

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1206

[Doc. # FV-02-708-FR]

Mango Promotion, Research, and Information Order; Subpart B—Referendum Procedures

AGENCY: Agricultural Marketing Service, Agriculture.

ACTION: Final rule.

SUMMARY: This rule establishes procedures which the Department of Agriculture (USDA or the Department) will use in conducting a referendum to determine whether the issuance of the proposed Mango Promotion, Research, and Information Order (Order) is favored by first handlers and importers of mangos. The Order will be implemented if it is approved by a majority of the eligible first handlers and importers voting in the referendum. These procedures will also be used for any subsequent referendum under the Order, if it is approved in the initial referendum. The proposed Order is being published separately in this issue of the **Federal Register**. This proposed program would be implemented under the Commodity Promotion, Research, and Information Act of 1996.

EFFECTIVE DATE: November 10, 2003.

FOR FURTHER INFORMATION CONTACT: Kathie M. Birdsell, RP, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 2535-8, Washington, DC 20250-0244; telephone 202-720-4835, fax 202-205-2800, or kathie.birdsell@usda.gov.

SUPPLEMENTARY INFORMATION: A referendum will be conducted among eligible first handlers and importers of mangos to determine whether they favor issuance of the proposed Mango Promotion, Research, and Information Order (Order) [7 CFR part 1206]. The program will be implemented if it is approved by a majority of the first handlers and importers voting in the referendum. The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (Act) [Pub. L. 104-127, 7 U.S.C. 7411-7425]. It would cover domestic and imported mangos of the *Mangifera indica* L. variety from the family of *Anacardiaceae*. A proposed Order is being published separately in this issue of the **Federal Register**.

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 E.O. 12988, Civil Justice Reform. It is not intended to have retroactive effect.

Section 524 of the Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under Section 519 of the Act, a person subject to an order may file a petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and requesting a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall be the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of entry of USDA's final ruling.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agency is required to examine the impact of the proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such action so that small businesses will not be disproportionately burdened.

The Act, which authorizes the Department to consider industry proposals for generic programs of promotion, research, and information for agricultural commodities, became effective on April 4, 1996. The Act provides for alternatives within the terms of a variety of provisions.

Paragraph (e) of Section 518 of the Act provides three options for determining industry approval of a new research and promotion program: (1) By a majority of those voting; (2) by a majority of the volume of the agricultural commodity voted in the referendum; or (3) by a majority of those persons voting who also represent a majority of the volume of the agricultural commodity voted in

the referendum. In addition, Section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under an order. The Fresh Produce Association of the Americas (Association) has recommended that the Department conduct a referendum in which approval of an order would be based on a majority of the first handlers and importers voting. The Association also has recommended that a referendum be conducted prior to the proposed Order going into effect.

This rule establishes the procedures under which first handlers and importers of mangos may vote on whether they want a mango promotion, research, and information program to be implemented. This action adds a new subpart which establishes procedures to conduct an initial and future referenda. The new subpart covers definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

There are approximately 5 first handlers and 55 importers of mangos who would be subject to the program and eligible to vote in the first referendum. The Small Business Administration [13 CFR 121.201] defines small agricultural service firms as those having annual receipts of \$5 million or less. First handlers and importers would be considered agricultural service firms. Using these criteria, most first handlers and importers to be covered by the proposed program would be considered small businesses.

U.S. production of mangos is located in California, Florida, Hawaii, and Puerto Rico, according to the most recent U.S. Census of Agriculture (Census) which was in 1997. The Census does not include California production because California has so few producers that publishing production data would reveal confidential information. In 1997, production in Florida totaled 6.1 million pounds, Hawaii's production was 0.1 million pounds, and Puerto Rico's production as approximately 32.9 million pounds. For Florida and Hawaii combined, production fell from 16.6 million pounds in 1992 to 6.2 million pounds in 1997. Census data are published every five years. USDA does not report the value of U.S. production.

Seven countries account for 99 percent of the mangos imported into the United States. These countries and their share of the imports (from September 1, 2000, through June 30, 2001) are: Mexico (57 percent); Brazil (11 percent);

Ecuador (10 percent); Peru (10 percent); Guatemala (7 percent); Haiti (3 percent); and Costa Rica (1 percent). For the period from September 1, 2000, through June 30, 2001, the United States imported a total of 170,445 tons of mangos, valued at \$106 million. In the previous full season (September 1, 1999, through August 31, 2000), 253,591 tons, valued at \$141 million, were imported into the United States.

A preliminary estimate of per capita consumption of mangos by USDA's Economic Research Service (ERS) was 1.80 pounds in 2000. Per capita consumption has been trending upwards for several decades. In 1979 per capita consumption was 0.21 pounds, and in 1989 was 0.51 pounds.

This rule provides the procedures under which first handlers and importers of mangos may vote on whether they want the Order to be implemented. In accordance with the provisions of the Act, subsequent referenda may be conducted, and it is anticipated that the proposed procedures would apply. There are approximately 5 first handlers and 55 importers who will be eligible to vote in the first referendum. First handlers and importers of less than 500,000 pounds of mangos annually will be exempt from assessments and not eligible to vote in the referendum.

USDA will keep these individuals informed throughout the program implementation and referendum process to ensure that they are aware of and are able to participate in the program implementation process. USDA will also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed. Further, the information will be available electronically.

Voting in the referendum is optional. However, if first handlers and importers choose to vote, the burden of voting would be offset by the benefits of having the opportunity to vote on whether or not they want to be covered by the program.

The information collection requirements contained in this rule are designed to minimize the burden on first handlers and importers. This rule provides for a ballot to be used by eligible first handlers and importers to vote in the referendum. The estimated annual cost of providing the information by an estimated 5 first handlers and for an estimated 55 importers would be \$5.00 for all first handlers or \$1.00 per first handler and \$55.00 for all importers or \$1.00 per importer.

USDA considered requiring eligible voters to vote in person at various

USDA offices across the country. USDA also considered electronic voting, but the use of computers is not universal. Conducting the referendum from one central location by mail ballot would also be more cost-effective and reliable. USDA will provide easy access to information for potential voters through a toll-free telephone line and the Internet.

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

This Final Regulatory Flexibility Analysis has a conforming change to the Order's Final Regulatory Flexibility Analysis. This change includes production information from Puerto Rico to address a concern of one commenter raised in a comment concerning the proposed Order's Initial Regulatory Flexibility Analysis. This commenter noted that Puerto Rico is covered by the Order as part of the United States, but Puerto Rico's production was not included in the economic information on the mango industry. Therefore, information on Puerto Rico was added to the analysis.

Paperwork Reduction Act

In accordance with the OMB regulation [5 CFR 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the referendum ballot, which represents the information collection and recordkeeping requirements that will be imposed by this rule, has been approved by OMB.

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

OMB Number: 0581-0209.

Expiration Date of Approval: February 28, 2006.

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

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act. The burden associated with the ballot is as follows:

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

Respondents: First handlers and importers.

Estimated Number of Respondents: 60.

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

Estimated Total Annual Burden on Respondents: 6.0 hours.

The estimated annual cost of providing the information by an estimated 5 first handlers would be

\$5.00 or \$1.00 per first handler and for an estimated 55 importers would be \$55.00 or \$1.00 per importer.

Background

The Act, which became effective on April 4, 1996, authorizes the Department to establish a national research and promotion program covering domestic and imported mangos. The Association submitted an entire proposed Order on June 29, 2001, and revisions to the proposal on November 1, 2001. The proposal was published in the **Federal Register** on August 26, 2002 [67 FR 54908]. A slightly revised proposal that will be voted upon in the referendum is published in this issue of the **Federal Register**.

The proposed Order would provide for the development and financing of an effective and coordinated program of promotion, research, and consumer and industry information for mangos in the United States. The program would be funded by an assessment levied on first handlers and importers (to be collected by the Customs and Border Protection at time of entry into the United States) at an initial rate of 1/2 cent per pound. First handlers and importers of less than 500,000 pounds of mangos annually would be exempt from paying assessments. In addition, exports of U.S. mangos would be exempt from assessments.

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

Section 1206 of the Act requires that a referendum be conducted among eligible first handlers and importers of mangos to determine whether they favor implementation of the Order.

That section also requires the Order to be approved by a majority of the first handlers and importers voting.

This final rule establishes the procedures under which first handlers and importers of mangos may vote on whether they want the mango promotion, research, and information program to be implemented. There are approximately 60 eligible voters.

This action adds a new subpart establishing procedures to be used in this and future referenda. This subpart covers definitions, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

Proposed referendum procedures were published in the **Federal Register** on August 26, 2002, [67 FR 54920], with a sixty-day comment period ending on October 25, 2002.

One comment was received from a producer. In addition to noting that the Regulatory Flexibility Analysis did not contain production information from Puerto Rico, the commenter argued that since the Order would be implemented if it is approved by a majority of eligible first handlers and importers voting in the referendum, this would be assessment without representation for growers. The commenter expressed the view that growers would pay for program assessments in the form of lower returns, without any direct benefit. We disagree. Domestic producers are not responsible for paying assessments under the proposed program. Although it is possible that an assessment may be passed back to producers in some form, only importers and first handlers of 500,000 or more pounds of mangos per calendar year would be responsible for paying assessments and eligible to vote in a referendum. Domestic producers, however, would be represented on the board, with two of the 18 voting positions.

The definitions of eligible first handler and eligible importer are modified in this final rule. The definitions of first handlers and importer have been modified in the proposed order rulemaking published separately in this issue of the **Federal Register**. In that action, the definition of first handler was revised based upon a comment received and was further clarified by the Department. As a result, an appropriate conforming change was made to the definition of importer in that rulemaking action. This final rule revises the definition of eligible first handler and eligible importer to conform to and reflect the changes that appear in the order definitions.

List of Subjects in 7 CFR Part 1206

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

For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations is amended as follows:

1. Part 1206 is added to read as follows:

PART 1206—MANGO PROMOTION, RESEARCH, AND INFORMATION

Subpart A [Reserved]

Subpart B—Referendum Procedures.

Sec.

1206.100	General.
1206.101	Definitions.
1206.102	Voting.
1206.103	Instructions.
1206.104	Subagents.
1206.105	Ballots.
1206.106	Referendum report.
1206.107	Confidential information.
1206.108	OMB control number.

Authority: 7 U.S.C. 7411–7425.

Subpart A [Reserved]

Subpart B—Referendum Procedures.

§ 1206.100 General.

Referenda to determine whether eligible first handlers and importers of mangos favor the issuance, amendment, suspension, or termination of the Mango Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

§ 1206.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

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

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

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

mangos that are identified in the Harmonized Tariff Schedule of the United States by the numbers 0804.50.4040 and 0804.50.6040, during the representative period. Importation occurs when mangos originating outside of the United States are released from custody by the Customs and Border Protection and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced mangos immediately upon release by the Customs and Border Protection, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of mangos from the Customs and Border Protection when such mangos are entered or withdrawn for consumption in the United States.

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

(f) *Order* means the Mango Promotion, Research, and Information Order.

(g) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a mango farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(h) *Referendum agent* or *agent* means the individual or individuals designated by the Department to conduct the referendum.

(i) *Representative period* means the period designated by the Department.

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

§ 1206.102 Voting.

(a) Each eligible first handler and eligible importer of mangos shall be entitled to cast only one ballot in the referendum.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate first handler or importer, or an administrator, executor, or trustee or an eligible entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that

such individual is an officer or employee of the eligible entity, or an administrator, executive, or trustee of an eligible entity and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) All ballots are to be cast by mail, as instructed by the Department.

§ 1206.103 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this subpart, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions of this subpart, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible first handlers and importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

§ 1206.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence or such appointment, shall be performed by the agent.

§ 1206.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged,

the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1206.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1206.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

§ 1206.108 OMB control number.

The control number assigned to the information collection requirement in this subpart 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 0581-0209.

Dated: October 2, 2003.

A.J. Yates,

Administrator.

[FR Doc. 03-25456 Filed 10-8-03; 8:45 am]

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