

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 1218**

[FV-99-701-PR2]

Proposed Blueberry Promotion, Research, and Information Order**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

SUMMARY: This proposed rule would establish an industry-funded promotion, research, and information program for cultivated blueberries. A proposed program—the Blueberry Promotion, Research, and Information Order (Order)—was submitted to USDA by the North American Blueberry Council, Inc. Under the Order, blueberry producers and importers would pay an assessment of \$12 per ton, which would be paid to the proposed U.S.A. Blueberry Council. Producers and importers of less than 2,000 pounds of fresh and processed blueberries annually would be exempt from the assessment. The proposed program would be implemented under the Commodity Promotion, Research, and Information Act of 1996 (Act). In addition, the USDA is announcing that a referendum will be conducted among eligible blueberry producers and importers to determine whether they favor the implementation of the program.

DATES: In order to be eligible to vote, blueberry producers and importers must have produced or imported 2,000 pounds or more of blueberries during the period from January 1, 1999 through December 31, 1999 (representative period). The voting period for the referendum will be from March 13 through March 24, 2000.

FOR FURTHER INFORMATION CONTACT: Oliver L. Flake, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW, Room 2535-S, Washington, DC 20250-0244; telephone (202) 720-5976 or fax (202) 205-2800.

SUPPLEMENTARY INFORMATION: This proposed Order is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996, 7 U.S.C. 7401-7425; Public Law 104-127, enacted April 4, 1996, hereinafter referred to as the Act.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 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 the Order may file a petition with the Secretary of Agriculture (Secretary) stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not established in accordance with the law, and requesting a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order, or any obligation imposed in connection with the Order, shall be filed within two years after the effective date of the Order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Secretary of Agriculture (Secretary) will issue a ruling on a petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have 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 Secretary's final ruling.

Executive Order 12866

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

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 actions so that small businesses will not be disproportionately burdened.

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

This program is intended to develop and finance an effective and coordinated program of promotion, research, and information to maintain and expand the markets for cultivated blueberries (hereinafter referred to as

blueberries). A proposal was submitted by the North American Blueberry Council, Inc. (proponent or NABC). The proponent has proposed that blueberry producers and importers approve the program in a referendum in advance of its implementation. In addition, NABC proposed that producers, importers, exporters, and first handlers would serve on a 13-member U.S.A. Blueberry Council (USABC) that would administer the program under USDA's oversight. In order to provide the opportunity for public input into USABC deliberations, the Secretary added one public member to the proponent's proposed USABC. Any person subject to the program may file with the Secretary a petition stating that the Order or any provision of the Order is not in accordance with law and requesting a modification of the Order or an exemption from the Order.

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. First handlers would collect and remit the assessments on domestic blueberries to the Council. Their responsibilities would include accurate recordkeeping and accounting of all blueberries purchased or contracted for, including the number of pounds handled, the names of their producers, and when blueberries are 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 Act. Such records shall be retained for at least two years. This information is already being maintained as a normal business practice.

In addition, first handlers of blueberries who seek nomination to serve on the USABC would be required to complete a nomination form which would be submitted to the Secretary.

The added burden to first handlers for a blueberry promotion, research, and information program is therefore expected to be minimal.

There is also a minimal paperwork burden on producers. The burden relates to those producers who would seek nomination to serve on the USABC and those who vote in referenda. In addition, the proposed Order would require producers to keep records and to provide information to the USABC or the Secretary when requested. However, it is not anticipated that producers would be required to submit forms to the USABC. Most likely, the information would be obtained through an audit of a producer's records to confirm

information provided by a first handler or if a first handler did not file the required reports as part of the USABC's compliance operation. When seeking nomination to serve on the USABC, producers would be required to complete one form which would be submitted to the Secretary.

In addition, there is a minimal burden on importers. The import assessments would be collected by the U.S. Customs Service (Customs) at time of entry into the United States. Importers would be required to keep records and to provide information to the USABC or the Secretary when requested. However, it is not anticipated that importers would be required to submit forms to the USABC. Importers who seek nomination to serve on the USABC would be required to complete one form which would be submitted to the Secretary.

Further, there would be a minimal burden on exporters who seek nomination to serve on the USABC. They would be required to complete one form which would be submitted to the Secretary.

The estimated annual cost of providing the information to the USABC by an estimated 2,254 respondents (2,000 producers, 200 first handlers, 50 importers, and 4 exporters) would be \$14,570 or \$11,090 for all producers or \$5.55 per producer, \$2,020 for all first handlers or \$10.10 per first handler, \$1,440 for all importers or \$28.80 per importer, and \$20 for all exporters or \$5.00 per exporter.

USDA would oversee program operations and, if the program is implemented, would conduct a referendum (1) every five years to determine whether blueberry producers and importers support continuation of the program, (2) at the request of the USABC, or (3) at the request of 10 percent or more of the number of persons eligible to vote in referenda. Additionally, the Secretary may conduct a referendum at any time to determine whether the continuation, suspension, or termination of the Order or a provision of the Order is favored by those eligible to vote in referenda.

There are approximately 2,000 producers, 200 first handlers, 50 importers, and 4 exporters of blueberries who would be subject to the program. These figures have been revised since publication of the proposed rule. This revision is based upon more current information from a comment received concerning the proposed Order. That comment is discussed later in this proposed rule. Most of the producers would be classified as small businesses under the criteria established by the Small Business Administration (SBA)

[13 CFR 121.601]. Most importers and first handlers would not be classified as small businesses and, while most exporters are large, we assume that some are small. The SBA defines small agricultural handlers as those whose annual receipts are less than \$5 million, and small agricultural producers are defined as those having annual receipts of not more than \$500,000 annually.

The blueberry, along with the cranberry and Concord grape, is one of only three native North American fruits. Blueberries were domesticated from wild highbush blueberries in the early 1900's. Over the years, they have been bred for flavor, size, color, vigor, and yield.

North America is the world's leading producer of blueberries. From 1993 to 1997, cultivated blueberries represented an average of approximately 70 percent of all blueberries produced in the United States with the remainder, known as lowbush (wild) blueberries, produced primarily in Maine. There are over 37 varieties of blueberries, but not all are actively produced for market.

Blueberries are harvested from April through October, with more than 60 percent harvested from mid-June through mid-August. Blueberries are grown in 35 states. Commercial production operations are located in Michigan (44 percent), New Jersey (19 percent), Oregon (12 percent), Georgia (9 percent), North Carolina (5 percent), Washington (5 percent), Indiana and Florida (2 percent each), and all other states (2 percent).

A majority of blueberry growers are relatively small business owners, operating 20- to 30-acre farms which have been in their families for a number of generations. Blueberry acreage is expanding in the United States, with considerable growth in the high-yielding areas of the Northwest and South. Harvested acreage in the United States has more than doubled over the past 15 years, from 21,850 harvested acres in 1980 to an estimated 46,685 harvested acres in 1996.

U.S. blueberry production has more than doubled since the late 1970's, from an average of 35,693 tons during the five-year period 1977 through 1981 to an average of more than 75,500 tons from 1993 through 1997. According to USDA's National Agricultural Statistics Service (NASS), total production of blueberries was 79,485 tons in 1998, a decrease from 84,990 tons in 1997. Approximately 39,493 tons of the total were utilized for fresh market sale and 37,608 tons were processed (primarily frozen).

Farm value of the 1997 blueberry crop was \$141 million, compared with \$113.6 million a year earlier.

U.S. frozen blueberry per capita consumption has been declining rapidly in recent years, decreasing from 0.38 pounds in 1996 to 0.33 pounds in 1997. From calendar year 1991 through 1995, U.S. per capita consumption of frozen blueberries averaged 0.43 pounds.

The United States exported 6.3 million pounds of fresh blueberries in 1997, valued at \$7.9 million. Canada is the principal destination for U.S. exports—accounting for nearly 79 percent of the total in 1997. Other key markets included Switzerland (7 percent), the United Kingdom (5 percent), and Germany (3 percent). The remaining export volume went mostly to other European and Asian countries.

U.S. exports of frozen blueberries totaled 11,050 tons in 1997, and were valued at \$9.9 million. The largest U.S. export market for frozen blueberries is Canada, accounting for 90 percent of the total quantity exported in 1997. Japan was the second largest U.S. market, accounting for 8 percent of the total. The remaining 2 percent of U.S. exports were sent mainly to other Asian and European countries.

In 1997, the United States imported 6,950 tons of fresh blueberries worth \$10.8 million. Imports from Canada accounted for 89 percent of the total. Other major suppliers of fresh blueberries were Chile, with 9 percent of the total, and New Zealand with 2 percent.

In 1997, total imports of frozen blueberries reached 4,900 tons, valued at \$8.5 million. The bulk of U.S. frozen blueberry imports (about 96 percent) in 1997 came from Canada. U.S. imports of frozen blueberries from Chile represented 2 percent of the total, while Mexico accounted for 1 percent of the total. The rest of the 1997 import volume originated from the Netherlands, Costa Rica, and Colombia.

During the 1997 season, average annual production per U.S. producer was approximately 66.04 tons of blueberries. Blueberries produced during this growing season provided average annual gross sales of \$109,557 per blueberry producer.

The proposed Order would authorize a fixed assessment paid by producers (to be collected by first handlers) and importers (to be collected by Customs) at a rate of \$12 per ton.

Section 516(a)(1) of the Act provides authority to the Secretary to exempt from the Order any de minimis quantity of an agricultural commodity otherwise covered by the Order. The proponent has recommended that producers and

importers of less than 2,000 pounds of blueberries annually be exempt from assessment.

At the proposed rate of assessment of \$12 per ton, the USABC would collect approximately \$1.1 million annually. It is expected that the assessment would represent less than 1 percent of producers' average return. In 1997, the average price for blueberries was \$1,659 per ton.

USDA will keep all individuals informed throughout the referendum process to ensure that they are aware of and are able to participate in the referendum. USDA will publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

In addition, the blueberry industry would nominate producers and the USABC would nominate importers, exporters, first handlers, and a public member to serve as members and alternates on the USABC. The USABC would recommend the assessment rate, programs, projects, a budget, and any rules and regulations that might be necessary for the administration of the program. USDA would ensure that the nominees represent the blueberry industry in accordance with the proposed Order.

The USABC would consist of 13 members: one producer representative from each of four regions, one producer representative for each of the top five producing states, one importer, one exporter, one first handler, and one public member. The regional and state members would be nominated from within the respective regions or states by the state commissions or the NABC as applicable for initial nominations, and the importer, exporter, and first handler members would be nominated by the USABC. There would be an alternate for each member. The importer position would be filled by a person who imports fresh or processed blueberries from outside of the United States for sale in the United States. The exporter position would be filled by a representative of the foreign production area which, based on a 3-year average, produces the most blueberries that are shipped to the United States.

In order to provide the opportunity for public input into USABC deliberations, the Secretary added one public member and alternate to the proponent's proposed USABC. The public member and alternate would be nominated by the USABC.

Proposed recordkeeping and reporting requirements for the blueberry promotion, research, and information program would be designed to minimize

the burden on the blueberry industry. The blueberry promotion program would be designed to strengthen the position of blueberries in the marketplace, maintain and expand existing domestic and foreign markets, and develop new uses and markets for blueberries.

The estimated annual cost of providing the information to the USABC by an estimated 2,254 respondents (2,000 producers, 200 first handlers, 50 importers, and 4 exporters) would be \$14,570 or \$11,090 for all producers or \$5.55 per producer, \$2,020 for all first handlers or \$10.10 per first handler, \$1,440 for all importers or \$28.80 per importer, and \$20 for all exporters or \$5.00 per exporter.

With regard to alternatives to this proposed rule, the 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 Act, and other sections provide for alternatives. For example, Section 514 of the Act provides for orders applicable to (1) producers, (2) first handlers and other persons in the marketing chain as appropriate, and (3) importers (if imports are subject to assessment). Section 516 authorizes an order to provide for exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports. In addition, Section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within 3 years after assessments first begin under the order. An order also may provide for its approval in a referendum to be based upon (1) 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 Act provides for establishment of a board 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; and an initial referendum to be

conducted prior to the Order going into effect. Approval would be determined by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum.

The proposed rule that was published in the **Federal Register** on July 22, 1999 [64 FR 39790] invited comments concerning the potential effects of the proposed Order. One comment from the proponent of the Order was received regarding the Regulatory Flexibility Analysis.

Based upon available information, we estimated that 1,297 producers and 120 importers would be subject to the program. The commenter estimates in its comment that 2,000 producers and 50 importers/exports would be subject to the program.

In the July 22, 1999, proposed rule, we invited information on the number of persons subject to the program. The commenter's estimate of the number of producers subject to the program is supported by data from the 1997 Census of Agriculture. Further, we accept the estimate as to importers. However, our estimate as to the number of handlers and exporters will remain unchanged based upon available information. Accordingly, we have changed all references to these estimates in both this proposed Order as well as the referendum procedures, which are published separately in this issue of the **Federal Register**.

The commenter also requested a change to a reference in the Regulatory Flexibility Analysis regarding the required forms to be submitted to the USABC. The commenter requested that producers be required to provide the USABC with an annual report at the end of the harvest season. The commenter asked that this report include the producer's production so that proper assessments can be determined and checked with USABC production figures. We believe that such a required annual report would place an unnecessary added burden on producers. The Order already requires that producers maintain records to confirm information provided by first handlers. Consequently, if needed, assessments can be checked through an audit of producers' records. Therefore, no changes are made as a result of this comment.

Regarding a reference in the Regulatory Flexibility Analysis to the nomination of the public member to the USABC, the commenter inquired whether the blueberry industry would be responsible to nominate this public member. Section 1218.41(d) states that

the nominations for the public member will be made by the USABC after it is appointed. We have revised the Regulatory Flexibility Analysis as appropriate. Another point addressed by the commenter concerned the accuracy of a reference to native North American fruits and whether crab apples should be included in the reference. The statement is correct, and no change is necessary.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that may be imposed by this Order have been submitted to OMB for approval.

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

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

Expiration Date of Approval: July 31, 2002.

OMB Number for other information collections: 0581-0093.

Expiration Date of Approval: November 30, 2000.

Type of Request: Revision of currently approved information collections for advisory committees and boards and for research and promotion programs.

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

In addition, there will be the additional burden on 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 USABC. 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. The estimated annual cost of providing the information to the USABC by an estimated 2,254 respondents (2,000 producers, 200 first handlers, 50 importers, and 4 exporters) would be \$14,570 or \$11,090 for all producers or \$5.55 per producer, \$2,020 for all first handlers or \$10.10 per first

handler, \$1,440 for all importers or \$28.80 per importer, and \$20 for all exporters or \$5.00 per exporter.

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 blueberry programs administered by USDA.

The proposed forms would require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the USABC. 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. Reporting other than yearly would impose an additional and unnecessary recordkeeping burden on first handlers. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and first handlers who are subject to the provisions of the 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.*

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

Respondents: Producers, importers, exporters, and first handlers.

Estimated number of Respondents: 18 (52 for initial nominations to the USABC, 28 in the second year, and 24 in the fourth year).

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

Estimated Total Annual Burden on Respondents: 26 hours for the initial nominations to the Council and 9 hours annually thereafter.

(2) *An annual report by each first handler of blueberries.*

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

Respondents: First handlers.

Estimated number of Respondents: 200.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 100 hours.

(3) *A request for certificate of exemption.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per first handler, producer, or importer reporting on blueberries handled. Upon approval of an application, producers and importers will receive exemption certification.

Respondents: Producers and importers.

Estimated number of Respondents: 200.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 100 hours.

(4) *Importer application for reimbursement of assessment.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.5 hours per importer requesting a refund.

Respondents: Importers.

Estimated number of Respondents: 18.

Estimated number of Responses per Respondent: 12.

Estimated Total Annual Burden on Respondents: 108 hours.

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

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

Recordkeepers: Producers, first handlers, and importers.

Estimated number of recordkeepers: 2,250.

Estimated total recordkeeping hours: 1,125 hours.

Comments were invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the Order and the USDA's oversight of the program, including whether the information will have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility,

and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The burdens have been revised, as appropriate, based upon a comment from the proponent concerning the estimated number of producers and importers. Another comment was received from a producer who opposed the proposed Order. This commenter did not want more paperwork and specifically stated that she did not want to submit an annual report. A comment from the proponent requested that an annual report be required of producers. As previously discussed, we have not included such a change in the Order provisions. Further, every attempt has been made to minimize the burden on regulated parties, including producers. Accordingly, no change is made based upon the producer's comment.

Background

The Act authorizes the Secretary, under a generic authority, to establish agricultural commodity research and promotion orders. The Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the Act provides permissive terms for orders, and other sections provide for alternatives. For example, Section 514 of the Act provides for orders applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if importers are subject to assessment). Section 516 authorizes an order to provide for exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports. In addition, Section 518 of the Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within 3 years after assessments first begin under the order. The order also may provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board from among producers, first handlers and others in the marketing chain as

appropriate, and importers, if imports are subject to assessment.

This proposed Order includes provisions for both domestic and foreign market expansion and improvement, reserve funds, and an initial referendum to be conducted prior to the Order going into effect. Approval would be determined by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum.

The proponent has requested the establishment of a national blueberry promotion, research, and information order pursuant to the Act. The Act authorizes the establishment and operation of generic promotion programs which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. This proposal would provide for the development and financing of an effective and coordinated program of research, promotion, and information for blueberries. The purpose of the program would be to strengthen the position of blueberries in domestic and foreign markets, and to develop, maintain, and expand markets for blueberries.

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

In accordance with Section 518(e) of the Act, an order may provide for its approval in a referendum 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.

The Secretary will conduct a referendum in which approval of the Order would be determined by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum. The proponent has recommended that a referendum be conducted prior to the proposed Order going into effect.

In accordance with the Act, USDA would oversee the program's operations. In addition, the Act requires the Secretary to conduct subsequent referenda: (1) not later than 7 years after assessments first begin under the Order; or (2) at the request of the board established under the Order; or (3) at the request of 10 percent or more of the number of persons eligible to vote. The proponent group has requested that a referendum be conducted every five years to determine if producers and importers want the program to continue.

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

A national research and promotion program for blueberries would help the industry to address the many market problems it currently faces. According to the proponent, three main factors currently affecting blueberry sales, both here in the domestic market and abroad, are increasing production, aggressive competition, and changing consumer habits.

Over the years, increased blueberry production has led to depressed grower prices and increasing cold storage inventory levels. Though slightly lower production and inventory levels in 1996 and early 1997 improved grower returns to more profitable levels, record production in 1997 led once again to a build up in cold storage inventory of frozen blueberries and a downturn in grower prices in late 1997 and early 1998. The potential for continued increases in tonnage from new plantings, expected to come into full production in the future, will continue to affect the balance of supply and demand and threaten to depress grower returns.

The blueberry industry has seen tremendous growth in the Northwest and Southern states which accounted for an estimated 19.9 percent of total U.S. blueberry acreage in 1980 and an estimated 38.6 percent of acres by 1996. The growth in the Northwest is an important factor for the future of the industry, given its production potential. Over the years, yield per acre in the Northwest has been substantially above that of the major growing regions of Michigan and New Jersey. On average, from 1990 to 1996, Oregon produced 71 percent more blueberries per acre than New Jersey (3.6 tons per acre versus 2.1 tons per acre) and more than twice the yield of Michigan (3.6 tons per acre versus 1.6 tons per acre). During this same time period, Washington produced

an average of 38 percent more blueberries per acre than New Jersey (2.9 tons per acre compared to 2.1 tons per acre) and 81 percent more than Michigan (2.9 tons per acre versus 1.6 tons per acre).

The blueberry industry is facing strong competition in the marketplace from both indirect and direct competitors. Like all food products, the blueberry must compete for a share of the consumer dollar. As competition in the supermarket increases, the blueberry industry must work harder to gain its share of consumer attention at a time when the industry's direct and indirect competitors expand their promotional activities.

A recent informal survey conducted by the proponent showed that from 1991 to 1995, the blueberry industry committed an average of 0.26 percent of farm gate value to the voluntary NABC domestic marketing program, far below the average of products such as prunes, kiwifruit, figs, pears, grapes, apples, citrus, and avocados whose domestic marketing expenditures averaged 2.10 percent of crop value. Though some individual members of the blueberry industry conduct promotional efforts on their own as well as contribute to the NABC program, it is extremely difficult to compete for a share of consumer and industrial user attention when the national generic marketing expenditure is slightly more than one-tenth the average amount of competitive products.

The blueberry industry must also address direct competition with the lowbush blueberry industry which is very active in the industrial market both in the United States and abroad. The blueberry industry must also contend with artificial blueberries which are making their presence felt in a wide range of national and regional branded food products.

Changing consumer trends are also having an impact on the use of blueberries. Of great concern to the blueberry industry is the overall decline in home baking, given the fact that consumers perceive blueberries as the primary baking berry. As consumers move away from home baking of blueberry muffins and pies and decide to buy rather than bake, the industry must increase its efforts in the industrial market to be sure that manufacturers maintain and expand their use of blueberries in baked applications.

It is also necessary for the industry to expand the awareness of the versatility of blueberries and encourage new consumer and food manufacturer uses.

In 1965, the NABC was established as a voluntary association of U.S. and

Canadian lowbush (native) and cultivated (highbush) blueberry growers and marketers who collectively worked to promote blueberry awareness and consumption. Over the years, the structure of the organization changed to where the association now represents only the cultivated blueberry industry in the United States and Canada. The 31 U.S.-based NABC members account for an estimated 78 percent of the U.S. blueberry crop. These members, along with members from British Columbia and Quebec, voluntarily assess themselves at a rate of \$9 per ton to fund domestic publicity and promotion efforts directed to both the consumer and industrial user, as well as to support international market development. The NABC generates approximately \$500,000 annually.

As the only national organization funding market development efforts for cultivated (highbush) blueberries, the voluntary NABC has not been able to generate the funds necessary to support the aggressive marketing efforts needed to help expand blueberry consumption and improve the profitability of the industry. In order to deal with increased production, aggressive competition, and changing consumer habits, the proponent states that a more extensive marketing program is needed. A mandatory national program could solve this problem. In addition, a mandatory national program would place all domestic growers, first handlers, and importers on an equal playing field with each investing a fair share in promoting blueberries.

Additional funds generated through a national program would allow the blueberry industry to take advantage of a wide range of promotional opportunities. At a minimum, increased funding would allow the industry to expand its current consumer, food service, and food manufacturer promotion efforts. It would also allow for increased participation in the USDA's Market Access Program and the opportunity to develop stronger markets overseas. Increased funding would allow for a more aggressive school effort (educational films, educational booklets, Internet lesson plans, and the like) and help increase awareness and demand among children. In addition, such a program would create the opportunity to explore tie-in promotional activities with nationally branded food products which would help the blueberry industry gain advertising and in-store exposure. Further, a mandatory national program would generate the funds for the industry to support expanded varietal research activities, new product

development efforts, and nutritional and health research proposals.

Section 516(f) of the Act allows an order to authorize the levying of assessments on imports of the commodity covered by the program or on products containing that commodity, at a rate comparable to the rate determined for the domestic agricultural commodity covered by the order. The proponent has proposed to assess imports.

The assessment levied on domestically-produced and imported blueberries would be used to pay for promotion, research, and consumer and industry information as well as administration, maintenance, and functioning of the Council. Expenses incurred by the Secretary in implementing and administering the Order, including referenda costs, also would be paid from assessments.

Sections 516(e)(1) and (2) of the Act state that the Secretary may provide credits of assessments for generic and branded activities. The proponent has elected not to propose credits for generic or branded activities. Therefore, the terms "generic activities" and "branded activities" are not defined in the Order.

First handlers would be responsible for the collection of assessments from the producer and payment to the Council. First handlers would be required to maintain records for each producer for whom blueberries are handled, including blueberries produced by the first handler. In addition, first handlers would be required to file reports regarding the collection, payment, or remittance of the assessments.

Assessments on imported fresh and processed blueberries would be collected by Customs at the time of entry into the United States and remitted to the Council.

All information obtained from persons subject to this Order as a result of recordkeeping and reporting requirements would be kept confidential by all officers, employees, and agents of USDA and of the Council. This information may be disclosed only if the Secretary 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 Secretary or to which the Secretary or any officer of USDA is a party. Other exceptions for disclosure of confidential information would include the issuance of general statements based on reports or on information relating to a number of persons subject to an order if the statements do not identify the

information furnished by any person or the publication, by direction of the Secretary of the name of any person violating the Order and a statement of the particular provisions of the Order violated by the person.

The proposed Order provides for USDA to conduct an initial referendum preceding the proposed Order's effective date. Therefore, the proposed Order must be approved by producers and importers voting in the referendum. Approval would be determined by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum. The proposed Order also provides for subsequent referenda to be conducted (1) every 5 years after the program is in effect, (2) at the request of the Board established under the Order, or (3) when requested by 10 percent or more of blueberry producers and importers subject to the Order. In addition, the Secretary may conduct a referendum at any time.

The Act requires that such a proposed order provide for the establishment of a board to administer the program under USDA supervision. The proponent's proposal provided for a 12-member U.S.A. Blueberry Council to which the Secretary would add a public member, as stated earlier.

To ensure fair and equitable representation of the blueberry industry on the USABC, the Act requires membership on the USABC to reflect the geographical distribution of the production of blueberries and the quantity or value of imports. To that end, the proposed Order divides the production area into four relatively equal regions which would each have one member on the USABC. Regions are based on the most recent three-year average of blueberries produced in each region. The proposed Order also provides for a representative from each of the top five blueberry producing states based on the most recent 3-year average of blueberries produced in each state. In addition, the proposed Order provides for one importer, a first handler, and an exporter position to be filled by a representative of the foreign production area which, based on a 3-year average, produces the most blueberries that are shipped to the United States. Each member would have an alternate.

Upon implementation of the Order and pursuant to the Act, the USABC would at least once in each five-year period, but not more frequently than once in each three-year period, review the geographical distribution of blueberry production in the United

States and the quantity of fresh and processed blueberries imported into the United States and make a recommendation to the Secretary after considering the results of its review and other information it deems relevant regarding the reapportionment of the USABC.

Members and alternates would serve for three-year terms, except that the members and alternates appointed to the initial USABC would serve proportionately for two, three, and four years. No member or alternate would serve more than two consecutive three-year terms.

A proposal was submitted by the North American Blueberry Council, Inc. (proponent or NABC). Prior to publication, the Department modified the proponent's proposal to make it consistent with the Act and other similar national research and promotion programs; for consistency throughout the text; and for clarity.

In the definitions, "commodity covered" was changed to "blueberries," "consumer information" and "producer information" were combined into a definition of "information" to conform with the Act. Additionally, the definition of "research," and "importer" were altered to conform with the Act.

In the definitions and throughout the proposed Order, "grower/producer" was changed to "producer," "handler" was changed to "first handler," the term "board" was eliminated, and "council" was changed to "U.S.A. Blueberry Council" or "USABC." The terms "plans, projects, and programs" were deleted because they were deemed unnecessary, and a definition for "processed blueberries" and "part and subpart" were added. Throughout the proposed Order, the term "blueberry products" was changed to "fresh and processed blueberries," and, for clarity, time periods were changed to match definitions.

The following terms were removed from the definitions: "association," "buyer," "broker," "distributor," "packer," "processor," and "shipper." These terms were removed because they are not necessary for the administration of the proposed program.

In § 1218.40 *Establishment and membership*, the two exporter/importer positions on the proposed USABC were changed to an importer position and an exporter position. The industry's proposal made importer representation optional. However, Section 515(b)(2)(B) of the Act requires importers to have representation on boards when imports are assessed under a program. It is estimated that imports will represent approximately 12 percent of the

assessments under this proposed program. One of the optional importer/exporter positions was changed to provide for an importer position, and the other position was changed to provide for an exporter position. The exporter position would be filled by a representative of the foreign production area which, based on a three-year average, produces the most fresh and processed blueberries that are shipped to the United States. In addition, to provide the opportunity for public input into USABC deliberations, the Secretary added a public member and alternate to the proponent's proposed USABC. The public member and alternate would be nominated by the USABC. In this same section, a statement indicating that the addition of importer members and alternates would be accomplished by notice and rulemaking, was deleted as unnecessary.

In § 1218.43 *Vacancies*, additional information was added to specify that alternate members would assume the position of member if the member position becomes vacant during a term of office. In § 1218.44, a new paragraph (g) was added to clarify that proxy voting is not authorized. In addition, a new paragraph (h) was added to allow the chairperson to have a vote during the USABC meetings.

In § 1218.60, the date all reports are due was changed from November 30 of the crop year to 30 days after the end of the crop year. This phrase was changed for clarity.

In § 1218.61, the length of time records must be maintained by first handlers, producers, and importers was changed from seven years to two years beyond the fiscal period to be consistent with other research and promotion programs. Also, the following sections were added to the proponent's proposal: § 1218.73 *Proceedings after termination*; § 1218.74 *Effect of termination or amendment*; and § 1218.76 *Separability*.

Other minor changes which did not materially affect the text were made for consistency and clarity.

A proposed rule seeking comments on the national research and promotion program for blueberries was published on July 22, 1999, in the **Federal Register** [64 FR 39790]. Comments were invited on the entire proposal with the deadline for comments on September 20, 1999. Eight comments were received from seven commenters by that deadline. Of the eight comments, three were supportive of the proposed program, one expressed opposition, two addressed specific concerns, and two were generally not applicable to the proposed Order. The commenters were a blueberry producer association, a state

department of agriculture, four producers, and a blueberry cooperative. Two additional comments (one of which was sent twice) were received after the close of the comment period. The late comments reflected to a large extent the comments that were timely received. One of the late comments had questions about regulation of U-pick operations which are covered by the proposed Order.

A comment was received requesting that, throughout the proposal and in the Council's title, the term "blueberry" be changed to "cultivated blueberry." The commenter stated that the generic use of the term "blueberry" was misleading as to the specific type of blueberry and industry segment represented by the proposed Council. The commenter noted that the wild blueberry industry promotes its product as unique from the cultivated blueberry. While the commenter brings forth differences between the two types of blueberries, the Order and Council name were proposed by the proponent organization which represents approximately 70 percent of domestic production of all blueberries. Wild blueberry production is very localized and represents less than 30 percent of total domestic blueberry production. Generally, most consumers do not differentiate between wild and cultivated blueberries. *Webster's Ninth New Collegiate Dictionary* (1984) defines a blueberry as "the edible blue or blackish berry of any of several plants (genus *Vaccinium*) of the heath family; a low or tall shrub producing these berries." This definition includes both wild (lowbush) and cultivated (highbush) varieties.

Even if this proposed program is implemented, the wild blueberry industry can still create a separate image and niche market to identify its product.

It is not uncommon in other national research and promotion programs that a generic term is used for a commodity that is defined with further specificity. For example, the Fluid Milk Promotion Order uses the term "milk" and defines it as any class of cow's milk produced in the United States. Neither this definition of milk nor the title of the Fluid Milk Promotion Order addresses goats' milk or other speciality milks. As with fluid milk, "blueberry" is a generic term. Further, cultivated blueberries represent the majority of production. Therefore, no change will be made as a result of this comment, and we will leave the proposed Order provisions and Council title as recommended by the proponent.

Comments were received concerning the accuracy and clarity of wording in the background section of the proposed

Order. These comments included a notation that the NABC is not the only national organization funding blueberry market development and asked for clarification of how the proposed Order would be approved in a referendum. We have addressed these comments and revised the background section, as appropriate.

Comments regarding the regulatory text included a comment concerning § 1218.2 which defines blueberries. The commenter requested that the definition of blueberries be clarified by including lowbush/highbush crosses (known as "half-high" blueberries). The definition of blueberries submitted by the proponent only excludes the lowbush (wild) blueberry. Therefore, simply clarifying that hybrids are included will not significantly change the definition of blueberry. Further, any blueberry that is not a pure lowbush is generally considered cultivated (highbush).

A comment was submitted on § 1218.07 which defines a first handler. The commenter felt a need to specify that a producer who markets his or her own product be considered a first handler. Including such producers in the definition of first handlers is consistent with other similar national research and promotion programs. Therefore, we accept the commenter's suggestion to include blueberry producers who market their own product in the definition of first handlers and have added this to the definition.

A comment was received concerning § 1218.41 which addresses nominations and appointments to the USABC. The commenter requested the inclusion of a statement indicating that no one group should have a majority position on the USABC. The commenter specifically requested that no one state and/or organization have representatives filling more than 6 out of the 13 USABC positions. The commenter addresses a valid concern regarding representation of states and organizations on the USABC. However, according to § 1218.40, which describes the establishment of membership, it would not be possible for any state or organization to have a majority of the positions on the Council. Only two members could come from the same state as, of the nine producer positions, four regions are represented along with the top five blueberry producing states. Concerning majority representation of organizations, with 9 of the 13 positions being filled by producers, an organization could not obtain a majority position. Therefore, no change is necessary as a result of this comment.

One comment was submitted regarding § 1218.45 which outlines USABC procedures. The commenter requested that "industry experts" be included on USABC committees and that these individuals be able to vote on committee actions. Similar national research and promotion programs allow for nonmembers to serve on Board committees and vote on committee actions but not on Board actions. We have accepted this comment and added the following language to § 1218.45(e): Committees may also consist of individuals other than USABC members and such members may vote in committee meetings.

A comment was received regarding § 1218.47 which outlines the powers and duties of the proposed USABC. The commenter requested that the USABC have the power to pay all necessary expenses and fees for committee members who are not USABC members. As mentioned in the previous paragraph, precedent exists for allowing individuals to serve on USABC committees who are not USABC members. The Act states that members and alternates will serve without compensation except that they may be reimbursed for travel expenses. Therefore, we accept the comment that non-USABC members who serve on committees be compensated for travel expenses but deny the request that the USABC pay fees for such committee members. This comment is addressed in § 1218.45(e), where a reference to travel expenses for such committee members has been added.

One comment was received regarding § 1218.50 which addresses budget and expenses. The commenter requested a statement in this section that would allow the USABC to establish an operating monetary reserve and carry over excess funds to subsequent fiscal periods provided that the funds in the reserve do not exceed one fiscal period's budget. The Act authorizes orders to contain authority to reserve funds from assessments provided that the amount of funds reserved does not exceed the greatest aggregate amount of the anticipated disbursements specified in budgets approved by the Secretary for any two fiscal years. We therefore accept the commenter's request and have added § 1218.50(j) which authorizes an operating monetary reserve, not to exceed one fiscal period's budget.

One comment was received in regard to § 1218.51 which deals with financial statements. The commenter requested clarification on how often financial statements would be required of the USABC. As a general rule, research and

promotion boards submit financial statements on a monthly basis. Section 1218.51(a) provides that the USABC shall prepare and submit financial statements to the Secretary as requested by the Secretary. Therefore, along with the annual financial statement, the Secretary may request a financial statement at any time. Consequently, no change to the Order provision is needed as a result of this comment.

Comments were received concerning § 1218.52 which deals with assessments. Some of the comments questioned whether the USABC could charge a penalty on late assessments in addition to interest charges. A commenter suggested that the Council set the penalty amount and interest charge upon approval by the Secretary. The Act and other similar national research and promotion programs allow for late-payment charges. Therefore, we have revised § 1218.52(e) to include a late payment charge, in addition to interest, that may be charged to late assessments. However, it should be noted that the USABC would be required to use the rates specified in official debt collection regulations. These regulations authorize a one-time late payment charge of 6 percent per year of the unpaid balance once the payment of assessments is 90 days past due. In addition, from the first day any assessments are late, a rate of 15 percent interest is applied on the unpaid balance.

Another comment requested that § 1218.52(d)(1) be clarified by indicating that the assessment rate for imported fresh and processed blueberries be the same or equivalent to the rate for fresh and processed blueberries produced in the United States. The commenter's request that "and processed" be added to the description of blueberries produced in the United States, which would be assessed, is not made because among domestic blueberries only fresh blueberries would be assessed under the Order.

Another comment was submitted addressing § 1218.52(c). The commenter felt that the method of assessment should be changed from an amount per unit of sale (\$12 per ton) to a percent of farm gate value. This commenter stated that an assessment rate based on a percent of farm gate value is more equitable. The proponent, which represents the majority of domestic blueberry producers and is comprised of importers as well as producers, recommended that only a flat assessment rate of \$12 per ton be used. The Act provides authority to tailor a program according to the individual needs of an industry. Further, the proposed flat assessment conforms to

many other national research and promotion programs. The industry is familiar with this method of assessment, and it would enhance administrative simplicity and cost effectiveness. Accordingly, no change to the Order provisions is made as a result of this comment.

A comment was submitted regarding § 1218.75 which addresses personal liability. The commenter believed that USABC staff should be covered under this liability statement. Taking this comment into account, we have changed § 1218.75, as appropriate.

One comment was received that was opposed to the overall Order. The commenter noted that the program was not voluntary, that it would increase expenses and paperwork, and that the current promotion of blueberries was very good. We disagree with this comment. The proposed program is authorized and consistent with the provisions of the Act and, if implemented, would benefit the overall industry. Further, every effort has been made to minimize the burden of this program on the affected parties. Further, we would also note that, if this proposed Order is approved in a referendum, the terms of office for the initial Council will be established according to the provisions of § 1218.42, with appropriate rounding to maintain a calendar year basis.

In summary, § 1218.02, § 1218.07, § 1218.45(e), § 1218.50, § 1218.52(e), § 1218.75, and the background section have been revised as a result of comments received that were deemed to have merit. Changes to the Regulatory Flexibility Analysis were discussed previously. In addition to making several changes to the proposed Order based on the comments received, two additional changes to the proposed rule made by AMS are noted and discussed below.

The Department has revised the referendum requirements. The proponent had recommended that the Order be implemented if approved by producers and importers representing a majority of the volume of blueberries represented in the referendum. The Department will keep this requirement but add a second requirement. In order to be implemented, the Order must also be approved by a majority of the voters in the referendum. The majority of the persons to be covered by the proposed program are small producers. This change was made in order to ensure that these small producers have fair input into the outcome of the referendum. In addition, this change would further the goals of the Secretary's Small Farm

Initiative without harming the interests of the larger growers.

In addition, in § 1218.52 *Assessments*, a statement was added indicating that, along with assessments, the USABC may use donations and other funds available to cover its expenses. This was added because the USABC may be eligible to receive funds from sources such as the Department's Foreign Agricultural Service.

The Order is summarized as follows: Sections 1218.01 through 1218.23 of the proposed Order define certain terms, such as blueberries, producer, and importer, which are used in the proposed Order.

Sections 1218.40 through 1216.48 include provisions relating to the USABC. These provisions cover establishment and membership, nominations and appointments, term of office, vacancies, alternate members, procedures for conducting USABC business, compensation and reimbursement, and powers and duties of the USABC, and prohibited activities. The USABC is the governing body authorized to administer the Order through the implementation of programs, plans, projects, budgets, and contracts to promote and disseminate information about blueberries, subject to oversight of the Secretary.

Sections 1218.50 through 1218.56 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 USABC for the performance of its duties and expenses incurred for USDA'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 USABC 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 \$12 per ton for domestic blueberries and imported fresh and processed blueberries. The assessment rate may be raised or lowered after the initial continuance referendum which would be conducted after the program has been in operation five years. A referendum on a higher or lower new assessment rate is not required.

The federal debt collection procedures referenced above and in § 1218.52(e) include those set forth in 7

CFR 3.1 through 3.36 for all research and promotion programs administered by AMS [60 FR 12533, March 7, 1995].

Sections 1218.60 through 1218.62 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of information from such books, records, or reports.

Sections 1218.70 through 1218.78 describe the rights of the Secretary; address referenda; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers.

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

For the Order to become effective, the Order must be approved by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum.

Referendum Order

It is hereby directed that a referendum be conducted among eligible blueberry producers and importers to determine whether they favor implementation of the Blueberry Promotion, Research, and Information Order.

The referendum shall be conducted from March 13 through 24, 2000. Ballots will be mailed to all known blueberry producers and importers on or before March 13, 2000. Eligible voters who do not receive a ballot by mail should call the following toll-free telephone number to receive a ballot: 1 (888) 720-9917. All ballots will be subject to verification. Ballots must be received by the referendum agents no later than March 24, 2000, to be counted.

Oliver L. Flake and Martha B. Ransom, Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, Room 2535-S, Stop 0244, Washington, DC 20250-0244, are designated as the referendum agents of the Secretary of Agriculture to conduct the referendum. The Procedure for the Conduct of Referenda in Connection with the Blueberry Promotion, Research, and Information Order, 7 CFR 1218.100-1218.107, which is being published separately in this issue of the **Federal Register**, shall be used to conduct the referendum.

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Blueberries, Consumer information, Marketing agreements, Blueberry promotion,

Reporting and recordkeeping requirements.

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

PART 1218—BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

1. The authority citation for part 1218 continues to read as follows:

Authority: 7 U.S.C. 7401-7425.

2. Subpart A is added to part 1218 to read as follows:

Subpart A—Blueberry Promotion, Research, and Information Order

Definitions

Sec.

- 1218.1 Act.
- 1218.2 Blueberries.
- 1218.3 Conflict of interest.
- 1218.4 Crop year.
- 1218.5 Department.
- 1218.6 Exporter.
- 1218.7 First handler.
- 1218.8 Fiscal period.
- 1218.9 Importer.
- 1218.10 Information.
- 1218.11 Market or marketing.
- 1218.12 Order.
- 1218.13 Part and subpart.
- 1218.14 Person.
- 1218.15 Processed blueberries.
- 1218.16 Producer.
- 1218.17 Promotion.
- 1218.18 Research.
- 1218.19 Secretary.
- 1218.20 Suspend.
- 1218.21 Terminate.
- 1218.22 United States.
- 1218.23 USABC.

U.S.A. Blueberry Council

- 1218.40 Establishment and membership.
- 1218.41 Nominations and appointments.
- 1218.42 Term of office.
- 1218.43 Vacancies.
- 1218.44 Alternate members.
- 1218.45 Procedure.
- 1218.46 Compensation and reimbursement.
- 1218.47 Powers and duties.
- 1218.48 Prohibited activities.

Expenses and Assessments

- 1218.50 Budget and expenses.
- 1218.51 Financial statements.
- 1218.52 Assessments.
- 1218.53 Exemption procedures.
- 1218.54 Programs, plans, and projects.
- 1218.55 Independent evaluation.
- 1218.56 Patents, copyrights, trademarks, information, publications, and product formulations.

Reports, Books, and Records

- 1218.60 Reports.
- 1218.61 Books and records.
- 1218.62 Confidential treatment.

Miscellaneous

- 1218.70 Right of the Secretary.

- 1218.71 Referenda.
- 1218.72 Suspension and termination.
- 1218.73 Proceedings after termination.
- 1218.74 Effect of termination or amendment.
- 1218.75 Personal liability.
- 1218.76 Separability.
- 1218.77 Amendments.
- 1218.78 OMB control numbers.

Subpart A—Blueberry Promotion, Research, and Information Order

Definitions

§ 1218.1 Act.

Act means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7401-7425; Pup. L. 104-127; 110 Stat. 1029), or any amendments thereto.

§ 1218.2 Blueberries.

Blueberries means cultivated blueberries grown in or imported into the United States of the genus *Vaccinium* *Corymbosum* and *Ashei*, including the northern highbush, southern highbush, rabbit eye varieties, and any hybrid, and excluding the lowbush (native) blueberry *Vaccinium Angustifolium*.

§ 1218.3 Conflict of interest.

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

§ 1218.4 Crop year.

Crop year means the 12-month period from November 1 through October 31 of the following year or such other period approved by the Secretary.

§ 1218.5 Department.

Department means the U.S. Department of Agriculture.

§ 1218.6 Exporter.

Exporter means a person involved in exporting blueberries from another country to the United States.

§ 1218.7 First handler.

First handler means any person, (excluding a common or contract carrier), receiving blueberries from producers and who as owner, agent, or otherwise ships or causes blueberries 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 blueberries in commercial quantities. This definition includes a retailer, except a retailer who purchases or acquires from, or handles on behalf of

any producer, blueberries. The term first handler includes a producer who handles or markets blueberries of the producer's own production.

§ 1218.8 Fiscal period.

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

§ 1218.9 Importer.

Importer means any person who imports fresh or processed blueberries into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles fresh or processed blueberries 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 blueberries.

§ 1218.10 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 blueberries on a national or international basis. These include:

(a) *Consumer information*, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of blueberries; and

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

§ 1218.11 Market or marketing.

(a) *Marketing* means the sale or other disposition of blueberries in any channel of commerce.

(b) To *market* means to sell or otherwise dispose of blueberries in interstate, foreign, or intrastate commerce.

§ 1218.12 Order.

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

§ 1218.13 Part and subpart.

Part means the Blueberry 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.

§ 1218.14 Person.

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

§ 1218.15 Processed blueberries.

Processed blueberries means blueberries which have been frozen, dried, pureed, or made into juice.

§ 1218.16 Producer.

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

§ 1218.17 Promotion.

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

§ 1218.18 Research.

Research means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of blueberries, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value, health research, and marketing of blueberries.

§ 1218.19 Secretary.

Secretary means the Secretary of Agriculture of the United States, 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.

§ 1218.20 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.

§ 1218.21 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.

§ 1218.22 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.

§ 1218.23 USABC.

USABC, or U.S.A. Blueberry Council, means the administrative body established pursuant to § 1218.40.

U.S.A. Blueberry Council

§ 1218.40 Establishment and membership.

(a) Establishment of the U.S.A. Blueberry Council. There is hereby established a U.S.A. Blueberry Council, hereinafter called the USABC, composed of no more than 13 members and alternates, appointed by the Secretary from the nominations as follows:

(1) One producer member and alternate from each of the following regions:

(i) Region #1 Western Region (all states from the Pacific east to the Rockies): Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

(ii) Region #2 Midwest Region (all states east of the Rockies to the Great Lakes and south to the Kansas/Missouri/Kentucky state line): Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

(iii) Region #3 Northeast Region (all states east of the Great Lakes and North of the North Carolina/Tennessee state line): Connecticut, Delaware, New York, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, D.C., and West Virginia.

(iv) Region #4 Southern Region (all states south of the Virginia/Kentucky/Missouri/Kansas state line and east of the Rockies): Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee and Texas.

(2) One producer member and alternate from each of the top five blueberry producing states, based upon the average of the total tons produced over the previous three years. Average tonnage will be based upon North American Blueberry Council production figures for the initial election and production and assessment figures generated by the USABC thereafter.

(3) One importer and alternate.

(4) One exporter and alternate shall be filled by foreign blueberry producers currently shipping blueberries into the

United States from the largest foreign blueberry production area, based on a three-year average.

(5) One first handler member and alternate shall be filled by a United States based independent or cooperative organization which is a producer/shipper of domestic blueberries.

(6) One public member and alternate.

(b) Adjustment of membership. At least once every five years, the USABC will review the geographical distribution of United States production of blueberries and the quantity of imports. The review will be conducted through an audit of state crop production figures and USABC assessment receipts. If warranted, the USABC will recommend to the Secretary that membership on the USABC be altered to reflect any changes in geographical distribution of domestic blueberry production and the quantity of imports. If the level of imports increases, importer members and alternates may be added to the USABC.

§ 1218.41 Nominations and appointments.

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

(b) In a case where a state has a state blueberry commission or marketing order in place, the state commission or committee will nominate members and alternates to serve on the USABC. At least two nominees shall be submitted to the Secretary for each member and each alternate.

(c) Nomination and election of regional, and state representatives where no commission or order is in place will be handled by the USABC, provided that the initial nominations will be handled by the North American Blueberry Council. The USABC will seek nominations for members and alternates from the specific states and/or regions. Nominations will be returned to the USABC and placed on a ballot which will then be sent to producers in the state and/or region for vote. The final 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 final 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.

(d) Nominations for the importer, exporter, first handler, and public member positions will be made by the USABC. Two nominees for each member and alternate position will be submitted to the Secretary for consideration.

(e) From the nominations, the Secretary shall select the members of the USABC and alternates for each position on the USABC.

§ 1218.42 Term of office.

USABC members and alternates will serve for a term of three years and be able to serve a maximum of two consecutive terms. A USABC member may serve as an alternate during the years the member is ineligible for a member position. When the USABC is first established, the state representatives, first handler member, and their respected alternates will be assigned initial terms of three years. Regional representatives, the importer member, the exporter member, public member, and their alternates will serve an initial term of two years. Thereafter, each of these positions will carry a full three-year term. USABC nominations and appointments will take place in two out of every three years. Each term of office will end on December 31, with new terms of office beginning on January 1.

§ 1218.43 Vacancies.

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

(b) If a member of the USABC consistently refuses to perform the duties of a member of the USABC, or if a member of the USABC engages in acts of dishonesty or willful misconduct, the USABC may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the USABC shows adequate cause, the Secretary shall 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 § 1218.40 and § 1218.41, except that said nomination and replacement shall not be required if said unexpired terms are less than six months.

§ 1218.44 Alternate members.

An alternate member of the USABC, 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 both a producer member of the USABC and the alternate are unable to attend a meeting, the USABC may not designate any other alternate to serve in such member's or alternate's place and stead for such a meeting.

§ 1218.45 Procedure.

(a) At a USABC meeting, it will be considered a quorum when a minimum of seven members, or their alternates serving in the absence, are present.

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

(c) All USABC members and alternates will receive a minimum of 10 days advance notice of all USABC and committee meetings.

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

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

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

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting member.

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

§ 1218.46 Compensation and reimbursement.

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

§ 1218.47 Powers and duties.

The USABC 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 USABC, 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 USABC a chairperson, other officers, committees, and subcommittees, as the USABC determines to be appropriate;
- (d) To employ persons, other than the members, as the USABC considers necessary to assist the USABC in carrying out its duties and to determine the compensation and specify the duties of such persons;
- (e) 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 USABC shall develop and submit to the USABC 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 USABC of activities conducted under the contract or agreement; and make such other reports available as the USABC or the Secretary considers relevant. Any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the USABC 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 USABC of activities conducted, submit accounting for funds received

and expended, and make such other reports as the Secretary or the USABC may require;

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

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

(f) To prepare and submit for approval of the Secretary fiscal year budgets in accordance with § 1218.50;

(g) 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 prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the USABC;

(h) To cause its books to be audited by a competent 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;

(i) To give the Secretary the same notice of meetings of the USABC 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 USABC to the Secretary;

(j) To act as intermediary between the Secretary and any producer, first handler, importer, or exporter;

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

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

(m) To recommend to the Secretary such amendments to the Order as the USABC considers appropriate; and

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

§ 1218.48 Prohibited activities.

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

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

(b) Using funds collected by the USABC 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.

Expenses and Assessments**§ 1218.50 Budget and expenses.**

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

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

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

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

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

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

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another. Shifts of funds which do not cause an increase in the USABC's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(d) The USABC 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 USABC 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 USABC.

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

(f) The USABC may accept voluntary contributions, but these shall only be

used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the USABC shall retain complete control of their use.

(g) The USABC 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.

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

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

(j) The USABC 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.

§ 1218.51 Financial statements.

(a) As requested by the Secretary, the USABC 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 USABC shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal year to which it applies.

§ 1218.52 Assessments.

(a) The funds to cover the Council's expenses shall be paid from assessments on producers and importers, donations from any person not subject to assessments under this Order, and other funds available to the Board including those collected pursuant to § 1218.56

and subject to the limitations contained therein.

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

(c) Such assessments shall be levied at a rate of \$12 per ton on all blueberries. The assessment rate will be reviewed, and may be modified with the approval of the Secretary, after the first referendum is conducted as stated in § 1218.71(b).

(d) Each importer of fresh and processed blueberries shall pay an assessment to the USABC on blueberries imported for marketing in the United States, through the U.S. Customs Service.

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

(2) The import assessment shall be uniformly applied to imported fresh and frozen blueberries that are identified by the numbers 0810.40.0028 and 0811.90.2028, respectively, in the Harmonized Tariff Schedule of the United States or any other numbers used to identify fresh and frozen blueberries. Assessments on other types of imported processed blueberries, such as dried blueberries, puree, and juice, may be added at the recommendation of the USABC with the approval of the Secretary.

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

(e) All assessment payments and reports will be submitted to the office of the USABC. All final payments for a crop year are to be received no later than November 30 of that year. A late payment charge shall be imposed on any handler who fails to remit to the USABC, the total amount for which any such handler is liable on or before the due date established by the USABC. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the handler 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 USABC may authorize other organizations to collect assessments on

its behalf with the approval of the Secretary.

§ 1218.53 Exemption procedures.

(a) Any producer who produces less than 2,000 pounds of blueberries annually who desires to claim an exemption from assessments during a fiscal year as provided in § 1218.52 shall apply to the USABC, on a form provided by the USABC, for a certificate of exemption. Such producer shall certify that the producer's production of blueberries shall be less than 2,000 pounds for the fiscal year for which the exemption is claimed. Any importer who imports less than 2,000 pounds of fresh and processed blueberries annually who desires to claim an exemption from assessments during a fiscal year as provided in § 1218.52 shall apply to the USABC, on a form provided by the USABC, for a certificate of exemption. Such importer shall certify that the importer's importation of fresh and processed blueberries shall not exceed 2,000 pounds, for the fiscal year for which the exemption is claimed.

(b) On receipt of an application, the USABC shall determine whether an exemption may be granted. The USABC then will issue, if deemed appropriate, a certificate of exemption to each person who is eligible to receive one. Each producer who is exempt from assessment must provide an exemption number to the first handler in order to be exempt from the collection of an assessment on blueberries. First handlers and importers, except as otherwise authorized by the USABC, shall maintain records showing the exemptee's name and address along with the exemption number assigned by the USABC.

(c) Importers who are exempt from assessment shall be eligible for reimbursement of assessments collected by the U.S. Customs Service and shall apply to the USABC for reimbursement of such assessments paid. No interest will be paid on assessments collected by the U.S. Customs Service. Requests for reimbursement shall be submitted to the USABC within 90 days of the last day of the year the blueberries were actually imported.

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

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

§ 1218.54 Programs, plans, and projects.

(a) The USABC 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 programs, plans, or projects shall provide for:

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

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

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the USABC 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 USABC to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the USABC that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the USABC shall terminate such program, plan, or project.

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

§ 1218.55 Independent evaluation.

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

§ 1218.56 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 USABC under

this subpart shall be the property of the U.S. Government as represented by the USABC 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 USABC; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the USABC; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1218.73 shall apply to determine disposition of all such property.

Reports, Books, and Records**§ 1218.60 Reports.**

(a) Each first handler subject to this subpart may be required to provide to the USABC periodically such information as may be required by the USABC, 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 USABC 30 days after the end of the crop year.

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

(1) Number of pounds produced;

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

(3) Name and address of the producer;

(4) Date collection was made on each pound produced.

All reports are due to the USABC 30 days after the end of the crop year.

§ 1218.61 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 2 years beyond the fiscal period of their applicability.

§ 1218.62 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 USABC, 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 USABC members, producers, importers, exporters, 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**§ 1218.70 Right of the Secretary.**

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

§ 1218.71 Referenda.

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

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

(2) The Order is approved by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries.

(b) *Subsequent referenda.* Every five years, the Secretary shall hold a

referendum to determine whether blueberry producers and importers favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries. The Secretary will also conduct a referendum if 10 percent or more of all eligible blueberry producers and importers request the Secretary to hold a referendum. In addition, the Secretary may hold a referendum at any time.

§ 1218.72 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 also represent a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries.

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

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

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

§ 1218.73 Proceedings after termination.

(a) Upon the termination of this subpart, the USABC 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 USABC. 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 USABC, 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 USABC 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 USABC and the trustees, to such person or persons as the Secretary may direct; and

(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 USABC 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 USABC 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 the blueberry producer organizations in the interest of continuing blueberry promotion, research, and information programs.

§ 1218.74 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; or

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

(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.

§ 1218.75 Personal liability.

No member, alternate member, or employee of the USABC 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.

§ 1218.76 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.

§ 1218.77 Amendments.

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

§ 1218.78 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 0581-0093, except for the USABC nominee background statement form which is assigned OMB control number 0505-001.

Dated: February 9, 2000.

Kathleen A. Merrigan,
Administrator, Agricultural Marketing Service.

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