

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

[FV-01-701 FR]

Watermelon Research and Promotion Plan; Subpart D—Referendum Procedures**AGENCY:** Agricultural Marketing Service, Agriculture.**ACTION:** Final rule.

SUMMARY: This rule establishes procedures which the U.S. Department of Agriculture (USDA or the Department) will use in conducting a referendum to determine whether the Watermelon Research and Promotion Plan (Plan) and the regulations issued under the Plan should be amended to cover all handlers. The Plan will be amended if the amendments are approved by a simple majority of the eligible watermelon producers, handlers, and importers voting in the referendum. These procedures will also be used for any subsequent referenda under the Plan.

EFFECTIVE DATE: December 7, 2001.

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SUPPLEMENTARY INFORMATION: *Prior documents.* USDA published proposed referendum procedures in the **Federal Register** on April 30, 2001 [66 FR 21596] with a 60-day comment period. On the same date, USDA published a proposed rule on amending the Plan in the **Federal Register** on April 30, 2001 [66 FR 21602] with a 60-day comment period.

A referendum will be conducted among eligible watermelons producers, handlers, and importers to determine whether to the Plan and the regulations issued under the Plan should be amended to cover all handlers of watermelons. The amendments to the Plan will be implemented if they are approved by a simple majority of the eligible watermelon producers, handlers, and importers voting in the referendum.

The National Watermelon Promotion Board (Board) administers the Plan under the supervision of the USDA. The Plan was issued under the Watermelon Research and Promotion Act (Act) in 1989.

The Board conducts promotion, consumer information, industry information, and research programs. To fund these activities, producers and first handlers pay 2 cents per hundredweight (cwt.) on the watermelons 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 10 or more 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 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.

Question and Answer Overview*Why Are These Referendum Procedures Being Published?*

USDA will conduct a national referendum on amending the Plan in the near future. In order to conduct the referendum, procedures need to be established. The proposed amendments would require all handlers (not just first handlers) to pay assessments to the Board for the first time. These procedures are being made final in advance of the referendum and will help ensure that members of the watermelon industry know the eligibility criteria for voting and other pertinent information.

When Is the Referendum?

The voting period for the referendum will be from December 3, 2001 through January 11, 2002. The Agricultural Marketing Service (AMS) will mail all known eligible voters a ballot, details on the proposed amendments, and voting instructions on or about November 19, 2001.

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); watermelon importers of 150,000 or more pounds of watermelons annually; and importers who import less than 150,000 pounds of watermelons annually and did not apply for and receive reimbursement of assessments.

How Can I Vote in the Referendum?

Voting will take place by mail. All known eligible watermelon 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 January 11, 2002.

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?

Persons may call 1-888-729-9917 (toll-free) 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.

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 simple majority of the eligible watermelon producers, handlers, and importers voting in the referendum.

Executive Orders 12866 and 12988

This final 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 rule has been reviewed under E.O. 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will 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

Final 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 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 \$750,000.

Approximately 2,220 domestic watermelon producers, 1,170 domestic watermelon handlers, and 280 importers of foreign watermelons will 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 will 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 final rule creates a new Subpart D-Referendum Procedures [7 CFR 1210.600–1210.607] under the Plan. The procedures will be used in conducting referenda under the Act and the Plan. Initially, the procedures will be used for a referendum during which eligible watermelon producers, handlers, and importers will vote on proposed amendments to the Plan. The amendments would revise the Plan and the regulations under the Plan to include all handlers. A proposed rule on the amendments 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 will 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 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 is \$2,290 or \$0.62 per voter.

USDA considered requiring eligible voters to vote in person at various USDA offices across the country. USDA also considered electronic voting but noted the use of computers is not universal. USDA will continue to monitor the technology, reliability, and security in this area, and, if it becomes feasible to use electronic voting in the future, USDA will advise the industry at that time. However, conducting the referendum from one central location 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 final Regulatory Flexibility Analysis regarding the impact of this rule on small entities.

Paperwork Reduction Act. In accordance with 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 imposed by this rule.

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

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

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

OMB Number: 0581–0093.

Expiration Date of Approval: July 31, 2004.

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 rule 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 is \$2,290 or \$0.62 per voter. The currently approved burden for the ballot is 183.5. Therefore, the new burden estimate represents an increase of 46 hours which has been added under OMB No. 0581–0093.

In the proposed rule published on April 30, 2001, comments were 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.

One comment was received by the June 29, 2001, deadline. The commenter stated that the estimate of the burden associated with the ballot is accurate, but the burden could be reduced if USDA allowed electronic voting in addition to the mail ballot. USDA is exploring the feasibility of electronic voting and will notify voters if this option is implemented in the future. USDA will continue to monitor the technology, reliability, and security in this area, and, if it becomes feasible to use electronic voting in the future, USDA will advise the industry at that time.

Background

The Board conducts promotional, consumer information, industry information, and research 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 referendum procedures provide that the following persons are eligible to vote in referenda: Producers of 10 or more acres of watermelons; all handlers; importers of 150,000 pounds or more annually; and importers who imported less than 150,000 pounds of watermelons annually and did not apply for and receive reimbursement of assessments. 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 rule adds a new Subpart D—Referendum Procedures [7 CFR 1210.600–1210.607] to 7 CFR part 1210. The procedures cover definitions, voting, instructions, subagents, ballots, referendum report, and confidential information.

In addition, this rule: (1) Redesignates Subpart—Watermelon Research and Promotion Plan [7 CFR 1210.301–1210.367] as Subpart A; (2) redesignates and renames Subpart—Procedures for Nominating Members to the National Watermelon Promotion Board [7 CFR 1210.400–1210.405] as Subpart B—Nomination Procedures; and redesignates Subpart—Rules and Regulations [7 CFR 1210.500–1210.540] as Subpart C.

A proposed rule on these actions was published on April 30, 2001, in the **Federal Register** [66 FR 21596]. By the June 29, 2001, deadline for comments, we received two comments. One commenter suggested conducting the referendum by mail and electronic voting. USDA is exploring the possibility of providing watermelon producers, handlers, and importers the opportunity to vote electronically in future referenda. USDA will continue to monitor the technology, reliability, and security in this area, and, if it becomes feasible to use electronic voting in the future, USDA will advise the industry at that time. Another comment was received. However, this commenter essentially asserted that the program is a large burden and expense for his company and that he is opposed to the Plan. The comment did not specifically address the proposed referendum rules. Accordingly, the proposed rule is made final without change.

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, Title 7, chapter XI of the Code of Federal Regulations, is 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.
1240.601	Definitions.
1240.602	Voting.
1240.603	Instructions.
1240.604	Subagents.
1240.605	Ballots.
1240.606	Referendum report.
1240.607	Confidential information.

Subpart D—Referendum Procedures

§ 1240.600 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.

§ 1240.601 Definitions.

Unless otherwise defined in this section, 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) of this chapter, 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.

§ 1240.602 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.

§ 1240.603 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this section, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions in this section, 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.

§ 1240.604 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.

§ 1240.605 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.

§ 1240.606 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.

§ 1240.607 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: October 30, 2001.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

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