

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 1206**

[Doc. # FV-02-707-PR2]

RIN 0581-AC05

Mango Promotion, Research, and Information Order; Referendum Order**AGENCY:** Agricultural Marketing Service, Agriculture.**ACTION:** Proposed rule and referendum order.

SUMMARY: This proposed rule would establish an industry-funded promotion, research, and information program for fresh mangos. The proposed program—the Mango Promotion, Research, and Information Order (Order)—was submitted to the Department (the Department or USDA) by the Fresh Produce Association of the Americas (Association). Under the proposed Order, first handlers and importers of 500,000 or more pounds of mangos would pay an assessment of ½ cent per pound on domestic and imported mangos to the National Mango Promotion Board (Board). The Board would be appointed by the Department to conduct a program of research and promotion, industry information, and consumer information needed for the maintenance, expansion, and development of domestic markets for fresh mangos. The Order would be implemented if it is approved by a majority of the eligible first handlers and importers voting in a referendum. A separate final rule on referendum procedures is being published in this issue of the **Federal Register**.

DATES: To be eligible to vote, mango importers and first handlers must have imported or handled 500,000 or more pounds of mangos during the representative period from January 1 through December 31, 2002. The voting period for the referendum will be from November 10, 2003 through November 28, 2003. Ballots must be received by the referendum agents no later than the close of business, Eastern daylight-standard time, November 28, 2003, to be counted.

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SUPPLEMENTARY INFORMATION: This proposed Order is issued under the

Commodity Promotion, Research, and Information Act of 1996 (Act) (7 U.S.C. 7411-7425; Public Law 104-127; 110 Stat. 1029), or any amendments thereto.

Prior Documents: A proposed rule was published in the **Federal Register** on August 26, 2002 [67 FR 54908], with a 60-day comment period. In addition, the USDA published a proposed rule on the referendum procedures in the **Federal Register** on August 26, 2002 [67 FR 54920], also with a 60-day comment period.

Question and Answer Overview*Why Is USDA Proposing a Program for Mangos?*

The Department received a proposal from the Association for this program. The Department issued a proposed rule to obtain comments on the proposal and to obtain information on the potential impact of the program on the mango industry before developing a final proposed program and conducting a referendum on it.

What Is the Purpose of the Mango Program?

The purpose of the program is to maintain, expand, and develop domestic markets for fresh mangos.

How Will the Mango Program Be Implemented?

A referendum will be conducted on the proposed Order. The Order will be implemented if it is approved by a majority of the eligible voters in the referendum.

When Will the Referendum Be Held?

The voting period for the referendum will be November 10, 2003 through November 28, 2003.

Who Will Be Covered by the Program?

Domestic first handlers and importers of 500,000 or more pounds of mangos per calendar year will pay assessments under the program. Domestic mangos that are exported will not be assessed under the Order.

Who Will Sit on the Board?

Under the proposal, there will be a 20-member Board consisting of eight U.S. importers, one U.S. first handler, two U.S. producers, seven foreign producers, and two non-voting U.S. wholesalers and/or retailers of mangos. The chairperson shall reside in the United States.

How Will Members of the Board Be Selected?

The U.S. importers, first handlers, and producers would be nominated by U.S. importers, first handlers, and producers,

respectively. Foreign producers would be nominated by foreign producer associations. The U.S. wholesalers and/or retailers would be nominated by the Board. Two names must be submitted for each position. From the names submitted, the Department will appoint the members.

If the Mango Program Is Implemented and There Are Concerns About How It Is Operating, Can the Program Be Terminated?

Yes. After the program is implemented, the Department will conduct a referendum to determine whether the mango industry continues to support the program: (1) Every 5 years after the program is in effect, (2) at the request of the Board established under the proposed Order, or (3) when requested by 10 percent or more of first handlers and importers covered by the proposed Order. In addition, the Department may conduct a referendum at any time. If a majority of the first handlers and importers voting in the referendum do not favor continuation, the program will be terminated.

Executive Order 12866

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

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a 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 USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and requesting a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling 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 have 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 USDA's final ruling.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USDA 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 actions so that small businesses will not be disproportionately burdened.

The Act authorizes generic programs of promotion, research, and information for agricultural commodities. Congress found that it is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, government-supervised, generic commodity promotion programs.

The Association submitted a proposal on June 29, 2001, for this program to: (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer information regarding mangos; (2) strengthen the position of the mango industry in U.S. markets; and (3) maintain, develop, and expand domestic markets for mangos. The Association submitted changes to their proposal on November 1, 2001.

First handlers and importers of mangos must approve the program in a referendum in advance of its implementation. These persons would also serve on the proposed 20-member Board. The Board would be composed of eight U.S. importers, one U.S. first handler, two U.S. producers, seven foreign producers, and two non-voting wholesalers and/or retailers. If domestic production increases, additional U.S. first handlers would be added to the Board. The Board would administer the program under the Department's supervision. In addition, any person subject to the program may file with the Department a petition stating that the Order or any provision of the Order is not in accordance with the law and requesting a modification of the Order or an exemption from the Order. Administrative proceedings were discussed earlier in this proposed rule.

In this program, first handlers would be required to pay assessments, file reports, and submit assessments to the Board. Importers would be required to remit to the Board assessments not collected by the Customs and Border

Protection (Customs) and to file reports with the Board. First handlers and importers of less than 500,000 pounds of mangos per calendar year and exports of U.S. mangos would be exempt from assessment. While the proposed Order would impose certain recordkeeping requirements on first handlers and importers, information required under the proposed Order could be compiled from records currently maintained and would involve clerical or accounting skills. The forms require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act.

An estimated 89 respondents would provide information to the Board. They would be: 5 first handlers covered by the program, 3 exempt first handlers, 55 importers covered by the program, 3 exempt importers, 4 domestic producer nominees, 1 foreign producer organization, 14 foreign producer nominees, and 4 wholesaler and/or retailer nominees. The estimated total cost of providing information to the Board by all respondents would be \$790.01. The estimated cost for all first handlers covered by the program would be \$336.66 or \$67.33 per first handler covered by the program; \$7.50 for all exempt first handlers or \$2.50 per exempt first handler; \$393.34 for all importers covered by the program or \$7.15 per importer covered by the program; \$7.50 for all exempt importers or \$2.50 for each exempt importer; \$13.34 for all domestic producers or \$3.34 per domestic producer; \$1.67 for the foreign producer organization; \$23.33 for all foreign producer nominees or \$1.67 per foreign producer nominee; and \$6.67 for the wholesaler and/or retailer nominees or \$1.67 per wholesaler and/or retailer nominee. These totals have been estimated by multiplying total burden hours requested by \$10.00 per hour, a sum deemed to be reasonable should the respondents be compensated for their time.

The Department would oversee the operation of the program. Every five years, the Department would conduct a referendum to determine whether the mango industry supports continuation of the program. In addition, the Secretary may conduct a referendum at any time, at the request of 10 percent or more of the first handlers and importers required to pay assessments, or at the request of the Board.

There are approximately 5 first handlers and 55 importers of mangos that would be covered by the program. First handlers and importers of less than 500,000 pounds of mangos per calendar

year and exports of U.S. mangos would be exempt from assessments. The program would also affect domestic and foreign mango producers, an association of foreign mango producers, and wholesalers and retailers. These entities would serve on the Board or participate in the nomination process.

The Small Business Administration [13 CFR 121.201] defines small agricultural producers as those having annual receipts of \$750,000 or less annually and small agricultural service firms as those having annual receipts of \$5 million or less. First handlers, importers, wholesalers, and retailers would be considered agricultural service firms. Using these criteria, most producers, first handlers, and importers would be considered small businesses while wholesalers and retailers would not. The foreign producer association would consist of producers and would reflect the size of these entities.

U.S. production of mangos is located in California, Florida, Hawaii, and Puerto Rico according to the most recent U.S. Census of Agriculture (Census) which was in 1997. The Census does not include California production because California has so few producers that publishing production data would reveal confidential information. In 1997, production in Florida totaled 6.1 million pounds, Hawaii's production was 0.1 million pounds, and Puerto Rico's 1998 production was approximately 32.9 million pounds. For Florida and Hawaii combined, production fell from 16.6 million pounds in 1992 to 6.2 million pounds in 1997. Census data is published every five years. USDA does not report the value of U.S. production. Although domestic production accounts for only 8 percent of U.S. consumption of mangos, we anticipate that any increase in demand for mangos resulting from this program may lead to a corresponding increase in domestic production.

Seven countries account for 99 percent of the mangos imported into the United States. These countries and their share of the imports (from September 1, 2000, through June 30, 2001) are: Mexico (57 percent); Brazil (11 percent); Ecuador (10 percent); Peru (10 percent); Guatemala (7 percent); Haiti (3 percent); and Costa Rica (1 percent). For the period from September 1, 2000, through June 30, 2001, the United States imported a total of 170,445 tons of mangos, valued at \$106 million. In the previous full season (September 1, 1999, through August 31, 2000), 253,591 tons, valued at \$141 million, were imported into the United States. A preliminary estimate of per capita consumption of mangos by USDA's Economic Research

Service (ERS) was 1.8 pounds in 2000. Per capita consumption has been trending upwards for several decades. Per capita consumption was 0.21 pounds in 1979 and 0.51 pounds in 1989.

The proposed Order would authorize assessments on first handlers and on importers (collected by Customs) of mangos at a rate of ½ cent per pound. This would generate about \$2.5 million to administer the program: About 8 percent from domestic production and 92 percent from imports. First handlers and importers of less than 500,000 pounds of mangos per year will be exempt. U.S. produced mangos that are exported are also exempt.

The cost of the assessment and reporting requirements for first handlers and importers is likely to be offset by the benefit of increased demand for mangos in the United States. The Association's goal for the program is to increase consumption of mangos in the United States by 30 percent after one year. In addition, U.S. consumers would benefit from additional information regarding mangos. Another benefit to first handlers and importers of mangos would be that they could serve on the Board and direct the Board's programs.

Associations and related industry media would receive news releases and other information regarding the implementation and referendum process. Furthermore, all information would be available electronically.

The Board would develop guidelines for compliance with the program. The Board would recommend changes in the assessment rate, programs, plans, projects, budgets, and any rules and regulations that might be necessary for the administration of the program. The administrative expenses of the Board are limited by the Act to no more than 15 percent of its assessment income.

There are no federal or state programs that duplicate, overlap, or conflict with this proposed rule.

With regard to alternatives to this proposed rule, the Act itself provides for authority to tailor a program according to the individual needs of an industry. A provision is made for permissive terms in an order under section 516 of the Act, and other sections provide for alternatives. For example, section 514 of the Act provides for orders applicable to: (1) Producers; (2) first handlers and other persons in the marketing chain as appropriate; and (3) importers (if imports are subject to assessment).

Section 515 of the Act provides for the establishment of a board to administer a program established under the Act. This section states that the board will consist of members

considered by the Department, in consultation with the agricultural commodity industry involved, to be appropriate. The Act authorizes the following types of board members: Producers, first handlers, others in the marketing chain as appropriate, importers (if importers are subject to assessment), and members of the general public. The Association's proposal specified that the Board would consist of eight U.S. importers, one U.S. first handler, seven foreign producers, one public member, and two non-voting U.S. wholesalers and/or retailers of mangos. In reviewing the Association's proposal, the Department determined that an alternative composition of the Board would be more appropriate. Therefore, this proposed rule provides for the Board to consist of eight U.S. importers, one U.S. first handler, two U.S. producers, seven foreign producers, and two non-voting U.S. wholesalers and/or retailers.

Section 516 authorizes an order to provide for exemption of *de minimis* quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

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 3 years after assessments first begin under the order. An order also may provide for its approval in a referendum to be based upon: (1) Approval by a majority of those persons voting; (2) persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

This proposal includes provisions for domestic market expansion and improvement, reserve funds, and an initial referendum to be conducted prior to the Order going into effect. Approval would be based upon a majority of the first handlers and importers of mangos represented by those voting in the referendum.

We received comments on the initial regulatory flexibility analysis. One commenter questioned a statement in the analysis that indicated that an increase in demand for mangos resulting from this program may lead to a

corresponding increase in production. We continue to believe that this statement has merit. Another commenter noted that Puerto Rico is covered by the Order as part of the United States, but Puerto Rico's production was not included in the economic information on the mango industry. Therefore, information on Puerto Rico was added to the analysis. Finally, one commenter noted that the 500,000 pound exemption for first handlers and importers would eliminate the regulatory burden on small packers and importers and also would benefit the program administratively.

Paperwork Reduction Act

In accordance with OMB regulations [5 CFR part 1320], which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that may be imposed by this Order were submitted to OMB for review. Those requirements would become effective only upon implementation of the Order if the referendum passes and after OMB approval.

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

OMB Number for background form (number 1 below): 0505-0001.

Expiration date of approval: February 28, 2006.

OMB Number for other information collections: 0581-0209.

Expiration Date of Approval: February 28, 2006.

Type of Request: New information collection for research and promotion programs.

Abstract: The information collection requirements in the request are essential to carry out the intent of the Act.

In addition, there will be the additional burden on first handlers and importers voting in referenda. The referendum ballot, which represents the information collection requirement relating to referenda, is addressed in a proposed rule on referendum procedures which is published separately in this issue of the **Federal Register**.

Under the proposed program, first handlers would be required to pay assessments and file reports with and submit assessments to the Board. While the proposed Order would impose certain recordkeeping requirements on first handlers, information required under the proposed Order could be compiled from records currently maintained. Such records shall be retained for at least two years beyond the marketing year of their applicability.

An estimated 89 respondents would provide information to the Board. They would be: 5 first handlers covered by the program, 3 exempt first handlers, 55 importers covered by the program, 3 exempt importers, 4 domestic producer nominees, 1 foreign producer organization, 14 foreign producer nominees, and 4 wholesaler and/or retailer nominees. The estimated total cost of providing information to the Board by all respondents would be \$790.01. The estimated cost for all first handlers covered by the program would be \$336.66 or \$67.33 per first handler covered by the program; \$7.50 for all exempt first handlers or \$2.50 per exempt first handler; \$393.34 for all importers covered by the program or \$7.15 per importer covered by the program; \$7.50 for all exempt importers or \$2.50 for each exempt importer; \$13.34 for all domestic producers or \$3.34 per domestic producer; \$1.67 for the foreign producer organization; \$23.33 for all foreign producer nominees or \$1.67 per foreign producer nominee; and \$6.67 for the wholesaler and/or retailer nominees or \$1.67 per wholesaler and/or retailer nominee. These totals have been estimated by multiplying total burden hours requested by \$10.00 per hour, a sum deemed to be reasonable should the respondents be compensated for their time.

The proposed Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other mango programs administered by USDA.

The proposed forms would require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly during the production season would coincide with normal industry business practices. Reporting, other than monthly, would impose an additional and unnecessary recordkeeping burden on first handlers and importers. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing

the amount of work necessary to fill out the required reports. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual first handlers who are subject to the provisions of the Act. The requirement to keep records for two years is consistent with normal industry practices.

Therefore, there is no practical method for collecting the required information without the use of these forms.

Information collection requirements that are included in this proposal include:

(1) A Background Information Form (OMB Form 0505-0001).

Estimate of Burden: Public reporting for this collection of information is estimated to average 0.5 hours per response for each Board nominee.

Respondents: First handlers, importers, domestic producers, foreign producers, and wholesalers and/or retailers.

Estimated number of Respondents: 40 for initial nominations, 13 in subsequent years.

Estimated number of Responses per Respondent: 1 every 3 years. (0.3)

Estimated Total Annual Burden on Respondents: 20 hours for the initial nominations and 6.7 hours annually thereafter.

(2) Voting in the nomination process

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

Respondents: First handlers, importers, domestic producers, and a foreign producer organization.

Estimated number of Respondents: 65.

Estimated Number of Responses per Respondent: 1 every 3 years. (0.3)

Estimated Total Annual Burden on Respondents: 11 hours.

(3) An exemption application for first handlers and importers who will be exempt from assessments

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

Respondents: Exempt First handlers and importers.

Estimated Number of Respondents: 6.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1.5 hours.

(4) Monthly report by each first handler of mangos

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per each first handler reporting on mangos handled.

Respondents: First handlers.

Estimated number of Respondents: 5.

Estimated number of Responses per Respondent: 12.

Estimated Total Annual Burden on Respondents: 30 hours.

(5) A requirement to maintain records sufficient to verify reports submitted under the Order.

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average 0.5 hours per recordkeeper maintaining such records.

Respondents: First handlers and importers.

Estimated Number of Respondents: 60.

Estimated Total Annual Burden of Respondents: 30 hours.

Background

The Act authorizes the Department, under a generic authority, to establish agricultural commodity research and promotion orders. The Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the Act provides for orders applicable to: (1) Producers; (2) first handlers and others in the marketing chain as appropriate; and (3) importers (if importers are subject to assessment). Section 516 authorizes an order to provide for exemption of *de minimis* quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports. 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 3 years after assessments first begin under an order. An order also may provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board from among producers, first handlers

and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

This proposed Order includes provisions for domestic market expansion and improvement, reserve funds, and an initial referendum to be conducted prior to the program going into effect. Approval would be based upon a majority of the first handlers and importers voting in the referendum.

The Association has requested the establishment of a Mango Promotion, Research, and Information Order (Order) pursuant to the Act. The Act authorizes the establishment and operation of generic promotion programs which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. This proposal would provide for the development and financing of an effective and coordinated program of research, promotion, and information for mangos. The purpose of the program is to maintain, expand, and develop domestic markets for fresh mangos.

The program would not become effective until approved in a referendum conducted by USDA. Section 518 of the Act provides for USDA to: (1) Conduct an initial referendum, preceding a proposed Order's effective date, among persons who would pay assessments under the program; or (2) implement a proposed Order, pending the conduct of a referendum, among persons subject to assessments, within three years after assessments first begin.

In accordance with section 518(e) of the Act, the results of the referendum must be determined one of three ways: (1) By a majority of those persons voting; (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

The Association has recommended that the Department conduct a referendum in which approval of the proposed Order would be based on a majority of the eligible first handlers and importers voting in the referendum. The Association has also recommended that a referendum be conducted prior to the proposed Order going into effect.

In accordance with the Act, USDA would oversee the program's operations. In addition, the Act requires the Department to conduct subsequent referenda: (1) Not later than 7 years after assessments first begin under the

proposed Order; or (2) at the request of the Board established under the proposed Order; or (3) at the request of 10 percent or more of the number of persons eligible to vote. The Association has requested that a referendum be conducted every five years to determine if first handlers and importers want the program to continue.

In addition to these criteria, the Act provides that the Department may conduct a referendum at any time to determine whether the continuation, suspension, or termination of the proposed Order or a provision of the proposed Order is favored by persons eligible to vote.

A national research and promotion program for mangos would help the industry to increase consumption of mangos in the United States.

Worldwide, mangos rank first in terms of overall fruit consumption per capita. In the United States, mango consumption currently ranked sixteenth at 1.8 pounds per capita in 2000, according to ERS. In contrast, bananas ranked number one in the United States with a per capita consumption of 29.2 pounds. According to the Association, the low level of mango consumption is due, in part, to lack of product awareness. U.S. consumers are largely unfamiliar with the varieties of mangos, their nutritional benefits, and how to handle them.

Except for a pilot project conducted by the Association with voluntary contributions in 1999, mango promotion has been virtually nonexistent in the United States. There are no large industry members capable of promoting the commodity independently. The mango industry is fragmented. Distribution is conducted by a large number of small importers receiving product from multiple countries of origin. This makes coordinated research and promotion efforts extremely difficult in the absence of a national program.

Average annual U.S. mango prices have been declining since 1990. Increased supply accompanied by current demand levels will most likely yield lower wholesale prices in the future.

A national program would generate funds through mandatory assessments on domestic and imported mangos to be used to conduct research and market development strategies such as sales promotion, publicity, public relations, and advertising. Such a program would also provide centralized communications and facilitate better distribution management for industry members. Section 516(f) of the Act allows an order to authorize the levying

of assessments on imports of the commodity covered by the program or on products containing that commodity, at a rate comparable to the rate determined for the domestic agricultural commodity covered by the proposed Order. The Association has proposed to assess imports.

The assessment levied on domestically-produced and imported mangos would be used to pay for promotion, research, and consumer and industry information as well as administration, maintenance, and functioning of the Board. Expenses incurred by the Department in implementing and administering the proposed Order, including referenda costs, also would be paid from assessments. Sections 516(e)(1) and (2) of the Act state that an order may provide for credits of assessments for generic and branded activities. The Association has elected not to propose credits for generic or branded activities. Therefore, the terms "generic activities" and "branded activities" are not defined in the proposed Order, and credits for assessments would not be allowed.

The Association's initial proposal, dated June 29, 2001, provided for the assessments to be paid by producers and included no exemptions. Subsequently, the Association sent a letter to the Department to revise its proposal by changing the U.S. producer assessment to a U.S. first handler assessment and to exempt handlers and importers of less than 500,000 pounds of mangos per calendar year and exports of U.S. mangos. These modifications reflected a change in industry preferences for program coverage.

First handlers would be required to pay assessments to the Board and maintain records on all mangos handled, including mangos produced by a first handler.

Assessments on imported mangos would be collected by Customs at the time of entry into the United States and remitted to the Board.

All information obtained from persons subject to this proposed Order as a result of recordkeeping and reporting requirements would be kept confidential by all officers, employees, and agents of USDA and of the Board. However, this information may be disclosed only if the Department considers the information relevant, and the information is revealed in a judicial proceeding or administrative hearing brought at the direction or on the request of the Department or to which the Department or any officer of USDA is a party. Other exceptions for disclosure of confidential information would include the issuance of general

statements based on reports or on information relating to a number of persons subject to an order if the statements do not identify the information furnished by any person or the publication, by direction of the Department of the name of any person violating an order and a statement of the particular provisions of an order violated by the person.

The proposed Order provides for USDA to conduct an initial referendum preceding the proposed Order's effective date. Therefore, approval of the proposed Order will be determined by a majority of the eligible first handlers and importers voting in the referendum. The proposed Order also provides for subsequent referenda to be conducted (1) every 5 years after the program is in effect; (2) at the request of the Board established under the proposed Order; or (3) when requested by 10 percent or more of first handlers and importers of mangos covered by the proposed Order. In addition, the Department may conduct a referendum at any time.

The Act requires that an order provide for the establishment of a board to administer the program under USDA supervision. The Department modified the Association's proposal by adding two domestic producers and eliminating the public member position to help ensure that the program will benefit the domestic mango industry. Therefore, the proposed Order provides for a 20-member Board consisting of eight U.S. importers, one U.S. first handler, two U.S. producers, seven foreign producers, and two non-voting wholesalers and/or retailers. In addition, the Department included a separate definition for foreign producers.

To ensure fair and equitable representation of the mango industry on the Board, the Act requires membership on the Board to reflect the geographical distribution of the production of mangos and the quantity or value of imports. We anticipate that this program will assist domestic producers by increasing the demand for mangos. It is possible that domestic production will expand accordingly, in which case reapportioning of the Board would be required under the Order.

Upon implementation of the proposed Order and pursuant to the Act, at least once every five years, the Board will review the geographical distribution of production of mangos in the United States, the geographical distribution of the importation of mangos into the United States, the quantity of mangos produced in the United States, and the quantity of mangos imported into the United States. The review will be based on Board assessment records and

statistics from the Department. If warranted, the Board will recommend to the Department that membership on the Board be altered to reflect any changes in geographical distribution of domestic mango production and importation and the quantity of domestic production and imports. To help ensure equitable representation of importers and first handlers on the Board, additional first handlers may be added to the Board if the quantity of domestic production increases to a level where first handlers would be entitled to an additional member on the Board. Currently, each importer member represents about 42.6 million pounds of imported mangos, and the first handler member represents about 6.2 million pounds of domestic mango production.

Board members will serve terms of three years and be able to serve a maximum of two consecutive terms, except that the wholesaler/retailer positions shall carry a term of one year. Wholesaler and retailer members may serve three consecutive one-year terms. When the Board is first established, the U.S. first handler, two U.S. importers, one U.S. producer, and two foreign producers will be assigned initial terms of four years; three U.S. importers, one U.S. producer, and two foreign producers will be assigned initial terms of three years; and three U.S. importers, and three foreign producers will be assigned initial terms of two years. Thereafter, these positions will carry a three-year term. Members serving initial terms of two or four years will be eligible to serve a second term of three years. Each term of office will end on December 31, with new terms of office beginning on January 1.

Comments

The proposal was published in the **Federal Register** on August 26, 2002 [67 FR 54908], with a 60-day comment period ending on October 25, 2002. In addition, the USDA published a proposed rule on the referendum procedures in the **Federal Register** on August 26, 2002 [67 FR 54920], with the same 60-day comment period. Twenty-two comments from 21 persons or organizations were received by the deadline. Commenters included domestic packers, private farms, four foreign interests, and an American produce association. Nineteen of the 22 comments were in support of the proposed program while three were opposed. Two comments were received late, however, they did not raise any issues different from those timely received. Some of the favorable comments recommended changes to the

proposal. Recommendations that have been adopted are discussed herein.

The opposing comments also raised additional issues and concerns regarding the proposed program. These commenters questioned the constitutionality of the program; offered their own views of the impact of the proposed program on the domestic mango industry; discussed the state of the domestic mango industry and the comparative advantages and disadvantages for U.S. mango growers in terms of regulatory requirements, ability to export, costs of production and the like; and questioned the make-up of the proposed board. Questions were raised as to program focus with regard to imports. Two of the commenters referenced an agricultural economic study conducted in Florida, at the state level, to support their views. The commenters believe the proposed program would not benefit U.S. growers. Two opponents concluded that the proposed program should not be applied to domestic production (producers) and that domestic production should be exempt from assessments. We disagree. We are of the view that this program is constitutional and consistent with the provisions of the Act and that the benefits of this program would outweigh program costs. In addition, a favorable comment also supported one exemption for U.S. producers based upon the volume of U.S. production.

The commenters from Florida and Puerto Rico also expressed the belief that the proposed mango program represents, for domestic producers, taxation without representation. However, domestic producers are not responsible for paying assessments under the proposed program. Although it is possible that the assessment will be passed back to the producers, only importers and first handlers of fresh mangos would be responsible for paying assessments into the program. Handlers and importers of less than 500,000 pounds of mangos, per calendar year, are exempt from paying assessments. Further, 92 percent of the assessment funds would come from imported mangos. USDA recognized the interests of domestic producers by adding two U.S. producers to the Board. These two members represent two of the 18 voting positions on the Board which represents 11 percent of the seats on the Board.

In contrast, six other commenters stated that they supported USDA adding domestic producer seats to the Board. In addition, five of these commenters noted that they were also satisfied that the proposal requires that, at least once every five years, the Board would

review the geographic distribution and production of mangos to ensure equitable Board composition and that additional U.S. first handlers would be added if domestic production increases.

One commenter who supported the program requested that the definition of first handler in § 1206.6 be revised for clarity. The commenter proposed a rewrite of the definition, including in the text the time frame of a calendar year for the handling of 500,000 pounds or more of mangos. Specifying the time frame has merit. However, we believe that with one additional change, the definition of first handler is clear and consistent with the overall regulatory provisions. A separate reference to retailer in the definition of first handler is not needed. All persons, including retailers who meet the terms of the definition of first handler as provided in § 1206.6 would be covered under the provisions of the Mango Order. Accordingly, the reference is deleted. Further, as a result of the time frame change to § 1206.6, an appropriate conforming change has been made to the definition of importer in § 1206.9.

Another commenter expressed support for the program and recommended that the definition of foreign producer in § 1206.8 more closely reflect the definition of domestic producers in § 1206.16 to ensure that foreign producer members on the Board are actually producers of mangos and not merely exporters of mangos to the United States. This comment has merit and § 1206.8 is revised accordingly.

Three commenters in support of the program recommend that the term of office for the wholesaler/retailer position be reduced from three years to one year. This would expose the Board to a wider range of firms with marketing and consumer sales experience and allow a broader base of wholesalers and retailers. This comment has merit. Accordingly, USDA has added a term limitation for these positions of three, one-year terms in § 1206.32.

The same three commenters also recommended a three-week voting period for the referendum instead of four. Due to the relatively small number of eligible voters in a referendum, this comment has been adopted and requires no change in the text of the Order.

Regarding the foreign producer positions on the Board, one commenter stated support for the definition of foreign producer in the Order because the definition excludes persons who are solely exporters or brokers. The commenter also stated that there is no well recognized organization that represents the interests of producers in exporting countries. This commenter

also expressed the view that a single organization representing each exporting country would be more feasible and practical than one organization representing the interests of the producers of all exporting countries. This comment has merit and we have eliminated the requirement that there be one foreign producer organization from § 1206.31(g) of the Order. This would provide flexibility in the Order concerning foreign producer organizations.

This commenter also recommended that the Order be changed to allow the government of an exporting country to nominate foreign producer members if there is no national producer organization in that country. We disagree with this comment. As stated above, we have removed the limitation on the number of foreign producer organizations. In countries where there is currently no such organization, producers may create one in order to submit nominees for the foreign producer positions on the Board. This would be consistent with other national research and promotion programs supervised by USDA. Another commenter recommended that each of the seven major exporting countries be represented on the Board. Section 1206.31(g) already provides that foreign producer member nominees be representative of the major countries exporting mangos to the United States.

Two of the commenters who supported the Order stated that they would like a means of expressing their views to the Board if they do not have a member on the Board. All Board meetings will be open to the public, and any person will have the opportunity to contact the Board's staff or members at any time without making any changes to the Order. Accordingly, no change to the Order is made as a result of this comment.

One commenter who supported the Order requested that USDA develop grade standards for mangos. The Board will not have the authority to develop grade standards, and this issue is best addressed to the USDA's fruit and vegetable grading service. Therefore, this comment is denied.

Another commenter who favored the program requested that the Board's promotional campaigns disseminate variety-specific information on mangos. The Board, once it is appointed and has a staff, will make decisions regarding the types of promotional campaigns it will conduct. This may include dissemination of information on all different varieties of mangos. The Act requires mangos of all origins be promoted generically and § 1206.50(d)

of the Order requires that all varieties of mangos be treated equally.

Two of the commenters who are opposed to the program expressed the belief that USDA should have notified them when USDA received the proposal from the Association. USDA does not announce to the public when a proposal is received because, at that point, it is not known whether the proposal will be accepted by USDA. Notice to all potentially affected parties is made by publishing in the **Federal Register** the initial proposed rule requesting comments. In addition to that proposed rule, USDA issued a news release. Further, fruit and vegetable industry trade paper and magazine coverage of the proposal from the development stages, prior to the submission to USDA, and to date has been extensive. Therefore, the industry received substantial advance notice.

Finally, miscellaneous non-substantive changes are made by the Department for clarity in the definition of Market and Marketing in § 1206.12 and § 1206.78 to update the OMB control number.

The proposed Order is summarized as follows:

Sections 1206.1 through 1206.24 of the proposed Order define certain terms, such as mango, first handler and importer, which are used in the proposed Order. The definitions of eligible first handler and eligible importer were modified to improve clarity and be consistent with current Agency rules.

Sections 1206.30 through 1206.37 include provisions relating to the Board. These provisions cover establishment and membership, nominations and appointments, term of office, vacancies, procedures, compensation and reimbursement, powers, duties and prohibited activities of the Board, which is the governing body authorized to administer the proposed Order through the implementation of programs, plans, projects, budgets, and contracts to promote and disseminate information about mangos, subject to oversight of the Department.

Sections 1206.40 through 1206.43 cover budget review and approval; financial statements; authorize the collection of assessments; specify how assessments would be used; specify who pays the assessment and how; exemptions; and authorize the imposition of a late-payment charge on past-due assessments.

The Association recommends a proposed assessment rate of ½ cent per pound for domestic mangos and imported mangos. The assessment rate will be reviewed and may be modified

with the approval of the Department, after the first referendum is conducted as stated in § 1206.71(b). Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures as set forth in 7 CFR 3.1 through 3.36 for all research and promotion programs administered by USDA [60 FR 12533, March 7, 1995].

Sections 1206.50 through 1206.52 address programs, plans, and projects; require the Board to periodically conduct an independent review of its overall program; and address patents, copyrights, trademarks, information, publications, and product formulations developed through the use of assessment funds.

Sections 1206.60 through 1206.62 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of information from such books, records, or reports.

Sections 1206.70 through 1206.78 describe the rights of the Secretary of Agriculture (Secretary); address referenda; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after suspension or termination; and address personal liability, separability, amendments, and the OMB control number.

In addition to adding a definition of foreign producer and changing the composition of the Board, the Department made minor changes to the Association's proposal which do not materially affect the program.

The Department has determined that this proposed Order is consistent with and will effectuate the purposes of the Act.

For the proposed Order to become effective, it must be approved by a majority of the eligible importers and first handlers voting in the referendum.

Referendum Order

It is hereby directed that a referendum be conducted among eligible mango importers and first handlers to determine whether they favor implementation of the Mango Promotion, Research, and Information Order.

The referendum shall be conducted from November 10, 2003 through November 28, 2003. Ballots will be mailed to all known mango importers and first handlers on or before October 27, 2003. First handlers and importers who handled or imported 500,000 pounds or more of fresh mangos, respectively, from January 1 through December 31, 2002, are eligible to vote. Eligible voters who do not receive a

ballot by mail should call the following toll-free telephone number to receive a ballot: 1 (888) 720-9917. All ballots will be subject to verification. Ballots must be received by the referendum agents no later than the close of business, Eastern daylight-standard time, November 28, 2003, to be counted.

Kathie M. Birdsell and Margaret B. Irby, Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, Room 2535-S, Stop 0244, Washington, DC 20250-0244, are designated as the referendum agents of the Department to conduct the referendum. The Procedure for the Conduct of Referenda in connection with the Mango Promotion, Research, and Information Order, 7 CFR 1206.100-1206.108, which is being published separately in this issue of the **Federal Register**, shall be used to conduct the referendum.

List of Subjects in 7 CFR Part 1206

Administrative practice and procedure, Advertising, Consumer information, Mangos, 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 as follows:

1. The authority citation for part 1206 continues to read as follows:

Authority: 7 U.S.C. 7411-7425.

2. Subpart A is added Part 1206 to read as follows:

PART 1206—MANGO PROMOTION, RESEARCH, AND INFORMATION

Subpart A—Mango Promotion, Research, and Information Order Definitions

Sec.

- 1206.1 Act.
- 1206.2 Board.
- 1206.3 Conflict of interest.
- 1206.4 Customs.
- 1206.5 Department.
- 1206.6 First handler.
- 1206.7 Fiscal period.
- 1206.8 Foreign producer.
- 1206.9 Importer.
- 1206.10 Information.
- 1206.11 Mangos.
- 1206.12 Market or marketing.
- 1206.13 Order.
- 1206.14 Part and subpart.
- 1206.15 Person.
- 1206.16 Producer.
- 1206.17 Promotion.
- 1206.18 Research.
- 1206.19 Retailer.
- 1206.20 Secretary.
- 1206.21 Suspend.
- 1206.22 Terminate.
- 1206.23 United States.
- 1206.24 Wholesaler.

National Mango Promotion Board

- 1206.30 Establishment and membership.
- 1206.31 Nominations and appointments.
- 1206.32 Term of office.
- 1206.33 Vacancies.
- 1206.34 Procedure.
- 1206.35 Compensation and reimbursement.
- 1206.36 Powers and duties.
- 1206.37 Prohibited activities.

Expenses and Assessments

- 1206.40 Budget and expenses.
- 1206.41 Financial statements.
- 1206.42 Assessments.
- 1206.43 Exemptions.

Promotion, Research, and Information

- 1206.50 Programs, plans, and projects.
- 1206.51 Independent evaluation.
- 1206.52 Patents, copyrights, trademarks, information, publications, and product formulations.

Reports, Books, and Records

- 1206.60 Reports.
- 1206.61 Books and records.
- 1206.62 Confidential treatment.

Miscellaneous

- 1206.70 Right of the Secretary.
- 1206.71 Referenda.
- 1206.72 Suspension and termination.
- 1206.73 Proceedings after termination.
- 1206.74 Effect of termination or amendment.
- 1206.75 Personal liability.
- 1206.76 Separability.
- 1206.77 Amendments.
- 1206.78 OMB control number.

Authority: 7 U.S.C. 7411-7425.

Subpart A—Mango Promotion, Research, and Information Order Definitions

§ 1206.1 Act.

Act means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411-7425; Public Law 104-127; 110 Stat. 1029), or any amendments thereto.

§ 1206.2 Board.

Board or National Mango Promotion Board means the administrative body established pursuant to § 1206.30, or such other name as recommended by the Board and approved by the Department.

§ 1206.3 Conflict of interest.

Conflict of interest means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

§ 1206.4 Customs.

Customs means the Customs and Border Protection of the U.S. Department of Homeland Security.

§ 1206.5 Department.

Department means the U.S. Department of Agriculture or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1206.6 First handler.

First handler means any person, (excluding a common or contract carrier), receiving 500,000 or more pounds of mangos from producers in a calendar year and who as owner, agent, or otherwise ships or causes mangos to be shipped as specified in this Order. This definition includes those engaged in the business of buying, selling and/or offering for sale; receiving; packing; grading; marketing; or distributing mangos in commercial quantities. The term first handler includes a producer who handles or markets mangos of the producer's own production.

§ 1206.7 Fiscal period.

Fiscal period means a calendar year from January 1 through December 31, or such other period as recommended by the Board and approved by the Department.

§ 1206.8 Foreign producer.

Foreign producer means any person who is engaged in the production and sale of mangos outside of the United States and who owns, or shares the ownership and risk of loss of the crop for sale in the U.S. market or who is engaged, outside of the United States, in the business of producing, or causing to be produced, mangos beyond the person's own family use and having value at first point of sale.

§ 1206.9 Importer.

Importer means any person importing 500,000 or more pounds of mangos into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or handles mangos outside of the United States for sale in the United States, and who is listed as the importer of record for such mangos.

§ 1206.10 Information.

Information means information and programs that are designed to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of mangos in the United States. These include:

(a) Consumer information, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use,

nutritional attributes, and care of mangos; and

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the mango industry, and activities to enhance the image of the mango industry.

§ 1206.11 Mangos.

Mangos means all fresh fruit of *Mangifera indica* L. of the family *Anacardiaceae*.

§ 1206.12 Market or marketing.

Marketing means the sale or other disposition of mangos in the U.S. domestic market. To market means to sell or otherwise dispose of mangos in interstate or intrastate channels of commerce.

§ 1206.13 Order.

Order means an order issued by the Department under section 514 of the Act that provides for a program of generic promotion, research, and information regarding agricultural commodities authorized under the Act.

§ 1206.14 Part and subpart.

Part means the Mango Promotion, Research, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a subpart of such part.

§ 1206.15 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1206.16 Producer.

Producer means any person who is engaged in the production and sale of mangos in the United States and who owns, or shares the ownership and risk of loss of, the crop or a person who is engaged in the business of producing, or causing to be produced, mangos beyond the person's own family use and having value at first point of sale.

§ 1206.17 Promotion.

Promotion means any action taken to present a favorable image of mangos to the general public and the food industry for the purpose of improving the competitive position of mangos and stimulating the sale of mangos in the United States. This includes paid advertising and public relations.

§ 1206.18 Research.

Research means any type of test, study, or analysis designed to advance the image, desirability, use,

marketability, production, product development, or quality of mangos, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value and benefits, and marketing of mangos.

§ 1206.19 Retailer.

Retailer means a person engaged in the business of selling mangos only to consumers.

§ 1206.20 Secretary.

Secretary means the Secretary of Agriculture of the United States.

§ 1206.21 Suspend.

Suspend means to issue a rule under section 553 of title 5, U.S.C., to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

§ 1206.22 Terminate.

Terminate means to issue a rule under section 553 of title 5, U.S.C., to cancel permanently the operation of an order or part thereof beginning on a certain date specified in the rule.

§ 1206.23 United States.

United States or U.S. means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1206.24 Wholesaler.

Wholesaler means any person engaged in the purchase, assembly, transportation, storage, and distribution of mangos for sale to other wholesalers, retailers, and foodservice firms.

National Mango Promotion Board**§ 1206.30 Establishment and membership.**

(a) *Establishment of the National Mango Promotion Board.* There is hereby established a National Mango Promotion Board composed of eight importers, one first handler, two domestic producers, seven foreign producers, and two non-voting wholesalers and/or retailers of mangos in the United States. The chairperson shall reside in the United States and the Board office shall also be located in the United States.

(b) *Importer districts.* The importer seats shall be allocated based on the volume of mangos imported into the Customs Districts identified by their name and Code Number as defined in the Harmonized Tariff Schedule of the United States. The initial allocation will be two seats for District I, three seats for District II, two seats for District III, and one seat for District IV.

(1) *District I* includes the Customs Districts of Portland, ME (01), St. Albans, VT (02), Boston, MA (04), Providence, RI (05), Ogdensburg, NY (07), Buffalo, NY (09), New York City, NY (10), Philadelphia, PA (11), Baltimore, MD (13), Norfolk, VA (14), Charlotte, NC (15), Charleston, SC (16), Savannah, GA (17), Tampa, FL (18), San Juan, PR (49), Virgin Islands of the United States (51), Miami, FL (52) and Washington, DC (54).

(2) *District II* includes the Customs Districts of Mobile, AL (19), New Orleans, LA (20), Port Arthur, TX (21), Laredo, TX (23), Minneapolis, MN (35), Duluth, MN (36), Milwaukee, WI (37), Detroit, MI (38), Chicago, IL (39), Cleveland, OH (41), St. Louis, MO (45), Houston, TX (53), and Dallas-Fort Worth, TX (55).

(3) *District III* includes the Customs Districts of El Paso, TX (24), Nogales, AZ (26), Great Falls, MT (33), and Pembina, ND (34).

(4) *District IV* includes the Customs Districts of San Diego, CA (25), Los Angeles, CA (27), San Francisco, CA (28), Columbia-Snake, OR (29), Seattle, WA (30), Anchorage, AK (31), and Honolulu, HI (32).

(c) Adjustment of membership. At least once every five years, the Board will review the geographical distribution of production of mangos in the United States, the geographical distribution of the importation of mangos into the United States, the quantity of mangos produced in the United States, and the quantity of mangos imported into the United States. The review will be based on Board assessment records and statistics from the Department. If warranted, the Board will recommend to the Department that membership on the Board be altered to reflect any changes in geographical distribution of domestic mango production and importation and the quantity of domestic production and imports. To ensure equitable representation, additional first handlers may be added to the Board to reflect increases in domestic production.

§ 1206.31 Nominations and appointments.

(a) Voting for first handler, importer, and domestic producer members will be made by mail ballot.

(b) There shall be two nominees for each position on the Board.

(c) Nominations for the initial Board will be handled by the Department. Subsequent nominations will be handled by the Board's staff.

(d) Nominees to fill the first handler member position on the Board shall be solicited from all known first handlers. The nominees shall be placed on a

ballot which will be sent to all first handlers for a vote. The nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the first handlers' first and second choice nominees.

(e) Nominees to fill the importer positions on the Board shall be solicited from all known importers of mangos. The members from each district shall select the nominees for two positions on the Board. Two nominees shall be submitted for each position. The nominees shall be placed on a ballot which will be sent to importers in the districts for a vote. For each position, the nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the importers' first and second choice nominees.

(f) Nominees to fill the domestic producer member positions on the Board shall be solicited from all known domestic producers. The nominees shall be placed on a ballot which will be sent to all domestic producers for a vote. The nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the producers' first and second choice nominees.

(g) Nominees to fill the foreign producer member positions on the Board shall be solicited from organizations of foreign mango producers. Each organization shall submit two nominees for each position, and the nominees shall be representative of the major countries exporting mangos to the United States.

(h) The Board will nominate the wholesaler and/or retailer members.

(i) From the nominations, the Department shall select the members of the Board.

§ 1206.32 Term of office.

The term of office for first handler, importer, domestic producer, and foreign producer members of the Board will be three years, and these members may serve a maximum of two consecutive three-year terms. The term of office for wholesaler/retailer members shall be one year, and these members may serve a maximum of three consecutive one-year terms. When the Board is first established, the first handler, two importers, one domestic producer, and two foreign producers will be assigned initial terms of four years; three importers, one domestic producer, and two foreign producers will be assigned initial terms of three

years; and three importers and three foreign producers will be assigned initial terms of two years. Thereafter, each of these positions will carry a full three-year term. Members serving initial terms of two or four years will be eligible to serve a second term of three years. Each term of office will end on December 31, with new terms of office beginning on January 1.

§ 1206.33 Vacancies.

(a) In the event that any member of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such position shall automatically become vacant.

(b) If a member of the Board consistently refuses to perform the duties of a Board member, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Department that the member be removed from office. If the Department finds the recommendation of the Board shows adequate cause, the Department shall remove such member from office.

(c) Should any member position become vacant, successors for the unexpired term of the member shall be appointed in the manner specified in § 1206.31, except that nomination and replacement shall not be required if the unexpired term is less than six months.

§ 1206.34 Procedure.

(a) At a Board meeting, it will be considered a quorum when at least ten voting members are present.

(b) At the start of each fiscal period, the Board will select a chairperson and vice chairperson who will conduct meetings throughout that period.

(c) All Board members will be notified at least 30 days in advance of all Board and committee meetings unless an emergency meeting is declared.

(d) Each voting member of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by one vote more than 50 percent of the total votes represented by the Board members present.

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Committees may consist of individuals other than Board members, and such individuals may vote in committee meetings. Committee members shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

(f) In lieu of voting at a properly convened meeting and, when in the

opinion of the chairperson of the Board such action is considered necessary, the Board may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or any other means of communication. In that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All telephone votes shall be confirmed promptly in writing. All votes shall be recorded in Board minutes.

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting member and shall reside in the U.S.

(i) The organization of the Board and the procedures for conducting meetings of the Board shall be in accordance with its bylaws, which shall be established by the Board and approved by the Department.

§ 1206.35 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board, incurred by them in the performance of their duties as Board members.

§ 1206.36 Powers and duties.

The Board shall have the following powers and duties:

(a) To administer the Order in accordance with its terms and conditions and to collect assessments;

(b) To develop and recommend to the Department for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines appropriate;

(d) To employ persons, other than the members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons;

(e) To develop programs, plans, and projects, and enter into contracts or agreements, which must be approved by the Department before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall

provide that: any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and, make such other reports available as the Board or the Department considers relevant. Furthermore, any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other reports as the Department or the Board may require;

(3) The Department may audit the records of the contracting or agreeing party periodically; and

(4) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor.

(f) To prepare and submit for approval of the Department calendar year budgets in accordance with § 1206.40;

(g) To maintain such records and books and prepare and submit such reports and records from time to time to the Department as the Department may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(h) To cause its books to be audited by a competent auditor at the end of each calendar year and at such other times as the Department may request, and to submit a report of the audit directly to the Department;

(i) To give the Department the same notice of Board and committee meetings as is given to members in order that the Department's representative(s) may attend such meetings.

(j) To act as intermediary between the Department and any first handler or importer;

(k) To furnish to the Department any information or records that the Department may request;

(l) To receive, investigate, and report to the Department complaints of violations of the Order;

(m) To recommend to the Department such amendments to the Order as the Board considers appropriate; and

(n) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the mango industry's position in the U.S. domestic market; maintain and expand existing markets and uses for mangos; and to carry out programs, plans, and projects designed to provide maximum benefits to the mango industry.

§ 1206.37 Prohibited activities.

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(a) Any action that would be a conflict of interest; and

(b) Using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments, other than recommending to the Department amendments to the Order.

Expenses and Assessments

§ 1206.40 Budget and expenses.

(a) At least 60 days prior to the beginning of each calendar year, and as may be necessary thereafter, the Board shall prepare and submit to the Department a budget for the calendar year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project;

(2) A summary of anticipated revenue, with comparative data or at least one preceding year (except for the initial budget);

(3) A summary of proposed expenditures for each program, plan, or project; and

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this subpart.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Department, including shifting funds from one program, plan, or project to another. Shifts of funds which do not cause an increase in the Board's approved budget and which are

consistent with governing bylaws need not have prior approval by the Department.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Department finds reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Department, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Voluntary contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

(g) The Board shall reimburse the Department for all expenses incurred by the Department in the implementation, administration, and supervision of the Order, including all referendum costs in connection with the Order.

(h) The Board may not expend for administration, maintenance, and functioning of the Board in any calendar year an amount that exceeds 15 percent of the assessments and other income received by the Board for that calendar year. Reimbursements to the Department required under paragraph (g) of this section, are excluded from this limitation on spending.

(i) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established: Provided that the funds in the reserve do not exceed one fiscal period's budget. Subject to approval by the Department, such reserve funds may be used to defray any expenses authorized under this part.

§ 1206.41 Financial statements.

(a) As requested by the Department, the Board shall prepare and submit financial statements to the Department on a periodic basis. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the

report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Department within 30 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Department an annual financial statement within 90 days after the end of the calendar year to which it applies.

§ 1206.42 Assessments.

(a) The funds to cover the Board's expenses shall be paid from assessments on first handlers and importers, donations from any person not subject to assessments under this Order, and other funds available to the Board and subject to the limitations contained therein.

(b) The assessment rate shall be 1/2 cent per pound on all mangos. The assessment rate will be reviewed and may be modified by the Board with the approval of the Department, after the first referendum is conducted as stated in § 1206.71(b).

(c) *Domestic mangos.* First handlers of domestic mangos are required to pay assessments on all mangos handled for the U.S. market. This includes mangos of the first handler's own production.

(d) *Imported mangos.* Each importer of mangos shall pay an assessment to the Board through Customs on mangos imported for marketing in the United States.

(1) The assessment rate for imported mangos shall be the same or equivalent to the rate for mangos produced in the United States.

(2) The import assessment shall be uniformly applied to imported mangos that are identified by the numbers 0804.50.4040 and 0804.50.6040 in the Harmonized Tariff Schedule of the United States.

(3) The assessments due on imported mangos shall be paid when they enter or are withdrawn for consumption in the United States.

(e) Each person responsible for remitting assessments under paragraph (c) of this section shall remit the amounts due to the Board's office on a monthly basis no later than the fifteenth day of the month following the month in which the mangos were marketed, in such manner as prescribed by the Board.

(f) A late payment charge shall be imposed on any person failing to remit to the Board the total amount for which the person is liable by the payment due date established under this section. The amount of the late payment charge shall be prescribed by the Department.

(g) An additional charge shall be imposed on any person subject to a late payment charge in the form of interest

on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed by the Department.

(h) Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures.

(i) The Board may authorize other organizations to collect assessments on its behalf with the approval of the Department.

§ 1206.43 Exemptions.

(a) Any first handler or importer of less than 500,000 pounds of mangos per calendar year may claim an exemption from the assessments required under § 1206.42. Mangos produced domestically and exported from the United States may annually claim an exemption from the assessments required under § 1206.42.

(b) A first handler or importer desiring an exemption shall apply to the Board, on a form provided by the Board, for a certificate of exemption. A first handler shall certify that the first handler will handle less than 500,000 pounds of domestic mangos for the fiscal period for which the exemption is claimed. An importer shall certify that the importer will import less than 500,000 pounds of mangos during the fiscal period for which the exemption is claimed.

(c) Upon receipt of an application, the Board shall determine whether an exemption may be granted. The Board then will issue, if deemed appropriate, a certificate of exemption to each person who is eligible to receive one. It is the responsibility of these persons to retain a copy of the certificate of exemption.

(d) Importers who receive a certificate of exemption shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessments paid. No interest will be paid on the assessments collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the mangos were actually imported.

(e) Any person who desires an exemption from assessments for a subsequent calendar year shall reapply to the Board, on a form provided by the Board, for a certificate of exemption.

(f) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt mangos and, in the case of importers, proof of payment of assessments.

Promotion, Research, and Information**§ 1206.50 Programs, plans, and projects.**

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Department for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to mangos; and

(2) The establishment and conduct of research with respect to: the use, nutritional value and benefits, sale, distribution, and marketing of mangos in the United States; the creation of new products thereof, to the end that the marketing and use of mangos in the United States may be encouraged, expanded, improved, or made more acceptable; and to advance the image, desirability, or quality of mangos in the United States.

(b) No program, plan, or project shall be implemented prior to its approval by the Department. Once a program, plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

(d) No program, plan, or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Mangos of all origins shall be treated equally.

§ 1206.51 Independent evaluation.

The Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other programs conducted by the Board pursuant to the Act. The Board shall submit to the Department, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

§ 1206.52 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product

formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government, as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Department. Upon termination of this subpart, § 1206.73 shall apply to determine disposition of all such property.

Reports, Books, and Records**§ 1206.60 Reports.**

(a) Each first handler will be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Department, which may include but not be limited to the following:

(1) Number of pounds of domestic mangos handled;

(2) Number of pounds of domestic mangos on which an assessment was paid;

(3) Name and address of the producers from whom the first handler has received mangos;

(4) Date that assessment payments were made on each pound of domestic mangos handled;

(5) Number of pounds of domestic mangos exported;

(6) The first handler's tax identification number;

(b) Each importer may be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Department, which may include but not be limited to the following:

(1) Number of pounds of mangos imported;

(2) Number of pounds of mangos on which an assessment was paid;

(3) Name, address, and tax identification number of the importer; and

(4) Date that assessment payments were made on each pound imported.

§ 1206.61 Books and records.

Each first handler and importer shall maintain and make available for inspection by the Department such books and records as are necessary to carry out the provisions of this part, any regulations issued under this part, including such records as are necessary to verify any reports required. Such records shall be retained for at least two

years beyond the fiscal period of their applicability.

§ 1206.62 Confidential treatment.

All information obtained from books, records, or reports under the Act and this part shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, first handlers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this part, together with a statement of the particular provisions of this part violated by such person.

Miscellaneous**§ 1206.70 Right of the Secretary.**

All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1206.71 Referenda.

(a) *Initial Referendum.* The Order shall not become effective unless:

(1) The Department determines that the Order is consistent with and will effectuate the purposes of the Act; and

(2) The Order is approved by a majority of the first handlers and importers voting, who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos.

(b) *Subsequent referenda.* Every five years, the Department shall hold a referendum to determine whether first handlers and importers of mangos favor the continuation of the Order. The

Order shall continue if it is favored by a majority of the first handlers and importers voting who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos. The Department will also conduct a referendum if 10 percent or more of all non-exempt, first handlers and importers of mangos request the Department to hold a referendum. In addition, the Department may hold a referendum at any time.

§ 1206.72 Suspension and termination.

(a) The Department shall suspend or terminate this part or subpart or a provision thereof if the Department finds that the subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if the Department determines that this subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

(b) The Department shall suspend or terminate this subpart at the end of the marketing year whenever the Department determines that its suspension or termination is approved or favored by a majority of the first handlers and importers voting who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos.

(c) If, as a result of a referendum the Department determines that this subpart is not approved, the Department shall:

(1) Not later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under this subpart; and

(2) As soon as practical, suspend or terminate, as the case may be, activities under this subpart in an orderly manner.

§ 1206.73 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the

Department to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Department, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Department;

(2) Carry out the obligations of the Board under any contracts or agreements entered into pursuant to the Order;

(3) From time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and the trustees, to such person or persons as the Department may direct; and

(4) Upon request of the Department, execute such assignments or other instruments necessary and appropriate to vest in such persons title and right to all funds, property and claims vested in the Board or the trustees pursuant to the Order.

(c) Any person to whom funds, property or claims have been transferred or delivered pursuant to the Order shall be subject to the same obligations imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Department to be disposed of, to the extent practical, to one or more mango industry organizations in the interest of continuing mango promotion, research, and information programs.

§ 1206.74 Effect of termination or amendment.

Unless otherwise expressly provided by the Department, the termination or amendment of this part or any subpart thereof, shall not:

(a) Affect or waive any right, duty, obligation or liability which shall have

arisen or which may thereafter arise in connection with any provision of this part; or

(b) Release or extinguish any violation of this part; or

(c) Affect or impair any rights or remedies of the United States, or of the Department, or of any other persons with respect to any such violation.

§ 1206.75 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

§ 1206.76 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1206.77 Amendments.

Amendments to this subpart may be proposed from time to time by the Board or by any interested person affected by the provisions of the Act, including the Department.

§ 1206.78 OMB control number.

The control numbers assigned to the information collection requirements of this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, are OMB control number 0505-0001 and OMB control number 0581-0209.

Dated: October 2, 2003.

A.J. Yates,

Administrator.

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