

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 1218**

[FV-99-702-FR]

Blueberry Promotion, Research, and Information Order; Referendum Procedures**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: The purpose of this rule is to establish procedures which the Department of Agriculture (USDA or the Department) will use in conducting a referendum to determine whether the issuance of the proposed Blueberry Promotion, Research, and Information Order (Order) is favored by the blueberry industry. The Order will be implemented if it is approved by a majority of producers and importers who also represent a majority of the volume of blueberries represented in the referendum. These procedures would also be used for any subsequent referendum under the Order, if it is approved in the initial referendum. The Order is being published in a separate document. This proposed program would be implemented under the Commodity Promotion, Research, and Information Act of 1996 (Act).

DATES: This final rule is effective February 16, 2000.

FOR FURTHER INFORMATION CONTACT: Oliver L. Flake, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW, Room 2535-S, Washington, D.C. 20250-0244; telephone (202) 720-5976 or fax (202) 205-2800.

SUPPLEMENTARY INFORMATION: A referendum will be conducted among eligible blueberry producers and importers to determine whether the issuance of the proposed Blueberry Promotion, Research, and Information Order (Order) (7 CFR Part 1218) is favored by those who would pay assessments under the program. The Order will be implemented if it is approved by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum. The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (Act) [Pub. L. 104-427, 7 U.S.C. 7401-7425]. It would cover domestic and imported cultivated blueberries (hereinafter called blueberries). A proposed Order is being published separately in the **Federal Register**.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the Act, a person subject to the Order may file a petition with the Secretary of Agriculture (Secretary) stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not established in accordance with the law, and requesting a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order or any obligation imposed in connection with the Order, shall be filed within two years after the effective date of the Order, provision or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall be the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of entry of the Secretary's final ruling.

Executive Order 12866

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.

Regulatory Flexibility Act

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 purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such action so that small businesses will not be disproportionately burdened.

The Act, which authorizes the Secretary to consider industry proposals for generic programs of promotion, research, and information for agricultural commodities, became effective on April 4, 1996. The Act provides for alternatives within the terms of a variety of provisions.

Paragraph (e) of Section 518 of the Act provides three options for determining industry approval of a new research and promotion program: (1) By a majority of those voting; (2) by a majority of the volume of the agricultural commodity voted in the referendum; or (3) by a majority of those persons voting who

also represent a majority of the volume of the agricultural commodity voted in the referendum. In addition, section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the Order. The North American Blueberry Council, Inc. (proponent), has recommended that the Secretary conduct a referendum. Approval of the Order would be based on a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum. The proponent also has recommended that a referendum be conducted prior to the proposed Order going into effect.

This rule establishes the procedures under which producers and importers may vote on whether they want a blueberry promotion, research, and information program to be implemented. Blueberry producers and importers of 2,000 pounds or more of blueberries annually would be eligible to vote. The proposed Order provides for an exemption from assessments for producers and importers of less than 2,000 pounds of fresh and processed blueberries. This action will add a new subpart which establishes procedures to conduct an initial and future referenda. The subpart covers definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

There are approximately 2,000 producers, 200 first handlers, 50 importers, and 4 exporters of blueberries who would be subject to the program. It is estimated that 1,818 producers and 32 importers would be eligible to vote in the first referendum. These figures have been revised since publication of the proposed rule. This revision is based upon more current information from a comment received concerning the proposed Order. That comment is discussed in the proposed rule for the Order which is published separately in this issue of the **Federal Register**.

Most of the producers would be classified as small businesses under the criteria established by the Small Business Administration (SBA) [13 CFR 121.601]. Most importers and first handlers would not be classified as small businesses. The SBA defines small agricultural handlers as those whose annual receipts are less than \$5 million, and small agricultural producers are defined as those having annual receipts of not more than \$500,000 annually.

According to USDA's National Agricultural Statistics Service, total production of cultivated blueberries was 172.9 million pounds in 1997, up 35 percent from the 1996 output. Approximately 70.2 million pounds of the total were utilized for fresh market sale and 99.4 million pounds were used for processing (primarily frozen). Blueberries are grown in 35 states. Commercial production operations are located in Michigan (44 percent), New Jersey (19 percent), Oregon (12 percent), Georgia (9 percent), North Carolina (5 percent), Washington (5 percent), Indiana and Florida (2 percent each), and all other states (2 percent). Farm value for the 1997 cultivated blueberry crop was \$141 million, compared with \$113.6 million a year earlier.

U.S. frozen blueberry per capita consumption has been declining rapidly in recent years, decreasing from 0.38 pounds in 1996 to 0.33 pounds in 1997. From calendar year 1991 through 1995, U.S. per capita consumption of frozen blueberries averaged 0.43 pounds.

The United States exported 6.3 million pounds of fresh cultivated blueberries in 1997, valued at \$7.9 million. Canada is the principal destination for U.S. exports—accounting for nearly 79 percent of the total in 1997. Other key markets included Switzerland (7 percent), the United Kingdom (5 percent), and Germany (3 percent). The remaining export volume of fresh cultivated blueberries primarily went to other European and Asian countries.

U.S. exports of frozen cultivated blueberries totaled 22.1 million pounds in 1997 and were valued at \$9.9 million. The largest U.S. export market is Canada, accounting for 90 percent of the total quantity in 1997. Japan was the second largest U.S. market for frozen cultivated blueberries, accounting for 8 percent of the total. The remaining 2 percent of U.S. exports were sent mainly to other Asian and European countries.

In 1997, the United States imported 13.9 million pounds of fresh cultivated blueberries worth \$10.8 million. Imports from Canada alone accounted for 89 percent of the total. Other important fresh cultivated blueberry import sources were Chile with 9 percent of the total and New Zealand with 2 percent. Small amounts were also imported from Mexico and Honduras.

In 1997, total imports of frozen cultivated blueberries were 9.8 million pounds and were valued at \$8.5 million. The vast majority of U.S. frozen blueberry imports (about 96 percent) came from Canada in 1997. U.S. imports of frozen cultivated blueberries from Chile represented 2 percent of the total,

while Mexico accounted for 1 percent of the total. The rest of the 1997 import volume originated from the Netherlands, Costa Rica and Colombia.

This rule provides the procedures under which blueberry producers and importers may vote on whether they want the Order to be implemented. In accordance with the provisions of the Act, subsequent referenda may be conducted, and it is anticipated that these procedures would apply. There are approximately 1,818 producers and 32 importers who will be eligible to vote in the first referendum.

USDA will keep 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. USDA will also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

Voting in the referendum is optional. However, if producers and importers choose to vote, the burden of voting would be offset by the benefits of having the opportunity to vote on whether or not they want to be covered by the program.

The information collection requirements contained in this rule are designed to minimize the burden on producers and importers. This rule provides for a ballot to be used by eligible producers and importers to vote in the referendum. The estimated annual cost of providing the information by an estimated 1,818 producers (2,000 – 182 exempt producers) would be \$909.00 or \$.50 per producer and for an estimated 32 importers (50 – 18 exempt importers) would be \$16.00 or \$.50 per importer.

The Secretary considered requiring eligible voters to vote in person at various USDA offices across the country. The Secretary also considered electronic voting, but the use of computers is not universal, current technology is not reliable enough to ensure that electronic ballots would be received in a readable format, and technology is insufficient at this time to provide sufficient safeguards of voters' confidentiality. Conducting the referendum from one central location by mail ballot would be more cost-effective and reliable. The Department will provide easy access to information for potential voters through a toll-free telephone line.

There are no federal rules that duplicate, overlap, or conflict with this rule.

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 referendum ballot, which represents the information collection and recordkeeping requirements that may be imposed by this rule, has been submitted to OMB for approval.

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

OMB Number: 0581–0093.

Expiration Date of Approval: November 30, 2000.

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. The burden associated with the ballot is as follows:

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hours per response for each producer and importer.

Respondents: Producers and importers.

Estimated Number of Respondents: 1850.

Estimated Number of Responses per Respondent: 1 every 5 years (0.2).

Estimated Total Annual Burden on Respondents: 92.5 hours.

The estimated annual cost of providing the information by an estimated 1,818 producers (2,000 – 182 exempt producers) would be \$909.00 or \$.50 per producer and for an estimated 32 importers (50 – 18 exempt importers) would be \$16.00 or \$.50 per importer.

The ballot will be added to the other information collections approved for use under OMB Number 0581–0093.

In the proposed rule published on July 22, 1999, comments were invited on: (a) Whether the proposed collection of information is necessary and whether it will have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions 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 collection techniques or other forms of information technology.

The number of respondents and burden have been changed to reflect

more current information provided in a comment received concerning the proposed Order. This comment is discussed in the proposed rule for the Order which is published separately in this issue of the **Federal Register**.

Background

The Act authorizes the Secretary, under generic authority, to establish agricultural commodity research and promotion orders. The North American Blueberry Council, Inc. (proponent), has requested the establishment of a Blueberry Promotion, Research, and Information Order (Order) pursuant to the Act. The proposed Order would provide for the development and financing of an effective and coordinated program of promotion, research, and information for fresh and processed blueberries. The program would be funded by an assessment levied on producers (to be collected by handlers) and importers (to be collected by the U.S. Customs Service at time of entry into the United States) at a rate of \$12 per ton. In the proposed Order, blueberries are defined as cultivated blueberries grown in or imported into the United States of the genus *Vaccinium Corymbosum* and *Ashei*, including the northern highbush, southern highbush, rabbit eye varieties, any hybrid, and excluding the lowbush (native) blueberry *Vaccinium Angustifolium*.

Assessments would be used to pay for promotion, research, and information; administration, maintenance, and functioning of the U.S.A. Blueberry Council; and expenses incurred by the Secretary in implementing and administering the Order, including referendum costs.

Section 518 of the Act requires that a referendum be conducted among eligible blueberry producers and importers to determine whether they favor the Order. In addition, section 518 of the Act provides for referenda to ascertain approval of an Order to be conducted either prior to its going into effect or within three years after assessments first begin under the Order. According to a proposed rule published separately in this issue of the **Federal Register**, the Order will become effective if it is approved during the initial referendum, which will be held before the program is implemented. The program will be implemented if it is approved by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum. Producers and importers of 2,000 pounds or more of blueberries annually will be eligible to vote.

This rule establishes the procedures under which producers and importers may vote on whether they want the blueberry promotion, research, and information program to be implemented. There are approximately 1,850 eligible voters.

This rule would add a new subpart which would establish procedures to be used in this and future referenda. The subpart covers definitions, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

A proposed rule on the Order was published in the July 22, 1999, issue of the **Federal Register** (64 FR 39790). On the same date, a proposed rule was published on the referendum procedures (64 FR 39803). While no comments were received referencing this proposed rule, changes have been made to the estimates of the numbers of producers and importers and the information collection burden based upon more current information provided in a comment to the proposed Order.

In addition to estimate changes, the Department has revised the referendum requirements. The proponent had recommended that the Order be implemented if approved by producers and importers representing a majority of the volume of blueberries represented in the referendum. The Department will keep this requirement but add a second requirement. In order to be implemented, the Order must also be approved by a majority of the voters in the referendum. The majority of the persons to be covered by the proposed program are small producers. This change was made in order to ensure that these small producers have fair input into the outcome of the referendum. In addition, this change would further the goals of the Secretary's Small Farm Initiative without harming the interests of the larger growers.

Pursuant to the provisions in 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) A proposed rule with request for comments was published in the **Federal Register** and no comments were received; (2) it is necessary to have these procedures in place in order to conduct the referendum in February 2000 prior to the beginning of the 2000 crop year; and (3) no useful purpose will be served by a delay of the effective date.

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Blueberries,

Consumer Information, Marketing agreements, Blueberry promotion, Reporting and recordkeeping requirements.

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

1. Part 1218 is added to read as follows:

PART 1218—BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

Subpart A—[Reserved]

Subpart B—Procedure for the Conduct of Referenda in Connection with the Blueberry Promotion, Research, and Information Order

Sec.	
1218.100	General.
1218.101	Definitions.
1218.102	Voting.
1218.103	Instructions.
1218.104	Subagents.
1218.105	Ballots.
1218.106	Referendum report.
1218.107	Confidential information.

Authority: U.S.C. 7401—7425.

Subpart B—Procedure for the Conduct of Referenda in Connection with the Blueberry Promotion, Research, and Information Order

§ 1218.100 General.

Referenda to determine whether eligible blueberry producers and importers favor the issuance, amendment, suspension, or termination of the Blueberry Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

§ 1218.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Blueberries* means cultivated blueberries grown in or imported into the United States of the genus *Vaccinium Corymbosum* and *Ashei*, including the northern highbush, southern highbush, rabbit eye varieties, and any hybrid, and excluding the lowbush (native) blueberry *Vaccinium Angustifolium*.

(c) *Eligible importer* means any person who imported 2,000 pounds or more of fresh or processed blueberries, that are identified by the numbers 0810.40.0028

and 0811.90.2028, respectively, in the Harmonized Tariff Schedule of the United States or any other numbers used to identify fresh and frozen blueberries. Importation occurs when commodities originating outside the United States are entered or withdrawn from the U.S. Customs Service for consumption in the United States. Included are persons who hold title to foreign-produced blueberries immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of blueberries from the U.S. Customs Service when such blueberries are entered or withdrawn for consumption in the United States.

(d) *Eligible producer* means any person who produced 2,000 pounds or more of blueberries in the United States during the representative period who:

- (1) Owns, or shares the ownership and risk of loss of, the crop;
- (2) Rents blueberry production facilities and equipment resulting in the ownership of all or a portion of the blueberries produced;
- (3) Owns blueberry production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the blueberries produced; or
- (4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce blueberries who share the risk of loss and receive a share of the blueberries produced. No other acquisition of legal title to blueberries shall be deemed to result in persons becoming eligible producers.

(e) *Order* means the Blueberry Promotion, Research, and Information Order.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

- (1) A husband and a wife who have title to, or leasehold interest in, a blueberry farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and
- (2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(g) *Processed blueberries* means blueberries which have been frozen, dried, pureed, or made into juice.

(h) *Referendum agent* or *agent* means the individual or individuals designated by the Secretary to conduct the referendum.

(i) *Representative period* means the period designated by the Secretary.

(j) *United States* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1218.102 Voting.

(a) Each person who is an eligible producer or an eligible importer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce blueberries, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate producer or importer, or an administrator, executor, or trustee or an eligible entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible entity, or an administrator, executive, or trustee of an eligible entity and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) All ballots are to be cast by mail or by facsimile, as instructed by the Secretary.

§ 1218.103 Instructions.

The referendum agent shall conduct the referendum, in the manner herein provided, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions hereof, to govern the procedure to be followed by the referendum agent. Such agent shall:

- (a) Determine the period during which ballots may be cast.
- (b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the

person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible producers and importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

§ 1218.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions hereunder. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1218.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1218.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1218.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the

Act and the voting list shall be held confidential and shall not be disclosed.

Dated: February 9, 2000.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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