

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1210**

[FV-01-701 PR]

**Watermelon Research and Promotion Plan: Referendum Procedures**

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

**SUMMARY:** This proposed rule would establish procedures which the U.S. Department of Agriculture (USDA or the Department) would use to conduct referenda under the Watermelon Research and Promotion Plan (Plan). Initially, they will be used in a referendum on whether watermelon producers, handlers, and importers approve an amendment to the Plan which would require all handlers to pay assessments on all watermelons they handle, including any watermelons handled after their importation into the United States.

**DATES:** Comments must be received by June 29, 2001.

**ADDRESSES:** Interested persons are invited to submit written comments concerning the proposed rule to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535 South Building, Washington, DC 20250-0244. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours, or on the Internet at [www.ams.usda.gov/fv/rpdocketlist.htm](http://www.ams.usda.gov/fv/rpdocketlist.htm). Comments may also be submitted electronically to: [malinda.farmer@usda.gov](mailto:malinda.farmer@usda.gov). All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. A copy of this rule may be found at the above Internet address.

Pursuant to the Paperwork Reduction Act of 1995 (PRA), also 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. Comments concerning the information collection under the PRA should also be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Daniel R. Manzoni, Research and

Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535 South Building, Washington, DC 20250-0244; telephone (202) 720-9915; facsimile (202) 205-2800; or [Daniel.Manzoni@usda.gov](mailto:Daniel.Manzoni@usda.gov).

**SUPPLEMENTARY INFORMATION:** The National Watermelon Promotion Board (Board) administers the Watermelon Research and Promotion Plan (Plan) under the supervision of the U.S. Department of Agriculture (USDA). The Plan was issued under the Watermelon Research and Promotion Act (Act) in 1989.

The Board conducts promotional, consumer information, and industry information programs. To fund these activities, producers and first handlers pay 2 cents per hundredweight (cwt.) on the watermelon that they produce or handle, respectively, and importers pay 4 cents per cwt. on the foreign watermelons they import into the United States. First handlers collect the assessments from producers of fewer than 10 acres of watermelons and send the producer assessment to the Board along with their handler assessments. The assessments on imported watermelons are collected by the U.S. Customs Service (Customs) at the time the watermelons enter the United States. Customs remits the assessments to the Board. Importers of less than 150,000 pounds of watermelons annually may request reimbursement of their assessments.

The Board has recommended amending the Plan be amended to cover all handlers of domestic watermelons—not just first handlers—and that these handlers pay assessments on all watermelons they handle, including any watermelons handled after their importation into the United States. The additional handlers would be wholesalers, persons who arrange the sale or transfer of watermelons (such as brokers), and fresh-cut processors. Watermelon producers, handlers, and importers will vote in a referendum on whether the amendment will be adopted.

A proposed rule on the amendment is published separately in this issue of the **Federal Register**.

**Question and Answer Overview**

*Why Are These Referendum Procedures Being Proposed?*

USDA will conduct rulemaking and a national referendum on an amendment to the Plan. In order to conduct the referendum, procedures need to be established. Publishing this proposed rule provides the opportunity for public

input on the procedures before they are finalized.

*How Long Do I Have To Comment on the Proposed Rule?*

You have 60 days to submit written comments to USDA on the proposed procedures or to OMB on the paperwork burden associated with the procedures. You may submit your comments by mail, fax, or e-mail as indicated above.

*Who Is Eligible To Vote in the Referendum?*

If the following persons produced, handled, or imported watermelons in calendar year 2000, they may vote in the referendum: Current producers of 10 or more acres of watermelons; watermelon handlers (including first handlers, wholesalers, fresh-cut processors, and anyone who arranges the sale or transfer of watermelons); and watermelon importers of 150,000 or more pounds of watermelons annually.

*How Will the Vote in the Referendum Be Tabulated?*

Each eligible producer, handler, and importer will be allowed one vote in the referendum. In order to be implemented, the amendment must be approved by a majority of the producers, handlers, and importers voting in the referendum.

*When Will the Referendum Be Held?*

After we have analyzed the comments on this rule and the comments on the proposed rule on the amendments to the Plan, we will issue final referendum procedures and a second proposed rule on amendments. The second proposed rule on the amendments will include a Referendum Order, which will announce the voting period for the referendum. The voting period will last 30 days and be announced 30 days in advance.

*How Can I Vote in the Referendum?*

Voting will take place by mail. All known eligible producers, handlers, and importers will receive a ballot and voting instructions in the mail from USDA. Producers, handlers, and importers who believe they are eligible to vote and who do not receive a ballot in the mail may request a ballot by calling a toll-free telephone number. The ballot must be received by USDA by close of business on the last day of the voting period.

*How Will USDA Make Certain That Only Eligible Persons Vote in the Referendum?*

USDA will use Board records to verify voter eligibility and may request

evidence of eligibility from persons unknown to the Board.

*How Will USDA Make Certain That Every Eligible Person Has the Opportunity To Vote?*

USDA will have a toll-free telephone number for persons to call to request a ballot if they do not receive a ballot and they believe they are eligible to vote. These persons will be required to provide documentation of their eligibility to vote.

**Executive Orders 12866 and 12988**

This proposed rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

This proposed rule has been reviewed under E.O. 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.

Under Section 1650 of the Act, non-exempt producers, handlers, and importers of watermelons may file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with law. In the petition, the person may request a modification of the Plan or an exemption from the Plan. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's decision, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

**Regulatory Flexibility Act and Paperwork Reduction Act**

*Initial Regulatory Flexibility Analysis*

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agricultural Marketing Service (AMS) is required to examine the impact of this proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

In 13 CFR 121.201, the Small Business Administration defines small

agricultural service firms (handlers and importers) as those having annual receipts of less than \$5 million and small agricultural producers as those having annual receipts of not more than \$500,000.

There would be approximately 2,220 domestic watermelon producers, 1,170 domestic watermelon handlers, and 280 importers of foreign watermelons who would be eligible to vote under these referendum procedures. Currently, there are approximately 620 first handlers who are subject to the provisions of the Plan. An additional estimated 480 wholesalers and persons who arrange the sale or transfer of watermelons (such as brokers) and 70 fresh-cut processors would also be subject to the Plan if the amendment is approved in the referendum. A majority of these producers, handlers, and importers may be classified as small entities.

This proposed rule would create a new Subpart D-Referendum Procedures [7 CFR 1210.600–1210.607] under the Plan. The procedures would be used in conducting referenda under the Act and the Plan. Initially, the proposed procedures will be used for a referendum during which eligible watermelon producers, handlers, and importers will vote on a proposed amendment to the Plan. The amendment would revise the Plan and the regulations under the Plan to include all handlers. A proposed rule on the amendment is published separately in this issue of the **Federal Register**.

USDA will keep the watermelon industry informed throughout the referendum process to ensure that they are aware of and are able to participate in the referendum. 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, handlers, and importers choose to vote, the burden of casting a ballot would be offset by the benefits of having the opportunity to vote on whether the Plan should be amended.

The information collection requirements contained in this proposed rule are designed to minimize the burden on producers, handlers and importers voting in referenda. The estimated additional annual cost of providing the information by the estimated 3,670 persons eligible to vote in referenda would be \$2,290 or \$0.62 per voter.

The Secretary considered requiring eligible voters vote in person at various USDA offices across the country. The Secretary also considered electronic

voting, but the use of computers is not universal. Conducting the referendum from one central location by mail ballot will 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.

AMS has performed this initial Regulatory Flexibility Analysis regarding the impact of this proposed rule on small entities. However, in order to have additional data that may be helpful in evaluating the effects of this rule on small entities, we are inviting comments concerning potential effects. In particular, we are interested in determining the number of wholesalers, fresh-cut processors, and persons who arrange the sale or transfer of watermelons. In the past, these persons have not been eligible to vote in referenda on the watermelon program.

*Paperwork Reduction Act*

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the referendum ballot represents the information collection that may be imposed by this rule.

Approximately 2,220 watermelon producers, 1,170 domestic watermelon handlers, and 280 importers of foreign watermelons would be eligible to vote in the referendum.

The ballot has been previously approved for use under OMB Number 0581–0093. However, the number of producers, handlers, and importers eligible to vote in referenda has changed. Therefore, the new burden has been submitted to OMB.

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

*OMB Number:* 0581–0093.

*Expiration Date of Approval:* January 31, 2001.

*Type of Request:* Revision of a currently approved information collection for advisory committees and boards and for research and promotion programs.

*Abstract:* The information collection requirements in this request are essential to carry out the intent of the Act. The new burden associated with the ballot is as follows:

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.5 hours per response.

*Respondents:* Eligible producers, handlers, and importers.

*Estimated Number of Respondents:* 3,670.

*Estimated Number of Responses per Respondent:* 1 every 8 years (0.125).

*Estimated Total Annual Burden on Respondents:* 229 hours.

The estimated additional annual cost of providing the information by the estimated 3,670 persons eligible to vote in referenda would be \$2,290 or \$0.62 per voter. The currently approved burden for the ballot is 149.5. Therefore, the new burden estimate represents an increase of 79.5 hours which would be added under OMB No. 0581-0093.

Comments are invited on: (a) Whether the proposed additional 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 increase in the 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 collection techniques or other forms of information technology.

Comments concerning the information collection requirements contained in this action 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 the USDA Docket Clerk and OMB Desk Officer for Agriculture at the addresses and within the time frames specified above. 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.

OMB is required to make a decision concerning the increase in the collection of information contained in this rule between 30 and 60 days after publication. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

### Background

The Board conducts promotional, consumer information, and industry information programs. To fund these activities, producers and handlers pay 2 cents per hundredweight (cwt.) on the watermelon that they produce or handle, respectively, and importers pay 4 cents per cwt. on the foreign watermelons they import into the United States. Handlers collect the

assessments from producers of 10 acres or more of watermelons and send the producer assessment to the Board along with their handler assessments. The assessments on imported watermelons are collected by the U.S. Customs Service (Customs) at the time the watermelons enter the United States. Customs remits the assessments to the Board. Importers of less than 150,000 pounds of watermelons annually may request reimbursement of their assessments.

The Board has recommended that the Plan and its rules and regulations be amended to cover all handlers of watermelons. A proposed rule on the amendment is published separately in this issue of the **Federal Register**.

Section 1655(a) of the Act requires that amendments to the Plan must be approved by the industry in a referendum. Section 1653(b) provides that amendments will not take effect unless they are approved by a majority of eligible voters who vote. Therefore, a referendum is required for the proposed amendment.

The proposed referendum procedures provide that the following persons would be eligible to vote in referenda: producers of 10 or more acres of watermelons; all handlers; and importers of 150,000 pounds or more annually. In the referendum to determine whether the industry favors expanding coverage of the Plan to all handlers (not just first handlers), the additional handlers will be allowed to vote as if this amendment were in place during the representative period and at the time of the referendum. The additional handlers include wholesalers, anyone who arranges the sale or transfer of watermelons (such as brokers), and fresh-cut processors. If the proposed amendment is approved in the referendum, the additional handlers would vote in subsequent referenda. If the proposed amendment is not approved in the referendum, the additional handlers would not vote in future referenda.

This proposed rule would add a new Subpart D—Referendum Procedures [7 CFR 1210.600–1210.607] to 7 CFR part 1210. The proposed procedures cover definitions, voting, instructions, subagents, ballots, referendum report, and confidential information.

In addition, this rule would: (1) Redesignate Subpart—Watermelon Research and Promotion Plan [7 CFR 1210.301–1210.367] as Subpart A; (2) redesignate and rename Subpart—Procedures for Nominating Members to the National Watermelon Promotion Board [7 CFR 1210.400–1210.405] as Subpart B—Nomination Procedures;

and redesignate Subpart—Rules and Regulations [7 CFR 1210.500–1210.540] as Subpart C.

All written comments received in response to this proposal by the date specified will be considered prior to finalizing this action. The industry is asked to pay particular attention to the definitions to be sure that they are appropriate for purposes of determining voter eligibility. The industry is also encouraged to comment on any other practical considerations with regard to conducting the referendum within the parameters set forth in this proposed rule and the Act.

### List of Subjects in 7 CFR Part 1210

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Reporting and recordkeeping requirements, Watermelon promotion.

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

### PART 1210—WATERMELON RESEARCH AND PROMOTION

1. The authority citation for 7 CFR part 1210 continues to read as follows:

**Authority:** 7 U.S.C. 4901–4912.

2. Revise the subpart heading for “Subpart—Watermelon Research and Promotion Plan” to read as follows:

#### Subpart A—Watermelon Research and Promotion Plan

3. Revise the subpart heading for “Subpart—Procedures for Nominating Members to the National Watermelon Promotion Board” to read as follows:

#### Subpart B—Nominating Procedures

4. Revise the subpart heading for “Subpart—Rules and Regulations” to read as follows:

#### Subpart C—Rules and Regulations

5. Add a new Subpart D—Referendum Procedures to read as follows:

#### Subpart D—Referendum Procedures

Sec.	
1210.600	General.
1210.601	Definitions.
1210.602	Voting.
1210.603	Instructions.
1210.604	Subagents.
1210.605	Ballots.
1210.606	Referendum report.
1210.607	Confidential information.

**Subpart D—Referendum Procedures****§ 1210.600 General.**

Referenda to determine whether eligible producers, handlers, and importers favor the continuation, suspension, termination, or amendment of the Watermelon Research and Promotion Plan shall be conducted in accordance with this subpart.

**§ 1210.601 Definitions.**

Unless otherwise defined below, the definition of terms used in these procedures shall have the same meaning as the definitions in the Plan.

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

(b) *Department* means the United States Department of Agriculture.

(c) *Eligible handler* means any person (except a common contract carrier of watermelons owned by another person) who handles watermelons, including a producer who handles watermelons of the producer's own production, subject to the provisions of § 1210.602(a), who handles watermelons as a person performing a handling function and either:

(1) Takes title or possession of watermelons from a producer and directs the grading, packing, transporting, and selling of the watermelons in the current of commerce;

(2) Purchases watermelons from producers;

(3) Purchases watermelons from handlers;

(4) Purchases watermelons from importers; or

(5) Arranges the sale or transfer of watermelons from one party to another and takes title or possession of the watermelons: *Provided*, That harvest crews and common carriers who collect and transport watermelons from the field to a handler are not handlers and that retailers, wholesale retailers, foodservice distributors, and foodservice operators are not handlers.

(d) *Eligible importer* means any person who imports 150,000 pounds or more watermelons annually into the United States as principal or as an agent, broker, or consignee for any person who produces watermelons outside the United States for sale in the United States. An importer who imports less than 150,000 pounds of watermelons annually and did not

apply for and receive reimbursement of assessments is also an eligible importer.

(e) *Eligible producer* means any person who is engaged in the growing of 10 or more acres of watermelons, including any person who owns or shares the ownership and risk of loss of such watermelon crop. A person who shares the ownership and risk of loss includes a person who:

(1) Owns and farms land, resulting in ownership, by said producer, of the watermelons produced thereon;

(2) Rents and farms land, resulting in ownership, by said producer, of all or a portion of the watermelons produced thereon; or

(3) Owns land which said producer does not farm and, as rental for such land, obtains the ownership of a portion of the watermelons produced thereon. Ownership of, or leasehold interest in land, and the acquisition, in any manner other than set forth in this subpart, of legal title to the watermelons grown on said land, shall not be deemed to result in such owners or lessees becoming producers. Persons who produce watermelons for non-food uses are not producers for the purposes of this subpart.

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

(1) A husband and wife who have title to, or leasehold interest in, land 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 the agreement, informal or otherwise, contributed land and others contributed capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the production, handling, or importation of watermelons for market and the authority to transfer title to the watermelons so produced, handled, or imported.

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

(h) *Representative period* means the period designated by the Secretary pursuant to the Act.

**§ 1210.602 Voting.**

(a) Each person who is an eligible producer, handler, or importer as defined in this subpart, at the time of the referendum and who also was a producer, handler, or importer during

the representative period, shall be entitled to one vote in the referendum: *Provided*, That each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce watermelons in which more than one of the parties is a producer, shall be entitled to one vote in the referendum covering only that producer's share of the ownership: *Provided further*, That the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchased from other producer's production is more than 50 percent of the producer's own production: *Provided further*, That the vote of a person who both imports and handles watermelons will be counted as an importer vote if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

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

(c) *Casting of ballots*. All ballots are to be cast as instructed by the Secretary.

**§ 1210.603 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 voting period, 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 said agent may deem advisable.

(d) Mail to eligible producers; importers; and in the case of an order assessing handlers, handlers whose names and addresses are known to the referendum agent; the instructions on voting; a ballot; and a summary of the terms and conditions to be voted upon. No person who claims to be eligible to vote shall be refused a ballot. However, such persons may be required to submit evidence of their eligibility.

(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.

#### **§ 1210.604 Subagents.**

The referendum agent may appoint any individual or individuals necessary 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.

#### **§ 1210.605 Ballots.**

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

#### **§ 1210.606 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 analysis of the referendum and its results.

#### **§ 1210.607 Confidential information.**

All ballots cast and their contents and all other information or reports furnished to, compiled by, or in possession of, the referendum agent or subagents that reveal, or tend to reveal, the identity or vote of any producer, handler, or importer of watermelons shall be held strictly confidential and shall not be disclosed.

Dated: April 23, 2001.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

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**BILLING CODE 3410-02-P**