

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

**SUMMARY:** The U.S. Department of Agriculture (Department) is seeking comments on an industry-funded research, promotion and consumer information program for fresh kiwifruit. An Order for the proposed program—the Kiwifruit Research, Promotion, and Consumer Information Order—was submitted to the Department by the California Kiwifruit Commission. In addition, the New Zealand Kiwifruit Marketing Board submitted a partial proposal. Under the proposed 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. 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. In addition, in accordance with the Paperwork Reduction Act of 1995, this proposed rule specifies the public reporting burden for the collection of information involved in reporting the necessary information to administer the program.

**DATES:** Comments must be received by December 2, 1996.

**ADDRESSES:** Interested persons are invited to submit written comments concerning the proposed rule to: Research and Promotion Branch, Fruit and Vegetable Division, Agricultural Marketing Service (AMS), USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456, fax (202) 205-2800. Three copies of all written material should be submitted, and they will be made available for public inspection at the Research and Promotion Branch during regular business hours. All comments should reference the docket number and the date and page number of this issue of the Federal Register. Also, pursuant to the Paperwork Reduction Act, send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other

aspect of this collection of information, to the above address.

**FOR FURTHER INFORMATION CONTACT:**

Sonia N. Jimenez, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456, 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 § 558 of the Act, 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 is required to examine the impact of the proposed rule on small entities.

The kiwifruit industry initiated this program 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 a referendum to be conducted by the USDA before the program is implemented.

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 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 the 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 in annual sales. In addition, there are 10 producers at or over the \$500,000 annual sales receipts threshold. The Department does not have specific information regarding the size of importers. However, it could be concluded that the majority of kiwifruit producers and importers may be classified as small entities.

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

California is the source for practically all of the kiwifruit produced in the United States. The California kiwifruit industry consists of approximately 600 producers and 65 handlers. Production rose by 119 percent between 1984 and 1994, increasing from 18,000 tons to 34,800 tons. In the same period, the value of production increased by only 4 percent.

Most U.S. kiwifruit is utilized fresh. Fresh utilization increased by 219 percent between 1984 and 1994, growing from 11,700 tons to 37,500 tons. The season average price during the same period fell by 54 percent, declining from \$1,000 per ton to \$491 per ton. Exports accounted for about 29 percent of U.S. fresh utilization during that period.

Between 1992 and 1994, the average annual production per producer, including kiwifruit for processing, was 22,365 7-pound trays of kiwifruit. The average price was \$376 per ton, giving an average return of about \$29,000 per producer per year. The average value of total production (fresh and processed) per year was \$16.3 million. A typical f.o.b. price during this period was \$7.78 per tray, and the average amount shipped per handler was about 190,176 trays, yielding an average annual revenue per handler of \$1.5 million. U.S. importers handled an average of 172,163 trays per year per importer. During this period, the average value of total imports per year was \$17.1 million

(f.o.b. country of origin). The majority of kiwifruit came from Chile, with the remaining coming from New Zealand and Italy.

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 producer, 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 60 percent of the income under the program.

The effect of the assessments will depend on the actual rate recommended by the promotion board. At the maximum rate, it is expected that the effect on producers would be approximately 8 percent of their average return. However, this rule exempts 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 who could have a less frequent reporting period diminishing the reporting burden for those businesses.

The Department would keep all these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the program 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 USDA 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 USDA supervision. KAC is composed of California producers. The marketing order regulations for grade, size, maturity, and containers are designed to assure consumers 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 1995-96 assessment rate was set at 1.5 cents per tray or tray equivalent of kiwifruit. The 1994-95 rate of assessment was 1.0 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 it is estimated that producers would pay \$1,407,000 in assessments at a rate of 17 cents per kiwifruit tray or tray equivalent. Handlers collect the assessments and remit the money 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 will reduce the burden on producers and handlers of all sizes.

The CKC is currently participating in a voluntary promotional program with Chilean kiwifruit growers to jointly advertise kiwifruit in the United States. The CKC is authorized under California state law. 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 benefited 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.

While we have performed this Initial Regulatory Flexibility Analysis regarding the impact of this proposed rule on small entities, in order to have all the data necessary for a more comprehensive analysis of the effects of this rule on small entities, we are inviting comments concerning potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from implementation of this proposed rule and information on the expected benefits or costs.

#### Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR Part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that may be imposed by this order would be submitted to OMB for approval. Those requirements would not become effective prior to OMB review.

*Title:* National Research, Promotion, and Consumer Information Programs.  
*OMB Number:* 0581-0093.

*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 California Kiwifruit Commission. 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 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:* 28 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.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of functions of the Order and the Department's oversight of the program, including whether the information will have practical utility; (b) the accuracy of the AMS's estimate of the burden of the proposed collection of information including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collections techniques or other forms of information technology.

Comments should reference OMB No. 0581-0093, the docket number, and the date and page number of this issue of the Federal Register. Comments should be sent to Sonia N. Jimenez at the address listed above by December 2, 1996. All comments received will be available for public inspection during regular business hours at the same address. All responses to this notice will be summarized and included in the request for OMB approval.

#### Background

The Kiwifruit Research, Promotion, and Consumer Information Act (Act) authorizes the Secretary of Agriculture (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 are 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 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.

The U.S. Customs Service (Customs) would collect assessments on imported kiwifruit and would remit those assessments to the 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 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 National Kiwifruit Board. The Board would be composed of 11 voting members: 6 producers, 4 importers or exporters, and 1 public member. Each member shall have an alternate. Members will 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 California Kiwifruit Commission (Commission). The Commission 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 Commission'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 the U.S. Customs Service only; clarifying that the promotion board would have complete 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 Commission also submitted referendum procedures. The referendum procedures will be published separately as a proposed rule in the Federal Register.

The proposed Order submitted by the Commission 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.

The proposal from the NZKMB addresses importer and exporter representation on the Board and the use of assessments to fund export activities that would directly compete with exporting countries promotional activities.

The NZKMB proposed that the Secretary ensure that at least two of the four importer/exporter member seats be selected from nominees nominated by importers and/or exporters of New Zealand kiwifruit. As an alternative it proposed that the Secretary include as a primary consideration in the allocation of four importer/exporter member seats, the relative expenditure on promotion and marketing of kiwifruit in the United States over 10 years by the kiwifruit importer/exporters of the various countries of origin of the imported kiwifruit.

In addition, the NZKMB proposed that the Secretary ensure that all programs developed and implemented by the Board be intended to promote kiwifruit consumption in the U.S. domestic market only and no assessments be used to promote kiwifruit in competing foreign markets.

In addition to these proposals, the Department has received letters from three interested parties regarding the implementation of the Order. Since these letters do not include proposals

for a program, they will be considered during the comment period of this proposed rule.

The Department will analyze all written views received to date as well as written comments on the two proposals published below before issuing a final Order.

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

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

The proposals set forth below have not received the approval of the Secretary.

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:

#### Proposal I

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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1214.8	Kiwifruit.
1214.9	Marketing.
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1214.11	Person.
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National Kiwifruit Board	
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- 1214.51 Assessments.  
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- 1214.60 Reports.  
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- 1214.70 Right of the Secretary.  
 1214.71 Suspension or termination.  
 1214.72 Proceedings after termination.  
 1214.73 Effect of termination or amendment.  
 1214.74 Personal liability.  
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**Subpart B—Rules and Regulations**

## Definitions

## Sec.

- 1214.100 Terms defined.

## Nomination Procedures

- 1214.110 Nominations.  
 1214.111 Mail balloting.  
 1214.112 Appointment.

## General

- 1214.115 Financial statements.

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- 1214.120 Payment of assessments.  
 1214.121 Exemption procedures.

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- 1214.125 Reports.

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- 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 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 production. 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 to the Secretary reapportionment of Board membership subject to the 51 percent requirement.

(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 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 subsection, 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 a motion to set an assessment rate, will carry if supported by a simple majority of those voting.

(2) Motions to establish an assessment rate 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; and

(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.

(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.

#### 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 paragraph, 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 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 subpart or any provision thereof obstructs or does not tend to effectuate the declared purpose of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(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 subsection 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 rules or regulations issued in this part

(b) Release or extinguish any violation of this subpart or any such 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)(2) 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)(2) 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 of this part 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.

#### Proposal II

2. Part 1214 is added as set forth in Proposal I with the exception that paragraph (c)(4) would be added to § 1214.30 and paragraph (e) would be added to § 1214.40 to read as follows:

##### § 1214.30 Establishment, adjustment, and membership.

\* \* \* \* \*

(c) \* \* \*

(4) For the purpose of nominating and appointing members of the Board, the Secretary will ensure that at least two of the persons appointed to and serving on the Board are selected from nominees nominated by importers and/or exporters of New Zealand kiwifruit.

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

\* \* \* \* \*

(e) The Secretary shall ensure that all programs developed and implemented

by the Board are intended to promote kiwifruit consumption in the U.S. domestic market. No program shall be implemented by the Board the purpose or major effect of which is the promotion of exports of U.S.—produced kiwifruit in foreign markets.

#### Proposal III

3. Part 1214 is added as set forth in Proposal I with the exception that paragraph (c)(4) would be added to § 1214.30 to read as follows:

##### § 1214.30 Establishment, adjustment, and membership.

\* \* \* \* \*

(c) \* \* \*

(4) For the purposes of nominating and appointing members of the Board, the Secretary will include as a primary consideration in the allocation of the four importer/exporter seats on the Board, the relative expenditure on promotion and marketing of kiwifruit in the United States that has been made over the previous 10 years by the kiwifruit importer/exporters of the various countries of origin of the kiwifruit imported.

Dated: September 23, 1996.

Lon Hatamiya,  
Administrator.

[FR Doc. 96-24844 Filed 10-1-96; 8:45 am]  
BILLING CODE 3410-02-P

#### 7 CFR Part 1214

[FV-96-708PR]

#### Kiwifruit Research, Promotion, and Consumer Information Order; Referendum Procedures

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

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The purpose of this rule is to provide procedures which the Department of Agriculture (Department) will use in conducting the referendum to determine whether the issuance of the proposed Kiwifruit Research, Promotion, and Consumer Information Order (Order) is approved by a majority of the producers and importers voting in the referendum and that the producers and importers favoring approval produce and import 50 percent of the total volume of kiwifruit produced and imported by persons voting in the referendum.

**DATES:** Comments must be received by November 1, 1996. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by December 2, 1996.