

# Proposed Rules

Federal Register

Vol. 75, No. 25

Monday, February 8, 2010

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 1208

[Doc. No. AMS-FV-07-0077; FV-07-705-PR-2A]

RIN 0581-AC79

#### Proposed Processed Raspberry Promotion, Research, and Information Order

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

**ACTION:** Proposed rule and referendum order.

**SUMMARY:** This rule proposes the establishment of an industry-funded promotion, research, and information program for processed raspberries. The proposed program, Processed Raspberry Promotion, Research, and Information Order (Proposed Order), was submitted to the Department of Agriculture (Department) by the Washington Red Raspberry Commission (WRRRC). Under the Proposed Order, producers of raspberries for processing and importers of processed raspberries would pay an assessment of up to one cent per pound, with the initial assessment rate being one cent per pound, which would be paid to the proposed National Processed Raspberry Council (Council). Producers and importers of less than 20,000 pounds annually of raspberries for processing and processed raspberries, respectively, would be exempt from the assessment. The proposed program would be implemented under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act). The Department is conducting an initial referendum to ascertain whether the persons to be covered by and assessed under the Proposed Order favor the implementation of the program prior to it going into effect. In addition, USDA is announcing that the referendum will be conducted among eligible producers of raspberries for processing and importers of processed raspberries to

determine whether they favor the implementation of the Proposed Order. The Proposed Order would be implemented if it is approved by a majority of producers and importers voting in the referendum. A separate final rule on referendum procedures is being published in this issue of the **Federal Register**.

**DATES:** The voting period is March 22, 2010 through April 2, 2010. To be eligible to vote, producers must have produced 20,000 pounds of raspberries for processing and importers must have imported 20,000 pounds of processed raspberries during the representative period from January 1, 2008 through December 31, 2008. Ballots will be mailed to all known producers of raspberries for processing and importers of processed raspberries, on or before March 8, 2010. Ballots must be received by the referendum agents no later than the close of business 4:30 p.m. (Eastern Time) on April 2, 2010.

**ADDRESSES:** Copies of the Proposed Order may be obtained from: Referendum Agent, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0244, Room 0632-S, Washington, DC 20250-0244; telephone: (202) 720-9915 or (888) 720-9917 (toll free); or facsimile: (202) 205-2800; or can be viewed at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Coy, 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 (888) 720-9917 (toll free); or facsimile: (202) 205-2800; or e-mail: [Kimberly.Coy@ams.usda.gov](mailto:Kimberly.Coy@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

As part of this rulemaking, a proposed rule was published in the **Federal Register** on April 9, 2009 [74 FR 16289], with a 60-day comment period, which closed on June 8, 2009. Twenty-one comments were received.

#### Executive Order 12866

This 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act provides that the 1996 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 1996 Act, a person subject to an order may file a written petition with the Department 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 the 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, the Department will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Department's final ruling.

#### Executive Order 13132

This proposed rule has been reviewed under Executive Order 13132, Federalism. This Executive Order directs agencies to construe, in regulations and otherwise, a Federal Statute to preempt State law only when the statute contains an express preemption provision. Section 524 of the 1996 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.

The WRRRC and the Oregon Raspberry and Blackberry Commission (ORBC), the principal producers of processed raspberries, both administer State marketing orders, which require all producers of raspberries to pay assessments to support the health of

their respective industries. Both the WRRC and ORBC invest funds into research programs at their land-grant universities and other research institutions to study disease, pest control, and varietal development. In addition to developing and funding production research, they also fund marketing and promotion programs and seek to foster education and communication between producers. However, WRRC stated that it has not been able to generate the funds necessary, nor has the ORBC or international raspberry organizations, to support the marketing efforts needed to help expand processed raspberry consumption and increase the demand for processed raspberries. In order to manage increased production, increased competition, and changing consumer habits, the WRRC believes that a more extensive marketing program is needed. The WRRC and ORBC believe that a national research and promotion program would fund the promotional aspect necessary to stay competitive and would place all domestic producers and importers on an equal playing field with each investing a fair share in promoting processed raspberries. If a national processed raspberry program is established, the WRRC and ORBC will continue to fund processed raspberry research in areas not likely to be the focus of the national program.

In accordance with the 1996 Act, this proposed rule would not preempt any State-legislated programs. Further, section 1208.52(h) of the Proposed Order provides for credit of assessments for those individuals who contribute to local, regional, or State organizations that engage in similar generic research, promotion, and information programs as partial fulfillment of assessments due to the Council subject to approval of the Secretary, for expenditure on generic research, promotion and information programs conducted within the United States.

The proposed program is not intended to duplicate any State program. Considerable attention is being made to involve producers in discussions regarding future program development and administration and what the State commissions would look like subsequent to the implementation of a national program. It is expected that farm related activities, such as production research, would continue to be funded by the State organizations and market development functions, such as nutritional research and marketing programs, would shift to the Proposed Order.

Not only were the States informed throughout the development of the

national program, they were instrumental in the processed raspberry industry's decision to institute a national program.

In 2007, representatives from the WRRC were among other raspberry industry representatives who met with AMS representatives to discuss the possibility of implementing a national processed raspberry promotion, research, and information program. WRRC representatives participated in the development of the provisions of the Proposed Order during these meetings and with direct communication with the Oregon Raspberry and Blackberry Commission (ORBC).

#### Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601–612], AMS 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 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 \$7.0 million. Under these criteria, the majority of the producers and handlers that would be affected by this Proposed Order would be considered small entities, while most importers would not. Further, an estimated ten qualified organizations certified by the Secretary for nomination purposes, would be expected to generally consist of entities reflecting such sizes also. Producers and importers of less than 20,000 pounds per year of raspberries for processing and processed raspberries respectively would be exempt under this Proposed Order. Five organic producers and importers are also expected to be exempt from assessments. The number of entities assessed under the program would be around 245. Estimated revenue is expected at \$1.2 million of which 43 percent is expected from imported product and 57 percent from domestic product.

According to the WRRC, in 2006, there were approximately 195 producers of raspberries for processing and 34 processors (first handlers) of processed raspberries in Oregon and Washington States, which are the principal growing areas in the United States for raspberries destined for processing. Approximately 95 percent of the producers and 100 percent of the raspberry processors qualified under the definition for small

business owners. Although California is a significant producer of raspberries, virtually all harvested product is destined for the fresh market. In 2006, there were approximately 50 importers of processed raspberries. Based on the U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Statistics, in 2006 two countries accounted for 96 percent of the processed raspberries imported into the United States. These countries and their share of the imports are: Chile (78 percent) and Canada (18 percent).

The 1996 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 WRRC submitted this Proposed Order to:* (1) Develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding processed raspberries; (2) strengthen the position of the processed raspberry industry; and (3) maintain, develop, and expand existing markets for processed raspberries.

While the Proposed Order would impose certain recordkeeping requirements on first handlers, this information could be compiled from records currently maintained. First handlers would collect and remit the assessments on domestic raspberries for processing to the Council. First handler responsibilities would include accurate recordkeeping and accounting on all raspberries purchased or contracted for processing including the number of pounds handled, the names of their producers, and the dates raspberries were purchased. 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 1996 Act. Such records must be retained for at least two years. This information is already maintained as a normal business practice. In addition, most of these entities currently remit assessments under either the Washington or Oregon State programs, the additional recordkeeping and submission impact would be minimal.

There is also a minimal paperwork burden on producers. The Proposed Order would require producers to keep records and to provide information to

the Council or the Department when requested. However, it is not anticipated that producers would be required to submit forms to the Council other than for nomination to the Council. If, for example, the Council needs information from a producer as part of the Council's compliance program, the information would need to be obtained through an audit of the producer's records instead of having the producer complete and submit paperwork.

In addition, there is a minimal burden on importers. The import assessments would be collected by U.S. Customs and Border Protection (Customs) at time of entry into the United States. Importers would be required to keep records and to provide information to the Council or the Secretary of Agriculture (Secretary) when requested. However, it is not anticipated that importers would be required to submit forms to the Council for assessment collection because Customs conducts recordkeeping and assessment remittance at the time of product entry into the United States. Importers who seek nomination to serve on the Council would be required to complete a background form, which would be submitted to the Secretary.

Foreign producers from countries exporting a minimum of three million pounds of raspberries for processing based on a three-year average to the U.S. and at-large members seeking nomination to serve on the Council would also be required to complete a background form, which would be submitted to the Secretary.

The estimated annual cost of providing the information to the Council by an estimated 297 respondents (195 producers, 50 importers, 34 first handlers/processors, 2 foreign producers, 5 organic producers and importers, 10 certified organizations (for nomination purposes), and 1 at-large member) would be \$9,141.

Section 518 of the 1996 Act provides for referenda to ascertain approval of the Proposed Order to be conducted either prior to its going into effect or within three years after assessments first begin under the Proposed Order. An initial referendum will be conducted prior to putting this Proposed Order in effect. A referendum order is published herein. The Proposed Order also provides for approval in a referendum to be based upon approval by a majority of those persons voting in the referendum. Every seven years, the Department shall conduct a referendum to determine whether producers of raspberries for processing and importers of processed raspberries favor the continuation, suspension, or termination of the Proposed Order. In addition, the

Department could conduct a referendum at any time; at the request of 10 percent or more of all eligible producers of raspberries for processing and processed raspberries importers required to pay assessments; or if the Council requests that the Secretary hold a referendum.

The United States is among the leading producers of raspberries. Raspberries are grown in 49 states and are harvested late June to mid August. The 2007 Census of Agriculture indicates that about 80 percent of the U.S. raspberry acreage was in California, Oregon, and Washington.

According to the United States Department of Agriculture's National Agricultural Statistics Service (NASS) and the Foreign Agricultural Service, in 2008, 119,270 million pounds of raspberries (fresh) with a combined value approaching \$286 million (value at point of first sale) were produced in California, Oregon, and Washington, the three most productive States for growing raspberries in the United States. In 2007, 142,500 million pounds were produced and utilized, at a value of almost \$267 million. California's crop is predominately delivered to the fresh market, while Oregon and Washington are the principal producers of processed raspberries.

Domestic production varies from year to year due to climatic conditions and field health. Over the last fifteen years, total domestic production of raspberries delivered to processors in the United States (i.e., production utilized for processing) has increased from 47.5 million pounds in 1991 to almost 62 million pounds in 2007 with most recent years averaging approximately 69 million pounds. Washington continues to be the major supplier of processed raspberries to the domestic market, although its market share declined from 72 percent to 51 percent between 2001 and 2008. In comparison, imported processed raspberries surged from 7.5 to 53.8 million pounds from 1991 to 2005 and then decreased to 45.8 million pounds in 2008. Chile, which is the predominate importer of processed raspberries to the United States, supplied just over 18 percent of the total U.S. market in 2008.

Domestic uses of processed raspberries include further processing into juices, jellies, baked goods, and consumer retailer packs. After averaging approximately 188 million pounds for the period 2006 to 2008, approximately 165 million pounds of processed raspberries produced and imported into the United States in 2008, and 184 million pounds in 2007 were utilized for processing. These totals were calculated by using imports of frozen

raspberries (from USDA's Foreign Agricultural Service) and NASS reports of production utilized for processing in Oregon and Washington. Because of the way imports are currently reported, and because of the way NASS reports raspberry data, the totals represent the best information currently available.

The following countries are major exporters of raspberries to the United States: Canada, Chile, China, France, and Poland. Canada and Chile represented 91.5 percent share of total import tonnage in the domestic United States market from 2003 to 2008, with 22 and 69.5 percent respectively.

The same growing conditions and harvesting period apply to the Pacific Northwest and British Columbia, the major raspberry growing region in Canada. Exports of processed frozen raspberries from British Columbia to the United States ranged from 2.9 million metric tons to 5.7 million metric tons over the past five years.

Contra-season raspberry production in the southern hemisphere is primarily located in Chile, with a harvest season beginning in December and continuing into February. However, processed raspberries are imported into the United States throughout the year.

The Proposed Order would authorize a fixed assessment paid by producers of raspberries for processing and importers of processed raspberries at a rate of up to one cent per pound, with the initial assessment rate being one cent per pound. The assessment rate will be reviewed, and increased or decreased as recommended by the Council and approved by the Secretary after the first referendum is conducted as stated in § 1208.71(a). Such an increase or decrease may occur not more than once annually. Any change in the assessment rate shall be subject to rulemaking by the Department, and will be reviewed, and increased or decreased by the Secretary through rulemaking as recommended by the Council. Any change in the assessment rate shall be announced by the Council at least 30 days prior to going into effect. The maximum assessment rate authorized is one cent per pound.

At the proposed rate of assessment of up to one cent per pound, with the initial assessment rate being one cent per pound, the Council would collect approximately \$1.2 million annually based on an estimated 120 million pound supply from domestic raspberries for processing and imports of processed raspberries. The domestic supply represents approximately 57 percent of the total and imports represent 43 percent.

The Proposed Order would exempt producers and importers of less than 20,000 pounds annually of raspberries for processing and processed raspberries respectively. A review of producer delivery statistics from Oregon and Washington States indicate that around 15 percent of all producers would have been exempted from assessment in 2006 from the proposed research and promotion program based on a 20,000 pounds exemption threshold. Also, organic producers and importers would be exempt from assessment. Section 515 of the 1996 Act provides for the establishment of a board or council consisting of producers, importers, and others in the marketing chain as appropriate. The Proposed Order would provide for the establishment of the National Processed Raspberry Council to administer the Proposed Order under AMS oversight. The Secretary would appoint members to the Council from nominees submitted in accordance with the Proposed Order. The WRRC proposed that the Council be composed of 13 members and their alternates. The proposed Council membership is as follows: Six producer members of raspberries for processing from States producing a minimum of three million pounds of raspberries delivered for processing; one producer member of raspberries for processing representing all other States that produce less than the minimum of three million pounds of raspberries delivered for processing; three processed raspberry importer members; two foreign producers from countries exporting a minimum of three million pounds of raspberries for processing to the U.S. based on a three-year average; and one at-large member recommended by the Council. The distribution of producer member of raspberries for processing positions among the States producing a minimum of three million pounds of raspberries would be proportional to the average of the total pounds delivered to the processor for processing over the previous three years. The States that provide less than three million pounds will be combined into one region and will have one producer representative.

Under the Proposed Order, the Council members and alternates will serve for a term of three years and be able to serve a maximum of two consecutive terms. When the Council is first established, four producer members, two importers, one of the two foreign producers, and the at-large member and their respective alternates will be assigned initial terms of three years; and, three producer members, one importer member, and the second

foreign producer and their respective alternates will serve an initial term of two years. Thereafter, each of these positions will carry a full three-year term. Members serving an initial term of two years will be eligible to serve a second three-year term to complete their eligibility. Council nominations and appointments will take place in two out of every three years. Each term of office will end on December 31, and a new term will begin on January 1.

Producers and importers would represent those entities in the United States. The United States would be defined to include collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

The nominations for the six producer and alternate members from States producing a minimum three year average of three million pounds of raspberries delivered for processing will be submitted to the Council in the following manner: (1) For those States that have a State raspberry commission or State marketing order, the State commission or committee will nominate producers and their alternates to serve; or (2) for those States that do not have a State commission or State marketing order, the Council will seek nominations from the State Departments of Agriculture for members and alternates from the specific States.

For those States producing a minimum three year average of three million pounds of raspberries delivered for processing that have a State raspberry commission or State marketing order, the State commission or committee nominations will be sent to the Council and placed on a ballot which will then be sent to producers in the State for a vote. The nominee for member will have received the highest number of votes cast. The person with the second highest number of votes cast will be the nominee for alternate. The persons with the third and fourth place highest number of votes cast will be designated as additional nominees for consideration by the Secretary. Once the Council has received all of the nominations from commissions or committees, the information will be submitted to the Secretary for appointment. Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council staff and shall be submitted to the Secretary not less than 90 days prior to the expiration of the term of office.

If the Department determines that there are no State raspberry commissions or State marketing orders

from States producing a minimum three year average of three million pounds of raspberries delivered for processing, the Council will seek nominations from the State Departments of Agriculture for members and alternates from the specific States who may directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

The distribution of the six producer and alternate seats will be proportional to the percentage determined by the average of the total pounds produced and delivered to processors for processing over the previous three years divided by the average total pounds produced over the previous three years. For example, if Washington State and Oregon are the only two States producing a minimum of 3 million pounds each, and Washington's previous three year average is 62.4 million pounds and Oregon's previous three year average is 6.7 million pounds with the average total pounds for the previous three years being 69.1 million pounds, Washington would have 90 percent of the production and Oregon would have 10 percent of the production. Therefore, Washington would obtain five out of the six seats and Oregon would receive one seat.

The nominations for the one raspberry producer of raspberries for processing and alternate member, who represents all other States producing less than a minimum three year average of three million pounds of raspberries delivered for processing, which constitutes a region will be submitted to the Council in the following manner: (1) For those States that have a State raspberry commission or State marketing order, the State commission or committee will nominate producers and their alternates to serve; or (2) for those States that do not have a State commission or State marketing order, the Council will seek nominations from the State Departments of Agriculture for the member and alternate from the specific States.

For those States producing less than a minimum three year average of three million pounds of raspberries delivered for processing that have a State raspberry commission or State marketing order, the State commission or committee nominations will be sent to the Council and placed on a ballot which will then be sent to producers in the region for a vote. The nominee for member will have received the highest number of votes cast. The person with

the second highest number of votes cast will be the nominee for alternate. The persons with the third and fourth place highest number of votes cast will be designated as additional nominees for consideration by the Secretary. Once the Council has received all of the nominations from commissions or committees, the information will be submitted to the Secretary for appointment. Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council staff and shall be submitted to the Secretary not less than 90 days prior to the expiration of the term of office.

If the Department determines that there are no State raspberry commissions or State marketing orders from States producing less than a minimum three year average of three million pounds of raspberries delivered for processing, the Council will seek nominations from the State Departments of Agriculture for members and alternates from the specific States. The State Departments of Agriculture would have the opportunity to participate in nomination caucuses and will directly submit as a group a single slate of nominations to the Department for the producer position and the producer alternate position on the Council for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

Nominations for the three processed raspberry importer member positions and their alternates will be made by qualified national organizations representing importers. Two nominees for each member and each alternate position will be submitted to the Secretary for consideration.

All qualified national organizations representing importers would have the opportunity to participate in nomination caucuses and will submit as a group a single slate of nominations to the Secretary for the importer positions and the importer alternate positions on the Council.

Eligible organizations must submit nominations to the Department not less than 90 days prior to the expiration of the term of office. To become a qualified national organization representing importers under the Proposed Order, each such organization would be required to meet the following criteria: (1) Any organization representing importers must represent a substantial number of importers who market a substantial volume of raspberries for

processing; (2) it must have a history of stability and permanency and have been in existence for more than one year; (3) it must promote processed raspberry importers' welfare; and (4) it must derive a portion of its operating funds from importers.

If the Department determines that there are no qualified national organizations representing importers, individuals who have paid their assessments to the Council in the most recent fiscal year or for the initial Council, those that imported processed raspberries into the U.S. in the most recent fiscal year, could directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

Nominations for the two foreign producer member positions and their alternates will be made by qualified organizations representing foreign producers. Two nominees for each member and each alternate position will be submitted to the Secretary for consideration.

All qualified organizations representing foreign producers would have the opportunity to participate in nomination caucuses and will submit as a group a single slate of nominations per country to the Secretary for foreign producer positions and the foreign producer alternate positions on the Council.

Eligible organizations must submit nominations to the Department not less than 90 days prior to the expiration of the term of office. To become a qualified organization representing foreign producers under the Proposed Order, each such organization would be required to meet the following criteria:

(1) Any organization representing foreign producers must represent a substantial number of foreign producers who market or produce a substantial volume of raspberries for processing; (2) it must have a history of stability and permanency and have been in existence for more than one year; (3) it must promote processed raspberry foreign producers' welfare; (4) it must derive a portion of its operating funds from foreign producers; and (5) must be from a country exporting a minimum of three million pounds of raspberries for processing to the U.S. based on a three-year average.

If the Department determines that they are no qualified organizations representing foreign producer interests, individual foreign producers may

directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

In recommending the at-large member and alternate, the Council can give consideration to nutrition health professionals and others interested in the raspberry industry. Nominations for the at-large member and alternate will be conducted at a Council meeting by the Council staff and shall be submitted by the Council to the Secretary for approval not less than 90 days prior to the expiration of the term of office. Nominations for the initial Council will be handled by the Department.

The 1996 Act provides that to ensure fair and equitable representation, the composition of a board or council shall reflect the geographic distribution of the production of the agriculture commodity in the United States and the quantity or value of the agriculture commodity imported into the United States. The Proposed Order states that at least once every five years, but not more frequently than once every three years, the Council will review the geographic distribution of United States production of processed raspberries and the quantity and source of processed raspberry imports. If warranted, the Council will recommend to the Secretary that membership on the Council be altered to reflect any changes in geographic distribution of domestic raspberry production and the quantity of imports. Also, if the level of imports increases or decreases importer members and alternates may be added or reduced on the Council. However, the foreign producer seats will remain the same regardless of the volume of imports from importing countries.

The Proposed Order provides that all officers, employees, and agents of the Department and of the Council are required to keep confidential all information obtained from persons subject to the Proposed Order. This information would 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 the Department is a party. However, the issuance of general statements based on reports or on information relating to a number of persons subject to the Proposed Order would be permitted, if the statements do not identify the

information furnished by any person. Finally, the publication, by direction of the Department, of the name of any person violating the Proposed Order and a statement of the particular provisions of the Proposed Order violated by the person would be allowed.

Proposed recordkeeping and reporting requirements for the raspberry promotion, research, and information program would be designed to minimize the burden on the raspberry industry.

The estimated total cost of providing information to the Council by all respondents would be \$9,141. This total has been estimated by multiplying 277 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

With regard to alternatives to this proposed rule, the 1996 Act itself does provide for authority to tailor a program according to the individual needs of an industry. Provision is made for permissive terms in an order in section 516 of the 1996 Act, and other sections provide for alternatives. Section 514 of the 1996 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 516 states that an order may include an 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 activities for those individuals who contribute to other similar generic research, promotion, and information programs at State, regional or local level; and assessment of imports. In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. An order also may provide for its approval in a referendum to be based upon (1) 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. Section 515 of the 1996 Act provides for establishment of a council

from among producers, first handlers, and others in the marketing chain as appropriate and importers, if importers are subject to assessment.

This proposal includes provisions for both domestic and foreign market expansion and improvement; reserve funds; credits for generic activities; assessments on imports; and an initial referendum to be conducted prior to the Proposed Order going into effect. Approval would be determined by a majority of producers and importers voting for approval.

Similar to WRRRC, Oregon also has a state raspberry commission, the Oregon Raspberry and Blackberry Commission (ORBC). The WRRRC and ORBC both administer State marketing orders, which require all producers of raspberries to pay assessments to support the health of their respective industries. According to WRRRC, the two commissions have developed a good working relationship with each other over the years. Both the WRRRC and ORBC invest funds into research programs at their land-grant universities and other research institutions to study disease, pest control, and varietal development. In addition to developing and funding production research, they also fund marketing and promotion programs and seek to foster education and communication between producers. However, the WRRRC, stated that it has not been able to generate the funds necessary, nor has the ORBC or international raspberry organizations, to support the marketing efforts needed to help expand processed raspberry consumption and increase the demand for processed raspberries. In order to manage increased production, increased competition, and changing consumer habits, the WRRRC believes that a more extensive marketing program is needed. The WRRRC and ORBC believe that a national research and promotion program would fund the promotional aspect necessary to stay competitive and would place all domestic producers and importers on an equal playing field with each investing a fair share in promoting processed raspberries. The Council may provide credits of assessments for those individuals who contribute to local, regional, or State organizations engaged in similar generic research, promotion, and information programs as applied to assessment due to the Council subject to approval of the Secretary, for expenditure on generic research, promotion and information programs conducted within the United States. If a national processed raspberry program is established, the WRRRC and ORBC will continue to fund processed raspberry

research in areas not likely to be the focus of the national program.

The WRRRC and ORBC programs are not able to engage raspberry production in other States or countries in a meaningful way. The proposed program is not intended to duplicate any State program. Considerable attention is being made to involve producers in discussions regarding future program development and administration and what the State commissions would look like prior to the initial referendum. It is expected that farm related activities, such as production research, would continue to be funded by the State organizations and market development functions, such as nutritional research and marketing programs, would shift to the Proposed Order.

The WRRRC proposed that producers and importers of less than 20,000 pounds annually of raspberries for processing and processed raspberries respectively, be exempt from assessments. The WRRRC also proposed that a producer who operates under an approved National Organic Program (NOP) system plan, produces only products eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, be exempt from paying assessments under the Proposed Order. An importer who imports only products eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, would also be exempt from paying assessments.

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

The Department invited comments concerning potential effects of the Proposed Order on small entities and the accuracy regarding the number and size of entities covered under the Proposed Order. We did not receive any comments as a result of the publication of the Initial Regulatory Flexibility Analysis.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], AMS has requested approval of a new information collection and recordkeeping requirements for the proposed Processed Raspberry Program.

*Title:* Advisory Committee or Research and Promotion Background Information.

*OMB Number for background form AD-755:* (Approved under OMB No. 0505-0001).

*Expiration Date of Approval:* Awaiting Renewal.

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

OMB Number: 0581-NEW.

Expiration Date of Approval: 3 years from approval date.

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 1996 Act.

There will also be the additional burden on producers 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 collect assessments from producers and file reports with and submit assessments to the Council. 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.

Under the Proposed Order, importers are responsible to pay assessments. Importers must report the total quantity of processed raspberries imported during the reporting period and a record of each importation of such product during such period, giving quantity, date, and port of entry. Under the Proposed Order, Customs would collect assessments on imported processed raspberries and remit the funds to the Council.

An estimated 297 respondents would provide information to the Council. They would be 195 producers, 50 importers, 34 first handlers/processors, 5 organic producers and importers (for exemption purposes), 2 foreign producers, 10 certified organizations (for nomination purposes), and 1 at-large member. The estimated cost of providing the information to the Council by respondents would be \$9,141. This total has been estimated by multiplying 277 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

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 raspberry programs administered

by the Department and other state programs.

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 1996 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 Council. 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 yearly would coincide with normal industry business practices. 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. The requirement to keep records for two years is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers, first handlers, processors, foreign producers, and importers who are subject to the provisions of the 1996 Act.

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 AD-755 (OMB Form No. 0505-0001)*

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

*Respondents:* Producers, importers, foreign producers, and at-large nominee.

*Estimated number of Respondents:* 26 (52 for initial nominations to the Council, 26 in subsequent years).

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

*Estimated Total Annual Burden on Respondents:* 7.8 hours for the initial nominations to the Council and 3.9 hours annually thereafter.

(2) *An Annual Report by Each First Handler of Processed Raspberries*

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

*Respondents:* First handlers.

*Estimated number of Respondents:* 34.

*Estimated number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 17 hours.

(3) *An Exemption Application for Producers and Importers Who Would Be Exempt From Assessments*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hours per producers, or importer reporting on processed raspberries produced or imported. Upon approval of an application, producers and importers will receive exemption certification.

*Respondents:* Exempt producers and importers.

*Estimated number of Respondents:* 40.

*Estimated number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 10 hours.

(4) *Application for Reimbursement of Assessment*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hours per request for reimbursement.

*Respondents:* Producers and importers.

*Estimated number of Respondents:* 10.

*Estimated number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2.5 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 record keeper maintaining such records.

*Recordkeepers:* Producers, first handlers, and importers.

*Estimated number of recordkeepers:* 297.

*Estimated total recordkeeping hours:* 148.5 hours.

(6) *Application for Certification of Organizations*

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

*Respondents:* Importers and foreign producer organizations.

*Estimated Number of Respondents:* 10.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 5 hours.

**(7) Nomination Appointment Form**

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

*Respondents:* Producers, importers, and foreign producers.

*Estimated Number of Respondents:* 150.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 37.5 hours.

**(8) Nomination Appointment Ballot**

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 150.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 37.5 hours.

**(9) Application for Assessments Credit**

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hours per application.

*Respondents:* Producers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

**(10) Organic Exemption Form**

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per exemption form.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 5.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2.5 hours.

*Comments were invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of functions of the Proposed Order and the Department's oversight of the Proposed Order, including whether the information would have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of the Department's

estimate of the principal growing areas in the United States for raspberries destined for processing; (d) the accuracy of the Department's estimate of the number of producers and first handlers of processed raspberries that would be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. We received one comment regarding the collection of information part of this rule. This comment is discussed in the comments section of this proposal.

**Comments**

A 60-day comment period was provided to allow interested persons an opportunity to respond to this proposal. Twenty-one comments were received on the Proposed Order by the June 08, 2009 deadline. Comments were received from producers of raspberries for processing, importers of processed raspberries, industry associations, consumers, brokers, and other interested parties. Eighteen commenters supported the Proposed Order and three were opposed.

Three commenters that supported the Proposed Order stated that with new challenges in the current global situation, a good marketing program funded by those in the industry would help sustain the industry and that producers and importers working together would provide funds sufficient to carry out nutrition and health based research and subsequent marketing efforts to grow the market for all participants. These commenters also stated that in order to sustain the processed raspberry industry and develop new markets domestically and internationally, it is necessary to have the Proposed Order implemented.

Four commenters that supported the Proposed Order stated that it was necessary for those who benefit from market development activities to share in the cost burden. The commenters also stated that producers from countries that have turned from marketing fresh raspberries to processed raspberries because of the profitability year round should contribute to the cost of promotions and research needed to ensure strong markets. In addition, these commenters stated that importers who benefit from research and promotions generated domestically should pay their fair share into the program. The commenters also believe that growers

should pay equitable share of cost to keep the industry healthy and are therefore in favor of the Proposed Order. Under the Proposed Order, producers of raspberries for processing and importers of processed raspberries would pay an assessment of up to one cent per pound, with the initial assessment rate being one cent per pound.

Two commenters in favor of the Proposed Order stated that they appreciate the accessibility of raspberries during off season and the nutrition that they can provide to their family. The comments also stated that consumers need good factual nutrition information and a program to increase supply and build bigger markets is appreciated.

Two commenters that supported the Proposed Order said they felt the initial assessment rate of one cent per pound should provide adequate funding for nutritional research and consumer education programs.

One commenter that supported the Proposed Order believes the 20,000 pound exemption from assessment for producers is appropriate.

Three commenters that supported the Proposed Order were of the view that the Proposed Order would not only benefit small growers, but provide a gross benefit to the fresh market as well and can enable the fresh and processed raspberry industries to work together to build markets and address common research needs.

Two commenters that supported the Proposed Order would like to see fresh and organic raspberries added to the Proposed Order in the future. However, the proponent group did not include fresh raspberries believing that their inclusion was not timely. If the fresh raspberry industry is interested in including fresh raspberries in the proposed program in the future, the Proposed Order would need to be amended and a referendum would be conducted to determine if fresh raspberries should be added. With regard to organic raspberries, a producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, who also produces only products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation, is exempt from the payment of assessments. Furthermore, an importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall also be exempt from the payment of assessments.

One commenter that supported the Proposed Order is concerned that the

Order may disparage the fresh raspberries market. The Proposed Order states in section 1208.48(c) that the Council may not engage in, and shall prohibit, employees and agents of the Council from engaging in any advertising, including promotion, research, and information activities authorized to be carried out under the Order that may be false or misleading or disparaging to another agricultural commodity. Accordingly, this provision addresses the commenter's concern.

One commenter that supported the Proposed Order is concerned that the proposal does not clearly use "processed raspberries" in the definitions of information and research in the Proposed Order. This comment has merit. Accordingly, the Department has changed section 1208.11 and section 1208.24 of the Proposed Order to add processed raspberries to those sections.

One commenter that supported the Proposed Order states that passage of the referendum should be based on voting by a majority of those voting who also represent a majority of production of processed raspberries. Section 518(e) of the 1996 Act states that an order may provide for its approval in referendum by a majority of those persons voting, by persons voting for approval who represent a majority of the volume of the agricultural commodity, or by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. Any one of these three voting criteria would be appropriate for a research and promotion program. However, the proponent group proposed that passage of the referendum be based on a majority of those persons voting in the referendum. Further, only one comment was received concerning this matter. Therefore, the Department will keep the current method of voting, which is by a majority of those persons voting in the referendum, as the industry has put forth in the Proposed Order.

Three commenters that supported the Proposed Order believe that promotion activities should be restricted to the United States or consequently would request that the Council demonstrate how foreign expenditures will have the result of promotion consumption in the United States as well as abroad. Section 512(b)(2) of the Act provides authority for the Council to conduct activities in foreign markets. Furthermore, it is the Department's policy that the funds used for promotions for those research and promotion programs that promote outside the U.S. be proportionate to the funds collected domestically. In addition, the Council is composed of both importers and producers, and it is

the Council's responsibility to determine how best to properly allocate the funds collected consistent with the provisions of the Order and the 1996 Act.

One commenter that supported the Proposed Order would like a credit of assessments for contributions made to programs for generic activities initiated in foreign countries. According to section 516(e)(1) of the 1996 Act, authority is provided for credits of assessments for those individuals who contribute to other similar generic research, promotion, and information programs at the State, regional, or local level. Accordingly, no change to the proposal is made as a result of this comment.

Four commenters that supported the Proposed Order proposed that the aggregate credits that any importer or U.S. producer may be entitled to receive for contributions to U.S.-based and non U.S.-based generic research, promotion, and information programs in any one year be limited to an amount equal to no more than twenty-five percent of the total assessments paid by such importer or producer in that year. Section 516 of the 1996 Act authorizes credits only for similar generic research, promotion and information programs at the State, regional, or local level. The Department believes that this comment as it relates to a credit limit on contributions to U.S.-based programs has merit. However, a specific amount should be determined by the Council with approval of the Secretary. Therefore, section 1208.52(h)(3) of the Proposed Order is changed to add language allowing the Council to determine an appropriate rate. However, as stated above, contributions to non-U.S.-based programs are not authorized to receive credits of assessments paid.

One commenter that supported the Proposed Order approves of the provision for a public member and the membership distribution on the Council in the Proposed Order.

Three commenters that supported the Proposed Order suggested that the number of board seats for importers be reduced from three to two, while the number of foreign producer seats increase from two to three. In addition, three commenters proposed an increase in foreign producer seats on the Council because they believe that foreign producers will ultimately bear the cost of assessments. The Proposed Order states that the Council be composed of thirteen members and thirteen alternate members, appointed by the Secretary from nominations as follows: Six processed raspberry producer members and alternate members from States

producing a minimum of three million pounds of raspberries delivered for processing; one processed raspberry producer member and alternate member representing all other States producing less than a three million pounds of raspberries delivered for processing; three processed raspberry importer members and alternate members; two foreign producers and their alternate members from countries exporting a minimum of three million pounds of raspberries for processing to the U.S., based on a three-year average; and one at-large member and an alternate recommended by the Council. Using this distribution, the domestic producer members on the Council would account for 54 percent of Council membership, importer members would account for 23 percent of Council membership, foreign producers would account for 15 percent of Council membership, and the at-large member would account for 8 percent of Council membership. In 2010, estimated revenue from assessments is expected at \$1.2 million of which 57 percent is expected from domestic product and 43 percent from imported product. The total number of importers and foreign producers on the Council will equal 38 percent of the total seats on the Council. Taking into account the amount of domestic and imported product, the composition of the Council as proposed is reasonable. Accordingly, the Department is not making any changes to this section.

In addition, under the Proposed Order, producers of raspberries for processing and importers of processed raspberries would pay an assessment of up to one cent per pound, with the initial assessment rate being one cent per pound. Although the commenters believe that foreign producers would ultimately bear the cost of the assessments levied on importers, only producers and importers will pay assessments under the program. However, both foreign producers and importers will have representation on the Council. Therefore, the Department has not changed the proposed distribution of seats on the Council.

Two commenters that supported the Proposed Order were concerned that processed black raspberries would be included in the domestic and import assessment. The commenters proposed that growers of black raspberries for processing and importers of processed black raspberries be exempt from payment of assessments. The Department agrees with this comment as it relates to excluding black raspberries for processing and processed black raspberries from the Proposed Order. The Department worked with the 484(f)

Committee (Committee) of the United States International Trade Commission (USITC) which is the committee that reviews requests for changes to the statistical reporting requirements of the HTS for imports, to determine the feasibility of separating processed red raspberries from HTS code 0811.20.20.20. According to the Committee, separating the HTS code for processed red raspberries from all other raspberries is feasible. Accordingly, the Committee approved the petition for processed red raspberry statistical breakout in the Harmonized Tariff Schedule. The new number assigned to processed red raspberries will be 0811.20.2025 and the residual "other" for other processed raspberries, including black raspberries, will be 0811.20.2035, effective January 1, 2010. Therefore, black raspberries for processing, also defined as the genus *Rubus occidentalis* L., are not covered by the Order.

Two commenters that supported the Proposed Order were concerned that the assessments on imports collected did not include raspberry juice and raspberry juice concentrate. Raspberry juice and raspberry juice concentrate are currently under an HTS code that includes other juices in addition to raspberry juice. According to the Committee, separating the HTS code for raspberry juice and raspberry juice concentrate from all other juices is not feasible at this time. Therefore, no change to the Order provisions is made as a result of these comments.

One commenter that supported the Proposed Order stated that the preferred timing of a referendum would be after the peak harvest season of July or August. The referendum will be conducted outside of those months.

One commenter stated that the reporting required by the Proposed Order and assessment remittance procedures would not be a problem because the commenter keeps similar records for a State program and remits assessments in a similar manner.

Two commenters that opposed the Proposed Order were concerned about the effect of the cost of the program on the national taxpayer. Assessments would be paid by producers and importers of 20,000 or more pounds of raspberries for processing or processed raspberries respectively. Research and promotion programs under the Department are self-help programs, funded by their applicable industries, and do not receive taxpayer funds.

Two commenters that opposed the Proposed Order stated that the price of raspberries is unaffordable and the addition of a research program for

raspberries would subsequently increase the price further. The purpose of the Proposed Order is to maintain and expand markets for processed raspberries as well as to develop and carry out generic promotion, research, and information activities relating to processed raspberries. The Proposed Order does not regulate the price of raspberries. Further, these self-help programs usually make products more available to consumers by promoting year-round. Accordingly, no changes were made to the Proposed Order as a result of these comments.

Upon review, the Department has made additional changes to the Proposed Order. The Department has changed the definitions of first handler in section 1208.6 and handle in section 1208.9 to add for clarity, the term raspberries for processing, where appropriate. The reference to producers who handle their own production also is clarified. The Department added section 1208.40(c) to provide guidance to industry members when nominating members to the Council. The Department has changed section 1208.53(c) to revise the period of time concerning a request for reimbursement from importers from ninety (90) days to sixty (60) days to conform with other similar exemption time frames. In addition, the Department has changed section 1208.53(d)(1), (d)(2), and (d)(3) to correctly state that the provisions of the exemption under the National Organic Program apply to producers of raspberries for processing, not handlers. The supplementary information section of the proposed rule incorrectly described the producer exemption. Finally, the references to individuals in section 1208.52(h) is changed for clarify to persons.

The Proposed Order is summarized as follows: 1208.1 through 1208.29 of the Proposed Order define certain terms, such as processed raspberries, first handler, and importer, which are used in the Proposed Order.

Sections 1208.40 through 1208.48 include provisions relating to the Council. These provisions cover establishment and membership, nominations and appointments, term of office, vacancies, alternate members, and procedures for conducting Council business, compensation and reimbursement, and powers and duties of the Council, and prohibited activities. The Council 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 processed

raspberries, subject to oversight of the Secretary.

Sections 1208.50 through 1208.56 cover budget review and approval; financial statements; authorize the collection of assessments; specify how assessments would be used, including reimbursement of necessary expenses incurred by the Council for the performance of its duties and expenses incurred for the Department's oversight responsibilities; specify who pays the assessment and how; authorize the imposition of a late-payment charge on past-due assessments; outline exemption procedures; address programs, plans, and projects; require the Council 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.

The proposed assessment rate is up to one cent per pound for domestic raspberries for processing and imported processed raspberries, with the initial assessment rate being one cent per pound. The assessment rate will be reviewed, and increased or decreased as recommended by the Council and approved by the Secretary after the first referendum is conducted as stated in § 1208.71 (a). Such an increase or decrease may occur not more than once annually and may not exceed the initial assessment rate of one cent per pound. Any change in the assessment rate shall be subject to rulemaking by the Department, and will be reviewed, and increased or decreased by the Secretary through rulemaking as recommended by the Council. Any change in the assessment rate shall be announced by the Council at least 30 days prior to going into effect. The maximum assessment rate authorized is one cent per pound.

The assessment rate may be raised or lowered at a rate not to exceed one cent per pound, after the initial continuance referendum which would be conducted after the program has been in operation five years. A referendum to approve the new assessment rate or for any other change is not required.

Sections 1208.60 through 1208.62 concerns reporting and recordkeeping requirements for persons subject to the Proposed Order and protect the confidentiality of information from such books, records, or reports.

Sections 1208.70 through 1208.78 describe the rights of the Secretary; address referenda; authorize the Secretary to suspend or terminate the Proposed Order when deemed appropriate; prescribe proceedings after

termination; address personal liability, separability, and amendments; and provide OMB control numbers.

While the proposal set forth below has not received the approval of the Department, it is determined that this Proposed Order is consistent with and will effectuate the purposes of the 1996 Act.

For the Proposed Order to become effective, it must be approved by a majority of producers and importers voting for approval in the referendum. Referendum procedures will be published separately in this issue of the **Federal Register**.

#### Referendum Order

Pursuant to the 1996 Act, a referendum will be conducted to determine whether eligible producers of raspberries for processing and importers of processed raspberries favor issuance of the Proposed Order. The Proposed Order is authorized under the 1996 Act.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1, 2008, through December 31, 2008. Producers must have produced 20,000 pounds of raspberries for processing and importers must have imported 20,000 pounds of processed raspberries during the representative period from January 1, 2008 through December 31, 2008, to be eligible to vote. The referendum shall be conducted by mail ballot from March 22, 2010 through April 2, 2010. Ballots must be received by the referendum agents no later than the close of business 4:30 pm (Eastern Time) on April 2, 2010, to be counted.

Section 518 of the 1996 Act authorizes the Department to conduct a referendum prior to the Order's effective date. The Order shall become effective only if it is determined that the Order has been approved by a majority of those eligible persons voting for approval.

Marlene Betts and Kimberly Coy, of the USDA, AMS, Research and Promotion Branch, are designated as the referendum agents to conduct this referendum. The referendum procedures [7 CFR 1208.100 through 1212.108], which were issued pursuant to the 1996 Act, shall be used to conduct the referendum.

The referendum agents will mail registration instructions to all know eligible producers and importers in advance of the referendum. Any producer or importer who does not receive registration instructions should contact the referendum agent cited under the "For Further Information" section no later than one week before

the end of the registration period. Prior to the first day of the voting period, the referendum agents will mail the ballots to be cast in the referendum and voting instructions to all eligible voters. Persons who are producers and importers during the representative period are eligible to vote. Any producer or importer who does not receive a ballot should contact the referendum agent cited under the **FOR FURTHER INFORMATION** section no later than one week before the end of the registration period. Ballots must be received by the referendum agents by the close of business on or before April 2, 2010, to be counted.

In accordance with the OMB regulation [5 CFR 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. 35], the referendum ballot, which represents the information collection and recordkeeping requirements that may be imposed by this rule, was submitted to OMB for approval and approved under OMB Number 0581-NEW.

#### List of Subjects in 7 CFR Part 1208

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

For the reasons set forth in the preamble, it is proposed that part 1208, Title 7, Chapter XI of the Code of Federal Regulations, be amended as follows:

#### PART 1208—PROCESSED RASPBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

1. The authority citation for part 1208 continues to read as follows:

**Authority:** 7 U.S.C. 7411-7425; 7 U.S.C. 7401.

2. Subpart A, consisting of §§ 1208.1 through 1208.78, is added to read as follows:

#### Subpart A—Processed Raspberry Promotion, Research, and Information Order

##### Definitions

- Sec.
- 1208.1 Act.
  - 1208.2 Conflict of interest.
  - 1208.3 Crop year.
  - 1208.4 Customs.
  - 1208.5 Department.
  - 1208.6 First handler.
  - 1208.7 Fiscal period.
  - 1208.8 Foreign producer.
  - 1208.9 Handle.
  - 1208.10 Importer.
  - 1208.11 Information.

- 1208.12 Market or marketing.
- 1208.13 National Processed Raspberry Council.
- 1208.14 Order.
- 1208.15 Part and subpart.
- 1208.16 Person.
- 1208.17 Processed raspberries.
- 1208.18 Processor.
- 1208.19 Producer.
- 1208.20 Promotion.
- 1208.21 Qualified national organization representing importer interests.
- 1208.22 Qualified organization representing foreign producer interests.
- 1208.23 Raspberries.
- 1208.24 Research.
- 1208.25 Secretary.
- 1208.26 State.
- 1208.27 Suspend.
- 1208.28 Terminate.
- 1208.29 United States.

#### National Processed Raspberry Council

- 1208.40 Establishment and membership.
- 1208.41 Nominations and appointments.
- 1208.42 Term of office.
- 1208.43 Vacancies.
- 1208.44 Alternate members.
- 1208.45 Procedure.
- 1208.46 Compensation and reimbursement.
- 1208.47 Powers and duties.
- 1208.48 Prohibited activities.

#### Expenses and Assessments

- 1208.50 Budget and expenses.
- 1208.51 Financial statements.
- 1208.52 Assessments.
- 1208.53 Exemption and reimbursement procedures.
- 1208.54 Programs, plans, and projects.
- 1208.55 Independent evaluation.
- 1208.56 Patents, copyrights, trademarks, information, publications, and product formulations.

#### Reports, Books, and Records

- 1208.60 Reports.
- 1208.61 Books and records.
- 1208.62 Confidential treatment.

#### Miscellaneous

- 1208.70 Right of the Secretary.
- 1208.71 Referenda.
- 1208.72 Suspension and termination.
- 1208.73 Proceedings after termination.
- 1208.74 Effect of termination or amendment.
- 1208.75 Personal liability.
- 1208.76 Separability.
- 1208.77 Amendments.
- 1208.78 OMB control numbers.

#### Subpart A—Processed Raspberry Promotion, Research, and Information Order

##### Definitions

##### § 1208.1 Act.

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411-7425), and any amendments thereto.

##### § 1208.2 Conflict of interest.

*Conflict of interest* means a situation in which a member or employee of the

Council has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Council for anything of economic value.

**§ 1208.3 Crop year.**

*Crop year* means the 12-month period from April 1 to March 31 or such other period approved by the Secretary.

**§ 1208.4 Customs.**

*Customs* means the United States Customs and Border Protection or U.S. Customs Service, an agency of the United States Department of Homeland Security.

**§ 1208.5 Department.**

*Department* means the United States 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.

**§ 1208.6 First handler.**

*First handler* means any person (excluding a common or contract carrier) receiving raspberries for processing from producers in a calendar year and who as owner or agent, ships or causes processed raspberries or raspberries for processing to be shipped as specified in the Order. This definition includes those engaged in the business of buying, selling and/or offering for sale, receiving, packing, grading, marketing, or distributing processed raspberries or raspberries for processing in commercial quantities. This definition excludes a retailer, except a retailer who purchases or acquires from, or handles on behalf of, any producer of raspberries for processing. The term first handler includes a producer who handles or markets processed raspberries of the producer's own production.

**§ 1208.7 Fiscal period.**

*Fiscal period* means a calendar year from April 1 through March 31, or such other period as approved by the Secretary.

**§ 1208.8 Foreign producer.**

*Foreign producer* means any person:

- Who is engaged in the production and sale of raspberries for processing outside of the United States and who owns, or shares the ownership and risk of loss of raspberries for processing 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, processed raspberries beyond the person's own family use and having value at first point of sale.

**§ 1208.9 Handle.**

*Handle* means to pack, process, sell, transport, purchase, or in any other way to place or cause processed raspberries or raspberries for processing to which one has title or possession to be placed in the current of commerce. Such term shall not include the transportation or delivery of raspberries for processing by the producer thereof to a handler.

**§ 1208.10 Importer.**

*Importer* means any person importing 20,000 pounds or more of processed raspberries 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 processed raspberries outside of the United States for sale in the United States, and who is listed in the import records as the importer of record for such processed raspberries.

**§ 1208.11 Information.**

*Information* means information and programs that are designed to increase efficiency in processing and to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of processed raspberries or raspberries for processing on a national basis. These include:

- 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 processed raspberries and raspberries for processing.
- Food industry information*, which means any action taken to provide information to, and broaden the understanding of, the food industry regarding the consumption, use, nutritional attributes, and care of processed raspberries and raspberries for processing.

- Industry information*, which means any action taken to provide information to or collect information from, and broaden the understanding of, the raspberry industry regarding the production, consumption, use, nutritional attributes, and care of processed raspberries and raspberries for processing.

**§ 1208.12 Market or marketing.**

(a) *Marketing* means the sale or other disposition of processed raspberries in interstate, foreign or intrastate commerce.

(b) *To market* means to sell or otherwise dispose of processed raspberries in any channel of commerce.

**§ 1208.13 National Processed Raspberry Council.**

*National Processed Raspberry Council* or such other name as recommended by the Council and approved by the Department means the administrative body established pursuant to § 1208.40.

**§ 1208.14 Order.**

*Order* means the Processed Raspberry Promotion, Research, and Information Order.

**§ 1208.15 Part and subpart.**

*Part* means the Processed Raspberry 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.

**§ 1208.16 Person.**

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

**§ 1208.17 Processed raspberries.**

*Processed raspberries* means raspberries which have been frozen, dried, pureed, made into juice, or delivered in any other form altered by mechanical processes other than fresh.

**§ 1208.18 Processor.**

*Processor* means a person engaged in the preparation of raspberries for processing for market who owns or who shares the ownership and risk of loss of such raspberries.

**§ 1208.19 Producer.**

*Producer* means any person who grows 20,000 pounds or more of raspberries for processing in the United States for sale in commerce, and a person who is engaged in the business of producing, or causing to be produced for any market, raspberries for processing beyond the person's own family use and having value at first point of sale.

**§ 1208.20 Promotion.**

*Promotion* means any action taken to present a favorable image of processed raspberries to the general public and the food industry for the purpose of improving the competitive position of processed raspberries both in the United States and abroad and stimulating the sale of processed raspberries including paid advertising and public relations.

**§ 1208.21 Qualified national organization representing importer interests.**

*Qualified national organization representing importer interests* means an organization that the Secretary certifies as being eligible to nominate

importer and alternate importer members to the Council.

**§ 1208.22 Qualified organization representing foreign producer interests.**

*Qualified organization representing foreign producer interests* means an organization that the Secretary certifies as being eligible to nominate foreign producer and alternate foreign producer members to the Council.

**§ 1208.23 Raspberries.**

*Raspberries* mean and include all kinds, varieties, and hybrids of cultivated raspberries of the genus "rubus idaeus L." grown in or imported into the United States.

**§ 1208.24 Research.**

*Research* means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of processed raspberries or raspberries for processing, including but not limited to research relating to nutritional value, cost of production, new product development, health research, and marketing of processed raspberries or raspberries for processing.

**§ 1208.25 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has been delegated, or to whom authority may be delegated, to act in the Secretary's stead.

**§ 1208.26 State.**

*State* means any of the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

**§ 1208.27 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.

**§ 1208.28 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.

**§ 1208.29 United States.**

*United States* means collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

**National Processed Raspberry Council**

**§ 1208.40 Establishment and membership.**

(a) *Establishment of the National Processed Raspberry Council.* There is hereby established a National Processed Raspberry Council, or such other name as recommended by the Council and approved by the Department, hereinafter called Council, composed of thirteen (13) members and thirteen (13) alternate members, appointed by the Secretary from nominations as follows:

(1) Six (6) processed raspberry producer members and alternate members from States producing a minimum of three (3) million pounds of raspberries delivered for processing. Distribution of the seats among the eligible States shall be proportional to the percent determined by the average of the total pounds produced and delivered to processors for processing over the previous three years divided by the average total pounds by all of the eligible States for the previous three years. Only States whose producers deliver raspberries for processing and pay assessments are eligible for nomination and election to the Council. Average production will be based upon either State production figures or the Department data for the initial election, and production figures generated by either the Council or the Department thereafter;

(2) One (1) processed raspberry producer member and alternate member representing all other States producing less than three (3) million pounds of raspberries delivered for processing. All States producing less than three million pounds of raspberries delivered for processing will constitute a region from which one producer member and alternate will be nominated to the Council. Only States whose producers deliver raspberries for processing and pay assessments are eligible for nomination and election to the Council. Average production will be based upon either State production figures or the Department data for the initial election, and production figures generated by either the Council or the Department thereafter;

(3) Three (3) processed raspberry importer members and alternate members;

(4) Two (2) foreign producers and their alternate members from countries exporting a minimum of three million pounds of raspberries for processing to the U.S., based on a three-year average; and

(5) One (1) at-large member and an alternate recommended by the Council and shall be submitted by the Council to the Secretary for approval. In

recommending the at-large member and alternate, the Council shall give consideration to nutrition health professionals and others interested in the raspberry industry. Nominations for the initial Council will be handled by the Department.

(b) *Adjustment of membership.* At least once every five years, but not more frequently than once every three years, the Council will review the geographic distribution of United States production of processed raspberries and the quantity and source of processed raspberry imports. The review will be conducted through an audit of State crop production figures and Council assessment receipts. If warranted, the Council will recommend to the Secretary that membership on the Council be altered to reflect any changes in geographic distribution of domestic raspberry production for processing and the quantity of imports. If the level of imports increases or decreases, importer members and alternates may be added or reduced on the Council, subject to recommendation by the Council and approval of the Secretary. However, the foreign producer seats will remain the same regardless of the volume of imports from importing countries.

(c) *Council's Ability to Serve the Diversity of the Industry.* When making recommendations for appointments, the industry should take into account the diversity of the population served and the knowledge, skills, and abilities of the members to serve a diverse population, size of the operations, methods of production and distribution, and other distinguishing factors to ensure that the Council represents the diverse interests of persons responsible for paying assessments, and others in the marketing chain, if appropriate.

**§ 1208.41 Nominations and appointments.**

(a) Voting for regional and State producer representatives will be made by mail ballot.

(b) Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council.

(c) The nominations for the six producer and alternate members from States producing a minimum three year average of three million pounds of raspberries delivered for processing will be submitted to the Council in the following manner:

(1) For those States that have a State raspberry commission or State marketing order, the State commission or committee will nominate producers and their alternates to serve. Nominations will be sent to the Council and placed on a ballot which will then

be sent to producers in the State for a vote. The nominee for member will have received the highest number of votes cast. The person with the second highest number of votes cast will be the nominee for alternate. The persons with the third and fourth place highest number of votes cast will be designated as additional nominees for consideration by the Secretary. Once the Council has received all of the nominations from commissions or committees, the information will be submitted to the Secretary for appointment. Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council staff and shall be submitted to the Secretary not less than 90 days prior to the expiration of the term of office; or

(2) For those States that do not have a State commission or State marketing order, the Council will seek nominations from the State Departments of Agriculture for members and alternates from the specific States who may directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

(3) The distribution of the six producer and alternate seats will be proportional to the percentage determined by the average of the total pounds produced and delivered to processors for processing over the previous three years divided by the average total pounds produced over the previous three years.

(d) The nominee for the one raspberry producer of raspberries for processing and alternate member who represents all other States producing less than a minimum three year average of three million pounds of raspberries delivered for processing, will constitute a region and the nominations will be submitted to the Council in the following manner:

(1) For those States that have a State raspberry commission or State marketing order, the State commission or committee will nominate producers and their alternates to serve. The State commission or committee nominations will be sent to the Council and placed on a ballot which will then be sent to producers in the Region for a vote. The nominee for member will have received the highest number of votes cast. The person with the second highest number of votes cast will be the nominee for alternate. The persons with the third and fourth place highest number of votes cast will be designated as

additional nominees for consideration by the Secretary. Once the Council has received all of the nominations from commissions or committees, the information will be submitted to the Secretary for appointment. Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council staff and shall be submitted to the Secretary not less than 90 days prior to the expiration of the term of office; or

(2) For those States that do not have a State commission or State marketing order, the Council will seek nominations from the State Departments of Agriculture for the member and alternate from the specific States. The State Departments of Agriculture would have the opportunity to participate in nomination caucuses and will directly submit as a group a single slate of nominations to the Department for the producer position and the producer alternate position on the Council for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

(e) Only producers from States that deliver raspberries for processing and are covered under the program are eligible for nomination and election to the Council. Average production will be based upon Department production data for the initial nomination and production figures generated by either the Council or the Department thereafter.

(f) Nominations for the importer positions and their alternates will be made by qualified national organizations representing importers as follows:

(1) All qualified national organizations representing importers would have the opportunity to participate in nomination caucuses and will submit as a group a single slate of nominations to the Secretary for the importer positions and the importer alternate positions on the Council. Eligible organizations must submit nominations to the Department not less than 90 days prior to the expiration of the term of office. Two nominees for each member and each alternate position will be submitted to the Secretary for consideration.

(2) If the Department determines that there are no qualified national organizations representing importers, individuals who have paid their assessments to the Council in the most recent fiscal year or for the initial Council, those that imported processed

raspberries into the U.S., may directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office.

(g) Nominations for the foreign producer positions and their alternates will be made by qualified organizations representing foreign producers as follows:

(1) All qualified organizations representing foreign producer interests will have the opportunity to participate in nomination caucuses and will submit as a group a single slate of nominations to the Secretary for the foreign producer positions and the foreign producer alternate positions on the Council.

(2) If the Department determines that there are no qualified organizations representing foreign producer interests, individual foreign producers may directly submit nominations to the Department for the initial Council. Subsequent nominations shall be submitted to the Council and will be handled by the Council staff who in turn shall submit those nominations to the Secretary not less than 90 days prior to the expiration of the term of office. For the initial Council, persons that meet the definition of foreign producer as defined in this subpart will certify such qualification and upon certification, if qualified, may submit nominations. Two nominees for each member and each alternate position will be submitted to the Secretary for consideration.

(h) Nominations for the at-large member and alternate will be conducted at a Council meeting by the Council and shall be submitted by the Council to the Secretary for approval. Nominations for the initial Council will be handled by the Department. Subsequent nominations will be handled by the Council and shall be submitted to the Secretary not less than 90 days prior to the expiration of the term of office.

(i) From the nominations, the Secretary shall select the members of the Council and alternates for each position on the Council. Members will serve until their replacements have been appointed by the Secretary.

(j) If there is an insufficient number of nominees from whom to appoint members to the Council, the Secretary may appoint members in such a manner as the Secretary determines appropriate.

(k) Qualified national organization representing importer interests. To be certified as a qualified national organization representing importer

interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization must represent a substantial number of importers who market or produce a substantial volume of raspberries for processing;

(2) The organization has a history of stability and permanency and has been in existence for more than one year;

(3) The organization must promote processed raspberries importers' welfare; and

(4) The organization must derive a portion of its operating funds from importers.

(l) Qualified organization representing foreign producer interests. To be certified by the Secretary as a qualified organization representing foreign producer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization must represent a substantial number of foreign producers who produce a substantial volume of raspberries for processing;

(2) The organization has a history of stability and permanency and has been in existence for more than one year;

(3) The organization must promote processed raspberry foreign producers' welfare;

(4) The organization must derive a portion of its operating funds from foreign producers; and

(5) The organization must be from a country exporting a minimum of three million pounds of raspberries for processing to the U.S. based on a three-year average.

(m) Eligible organizations, foreign producers, or importers must submit nominations to the Secretary not less than 90 days prior to the expiration of the term of office. At least two nominees for each position to be filled must be submitted.

#### **§ 1208.42 Term of office.**

Council members and alternates will serve for a term of three years and be able to serve a maximum of two consecutive terms. A Council member may serve as an alternate during the years the member is ineligible for a member position. When the Council is first established, four producer members, two importers, one of the two foreign producers, and the at-large member and their respective alternates will be assigned initial terms of three years. The remaining three producer members, one importer member, and the second foreign producer and their alternates will serve an initial term of two years. Members serving an initial

term of two years will be eligible to serve a second term of three years. Thereafter, each of these positions will carry a full three-year term. Council nominations and appointments will take place in two out of every three years. Council members shall serve during the term of office for which they are appointed and have qualified, and until their successors are appointed and have qualified. Each term of office will end on December 31, with new terms of office beginning on January 1.

#### **§ 1208.43 Vacancies.**

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

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

(c) Should any member position become vacant, the alternate of that member shall automatically assume the position of said member. Should the positions of both a member and such member's alternate become vacant, successors for the unexpired terms of such member and alternate shall be appointed in the manner specified in §§ 1208.40 and 1208.41, except that said nomination and replacement shall not be required if said unexpired terms are less than six months.

#### **§ 1208.44 Alternate members.**

An alternate member of the Council, during the absence of the member for whom the person is the alternate, shall act in the place and stead of such member and perform such duties as assigned. In the event of death, removal, resignation, or disqualification of any member, the alternate for that member shall automatically assume the position of said member. In the event that a producer, importer, foreign producer, or at-large member of the Council and their alternate are unable to attend a meeting, the Council may not designate any other alternate to serve in such member's or alternate's place and stead for such a meeting.

#### **§ 1208.45 Procedure.**

(a) At a Council meeting, it will be considered a quorum when a majority (one more than half) of the Council

members is present. An alternate will be counted for the purpose of determining a quorum only if the member for whom the person is the alternate is absent or disqualified from participating.

(b) At the start of each fiscal period, the Council will select a chairperson, vice chairperson, and other officers as appropriate, who will conduct meetings throughout that period.

(c) The chairperson and the treasurer shall reside in the United States, and the Council office shall also be located in the United States.

(d) All Council meetings shall be held in the United States.

(e) All Council members and alternates will receive a minimum of 20 days' advance notice of all Council and committee meetings.

(f) Each member of the Council will be entitled to one vote on any matter put to the Council, and the motion will carry if supported by one (1) vote more than 50 percent of the total votes represented by the Council members present.

(g) It will be considered a quorum at a Council committee meeting when at least one more than half of those assigned to the Council committee are present. Alternates may also be assigned to Council committees as necessary. Council committees may consist of persons other than Council members and such persons may vote in Council committee meetings.

(h) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Council such action is considered necessary, the Council may take action if supported by one vote more than 50 percent of the members present, by mail, telephone, electronic mail, facsimile, or any other means of communication, and all telephone votes shall be confirmed promptly in writing. 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 Council. All votes shall be recorded in Council minutes.

(i) There shall be no voting by proxy.

(j) The chairperson shall be a voting member.

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

**§ 1208.46 Compensation and reimbursement.**

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

**§ 1208.47 Powers and duties.**

The Council 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 Secretary for approval such bylaws as may be necessary for the functioning of the Council, 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 Council a chairperson, other officers, committees, and subcommittees, as the Council determines to be appropriate;
- (d) To employ persons, other than members, as the Council considers necessary to assist the Council in carrying out its duties and to determine the compensation and specify the duties of such persons;
- (e) To develop and carry out generic promotion, research, and information activities relating to processed raspberries;
- (f) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary 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 Council shall develop and submit to the Council 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 Council of activities conducted under the contract or agreement; and make such other reports available as the Council or the Secretary considers necessary. Any contract or agreement shall provide that:
  - (1) The contractor or agreeing party shall develop and submit to the Council 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 Council of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Council may require;

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

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

(g) To prepare and submit for approval of the Secretary, before the beginning of each fiscal year, rates of assessment and a fiscal year budget of the anticipated expenses to be incurred in the administration of the Order, including the probable cost of each promotion, research, and information activity proposed to be developed or carried out by the Council in accordance with § 1208.50;

(h) To borrow funds necessary for the startup expenses of the order;

(i) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may require and to make the records available to the Secretary for inspection and audit; 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 Council;

(j) To cause its books to be audited by an independent auditor at the end of each fiscal year and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(k) To give the Secretary the same notice of meetings of the Council as is given to members in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Council to the Secretary;

(l) To act as intermediary between the Secretary and any producer, first handler, processor, importer, or foreign producer;

(m) To furnish to the Secretary any information or records that the Secretary may request;

(n) To receive, investigate, and report to the Secretary complaints of violations of the Order;

(o) To recommend to the Secretary such amendments to the Order as the Council considers appropriate;

(p) To work to achieve an effective, continuous, and coordinated program of

promotion, research, consumer information, evaluation, and industry information designed to strengthen the processed raspberry industry's position in the marketplace; maintain and expand existing markets and uses for processed raspberries; and to carry out programs, plans, and projects designed to provide maximum benefits to the processed raspberry industry; and

(q) To pay the cost of the activities with assessments collected under § 1208.52.

**§ 1208.48 Prohibited activities.**

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

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

(b) Using funds collected by the Council 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 Secretary amendments to the Order; and

(c) Any advertising, including promotion, research, and information activities authorized to be carried out under the Order that may be false or misleading or disparaging to another agricultural commodity.

**Expenses and Assessments****§ 1208.50 Budget and expenses.**

(a) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. The budget for research, promotion, or information may not be implemented prior to approval of the budget by the Secretary. No later than forty-five (45) days after the receipt of such budget, the Secretary shall notify the Council whether the Secretary approves or disapproves the budget. Each 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); and
  - (3) A summary of proposed expenditures for each program, plan, or project;
  - (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 Secretary, including shifting funds from one program, plan, or project to another. Shifts in funds which do not cause an increase in the Council's approved budget, and which are consistent with by laws, need not have prior approval by the Department.

(d) The Council is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Council 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 Council.

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

(f) The Council is authorized to repay startup costs associated with establishing a program and an initial referendum. If approved, these costs would be amortized and repaid over a maximum three (3) year period.

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

(h) The Council may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, with the approval of the Secretary, for authorized activities.

(i) The Council shall reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration, enforcement, and supervision of the Order, including all referendum costs in connection with the Order.

(j) The Council may not expend for administration, maintenance, and functioning of the Council in any fiscal year an amount that exceeds 15 percent of the assessments and other income received by the Council for that fiscal year. Reimbursements to the Secretary required under paragraph (i) of this

section are excluded from this limitation on spending.

(k) The Council 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 Secretary, such reserve funds may be used to defray any expenses authorized under this part.

(l) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Council may invest assessments and all other revenues collected under this section in:

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System; or

(4) Obligations fully guaranteed as to principal interest by the United States.

#### **§ 1208.51 Financial statements.**

(a) As requested by the Secretary, the Council shall prepare and submit financial statements to the Secretary 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 Secretary within 30 days after the end of the time period to which it applies.

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

#### **§ 1208.52 Assessments.**

(a) The funds to cover the Council's expenses shall be paid from assessments on producers and importers at a rate not to exceed one cent per pound; the initial rate is one cent per pound, donations from any person not subject to assessments under this Order, and other funds available to the Council including those collected pursuant to § 1208.56 and subject to the limitations contained therein.

(b) The collection of assessments on domestic processed raspberries will be the responsibility of the first handler receiving the raspberries for processing. In the case of the producer acting as its own first handler, the producer will be required to collect and remit its

individual assessments. The rate of assessments shall be prescribed in regulations issued by the Secretary.

(c) The Council may recommend to the Secretary an increase or decrease to the assessment rate. Such an increase or decrease may occur not more than once annually. Any change in the assessment rate shall be subject to rulemaking by the Department.

(d) Each importer of processed raspberries shall pay an assessment to the Council on processed raspberries imported for marketing in the United States, through Customs. If Customs does not collect an assessment from an importer, the importer would be responsible for paying the assessment directly to the Council. The assessment rate for imported processed raspberries shall not exceed one cent per pound, with the initial rate being one cent per pound.

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

(2) The import assessment shall be uniformly applied to imported processed red raspberries that are identified by the numbers 0811.20.2025 in the Harmonized Tariff Schedule of the United States or any other numbers used to identify processed raspberries.

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

(e) All assessment payments will be submitted to the office of the Council. All final payments for a crop year are to be received no later than October 30 of that year for producers of processed raspberries within the United States. A late payment charge shall be imposed on any handler or importer who fails to remit to the Council, the total amount for which any such first handler or importer is liable on or before the due date established by the Council. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the first handler or importer is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

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

(g) The Council may authorize other organizations to collect assessments on its behalf with the approval of the Secretary.

(h) Council may provide credits of assessments for those persons who contribute to local, regional, or State

organizations engaged in similar generic research, promotion, and information programs as partial fulfillment of assessment due to the Council subject to approval of the Secretary, for expenditure on generic research, promotion and information programs conducted within the United States.

(1) No credit will be given for funds expended for administrative purposes.

(2) No credit shall be given for research, promotion, and information program activity conducted outside of the United States.

(3) The aggregate credit allowable in any one year shall be limited to an amount determined by the Council subject to the approval of the secretary, and shall be equal to not more than the determined percentage rate of the total assessments paid by any individual in a year to any State, regional, or local program.

(4) Credit shall only be given for generic research, promotion, and information program activities.

(5) Credit of assessment may be obtained only by following the procedures prescribed in this section and any regulations recommended by the Council and prescribed by the Secretary. An individual owing assessments shall make a written request to the Council and the request shall contain the assessment paying individual's signature and shall show:

(i) The name and address of the assessment paying individual;

(ii) The name and address of the person who collected the assessment;

(iii) The quantity of processed raspberries on which a credit is requested;

(iv) The total amount of credit requested;

(v) The date or dates on which the assessments were paid;

(vi) A certification that the assessment was not collected from another producer or documentation of assessments collected from local, State, or regional organizations; and

(vii) The individual's signature or properly witnessed mark.

(6) The evidence of payment as required under § 1208.61, or a copy thereof, or such other evidence deemed necessary to the Council shall accompany the individual's credit of assessment request.

#### **§ 1208.53 Exemption and reimbursement procedures.**

(a) Any producer who produces less than 20,000 pounds of raspberries for processing annually who desires to claim an exemption from assessments during a fiscal year as provided in § 1208.52 shall apply to the Council, on

a form provided by the Council, for a certificate of exemption. Such producer shall certify that the producer's production of raspberries for processing shall be less than 20,000 pounds for the fiscal year for which the exemption is claimed. Any importer who imports less than 20,000 pounds of processed raspberries annually who desires to claim an exemption from assessments during a fiscal year as provided in § 1208.52 shall apply to the Council, on a form provided by the Council, for a certificate of exemption. Such importer shall certify that the importer's importation of processed raspberries shall not exceed 20,000 pounds, for the fiscal year for which the exemption is claimed. If a producer or importer determines at the end of the year that they did not meet the 20,000 pounds minimum, the producer or importer can request a reimbursement on the assessments paid to the Council by 60 days of the last day of the year. If, after a person has been exempt from paying assessments for any year pursuant to this section, and the person no longer meets the requirements of paragraph of this section for an exemption, the person shall file a report with the Council in the form and manner prescribed by the Council and pay an assessment on or before March 15 of the subsequent year on all raspberries for processing produced or processed raspberries imported by such persons during the year for which the person claimed the exemption.

(b) On receipt of an application, the Council shall determine whether an exemption may be granted. The Council will then issue, if deemed appropriate, a certificate of exemption to the producer or importer which is eligible to receive one. Each producer who is exempt from assessment must provide an exemption number as supplied by the Council to the first handler in order to be exempt from the collection of an assessment on raspberries for processing. First handlers shall maintain records showing the exemptee's name and address along with the exemption number assigned by the Council.

(c) Importers who are eligible for reimbursement of assessments collected by Customs shall apply to the Council for reimbursement of such assessments paid. No interest will be paid on assessments collected by Customs. Requests for reimbursement shall be submitted within 60 days of the last day of the year the processed raspberries were actually imported. Any claim for reimbursement submitted after sixty (60) days will be considered null and void.

(d) A producer who produces raspberries for processing who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, produces only products that are eligible to be labeled as 100 percent organic under the NOP, and is not a split operation shall be exempt from the payment of assessments.

(1) To obtain this exemption, an eligible producer shall submit a request for exemption to the Council—on a form provided by the Council—at any time initially and annually thereafter on or before the beginning of the fiscal period as long as the producer continues to be eligible for the exemption.

(2) The request shall include the following: The producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in the Organic Act, a signed certification that the applicant meets all of the requirements specified for an assessment exemption, and such other information as may be required by the Council and with the approval of the Secretary.

(3) If the producer complies with the requirements of paragraph (d) of this section, the Council will grant an assessment exemption and shall issue a Certificate of Exemption to the producer. For exemption requests received on or before March 15 of the fiscal year, the Council will have 60 days to approve the exemption request; after March 15 of the fiscal year, the Council will have 30 days to approve the exemption request. If the application is disapproved, the Council will notify the applicant of the reason(s) for disapproval within the same timeframe.

(4) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Council and request an exemption from assessment on 100 percent organic processed raspberries—on a form provided by the Council—at any time initially and annually thereafter on or before the beginning of the fiscal period as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of a producer in paragraph (d)(3) of this section. If the importer complies with the requirements of this section, the Council will grant the exemption and issue a Certificate of Exemption to the importer within the applicable timeframe. The Council will also issue the importer a 9-

digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic processed raspberries bearing this HTS classification assigned by the Council will not be subject to assessments.

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

(f) The Council, with the Secretary's approval, may request that persons claiming an exemption from assessments under § 1208.53 must provide it with any information it deems necessary about the exemption, including, without limitation, the disposition of the exempted commodity.

(g) The exemption will apply immediately following the issuance of the certificate of exemption.

#### **§ 1208.54 Programs, plans, and projects.**

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

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

(2) The establishment and conduct of research with respect to the use, nutritional value, production, health, sale, distribution, and marketing of processed raspberries, and the creation of new products or product development, thereof, to the end that the marketing and use of processed raspberries may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of processed raspberries.

(b) A program, plan, or project may not be implemented prior to approval of the program, plan, or project by the Secretary. No later than forty-five (45) days after the receipt of such program, plan, or project, the Secretary shall notify the Council whether the Secretary approves or disapproves the program, plan, or project. Once a program, plan, or project is so approved, the Council 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 Council to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Council that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Council shall terminate such program, plan, or project.

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

#### **§ 1208.55 Independent evaluation.**

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

#### **§ 1208.56 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 Council under this subpart shall be the property of the U.S. Government as represented by the Council 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 Council, shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Council, and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1208.73 shall apply to determine disposition of all such property.

#### **Reports, Books, and Records**

##### **§ 1208.60 Reports.**

(a) Each first handler subject to this subpart may be required to provide to the Council periodically such information as may be required by the Council, with the approval of the Secretary, which may include but not be limited to the following:

- (1) Number of pounds handled;
- (2) Number of pounds on which an assessment was collected;
- (3) Name and address of person from whom the first handler has collected the

assessments on each pound handled; and

(4) Date collection was made on each pound handled. All reports are due to the Council 30 days after the end of the crop year.

(b) Each importer subject to this subpart may be required to provide to the Council periodically such information as may be required by the Council, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of pounds processed raspberries imported;

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

(3) Name and address of the importer;

(4) Date collection was made on each pound processed raspberries imported. All reports are due to the Council 30 days after the end of the crop year.

##### **§ 1208.61 Books and records.**

Each first handler, producer, and importer subject to this subpart shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two (2) years beyond the fiscal period of their applicability.

##### **§ 1208.62 Confidential treatment.**

All information obtained from books, records, or reports under the Act, this subpart, and the regulations issued thereunder shall be kept confidential by all persons, including all employees and former employees of the Council, 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 Council members, producers, importers, exporters, foreign producers, or first handlers. 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 subpart, together with a statement of the particular provisions of this subpart violated by such person.

#### Miscellaneous

##### § 1208.70 Right of the Secretary.

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

##### § 1208.71 Referenda.

(a) *Initial referendum.* The Order shall not become effective unless the Order is approved by a majority of producers and importers voting for approval in the initial referendum who, during a representative period determined by the Secretary, have been engaged in the production of raspberries for processing or the importation of processed raspberries.

(b) *Subsequent referenda.* Every seven years, the Secretary shall hold a referendum to determine whether producers of raspberry delivered for processing and importers of processed raspberries favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of processed raspberries. The Secretary will also conduct a subsequent referendum if 10 percent or more of all eligible producers of raspberries for processing and importers of processed raspberries request the Secretary to hold a referendum or if the Council established under § 1208.40 requests that the Secretary hold a referendum. In addition, the Secretary may hold a referendum at any time.

##### § 1208.72 Suspension and termination.

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

(b) The Secretary shall suspend or terminate this subpart at the end of the marketing year whenever the Secretary

determines that its suspension or termination is approved or favored by a majority of producers and importers voting for approval who, during a representative period determined by the Secretary, have been engaged in the production or importation of processed raspberries.

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

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

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

##### § 1208.73 Proceedings after termination.

(a) Upon the termination of this subpart, the Council shall recommend not more than three of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Council. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property then in the possession or under control of the Council, 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 Secretary.

(2) Carry out the obligations of the Council 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 Council and the trustees, to such person or persons as the Secretary may direct.

(4) Upon request of the Secretary 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 Council 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 Council and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to one or more domestic raspberry industry organizations in the interest of continuing processed

raspberry promotion, research, and information programs.

##### § 1208.74 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendment to either 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 subpart or any regulation issued thereunder.

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder.

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

##### § 1208.75 Personal liability.

No member, alternate member, or employee of the Council 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, alternate, or employee, except for acts of dishonesty or willful misconduct.

##### § 1208.76 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.

##### § 1208.77 Amendments.

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

##### § 1208.78 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505-0001, OMB control number 0581-0093, and OMB control number 0581-NEW.

Dated: January 27, 2010.

**David R. Shipman,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 2010-2065 Filed 2-5-10; 8:45 am]

**BILLING CODE 3410-02-P**