

CFR part 931; California olives—7 CFR part 932; Oregon/California potatoes—7 CFR part 947; Colorado potatoes—7 CFR part 948; Georgia Vidalia onions—7 CFR part 955; Washington/Oregon Walla Walla onions—7 CFR part 956; Idaho-Eastern Oregon onions—7 CFR part 958; Texas onions—7 CFR part 959; Florida tomatoes—7 CFR part 966; Texas melons—7 CFR part 979; California almonds—7 CFR part 981; Oregon-Washington hazelnuts—7 CFR part 982; California walnuts—7 CFR part 984; Far West spearmint oil—7 CFR part 985; California dates—7 CFR part 987; California raisins—7 CFR part 989; and California dried prunes—7 CFR part 993).

These marketing order programs allow for promotion activities designed to assist, improve, or promote the marketing, distribution, or consumption of the commodity covered under the marketing order program. Some of these programs also authorize market promotion in the form of paid advertising. Promotion, including paid advertising, activities are paid for by assessments levied on handlers regulated under the various marketing orders.

Under this proposal, a new subpart would be added in 7 CFR part 900 General Regulations to specify the criteria for identifying persons eligible to obtain an assessment exemption for market promotion, including paid advertising; procedures for persons to apply for an exemption; procedures for calculating the assessment exemption; and other procedural details for the applicable marketing orders.

Prior to or during the assessment period, the person would submit an application for exemption to the applicable committee or board. The application would be reviewed by the committee or board to determine whether the applicant is eligible for an assessment exemption. If the application is disapproved, the marketing order committee or board will notify the handler of the reason(s) for disapproval. The Secretary may review any decisions made by the committees or boards at his/her discretion.

The marketing order's committee or board would compute the assessment rate for any person approved for an organic exemption. The exempt rate would be computed by dividing the committee's or board's estimated non-marketing promotion expenditures by the committee's or board's estimated total expenditures for the same assessment period, as approved by the Secretary, and applying that percentage to the assessment rate applicable to all persons for the assessment period.

Within 30 days following the applicable assessment period, the committee or board would re-compute the assessment rate for persons exempt under the section, based on the actual expenditures incurred during the assessment period. The exempt person would pay an additional assessment or be reimbursed or credited by the committee or board for the amount overpaid.

Who Is Eligible for Exemption?

To be eligible for an exemption, the person must be subject to an assessment under a designated marketing order program. All of the marketing order programs assess handlers; *i.e.*, persons that handle the regulated commodity.

The FAIR Act amendment specifies that to be exempt from a commodity promotion assessment, a person—meaning an individual, group of individuals, corporation, association, cooperative, or other business entity—must produce and market solely 100 percent organic products and must not produce any non-organic or conventional products. For purposes of this proposed rule, “produce” means to grow or produce food, feed, livestock, or fiber or to receive food, feed, livestock, or fiber, and alter that product by means of feeding, slaughtering, or processing. Under this proposed rule, handlers, and processors and producers acting as handlers may be eligible for exemption if they meet the definition of “produce” as outlined in this proposed rule. This proposed rule provides for assessment exemptions for those regulated under marketing orders for domestic commodities. Thus, importers subject only to section 8e import regulations would not pay marketing order assessments and would not be eligible for an assessment exemption. Additionally, to be exempt, such persons must possess certification from a USDA-accredited certifying agent that the farm or handling operation meets the requirements of 100 percent organic as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

Examples

- A grower who produces and markets (handles) 100 percent certified organic, is certified as an organic handling operation, and pays the marketing order assessments, is eligible for an exemption for the portion of the assessments used for marketing promotion.
- A handler receives 100 percent of the commodity as certified organic and is certified as an organic handling operation. The handler alters (*e.g.*,

shells, slices, processes, or in some other way alters) the commodity and pays marketing order assessments. The handler is eligible for an exemption for the portion of the assessments used for marketing promotion.

- A grower who produces and markets (handles) both certified organic and conventional commodities is not eligible for the exemption because that person is not producing and marketing solely 100 percent certified organic commodities.

- A handler receives 100 percent of a commodity that is organic, and the handler is certified as an organic handling operation. The handler sorts, packages, markets, and pays assessments on the commodity. The handler is not eligible for the exemption because the handler did not alter (*e.g.*, shell, slice, process, or in some other way alter) the commodity.

The FAIR Act amendment also covers 16 national research and promotion programs. The research and promotion programs will be addressed separately at a later date. The 16 programs cover blueberries, beef, cotton, dairy, eggs, fluid milk, Hass avocados, honey, lamb, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

As previously mentioned, assessments under the 28 marketing order programs are paid by handlers regulated under the various marketing orders. There are approximately 850 handlers regulated under the 28 marketing orders. USDA does not have precise numbers, but believes there may be approximately 84 persons who produce and market solely 100 percent organic products that might be exempt from paying assessments for market promotion, including paid advertising, under the 28 marketing order programs administered by AMS. Thus, the