positions to import or export who have no domestic production interests.

We agree that it would be very difficult to verify the promotional expenditures of each country in the U.S. Further, this would not be a reasonable measure to determine the number of importer members on the Board. The Department believes that the Secretary should have the latitude to appoint representatives to the Board in a manner that best reflects the interests of the various importer and/or exporter segments. Accordingly, this part of proposal II and all of proposal III are denied.

A comment was received from the Embassy of Australia concerning the proposed Order. The Australian Government indicated that it welcomed certain elements of the proposed program. First, the commenter noted that the proposed program would treat domestically produced and imported kiwifruit equitably by using assessment collected to undertake generic promotion for the whole industry. Second, there would be an equitable spread of representation on the Board. Third, the comment looked favorably on the exemption for importers of less than 10,000 pounds a year and kiwifruit sold for processing and the referendum to be conducted before the program would be implemented.

The comment, however, did raise a concern if the generic promotion activities discriminated against counter-seasonal produce and/or importers. The commenter stated that it would be concerned if assessments were used for the promotion of kiwifruit in competing export markets. The comment concluded that assessments should be used for the generic promotion of kiwifruit in the United States only.

Part of Proposal II recommended that all promotions be intended to promote kiwifruit consumption in the U.S. domestic market and not U.S.-produced kiwifruit in foreign markets.

We believe that these two concerns have merit. To avoid any negative effects of seasonal promotion, proposed § 1214.40, *Programs, plans, and projects*, is revised to include a new paragraph (e) to require that promotions be conducted all year round to promote kiwifruit during all seasons which would result in kiwifruit from all countries being promoted equitably. In addition, the Department is adopting this part of Proposal II and a new paragraph (f) is added to provide that all

programs established by the Board with the approval of the Secretary will be required to promote kiwifruit consumption on the U.S. domestic market and that no program could promote exports of U.S. produced kiwifruit in foreign markets. Section 557(e) of the Act [7 U.S.C. 7466] provides for the use of funds to be used for the development and expansion of sales in foreign markets of kiwifruit produced in the United States. However, this provision is permissive and not required to be in an Order. Accordingly, we believe that the most effective use of funds based upon the evidence in the rulemaking would be to limit the use of assessments to domestic promotion only.

In its comment concerning the proposed order, the Southern Hemisphere Association of Fresh Fruit Exporters opposed its implementation because it is contrary to the free trade principles embodied in the Uruguay Round of GATT. The commenter was of the view that the Order would restrict free market access and would operate as a non-tariff barrier to trade. The comment also stated that the restrictive trade effects of the proposed Order were apparent from its essential provision and noted that the proposed Order was drafted by the CKC. The comment went on to state that: (1) The proposed Order was anti-competitive in that it would divert funds from promotional programs of individual companies or countries and would operate as an anti-competitive non-tariff trade barrier; (2) the mandatory aspects of the order conflict with the domestic trade laws of many countries; (3) such mandatory programs are now subject to legal review in the Supreme Court on constitutional grounds; and (4) the implementation of the proposed Order would set a precedent for adoption of similar orders in other countries.

We disagree with the commenter's views and conclusions. As discussed previously in responding to similar comments received, we are of the view that the proposed Order is consistent with applicable law including the GATT. We again note the Supreme Court in *Wileman* held in favor of the government with regard to the constitutional arguments. We offer no view with regard to the domestic trade laws of the countries as to whether other countries would adopt similar programs.

The CKC commented on the proposed Order and Proposals II and III. The CKC comments regarding Proposals II and III were discussed previously.

With regard to § 1214.36(b)(2), the CKC stated that it would support a



three-quarters of a quorum requirement for votes on budget and assessment rate issues rather than the proposed two-thirds requirement. Referencing the CEA comment about adopting the voting provision contained in the generic statute, the commenter supported accommodating the Chilean concern by changing the two-thirds requirement to three-quarters and adopting by-laws to assure that there is near unanimous agreement among all interests on assessment and budget issues. However, the Act provides for the vote of two-thirds of a quorum of the Board for both budget and assessment recommendations to the Secretary. Accordingly, this proposed change is not adopted and the Order will provide for the percentages that are required by the Act.

As to § 1214.39(l), which specifies duties of the Board, the CKC would support a provision on the Order to prohibit the Promotion Board from making expenditures in any market other than the United States. This concern has been previously addressed in response to a comment received by the Australian Government and, as a result, § 1214.40 would be revised to include a new paragraph (f) to limit promotions of kiwifruit consumption to the U.S. domestic market.

The CKC raised concern about other commenters requesting that the proposal include a provision concerning credits. While expressing a lack of understanding of what purpose a generic credit would have, the CKC indicated that it would oppose a brand credit. The Act does not authorize credits for such expenditures.

Seven comments were received concerning the definition of kiwifruit as proposed in § 1214.8. Four of the comments were received from university professors, Extension Service personnel at Clemson University, Cornell University, Ohio State University, and Oregon State University, and from two growers of kiwifruit. In addition, the CKC commented on that section of the proposal.

Both the Act and the proposed Order define kiwifruit as all varieties of fresh kiwifruit grown in or imported into the United States. The university commenters requested that the definition of kiwifruit be revised to include only the species *Actinidia deliciosa*. They pointed out that this is the predominant species with one commenter noting that this species controls over 95 percent of the domestic market. There are other species of kiwifruit. These commenters all expressed concerns regarding the species *Actinidia arguta* or hardy

kiwifruit. One comment noted that while the inside of the fruit was similar to *Actinidia deliciosa*, this was really the only similarity. Exterior appearance, harvesting, production areas (Oregon, Washington, and Pennsylvania), production levels (an estimated 100,000 flats in the next 5 years), and marketing are all different.

The university commenters were concerned about the impact of the proposed Order on hardy kiwifruit producers. Two of the commenters suggested that, if such kiwifruit is assessed, then a percentage of funds should be earmarked for research and development of this new crop of hardy kiwifruit. The two grower comments also raised concerns regarding the definition of kiwifruit in the proposed Order. One grower opposed the inclusion of hardy kiwifruit grown in the State of Pennsylvania and stated that the Order should be limited to the State of California. The second grower raised issues similar to the university comments concerning hardy kiwifruit.

We agree that the species *Actinidia arguta* is a different species from the most common known *Actinidia deliciosa* or fuzzy kiwifruit. Therefore, the definition of kiwifruit was changed in the proposed order to mean all varieties of the fresh kiwifruit classified under the species *Actinidia deliciosa* or the genus *Actinidia*, whose fruit is a large berry, oval in shape, with a brown skin covered in hairs, which are grown in or imported into the United States. This definition would exclude the species *Actinidia arguta* also known as "hardy" kiwifruit from coverage under the program.

In its comment the CKC was in favor of the assessment being levied on all varieties that are referred to as "Kiwifruit or Kiwi" but stated that it would support a provision to allow the Board to exempt certain varieties due to their limited volume, perhaps under 80,000 pounds of total domestic production, differences in appearance, or other reasons.

Section 556(b)(5) of the Act [7 U.S.C. 7465] does provide for exemptions from assessment for producers who produce less than 500 pounds of kiwifruit per year, importers who import less than 10,000 pounds of kiwifruit a year, sales of kiwifruit made directly from the producer to a consumer for a purpose other than resale, and the production or importation of kiwifruit for processing. No other exemption is authorized in the Act. In addition, the proposed order will cover all varieties of kiwifruit under the *Actinidia deliciosa* species that meet the exemption levels.

In summary, § 1214.8, § 1214.36(b)(1) and (2), and § 1214.40 have been revised as a result of comments received.

Section 1214.8 was revised to define kiwifruit as all varieties of fresh kiwifruit classified under the species *Actinidia deliciosa*.

Section 1214.36(b)(2) was revised to require a two-third vote of a quorum for budget issues.

In § 1214.40, a new paragraph (e) was added to specify that promotions shall be conducted all year round. Also, a new paragraph (f) was added to this section to prohibit the use of funds for promotional activities in other countries.

There were no other changes to the proposed Order as a result of the comments received on the text of the Order provisions as they were proposed in the October 2, 1996, issue of the **Federal Register**.

For the Order to become effective, the Order must be approved by a majority of kiwifruit producers and importers voting in a referendum, with such majority producing or importing more than 50 percent of the total volume of kiwifruit produced and imported by persons voting in the referendum.

The proposed Order is summarized as follows:

Sections 1214.1 through 1214.19 of the proposed Order define certain terms, such as kiwifruit, handler, producer, and importer, which are used in the proposed Order.

Sections 1214.30 through 1214.39 include provisions relating to the establishment, adjustment, and membership; nominations; appointment; terms of office; vacancies; reimbursement; powers; and duties of the Board.

The Board would be the body organized to administer the Order through the implementation of programs, plans, projects, budgets, and contracts to promote and disseminate information about kiwifruit, under the supervision of the Secretary. Further, the Board would be authorized to incur expenses necessary for the performance of its duties and to set a reserve fund. Sections 1214.40 and 1214.50 provide information on these activities.

Sections 1214.51 through 1214.53 would authorize the collection of assessments, specify who pays them and how, and specifies persons who would be exempt from paying the assessment. In addition, it would prohibit use of funds to influence government policy or action.

The assessment rate may not exceed 10 cents per 7-pound tray of kiwifruit. The actual rate would be recommended by the Board and approved by the

Secretary through regulation. Direct sales to consumers by a producer and kiwifruit for processing are exempt from assessments.

The assessment sections also outline the procedures to be followed by handlers and importers for remitting assessments; establish a 1.5 percent per month interest charge for unpaid or late assessments; and provide for refunds of assessments paid by importers who import less than 10,000 pounds of kiwifruit a year.

Sections 1214.60 through 1214.62 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of information obtained from such books, records, or reports.

Sections 1214.70 through 1214.73 describe the rights of the Secretary, authorize the Secretary to suspend or terminate the Order when deemed appropriate, and prescribe proceedings after suspension or termination.

Sections 1214.74 through 1214.77 are miscellaneous provisions including the provisions involving personal liability of Board members and employees; handling of patents, copyrights, inventions, and others; amendments to the Order; and separability of Order provisions.

#### List of Subjects in 7 CFR Part 1214

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Kiwifruit, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that Title 7 of Chapter XI of the Code of Federal Regulations be amended as follows:

1. Part 1214 is added to read as follows:

#### PART 1214—KIWIFRUIT RESEARCH, PROMOTION, AND CONSUMER INFORMATION ORDER

##### Subpart A—Kiwifruit Research, Promotion, and Consumer Information Order

###### Definitions

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- 1214.2 Consumer information.
- 1214.3 Department.
- 1214.4 Exporter.
- 1214.5 Fiscal year.
- 1214.6 Handler.
- 1214.7 Importer.
- 1214.8 Kiwifruit.
- 1214.9 Marketing.
- 1214.10 Part and Subpart.
- 1214.11 Person.
- 1214.12 Processing.
- 1214.13 Producer.
- 1214.14 Programs, plans, and projects.
- 1214.15 Promotion.

- 1214.16 Promotion Board.
- 1214.17 Research.
- 1214.18 Secretary.
- 1214.19 United States.

###### National Kiwifruit Board

- 1214.30 Establishment, adjustment, and membership.
- 1214.31 Nominations.
- 1214.32 Acceptance.
- 1214.33 Appointment.
- 1214.34 Term of office.
- 1214.35 Vacancies.
- 1214.36 Procedure.
- 1214.37 Compensation and reimbursement.
- 1214.38 Powers.
- 1214.39 Duties.

###### Promotion, Research, and Consumer Information and Industry Information

- 1214.40 Programs, plans, and projects.

###### Expenses and Assessments

- 1214.50 Budget and expenses.
- 1214.51 Assessments.
- 1214.52 Exemption from assessment.
- 1214.53 Influencing governmental action.

###### Reports, Books, and Records

- 1214.60 Reports.
- 1214.61 Books and records.
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###### Miscellaneous

- 1214.70 Right of the Secretary.
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- 1214.72 Proceedings after termination.
- 1214.73 Effect of termination or amendment.
- 1214.74 Personal liability.
- 1214.75 Patents, copyrights, inventions, publications, and product formulations.
- 1214.76 Amendments.
- 1214.77 Separability.

##### Subpart B—Rules and Regulations

###### Definitions

Sec.

- 1214.100 Terms defined.

###### Nomination Procedures

- 1214.110 Nominations.
- 1214.111 Mail balloting.
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- 1214.115 Financial statements.

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- 1214.120 Payment of assessments.
- 1214.121 Exemption procedures.

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- 1214.125 Reports.

###### Miscellaneous

- 1214.130 OMB control numbers.

**Authority:** 7 U.S.C. 7461–7473.

##### Subpart A—Kiwifruit, Research, Promotion, and Consumer Information Order

###### Definitions

###### § 1214.1 Act.

*Act* means the National Kiwifruit Research, Promotion, and Consumer Information Act, subtitle D of title V of the Federal Agricultural Improvement and Reform Act of 1996, Public Law 104–127, 7 U.S.C. 7461–7473, and any amendments thereto.

###### § 1214.2 Consumer information.

*Consumer information* means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of kiwifruit.

###### § 1214.3 Department.

*Department* means the United States Department of Agriculture.

###### § 1214.4 Exporter.

The term *exporter* means any person outside the United States who exports kiwifruit into the United States.

###### § 1214.5 Fiscal year.

*Fiscal year* means the 12-month period from October 1 to September 30 each year, or such other period as recommended by the Promotion Board and approved by the Secretary.

###### § 1214.6 Handler.

*Handler* means any person, excluding a common carrier, engaged in the business of buying and selling, packaging, marketing, or distributing kiwifruit as specified in the Order.

###### § 1214.7 Importer.

*Importer* means any person who imports kiwifruit into the United States.

###### § 1214.8 Kiwifruit.

*Kiwifruit* means all varieties of fresh kiwifruit classified under the species *Actinidia deliciosa* or the genus *Actinidia*, whose fruit is a large berry, oval in shape, with a brown skin covered in hairs, which are grown in or imported into the United States.

###### § 1214.9 Marketing.

*Marketing* means to sell or otherwise dispose of kiwifruit into interstate, foreign, or intrastate commerce by buying, marketing, distribution, or otherwise placing kiwifruit into commerce.

###### § 1214.10 Part and subpart.

*Part* means this kiwifruit research, promotion, and consumer information order and all rules and regulations and

supplemental orders issued thereunder, and the term subpart means the kiwifruit research, promotion, and consumer information order.

**§ 1214.11 Person.**

*Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or other legal entity.

**§ 1214.12 Processing**

*Processing* means kiwifruit that are commercially canned, fermented, distilled, extracted, preserved, ground, crushed or processed in such manner as the Promotion Board, with the approval of the Secretary, may determine.

**§ 1214.13 Producer.**

*Producer* means any person who grows kiwifruit in the United States for sale in commerce.

**§ 1214.14 Programs, plans, and projects.**

*Programs, plans, and projects* means promotion, research, and consumer information plans, studies, projects, or programs conducted pursuant to this part.

**§ 1214.15 Promotion.**

*Promotion* means any action taken under this Order including paid advertising, to present a favorable image for kiwifruit to the general public for the purpose of improving the competitive position of kiwifruit and stimulating the sale of kiwifruit.

**§ 1214.16 Promotion Board.**

*Promotion Board* means the administrative body referred to as the National Kiwifruit Board or otherwise named Kiwifruit Promotion Board or Promotion Board established under § 1214.30.

**§ 1214.17 Research.**

*Research* means any type of research relating to the use, nutritional value, and marketing of kiwifruit conducted for the purpose of advancing the image, desirability, marketability, or quality of kiwifruit.

**§ 1214.18 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom the authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

**§ 1214.19 United States.**

*United States* means the 50 states of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

**National Kiwifruit Board**

**§ 1214.30 Establishment, Adjustment, and membership.**

(a) Establishment of National Kiwifruit Board. There is hereby established a National Kiwifruit Board of 11 members appointed by the Secretary as follows:

(1) Six members who are producers (or their representatives) and who are not exempt from an assessment.

(2) Four members who are importers (or their representatives) and who are not exempt from an assessment, or are exporters (or their representatives).

(3) One member appointed from the general public.

(b) Adjustment of Membership.

(1) Subject to the 11 member limit, the Secretary may adjust membership on the Promotion Board to accommodate changes in production and import levels of kiwifruit, so long as producers comprise not less than 51 percent of the membership of the Board.

(2) At least every five years, and not more than every three years, the Promotion Board shall review changes in the volume of domestic and imported kiwifruit. If the annual kiwifruit production and imports over the preceding four years, indicate that such changes in production and import levels have occurred warranting reapportionment, the Promotion Board shall recommend reapportionment of Board membership subject to the 51 percent requirement, for approval of the Secretary.

(3) In determining the volume of kiwifruit produced in the United States or imported into the United States for purposes of this section, the Promotion Board and the Secretary shall:

(i) Only consider kiwifruit produced or imported by producers and importers, respectively, as those terms are defined in § 1214.13 and 1214.7; and

(ii) Use the information received by the Promotion Board under § 1214.60, and data published by the California Kiwifruit Commission, U.S. Department of Commerce import statistics and other government kiwifruit production data.

(c) Appointment and nomination.

(1) *Appointment.* The Secretary shall appoint the members of the Promotion Board from nominations submitted in accordance with this section.

(i) Producers shall be appointed from individuals nominated by producers.

(ii) Importers and exporters shall be appointed from individuals nominated by importers and/or exporters.

(iii) The public representative shall be appointed from nominations submitted by the Promotion Board.

(iv) If producers, importers, or exporters fail to nominate individuals

for appointment, the Secretary shall appoint members in the manner specified in § 1214.31. If the Promotion Board fails to nominate a public representative, such member may be appointed by the Secretary without a nomination.

(2) The Secretary shall appoint an alternate for each member of the Promotion Board. Alternates shall:

(i) Be appointed in the same manner for whom such individual is an alternate; and

(ii) Serve on the Promotion Board as a voting member if such member is absent or disqualified.

(3) For purposes of the provisions of this section relating to the appointment of producers and importers or exporters to serve on the Promotion Board, the term producer, importer, or exporter refers to any person who is a producer, importer, or exporter, respectively, or if the producer, importer, or exporter is an entity other than an individual, an individual who is an officer or employee of such producer, importer, or exporter. Persons who qualify to serve as either a producer member or an importer member must select the industry group that they want to represent.

**§ 1214.31 Nominations.**

All nominations for appointments to the Promotion Board under § 1214.33 shall be made as follows:

(a) As soon as practicable after this subpart becomes effective, nominations for appointment to the initial Promotion Board shall be obtained from producers and importers or exporters by the Secretary. In any subsequent year in which an appointment to the Promotion Board is to be made, nominations for positions whose terms will expire at the end of that year shall be obtained from producers, and as appropriate, importers or exporters, and certified as eligible candidates by the Promotion Board and submitted to the Secretary by May 1 of such year, or such other date as approved by the Secretary.

(b) Nominations shall be made through mail ballot in accordance with procedures prescribed in this section.

(c) Except for initial Promotion Board members, whose nomination process will be initiated by the Secretary, the Promotion Board shall issue a call for nominations by March 1 of each year in which nominations for an appointment to the Promotion Board is to be made. The call shall include, at a minimum, the following information:

(1) A list by importer/exporter and producer category of the vacancies for which nominee may be submitted.

(2) The date by which the names of nominees shall be submitted for consideration to be in compliance with paragraph (a) of this section.

(3) Nominations for each position shall be made by mail. Nomination forms shall be mailed to all known producers, importers in the United States, and kiwifruit exporters and/or exporter organizations where possible. The nomination form shall have attached to it the requirements of the position, term, eligibility requirements, and the Department's equal opportunity policy. Except with respect to nominations for the initial appointments to the Promotion Board, publicizing the nomination process and vacant positions shall be the responsibility of the Promotion Board.

(4) All producers, importers within the United States, and exporters may participate in the nomination process. However, if a producer is engaged in the production of kiwifruit and is also an importer, such person's participation shall be limited to one vote. The following nomination process shall be followed:

(i) Nomination forms shall be sent to all known producers, importers, or exporters. The Promotion Board shall determine the eligibility and willingness to serve of all names of the individuals listed on the nomination forms returned to the Promotion Board. The names of the individuals who are eligible and willing to serve will be listed on a selection ballot. The selection ballot will be sent to all known producers and importers for final selection of the nominees to be sent to the Secretary. Exporters will not be sent a selection ballot.

(ii) Each nominee shall meet the qualifications set forth in this part.

(iii) If a producer nominee is engaged in the production of kiwifruit and is also an importer, such individual shall participate within the category that such individual so elects in writing to the Promotion Board and such election shall remain controlling until revoked in writing to the Promotion Board.

(d) When producers or importers are voting for nominees to the Promotion Board the following provisions shall apply:

(1) Voting for any open position shall be on the basis of one vote per eligible voter.

(2) Producers will vote for producer positions and importers will vote for importer and exporter positions only.

(3) Whenever the producers or importers are choosing nominees for one open position on the Promotion Board, the proposed nominee with the highest and second highest number of

votes cast shall be the nominees submitted to the Secretary.

(4) Each open position will be a separate position. Alternate and member selections will also be held as separate positions. A person shall only be nominated for one open member or alternate position.

(5) Voters shall certify on their ballots as to their eligibility. Such certification may be subject to verification.

(e) The Secretary may reject any nominee submitted. If there are insufficient nominees from which to appoint members to the Promotion Board as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary under the procedures set out in this section.

(f) Whenever producers or importers fail to nominate individuals for an open position on the Promotion Board under the preceding provisions of this section the Secretary may appoint members in such manner as the Secretary determines appropriate.

#### **§ 1214.32 Acceptance.**

Each individual nominated for membership on the Promotion Board shall qualify by filing a written acceptance with the Secretary at the time of nomination. Such acceptance shall represent the nominee's willingness to serve if selected and to operate in accordance with the provisions of this part.

#### **§ 1214.33 Appointment.**

From the nominations made pursuant to this subpart, the Secretary shall appoint the members and alternates.

#### **§ 1214.34 Term of office.**

(a) The members and alternates of the Promotion Board shall serve for terms of three years, except that five members and their alternates appointed to the initial Promotion Board shall be appointed for a term of two years and six members and their alternates shall be appointed for a term of three years.

(b)(1) Except with respect to terms of office of the initial Promotion Board, the term of office for each member and alternate of the Promotion Board shall begin on July 1 or such other date that may be approved by the Secretary.

(2) The term of office for the initial Promotion Board shall begin immediately following appointment by the Secretary, except that time in the interim period from appointment until the following July 1, or such other date that is the generally applicable beginning date for terms under paragraph (b)(1) of this section approved by the Secretary, shall not count toward the tenure limitation of office.

(c) Promotion Board members shall serve during the term of office for which they are appointed and have qualified, and until their successors are appointed and have qualified.

(d)(1) No member shall serve more than two successive three-year terms, except as provided in paragraph (d)(2) of this section and § 1214.35(b)(1). Members serving two consecutive three-year terms are eligible to serve as alternates, and alternates serving two consecutive three-year terms are eligible to serve two three-year terms as members.

(2) Those members serving initial terms of two years may serve one successive three-year term.

#### **§ 1214.35 Vacancies.**

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Promotion Board, the alternate of that member shall automatically assume the position of said member. If an alternate member position becomes vacant, the Secretary shall appoint an alternate member in the manner specified in § 1214.31. Each successor appointment shall be for the remainder of the term vacated. A vacancy will not be required to be filled if the unexpired term is less than six months.

(b)(1) No successor appointed to a vacated term of office shall serve more than two successive three-year terms on the Promotion Board, except as provided in paragraph (b)(2)(ii) of this section.

(2)(i) Any successor serving longer than one year may serve one successive three-year term.

(ii) Any successor serving one year or less may serve two successive three-year terms.

(c) If a member of the Promotion Board consistently refuses to perform the duties of a member of the Promotion Board, or if a member of the Promotion Board is engaged in acts of dishonesty or willful misconduct, the Promotion Board may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Promotion Board shows adequate cause, the Secretary shall remove such member from office. Further, without recommendation of the Promotion Board, a member may be removed by the Secretary upon showing of adequate cause, including the failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

**§ 1214.36 Procedure.**

(a) At a properly convened meeting of the Promotion Board, a majority of the members shall constitute a quorum.

(b) Each member of the Promotion Board will be entitled to one vote on any matter put to the Promotion Board. At assembled meetings of the Promotion Board, all votes will be cast in person.

(1) A motion, except motions to set an assessment rate and motion to approve a budget, will carry if supported by a simple majority of those voting.

(2) Motions to establish an assessment rate and motions to approve a budget shall require a two-thirds vote of a quorum of the Promotion Board for passage.

(c) Meetings of the Promotion Board may be conducted by other means of communications, provided that each member is given prior notice of the meeting and has an opportunity to be present either physically or by electronic connection.

(d) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Promotion Board such action is considered necessary, the Promotion Board may take action upon the concurring votes of a majority of its members by mail, telephone, electronic mail, facsimile, or any other means of communication, and, if appropriate, confirmed promptly in writing. In that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Promotion Board. All votes shall be recorded in Promotion Board minutes.

(e) The organization of the Promotion Board and the procedures for conducting meetings of the Promotion Board shall be in accordance with its bylaws, which shall be established by the Promotion Board and approved by the Secretary.

**§ 1214.37 Compensation and reimbursement.**

The members and alternate members of the Promotion Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses or a reasonable per diem allowance, as approved by the Promotion Board and the Secretary, incurred by such members in the performance of their responsibilities under this subpart.

**§ 1214.38 Powers.**

The Promotion Board shall have the following powers:

(a) To receive and evaluate or, on its own initiative, develop and budget for proposed programs, plans, or projects to promote the use of kiwifruit, as well as proposed programs, plans, or projects for research and consumer information, and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals. The Board shall seek, to the extent possible, to employ or contract with personnel who are already associated with state chartered organizations involved in promoting kiwifruit;

(d) To make rules and regulations to effectuate the terms and provisions of this subpart;

(e) To receive, investigate, and report to the Secretary for action complaints of violations of the provisions of this subpart;

(f) To establish committees and subcommittees of Promotion Board members, including an executive committee whose powers and membership shall be determined by the Promotion Board, subject to the approval of the Secretary, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(g) To establish committees which may include individuals other than Promotion Board members, and pay the necessary and reasonable expenses and fees for the members of such committees;

(h) To recommend to the Secretary amendments to this subpart;

(i) With the approval of the Secretary, to enter into contracts or agreements for the development and conduct of programs, plans, or projects authorized under § 1214.40 and for other services necessary for the implementation of this subpart, and for the payment of the cost thereof with funds collected and received pursuant to this subpart. The Promotion Board shall not contract with any person covered by the program or serving on the promotion board for the purpose of kiwifruit programs, plans, or projects. Any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Promotion Board a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) Any such program, plan, or project shall become effective upon approval of the Secretary;

(3) The contracting or agreeing party shall keep accurate records of all of its transactions and make periodic reports to the Promotion Board of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Promotion Board may require; and the Secretary may audit the records of the contracting or agreeing party periodically; and

(4) Any subcontractor who enters into a contract with a Promotion Board contractor and who receives or otherwise uses funds allocated by the Promotion Board shall be subject to the same provisions as the contractor;

(j) With the approval of the Secretary, to invest, pending disbursement pursuant to a program, plan, or project, funds collected through assessments provided for in § 1214.51, and any other funds received by the Promotion Board in, and only in, obligations of the United States or any agency thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States;

(k) To require its employees to receive, investigate, and report to the Secretary complaints of violations of this part; and

(l) Such other powers as may be approved by the Secretary.

**§ 1214.39 Duties.**

The Promotion Board shall have the following duties:

(a) To meet not less than two times per year, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, and consumer information programs, plans or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart and a marketing plan with all the programs, plans, and projects as provided in §§ 1214.40 and 1214.50;

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to

the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles and to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Promotion Board as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books, and records that clearly reflect all the acts and transactions of the Promotion Board. Minutes of each Board meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any industry member;

(k) To follow the Department's equal opportunity/civil rights policies;

(l) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation and industry information designed to strengthen the kiwifruit industry's position in the marketplace, maintain and expand existing markets and uses for kiwifruit, develop new markets and uses for kiwifruit, and to carry out programs, plans, and projects designed to provide maximum benefits to the kiwifruit industry;

(m) To conduct periodic review or evaluation of each program, plan, or project to ensure that it contributes to an effective program of research, promotion, and consumer information;

(n) Not less than every 5 years, authorize and fund, from funds otherwise available to the Promotion Board, an independent evaluation of the effectiveness of the programs conducted by the Promotion Board. The Promotion Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this section; and

(o) To investigate violations of the Order and report the results of such investigations to the Secretary for appropriate action to enforce the provisions of the Order.

## Promotion, Research, and Consumer Information

### § 1214.40 Programs, plans, and projects.

(a) The Promotion Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and consumer information with respect to kiwifruit; and

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing, of kiwifruit and kiwifruit products, and the creation of new products thereof, to the end that marketing and use of kiwifruit may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of kiwifruit.

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the Promotion Board shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Promotion Board to ensure that it contributes to an effective program of promotion, research, or consumer information. If it is found by the Promotion Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or consumer information, then the Promotion Board shall terminate such program, plan, or project.

(d) No program, plan, or project shall make any false claims on behalf of kiwifruit or use unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product. Kiwifruit of all origins shall be treated equally. All promotions shall be generic in nature.

(e) Promotions shall be conducted to promote kiwifruit during all seasons and from all countries.

(f) All programs developed and implemented by the Board shall promote kiwifruit consumption in the U.S. domestic market. No program shall be implemented by the Board to promote exports of U.S.-produced kiwifruit in foreign markets.

## Expenses and Assessments

### § 1214.50 Budget and Expenses

(a)(1) At least 60 days prior to the beginning of each fiscal year, and as

may be necessary thereafter, the Promotion Board shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(i) A statement of objectives and strategy for each program, plan, or project;

(ii) A summary of anticipated revenue, with comparative data for at least one preceding year;

(iii) A summary of proposed expenditures for each program, plan, or project; and

(iv) Staff and administrative expense breakdowns, with comparative data for at least one preceding year.

(2) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (f) of this section.

(3)(i) Subject to paragraph (a)(3)(ii) of this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting of funds from one program, plan, or project to another.

(ii) Shifts of funds which do not cause an increase in the Promotion Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(b) The Promotion Board is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Promotion Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Promotion Board.

(c) The Promotion Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Promotion Board shall retain complete control of their use.

(d) The Promotion Board shall reimburse the Secretary, from funds received by the Promotion Board, for administrative costs incurred by the Secretary in implementing and administering this subpart, including the salaries of Department employees and costs incurred in conducting referenda.

(e) The Promotion Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established. Such reserve funds may be

used to defray any expenses authorized under this subpart.

(f) With the approval of the Secretary, the Promotion Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Promotion Board. This provision is limited to the first year of operation of the Promotion Board.

#### **§ 1214.51 Assessments.**

(a) Any handler initially purchasing, or otherwise placing into interstate, foreign, or intrastate commerce, kiwifruit produced in the United States shall, in the manner as prescribed by the Promotion Board and approved by the Secretary, collect an assessment based upon the number of pounds of kiwifruit marketed in the United States for the account of the producer, and remit the assessment to the Promotion Board.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment shall not exceed \$0.10 per seven pound tray of kiwifruit or the equivalent thereof.

(2) The rate of assessment for a fiscal year may be changed at the beginning of the fiscal year only and by regulation as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraph (b)(1) of this section.

(c) Any person marketing kiwifruit of that person's own production into the channels of commerce in the United States, through retail or wholesale outlets, shall be considered a handler and shall remit to the Promotion Board an assessment on such kiwifruit at the rate then in effect, at such time and in such form and manner prescribed by the Promotion Board, with the approval of the Secretary.

(d)(1) Each importer of kiwifruit shall pay an assessment to the Promotion Board on kiwifruit imported for marketing in the United States, through the U.S. Customs Service. A person acting as a principal or as an agent, broker, or consignee for any person who produces kiwifruit outside the United States shall be considered an importer.

(2) The assessment rate for imported kiwifruit shall be the same or equivalent to the rate provided for kiwifruit produced in the United States.

(3) The import assessment shall be uniformly applied to imported kiwifruit that are identified by the number, 0709.51.0000, in the Harmonized Tariff Schedule of the United States or any

other number used to identify fresh kiwifruit.

(4) The assessments due on imported kiwifruit shall be paid when the kiwifruit are entered or withdrawn for consumption in the United States.

(5) Only one assessment shall be paid on each unit of kiwifruit imported.

(e)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (f) of this section, and importers if the U.S. Customs Service fails to collect the assessment, shall remit the assessments due to the Promotion Board on a monthly basis no later than the fifteenth day of the month following the month in which the kiwifruit were marketed, in such manner as prescribed by the Promotion Board.

(2)(i) The Promotion Board shall impose a late payment charge on any person that fails to remit to the Promotion Board the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(ii) The Promotion Board shall impose an additional charge on any person subject to a late payment charge, in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in rules and regulations as approved by the Secretary.

(3) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Promotion Board by the payment due date, shall be considered to have been payable on the payment due date. Under such a situation, paragraphs (e)(2)(i) and (e)(2)(ii) of this section shall be applicable.

(4) Persons failing to remit total assessments due in a timely manner may also be subject to penalties and actions under federal debt collection procedures as set forth in 7 CFR 3.1 through 3.36.

(f) The Promotion Board, with the approval of the Secretary, may enter into agreements authorizing other state mandated organizations to collect assessments in its behalf. Any such organization shall be required to maintain the confidentiality of such information as is required by the Promotion Board for collection purposes. Any reimbursement by the Promotion Board for such services shall be based on reasonable charges for services rendered.

(g) The Promotion Board is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Promotion Board shall not be obligated to pay interest on any advance payment.

(h) Except for the first year of operation of the promotion board, expenses for the administration, maintenance, and functioning of the board may not exceed 30 percent of the budget for a year.

#### **§ 1214.52 Exemption from assessment.**

(a) Producers who produce less than 500 pounds of kiwifruit annually shall be exempted from assessment.

(b) Importers who import less than 10,000 pounds of kiwifruit per year shall be exempted from assessment.

(c) Sales of kiwifruit made directly from the producer to a consumer for a purpose other than resale are exempt from assessment.

(d) Domestic and imported kiwifruit used for processing are exempt from assessment. The Promotion Board shall develop a list of approved processors.

(e) To claim an exemption, a producer or importer shall submit an application to the Promotion Board stating the basis on which the person claims the exemption for such year.

(f) If, after a person claims an exemption from assessments for any year under this section, and such person no longer meets the requirements of this paragraph for an exemption, such person shall file a report with the Board in the form and manner prescribed by the Board and pay an assessment on all the kiwifruit produced or imported by such person during the year for which the person claimed the exemption.

(g) Exempted individuals are subject to such safeguards as prescribed in rules and regulations in this part to prevent improper use of this exemption.

#### **§ 1214.53 Influencing governmental action.**

No funds received by the Promotion Board under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart.

#### **Reports, Books, and Records**

##### **§ 1214.60 Reports.**

(a) Each producer marketing kiwifruit of that person's own production for resale, and each handler responsible for the collection of assessments under § 1214.51(a) shall be required to report monthly to the Promotion Board, on a form provided by the Promotion Board,



such information as may be required under this subpart or any rules and regulations issued in this part. Such information shall include, but not be limited to, the following:

(1) The handler's name, address, telephone number, and social security number or Employer Identification Number;

(2) Date of report, which is also the date of payment to the Promotion Board;

(3) Period covered by the report; and

(4) The number of kiwifruit containers, weight, size, and type purchased, initially transferred or that in any other manner are subject to the collection of assessments, and a copy of a certificate of exemption, claiming exemption under § 1214.52 from those who claim such exemptions.

(b) If determined necessary by the Promotion Board and approved by the Secretary, each importer shall file with the Promotion Board periodic reports, on a form provided by the Promotion Board, containing at least the following information:

(1) The importer's name, address, telephone number, and social security number or Employer Identification Number;

(2) The quantity of kiwifruit entered or withdrawn for consumption in the United States during the period covered by the report; and

(3) The amount of assessments paid to the U.S. Customs Service at the time of such entry or withdrawal.

(c) For persons who have an exemption from assessments under § 1214.52, such information as deemed necessary by the Board, and approved by the Secretary, concerning the exemption including disposition of exempted kiwifruit.

#### **§ 1214.61 Books and records.**

Each person who is subject to this subpart shall maintain and make available for inspection by the Promotion Board staff or the Secretary such books and records as are deemed necessary by the Promotion Board, with the approval of the Secretary, to carry out the provisions of this subpart and any rules and regulations issued in this part, including such books and records as are necessary to verify any reports required. Such books and records shall be retained for at least two years beyond the fiscal year of their applicability.

#### **§ 1214.62 Confidential treatment.**

All information obtained from books, records, or reports under the Act, this subpart, and the rules and regulations issued in this part shall be kept confidential by all persons, including all employees and former employees of the

Promotion Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Promotion Board members, producers, importers, exporters, or handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only by judicial order in a suit or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of this subpart violated by such person.

#### **Miscellaneous**

##### **§ 1214.70 Right of the Secretary.**

All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Promotion Board shall be submitted to the Secretary for approval.

##### **§ 1214.71 Suspension or termination.**

(a) Whenever the Secretary finds that this part obstructs or does not tend to effectuate the declared purpose of the Act, the Secretary shall terminate or suspend the operation of provisions of this part.

(b)(1) Six years after the date on which this subpart becomes effective, and at the end of every six-year period thereafter; the Secretary shall conduct a referendum among producers and importers to determine whether they favor continuation, termination, or suspension of this subpart.

(2) The Secretary shall also hold a referendum:

(i) At the request of the Promotion Board; or

(ii) If not less than 30 percent of the kiwifruit producers and importers subject to assessments under the Order

submit a petition requesting a referendum be held.

(3) Whenever the Secretary determines that suspension or termination of this subpart is favored by a majority of the kiwifruit producers and importers voting in a referendum under paragraphs (b) (1) or (2) of this section who, during a representative period determined by the Secretary, have been engaged in producing and importing kiwifruit and who, on average, annually produced and imported more than 50 percent of the volume of kiwifruit produced and imported by all those producers and importers voting in the referendum, the Secretary shall:

(i) Suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

(ii) Suspend or terminate, as appropriate, all activities under this subpart in an orderly manner as soon as practicable.

(4) Referenda conducted under this subpart shall be conducted in such manner as the Secretary may prescribe.

#### **§ 1214.72 Proceedings after termination.**

(a) Upon the termination of this subpart, the Promotion Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Promotion Board. Such persons, upon designation by the Secretary, shall become trustees for all the funds and property owned, in the possession of, or under the control of the Promotion Board, including any claims unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Promotion Board under any contract or agreement entered into by it under this subpart;

(3) From time to time account for all receipts and disbursements, and deliver all property on hand, together with all books and records of the Promotion Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Promotion Board or the trustees under this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered under this subpart shall be subject to the same

obligations imposed upon the Promotion Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information, or industry information programs, plans, or projects authorized under this subpart.

#### **§ 1214.73 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any rule and regulation issued in this part, or the issuance of any amendment to such provisions, shall not:

(a) Affect or waive any right, duty, obligation, or liability that shall have arisen or may hereafter arise in connection with any provision of this subpart or any such rules or regulations issued in this part;

(b) Release or extinguish any violation of this subpart or any rules or regulations issued in this part; or

(c) Affect or impair any rights or remedies of the United States, the Secretary, or any person with respect to any such violation.

#### **§ 1214.74 Personal liability.**

No member or employee of the Promotion Board shall be held personally responsible, either individually or jointly, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee under this subpart, except for acts of dishonesty or willful misconduct.

#### **§ 1214.75 Patents, copyrights, inventions, publications, and product formulations.**

Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Promotion Board under this subpart shall be the property of the United States Government as represented by the Promotion Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, publications, or product formulations inure to the benefit of the Promotion Board. Upon termination of certain provisions in this subpart, § 1214.72 shall apply to determine disposition of all such property.

#### **§ 1214.76 Amendments.**

Amendments to this subpart may be proposed, from time to time, by the

Promotion Board or by any interested person affected by the provisions of the Act, including the Secretary.

#### **§ 1214.77 Separability.**

If any provision of this subpart is declared invalid, or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

### **Subpart B—Rules and Regulations**

#### **Definitions**

##### **§ 1214.100 Terms defined.**

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions in Subpart A—Kiwifruit Research, Promotion, and Consumer Information Order of this part.

#### **Nomination Procedures**

##### **§ 1214.110 Nominations.**

Nominations shall be made by mail ballot in accordance with the procedures prescribed in § 1214.31. Each mail ballot shall be scheduled so as to ensure that the nominations for each position that will be open at the beginning of the following year are received by the Secretary by May 1, or such other date approved by the Secretary.

##### **§ 1214.111 Mail balloting.**

(a) The Promotion Board shall conduct nominations of individuals as candidates for appointment to the Promotion Board by mail nomination form.

(b)(1) Notice of mail balloting to nominate candidates for a position on the Promotion Board shall be publicized by the Promotion Board to producers, importers, kiwifruit exporter organizations and to the Secretary, by March 1 of each year.

(2) Nomination forms will be used to collect names of individuals to be placed on a ballot to be sent to producers and importers to select the individuals for the Secretary's appointment. Completed nomination forms must be returned to the Promotion Board prior to March 30.

(c) Once proposed nominations have been submitted, the Promotion Board shall cause each proposed nomination, if the individual qualifies, to be placed on the producer or importer ballot. The Promotion Board then shall mail a ballot to each known producer or importer.

(d) Each producer or importer shall cast a ballot for each open position on

the Promotion Board assigned to the producers or importers/exporters in accordance with the procedures prescribed in § 1214.31. The completed ballot must be returned to the Promotion Board or its designee within 30 days after the ballot is issued.

(e) Within 45 days after a mail ballot is issued, the Promotion Board shall validate the ballots cast, tabulate the votes, and provide the Secretary with the results of the vote and the identification of the top two vote getters for each open position on the Promotion Board.

(f) The Promotion Board shall provide nominees with qualification statements and other specified information. Each nominee selected in the mail ballot will be contacted by the Promotion Board and asked to forward such completed documentation to the Promotion Board within 14 days of such notification.

##### **§ 1214.112 Appointment.**

If an employee, partner, officer, or shareholder of a producer, importer or exporter is a current member of the Promotion Board, no nominee who is also an employee, partner, officer, or shareholder of such producer, importer, or exporter shall be appointed to the Promotion Board. A Promotion Board member shall be disqualified from serving on the Promotion Board if such individual ceases to be affiliated with a producer, importer, or exporter the Promotion Board member represents.

#### **General**

##### **§ 1214.115 Financial statements.**

(a) As requested by the Secretary, the Promotion Board shall prepare and submit financial statements to the Secretary on a periodic basis. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Secretary within 30 days after the end of the time period to which it applies.

(c) The Promotion Board shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal year to which it applies.

#### **Assessments**

##### **§ 1214.120 Payment of assessments.**

(a) Each handler responsible for collecting assessments on domestic kiwifruit shall collect the amounts

assessed and remit such amounts to the Promotion Board on a monthly basis not later than the fifteenth day of the month following the month in which the kiwifruit were marketed to or through the handler, whatever comes first.

(b) A state mandated organization may collect producer assessments from handlers then remit the funds to the Promotion Board on a monthly basis. The state mandated program collecting the assessments must provide access to records for the purpose of periodic audit.

(c) Each producer who is also a handler responsible for paying any assessment amount on the producer's own kiwifruit shall complete a shipment data form to the Promotion Board not later than the fifteenth day of the month following the month in which the kiwifruit were marketed by the producer. An invoice will be sent to the producer for the amount owed.

(d) Each importer shall be responsible for remittance to the Promotion Board of any assessment amount not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. Any such assessment amount shall be remitted to the Promotion Board on a monthly basis not later than the fifteenth day of the month following the month of entry or withdrawal for consumption into the United States. Any person who imports kiwifruit, as principal or as an agent, broker, or consignee for any person who produces kiwifruit outside the United States shall be considered an importer.

(e) Remittance shall be by check, draft, or money order payable to the National Kiwifruit Board or Kiwifruit Promotion Board, and shall be accompanied by a report, on a form provided by the Promotion Board.

(f) The Promotion Board shall impose a late payment charge on any handler or importer who fails to make timely remittance to the Promotion Board of the total assessment amount for which the person is liable. Such late payment charge shall be imposed on any assessments not received by the last day of the month following the month in which the kiwifruit involved were marketed or, in the case of imports, not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. This one-time late payment charge shall be 10 percent of the assessments due before interest charges have accrued. The late payment charge will not be applied to any late payments postmarked within 15 days after the end of the month such assessments are due.

(g) In addition to the late payment charge, the Promotion Board shall

charge interest at a rate of 1.5 percent per month on the outstanding balance, including the late payment charge and any accrued interest, of any account that remains delinquent beyond the last day of the second month following the month the Kiwifruit involved were marketed. However, handlers paying their assessments, in accordance with paragraph (i) of this section, will not be subject to the 1.5 percent per month interest under this paragraph until the last day of the second month after such assessments were due under paragraph (i) of this section. In the case of imports, such a rate of interest will be charged to any account that remains delinquent on any assessments not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. Such a rate of interest will continue to be charged monthly until the outstanding balance is paid to the Promotion Board.

(h) Any assessment determined by the Promotion Board at a date later than prescribed by this section, because of a person's failure to submit a report to the Promotion Board when due, shall be considered to have been payable by the date it would have been due if the report had been filed on time. A late payment charge and monthly interest charges on the outstanding balance shall be applicable to such unpaid assessment in accordance with paragraphs (f) and (g) of this section.

(i) In lieu of the monthly assessment payment and reporting requirements of §§ 1214.125 and 1214.60, the Promotion Board may permit a handler to make advance payment of the total estimated assessment amount due to the Promotion Board for the ensuing fiscal year, or portion thereof, prior to the actual determination of assessable kiwifruit.

(j) Any person whose prepayment exceeds the amount paid shall be reimbursed for the amount of overpayment. The Promotion Board shall not, in any case, be obligated to pay interest on any advance payment.

#### **§ 1214.121 Exemption procedures.**

(a) Any producer who produces less than 500 pounds of kiwifruit annually or who produces kiwifruit for processing and who desires to claim an exemption from assessments during a fiscal year as provided in § 1214.52 shall apply to the Promotion Board, on a form provided by the Promotion Board, for a certificate of exemption. Such producer shall certify that their production of kiwifruit shall be less than 500 pounds, for the fiscal year for which the exemption is claimed. Any importer who imports less than 10,000 pounds of

kiwifruit annually or who imports kiwifruit for processing and who desires to claim an exemption from assessments during a fiscal year as provided in § 1214.52 shall apply to the Promotion Board, on a form provided by the Promotion Board, for a certificate of exemption. Such importer shall certify that their importation of kiwifruit shall not exceed 10,000 pounds, for the fiscal year for which the exemption is claimed.

(b) On receipt of an application, the Promotion Board shall determine whether an exemption may be granted. The Promotion Board then will issue, if deemed appropriate, a certificate of exemption to each person that is eligible to receive one. Each person who is exempt from assessment must provide an exemption number to the first handler in order not to be subject to collection of an assessment on kiwifruit. Handlers and importers, except as otherwise authorized by the Promotion Board, shall maintain records showing the exemptee's name and address along with the exemption number assigned by the Promotion Board.

(c) Importers who are exempt from assessment shall be eligible for reimbursement of assessments collected by the U.S. Customs Service and shall apply to the Promotion Board for reimbursement of such assessments paid. No interest will be paid on assessments collected by the U.S. Customs Service and determined to be exempt at a later time. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the year the kiwifruit were actually imported.

(d) Any person who desires to renew the exemption from assessments for a subsequent fiscal year shall reapply to the Promotion Board, on a form provided by the Promotion Board, for a certificate of exemption.

(e) The Promotion Board may require persons receiving an exemption from assessments to provide to the Promotion Board reports on the disposition of exempt kiwifruit and, in the case of importers, proof of payment of assessments.

#### **Reports**

##### **§ 1214.125 Reports.**

Each handler or producer that is also a handler shall be required to report monthly to the Promotion Board such information as may be required under § 1214.60. In addition, each handler may be required to provide the farm identification number or social security number of each producer the handler

has dealt with during the time period covered by the report.

**Miscellaneous**

**§ 1214.130 OMB control numbers.**

The control number assigned to the information collection requirements by

the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581-0093, except for the Promotion Board nominee background statement form which is assigned OMB control number 0505-0001.

Dated: October 8, 1997.

**Lon Hatamiya,**

*Administrator, Agricultural Marketing Service.*

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