

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1207

[Doc. No. AMS-FV-09-0024; FV-09-706]

#### Potato Research and Promotion Plan; Assessment Increase

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the Potato Research and Promotion Plan (Plan) to increase the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight. The increase is provided for under the Plan which is authorized by the Potato Research and Promotion Act (Act). The National Potato Promotion Board, which administers the Plan, recommended this action to sustain and expand their promotional, research, advertising and communications programs.

**DATES:** Comments must be received by September 25, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: <http://www.regulations.gov> or to the Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, Room 0632-S, Stop 0244, 1400 Independence Avenue, SW., Washington, DC 20250-0244; fax: (202) 205-2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or can be viewed at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Deborah Simmons, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 0632, Stop 0244, Washington, DC 20250-0244; telephone:

(202) 720-9915; or fax: (202) 205-2800; or email:

[Deborah.simmons@ams.usda.gov](mailto:Deborah.simmons@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Potato Research and Promotion Plan [7 CFR Part 1207] which became effective March 9, 1972. The Plan is authorized under the Potato Research and Promotion Act [7 U.S.C. 2611-2627].

#### Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

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

#### Initial Regulatory Flexibility Act and Paperwork Reduction Act

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

According to the National Potato Promotion Board (Board), there are

approximately 1,600 potato growing operations, 1,143 handlers and 252 importers who are subject to the provisions of the Plan.

The Small Business Administration defines, in 13 CFR Part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than \$7 million. Under these definitions, the majority of the handlers, producers and importers that would be affected by this rule would be considered small entities. Producers of less than 5 acres of potatoes are exempt from this program. Potato and potato products used for nonhuman food purposes, other than seed, are exempt from assessment but are subject to the disposition of exempted potatoes provisions of section 1207.515 of the regulations.

Under the current Plan, potato handlers and importers are required to pay a mandatory assessment of 2.5 cents per hundredweight. Handlers may collect assessments from the producer or deduct assessments from proceeds paid to the producer on whose potatoes the assessments are made. No more than one assessment shall be made on any potatoes or potato products. Funds collected by the board shall be used for research, development, advertising or promotion of potatoes and potato products and such other expenses for the administration, maintenance and functioning of the Board as may be authorized by the Secretary. The assessment at the current 2.5 cents per hundredweight generates about \$10 million in annual revenues. The 2.5 cents per hundredweight assessment rate was established in August 2006 when the Plan was amended. The Plan is administered by the Board under U.S. Department of Agriculture supervision.

According to the Board, additional revenue is required in order to sustain and expand the promotional, research, advertising and communications programs. The Board approved the proposed assessment rate increase at its March 13, 2009, meeting. This proposed increase is consistent with section 1207.342(a) of the Plan which states that funds to cover the Board's expenses shall be acquired by the levying of assessments upon handlers and importers as designated in regulations recommended by the Board and issued

by the Secretary. Such assessments shall be levied at the rate fixed by the Secretary which shall not exceed one-half of one per centum of the immediate past ten calendar years United States average price received for potatoes by growers as reported by the Department of Agriculture. Currently, section 1207.510 of the Plan states that an assessment of 2.5 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States and an assessment rate of 2.5 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes. An assessment rate of 2.5 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. Further, not more than one such assessment may be collected on any potatoes or potato products.

In March 2007, the Board conducted its most recent "Evaluation of Grower-Funded Value-Added Activities by the United States Potato Board." This study was completed by Dr. Timothy Richards and Dr. Paul Patterson of the Morrison School of Management and Agribusiness at Arizona State University. The study presented an econometric evaluation of the demand impact of board marketing, public relations and research activities and a simulation model that estimates the return on grower investment in board programs. The primary objective of this research was to estimate the long-run return on grower's investment in each board activity, in both domestic and export marketing.

The U.S. potato market was volatile over the five year period (CY 2002–CY 2006). According to USDA data, the per capita consumption of potatoes, of all forms in the U.S., changed very little over this period. Grower prices, on the other hand, were strong in 2001, but fell through the 2004 marketing season. High prices may have been due to the activities of a newly formed potato industry cooperative comprising some 65% of the U.S. potato supply. In 2001 the board adopted a new business model for increasing potato consumption, eschewing traditional generic advertising programs for retail partnerships, public relations, marketing research, product development and active export promotion programming. The objective of this study was to determine the return on investment to grower funds invested in board marketing activities. The relevant markets for U.S. potatoes are defined as the domestic retail market

(frozen, refrigerated, chips, bagged fresh, bulk fresh and dehydrated potatoes), the domestic food service market (skins, chips, formed products, hash browns, mashed, frozen, French fries, and whole potatoes), and export marketing for fresh (table stock and chipping stock), frozen, dehydrated and seed potatoes.

Econometric models were used to estimate the demand impact of board activities. Five models were created for this purpose: Domestic Retail, Domestic Foodservice model, Domestic "Best Practices" model to estimate the effect of targeted category management programs, and two export marketing models: One for Fresh, Frozen and Dehydrated potatoes and another for Seed potatoes. All models are estimated with data made available from board records and include retail scanner data, food service supplier survey data and USDA export data.

The study found that U.S. potato growers have received a significantly positive return on their investment in USPB activities over the FY–2002–FY–2006 period covered by the analysis. The study found that each is highly effective in increasing potato demand, although the final return varies widely among them. On a per dollar of investment basis the most likely estimate of the return to the Domestic Retail program is \$4.4743 in long run grower profit, while the Foodservice program provides a return of \$3.035 per dollar of investment. Considering the Best Practices program on its own, which is part of the Domestic Retail effort, category management investments provide incremental revenue of \$1.018 per dollar of program cost. On the export side, Frozen Consumer program generates a return of \$1.27, while Frozen Trade activities return \$1.11 and \$1.19, respectively, while Fresh Consumer and Trade activities yield \$10.36 and \$6.93 per dollar. In all cases, these Return on Investments estimates are at least as high as growers could earn on investments elsewhere and, in many cases, several times greater.

The Board's Executive Committee collectively recognized the need to sustain the momentum of current board programs, which continue to "Maximize Return on Grower Investment." According to the Board, the board's domestic and global market strategies to increase demand for U.S. Potatoes and Potato Products have been highly successful, but industry and economic conditions have eroded the board's ability to fund the future needs of all its programs. The board's Executive Committee proposed the ½ cent increase in the assessment rate in order

to maintain the value in all programs. Over the last three fiscal years, however, several trends have asserted downward pressure on the board programs continued ability to sustain the industry recognized high level of return. Acreage decreases, produced by right-sizing supply with demand, and competition for acres to produce other crops, has reduced revenues to the board. Higher costs, driven by worldwide inflation have increased the expenses of implementing board programs. The weakened U.S. dollar, in relation to the exchange rates of foreign currencies, has reduced the Board's purchasing power in obtaining needed goods and services to operate international marketing programs in foreign markets.

Alternatives were also considered by the Board, which included cutting back funding of marketing programs, international programs, and the new "Potatoes Goodness Unearthed" campaign. All of the alternatives were rejected by the Board. The Board believes that programs should not be reduced at a time when it's absolutely critical that they continue providing them, that it's a reasonable cost for keeping programs going and that the Board needs to maintain adequate reserves to handle food safety issues and other projects. The Board feels the direction it is going is in line with the grower's vision and that the assessment fee is money well invested. The Board believes that in order to continue to fund these and new programs, an increase in the assessment rate by ½ cent per hundredweight is needed.

Using the USDA previous 10-year average potato prices formula in the Plan, the assessment rate could be increased to 3.08 cents per hundredweight. However, it was determined that the rate would be increased ½ cent from 2.5 cents to 3 cents per hundredweight and that ½ cent would be easy to understand, communicate and ultimately to put into a collection system and at a full year of collection will deliver enough revenue to maintain the current programs with modest expansion. The ½ cent increase falls within the allowed limits in the Plan.

Using the 10-year average market price and average yield values of potatoes in the U.S., the increase in assessment rate to 3 cents per hundredweight will result in an average cost to growers of \$11.93 per acre, which represents less than one half of one percent (0.445 percent) of potato revenue per acre. Calculated at the current market price for potatoes of \$8.36 per cwt: At the 3 cents per cwt assessment the total assessment for

growers would be 0.359 percent of gross revenue per acre.

All potatoes are assessed the same assessment rate into the program regardless of origin—either U.S. grown or imported as fresh potatoes or potato products. The same assessments for domestic production and imports will be unchanged by the rate increase.

In order to sustain and expand the promotional, research, and communication programs, the Board decided to propose an increase assessment rate of ½ cent per hundredweight for a total assessment rate of 3 cents per hundredweight on all domestic and imported potatoes and potato products.

This rule does not impose additional recordkeeping requirements on handlers or importers of potatoes. Producers of fewer than 5 acres of potatoes annually are exempt.

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

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR Part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that are imposed by the Plan have been approved previously under OMB control number 0581-0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved.

We have performed this Initial Regulatory Flexibility Analysis regarding the impact of this proposed amendment to the Plan on small entities, and we invite comments concerning potential effects of this amendment on small businesses.

### Background

Under the Plan, which became effective March 9, 1972, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen potatoes' competitive position and expand domestic and foreign markets for potatoes and potato products. This program is financed by assessments on handlers and importers of potatoes and potato products. The Plan specifies that handlers are responsible for collecting and submitting assessments to the Board, reporting their handling of potatoes, and maintaining records necessary to verify their reporting. Handlers may collect assessments from producers or deduct assessments from the proceeds paid to the producer on whose potatoes the

assessments are made. Importers are responsible for payment of assessments to the Board on potatoes imported into the United States through the U.S. Customs Service and Border Protection.

Based on the most recent data available in March 2009 from USDA, the average price received for potatoes for the period 1999 to 2008 was \$6.74 per hundredweight. One-half of 1 percent of this average price would allow a maximum assessment rate of \$0.0337 cents per hundredweight. If the board had elected to use \$0.0337 cents per hundredweight in its fiscal year 2008, when 449.7 million hundredweight of potatoes were assessed, the Board would have realized assessment dollars of \$15,155,963 (vs. \$11,243,296 actual collected in FY 2008), an increase in assessment revenue of \$3.9 million.

This rule proposes to increase the assessment rate by ½ cent per hundredweight for handlers and importers. Currently, the assessment rate is 2.5 cents per hundredweight levied on potatoes handled within the 50 States of the United States and 2.5 cents per hundredweight on imports of potatoes and potato products. According to the Board, in order to sustain and expand the promotion, research, and communications programs at present levels, the Board contends that additional revenue is required. The proposed ½ cent per hundredweight assessment rate increase is estimated to generate \$1 to \$1.5 million in new revenue, depending upon production levels.

Based on assessments collected for crop year 2008, about 87 percent of this production total was from domestic assessments, with the remainder from imports. The Board states that the proposed assessment rate increase would enable it to expand media services, educational programs, research programs, and establish, maintain, and expand domestic and foreign markets for potatoes. Some of the additional revenue, the Board states, would be used to increase the reserve fund over a two-year period to provide for adequate cash flow. Based on the 2008 crop year production figures, the Board would have received \$13,491.955 million in total assessments at the 3 cents per hundredweight assessment rate on potatoes.

In addition, the Board, whose members represent all potato producing states as well as importers, voted to propose the assessment rate increase at its March 13, 2009 meeting, which was open to the public like all other meetings. The vote to recommend the assessment increase was 68 in favor and

7 against, of the Board members present at the meeting. Most of the dissenting votes concerned the impact the increase would have on small growers.

This rule would amend the rules and regulations issued under the Plan, increasing the assessment rate ½ cent per hundredweight. The rate would increase from 2.5 cents to 3 cents per hundredweight. Handlers and importers of potatoes and potato products will each pay 3 cents per hundredweight on potatoes annually. This proposed increase is consistent with section 308(e) of the Act that permits changes in the assessment rate through notice and comment procedures. Section 1207.342(a) of the Plan states that assessment rates shall be fixed by the Secretary in accordance with section 308(e) of the Act. Further, not more than one assessment may be collected on any lot of potatoes. The Board is recommending the proposed assessment rate increase based on continued inflation and rising cost expenditures since the current assessment rate places budget constraints on promotional, research, and communications programs and would result in reducing the programs in the future.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received in response to this rule by the date specified would be considered prior to finalizing this action.

### List of Subjects in 7 CFR Part 1207

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Potatoes, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Part 1207, Chapter XI of Title 7 is proposed to be amended as follows:

### PART 1207—POTATO RESEARCH AND PROMOTION PLAN

1. The authority citation for 7 CFR Part 1207 continues to read as follows:

**Authority:** 7 U.S.C. 2611-2627 and 7 U.S.C. 7401.

2. Section 1207.510 is amended by revising paragraphs (a)(1), (b)(1) and the Table in paragraph (b)(3) as follows:

#### § 1207.510 Levy of assessments.

(a) \* \* \* (1) An assessment rate of 3 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States.

\* \* \* \* \*

(b) \* \* \* (1) An assessment rate of 3 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate

consumption by humans and all seed potatoes imported into the United States. An assessment rate of 3 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. The importer of imported tablestock potatoes, potato products, or seed potatoes shall pay the assessment to the board through the U.S. Customs Service and Border Protection at the time of entry or withdrawal for consumption of such potatoes and potato products into the United States.

\* \* \* \* \*

(3) \* \* \*

| Tablestock potatoes, frozen or processed potatoes, and seed potatoes | Assessment |          |
|--|------------|----------|
|  | Cents/cwt  | Cents/kg |
| 0701.10.0020 .....   | 3.0        | 0.066    |
| 0701.10.0040 .....   | 3.0        | 0.066    |
| 0701.90.1000 .....   | 3.0        | 0.066    |
| 0701.90.5010 .....   | 3.0        | 0.066    |
| 0701.90.5020 .....   | 3.0        | 0.066    |
| 0701.90.5030 .....   | 3.0        | 0.066    |
| 0701.90.5040 .....   | 3.0        | 0.066    |
| 0710.10.0000 .....   | 6.0        | 0.132    |
| 2004.10.4000 .....   | 6.0        | 0.132    |
| 2004.10.8020 .....   | 6.0        | 0.132    |
| 2004.10.8040 .....   | 6.0        | 0.132    |
| 2005.20.0070 .....   | 4.716      | 0.104    |
| 0712.90.3000 .....   | 21.429     | 0.472    |
| 1105.10.0000 .....   | 21.429     | 0.472    |
| 1105.20.0000 .....   | 21.429     | 0.472    |
| 2005.20.0040 .....   | 21.429     | 0.472    |
| 2005.20.0020 .....   | 12.240     | 0.27     |
| 1108.13.0010 .....   | 27.0       | 0.595    |

\* \* \* \* \*

Dated: July 21, 2009.

**David R. Shipman,**  
Associate Administrator, Agricultural Marketing Service.  
[FR Doc. E9-17804 Filed 7-24-09; 8:45 am]  
BILLING CODE 3410-02-P

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1218**

[Document Number AMS-FV-09-0021; FV-09-704]

**Blueberry Promotion, Research, and Information Order; Assessment Increase**

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the Blueberry Promotion, Research, and Information Order (Order) to increase the assessment rate on producers and

importers who produce or import more than 2,000 pounds of highbush blueberries annually from \$12 per ton to \$24 per ton. The increase provided under the Order is authorized by the Commodity Promotion, Research, and Information Act of 1996 (Act). The U.S. Highbush Blueberry Council (Council) which administers the Order recommended this action to expand their promotional activities and add an advertising component to bridge the potential gap between highbush blueberry demand and future supply. Furthermore, the Council recommended to use the additional revenue to strengthen existing consumer, food service, and food manufacturer publicity; to expand their health research; to develop an educational campaign on good management practices and food safety within the United States as well as internationally.

**DATES:** Comments must be received by September 25, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: <http://www.regulations.gov> or to the Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture (Department), Room 0632-S, Stop 0244, 1400 Independence Avenue, SW., Washington, DC 20250-0244; facsimile: (202) 205-2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or can be viewed at <http://www.regulations.gov>. All comments received will be posted without change, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Jeanette Palmer, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, U.S. Department of Agriculture, Stop 0244, 1400 Independence Avenue, SW., Room 0632-S, Washington, DC 20250-0244; telephone: (888) 720-9917; facsimile: (202) 205-2800; or electronic mail: [Jeanette.Palmer@ams.usda.gov](mailto:Jeanette.Palmer@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Blueberry Promotion, Research, and Information Order [7 CFR Part 1218]. The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 [7 U.S.C. 7401-7425].

**Executive Order 12866**

The Office of Management and Budget (OMB) has waived the review process

required by Executive Order 12866 for this action.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

The Act provides that any person subject to an order may file a written petition with the Department if they believe that the order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with law. In any petition, the person may request a modification of the order or an exemption from the order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the petitioner resides or conducts business shall have the jurisdiction to review the Department's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

**Initial Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agricultural Marketing Service has considered the economic impact of this action on the small producers, first handlers, and importers that would be affected by this rule. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.

The Small Business Administration defines, in 13 CFR Part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms as those having annual receipts of no more than \$7 million. There are approximately 2,000 producers, 200 first handlers, 50 importers, and 4 exporters of highbush blueberries subject to the program. Most of the producers would be classified as small businesses under the criteria established by the Small Business Administration. Most importers, first handlers, and exporters would not be classified as small businesses. Producers who produce less than 2,000 pounds of highbush blueberries annually are exempt from this program. Importers who import less than 2,000 pounds of fresh and frozen highbush blueberries annually are also exempt from this program.