

Dated: July 5, 2001.

**Kenneth C. Clayton,**

*Acting Administrator.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1219

[FV-01-706-PR]

#### **Hass Avocado Promotion, Research, and Information Order; Subpart B—Referendum Procedures**

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

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

**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 Hass Avocado Promotion, Research, and Information Order (Order) is favored by the producers and importers of Hass avocados. The Order will be implemented if it is approved by a simple majority of the producers and importers voting 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 proposed Order is being published in a separate document. This proposed program would be implemented under the Hass Avocado Promotion, Research, and Information Act of 2000.

**DATES:** Comments must be received by August 27, 2001.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule to: Docket Clerk, Research and Promotion Branch (RP), Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535-S, 1400 Independence Avenue, SW., 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. Comments may also be submitted electronically to: 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: [www.ams.usda.gov/fv/rpdocketlist.htm](http://www.ams.usda.gov/fv/rpdocketlist.htm).

Pursuant to the Paperwork Reduction Act (PRA), send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including 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:** Julie A. Morin, RP, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535-S, Washington, DC 20250-0244; telephone (202) 720-6930 or fax (202) 205-2800, or [julie.morin@usda.gov](mailto:julie.morin@usda.gov).

**SUPPLEMENTARY INFORMATION:** A referendum will be conducted among eligible producers and importers of Hass avocados to determine whether they favor issuance of the proposed Hass Avocado Promotion, Research, and Information Order (Order) [7 CFR Part 1218]. The program will be implemented if it is approved by a simple majority of the producers and importers voting in the referendum. The Order is authorized under the Hass Avocado Promotion, Research, and Information Act of 2000 (Act) [Pub. L. 106-387, 7 U.S.C. 7801-7813]. It would cover domestic and imported Hass avocados. A proposed Order is being published separately in the **Federal Register**.

#### **Question and Answer Overview**

##### *Why Are These Referendum Procedures Being Proposed?*

USDA will conduct rulemaking and a national referendum on the Order. 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 45 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?*

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 and importers voting in the referendum.

##### *When Will the Referendum Be Held?*

After we have analyzed the comments on this proposed rule, we will issue final referendum procedures. 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 and importers will receive a ballot and voting instructions in the mail from USDA. Producers 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 the close of business on the last day of the voting period.

#### **Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 1212 of the Act states that the Act may not be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized under the laws of the United States or of a state.

Under Section 1207 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 (RFA) [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 implement a research and promotion program covering domestic and imported Hass avocados, became effective on October 23, 2000.

This proposed rule would establish the procedures under which producers and importers may vote on whether they want a national promotion, research, and information program to be implemented for Hass avocados. Producers and importers of Hass avocados who have produced or imported Hass avocados for at least one year prior to the referendum would be eligible to vote. This proposal would add a new subpart which establishes procedures to conduct the initial and future referenda. The proposed subpart covers definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

According to industry sources, there are approximately 6,000 producers and 200 importers who will vote in the referendum.

The Small Business Administration [13 CFR 121.201] defines small agricultural producers as those having annual receipts of \$500,000 or less annually and small agricultural service firms as those having annual receipts of \$5 million or less. Importers would be considered agricultural service firms. Using these criteria, most producers and importers would be considered small businesses. On August 6, 2001, the threshold for small agricultural producers will be increased to \$750,000. This increase has little import on the determination of whether those covered by the program would be considered small businesses.

The Act authorizes assessments on fresh, frozen, and processed Hass avocados. However, initially only fresh Hass avocados will be assessed. Therefore, only producers and importers of fresh Hass avocados are covered by this proposed rule.

California is the source for over 95 percent of the Hass avocados produced in the United States. According to the Commission, seven avocado varieties are grown in California. Hass, the most popular variety, accounts for 85 percent of the volume of California avocado

production. Hass avocados are available 12 months a year.

According to USDA's National Agricultural Statistics Service (NASS), total U.S. production of avocados during the 1999–2000 season was 181,300 tons, most of which was utilized fresh except for a small processed quantity that NASS included in fresh utilization to protect the confidentiality of individual operations. The value of the 1999–2000 crops was \$392 million. Production in 1999–2000 was up 14 percent from the previous year's total of 159,250 tons, which had a value of \$344 million. According to an industry report, the U.S. avocado category is expected to grow to more than 600 million pounds this year (2000–2001)—up 53% from 1997–1998.

In the 1999–2000 season, the major countries exporting to the U.S. were Chile (59 percent), Mexico (20 percent), and the Dominican Republic (15 percent). Data on imports is not collected by variety, but it is believed to be mostly Hass. Avocados are imported both in fresh and processed form. According to U.S. Census Bureau data, fresh avocado imports during the 1999–2000 season (November/October) accounted for about 75 percent of the total tonnage of fresh and processed avocados imported. In 1999–2000, imported fresh avocados totaled 66,237 tons, up from 55,515 tons during the 1998–99 season.

The total import value for fresh and processed avocados was \$137 million in 1999–2000, up from \$95 million in 1998–99. Almost all prepared or preserved avocado imports come from Mexico. The trend in imports is up, and imports have more than doubled since 1995.

This proposed rule provides the procedures under which producers and importers of Hass avocados 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 proposed procedures would apply.

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 proposed 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 6,000 producers would be \$3,000 or \$0.50 per producer and for an estimated 200 importers would be \$100 or \$0.50 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.

While we have performed this Initial Regulatory Flexibility Analysis regarding the impact of this proposed rule on small entities, in order to have as much data as possible 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 obtaining more information on the number of small entities that may incur benefits or costs from the 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 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–NEW.

*Expiration Date of Approval:* To be assigned by OMB.

*Type of Request:* New 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:* 6,200.

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

*Estimated Total Annual Burden on Respondents:* 310 hours.

The estimated annual cost of providing the information by an estimated 6,000 producers would be \$3,000.00 or \$0.50 per producer and for an estimated 200 importers would be \$100.00 or \$0.50 per importer.

Comments are 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.

Comments concerning the information collection requirements contained in this action should reference OMB No. 0581-NEW, 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 the 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.

### Background

The Act, which became effective on October 23, 2000, authorizes the Secretary to establish a national research and promotion program covering domestic and imported Hass avocados. The Commission submitted an entire proposed Order on December

29, 2000. Subsequently, on March 9, 2001, partial proposals were received from Hass avocado interests in Chile, Mexico, and New Zealand. These proposals are being published for public comment in this issue of the **Federal Register**.

The proposed Order would provide for the development and financing of an effective and coordinated program of promotion, research, and consumer and industry information for Hass avocados in the United States. 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 an initial rate of 2.5 cents per pound. The Act authorizes assessments on fresh, frozen, and processed Hass avocados. However, initially, only fresh domestic and imported Hass avocados will be covered by the program.

The assessments would be used to pay for promotion, research, and consumer and industry information; administration, maintenance, and functioning of the Hass Avocado Board; and expenses incurred by the Secretary in implementing and administering the Order, including referendum costs.

Section 1206 of the Act requires that a referendum be conducted among eligible producers and importers of Hass avocados to determine whether they favor implementation of the Order. That section also requires the Order to be approved by a simple majority of the producers and importers voting. In order to be eligible to vote, producers and importers must have been engaged in producing or importing Hass avocados for at least one year prior to the referendum.

This proposed rule establishes the procedures under which producers and importers of Hass avocados may vote on whether they want the Hass avocado promotion, research, and information program to be implemented. There are approximately 6,200 eligible voters.

This proposed rule would add a new subpart which would establish procedures to be used in this and future referenda.

The subpart covers definitions, registration, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

A 30-day comment period is provided on this proposed rule. This period is deemed appropriate to better reflect the implementation time frames provided in the Act.

All written comments received in response to this rule by the date specified will be considered prior to

finalizing this action. We encourage the industry to pay particular attention to the definitions to be sure that they are appropriate for the Hass avocado industry.

### List of Subjects in 7 CFR Part 1219

Administrative practice and procedure, Advertising, Consumer Information, Hass avocados, Marketing agreements, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that Title 7, Chapter XI of the Code of Federal Regulations be amended by amending part 1219 proposed elsewhere in this issue as follows:

1. The authority citation for part 1219 continues to read as follows:

**Authority:** 7 U.S.C. 7801-7813.

2. Subpart B is added to proposed Part 1219 to read as follows:

### PART 1219—HASS AVOCADO PROMOTION, RESEARCH, AND INFORMATION

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#### Subpart B—Referendum Procedures

Sec.

1219.100	General.
1219.101	Definitions.
1219.102	Registration.
1219.103	Voting.
1219.104	Instructions.
1219.105	Subagents.
1219.106	Ballots.
1219.107	Referendum report.
1219.108	Confidential information.

#### Subpart B—Referendum Procedures

##### § 1219.100 General.

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

##### § 1219.101 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) *Eligible importer* means any person who imported Hass avocados, that are identified in the Harmonized Tariff Schedule of the United States,<sup>1</sup>

<sup>1</sup> The Department of Agriculture has applied to the International Trade Commission for an

for at least one year prior to the referendum. Importation occurs when Hass avocados originating outside the United States are released from custody by the U.S. Customs Service and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced Hass avocados 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 Hass avocados from the U.S. Customs Service when such Hass avocados are entered or withdrawn for consumption in the United States.

(c) *Eligible producer* means any person who produced Hass avocados in the United States for at least one year prior to the referendum who:

(1) Owns, or shares the ownership and risk of loss of, the crop;

(2) Rents Hass avocado production facilities and equipment resulting in the ownership of all or a portion of the Hass avocados produced;

(3) Owns Hass avocado production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the Hass avocados produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce Hass avocados who share the risk of loss and receive a share of the Hass avocados produced. No other acquisition of legal title to Hass avocados shall be deemed to result in persons becoming eligible producers.

(d) *Hass avocados* means the fruit grown in or imported into the United States of the species *Persea americana* Mill. For the purposes of the initial referendum, the term shall include fresh fruit only.

(e) *Order* means the Hass Avocado 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 Hass avocado 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) *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.

(i) *United States*.—The term "United States" means collectively of the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the Republic of the Marshall Islands, the Federated States of Micronesia.

#### § 1219.102 Registration.

An eligible producer or importer of Hass avocados, as defined in this subpart, at the time of the referendum and during a representative period, who chooses to vote in any referendum conducted under this subpart, shall register with the Secretary prior to the voting period, after receiving notice from the Secretary concerning the referendum under § 1219.103.

#### § 1219.103 Voting.

(a) Each eligible producer and eligible importer who registers to vote in the referendum 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 Hass avocados, 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, as instructed by the Secretary.

#### § 1219.104 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 (voting period).

(b) Notify producers and importers of the voting period for the referendum and the requirement to register to vote in the referendum at least 30 days in advance 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.

(c) Develop the 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.

(d) Develop a list of producers and importers who register to vote.

(e) Mail to registered voters the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order.

(f) 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.

(g) Prepare a report on the referendum.

(h) Announce the results to the public.

#### § 1219.105 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.

#### § 1219.106 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.

**§ 1219.107 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.

**§ 1219.108 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 strictly confidential and shall not be disclosed.

Dated: July 5, 2001.

**Kenneth C. Clayton,**

*Acting Administrator.*

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