

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1250

[Doc. No. AMS-PY-09-0116]

#### Egg Research and Promotion Order; Referendum Procedures

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

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** This proposed rule would establish procedures which the USDA will use in conducting a referendum to determine whether egg producers favor increasing the assessment they pay to the American Egg Board (AEB) from a rate of 10 cents per 30-dozen case of commercial eggs to 15 cents per case. An amendment to increase the assessment rate in the Egg Research and Promotion Order will be implemented if it is approved by two-thirds of the egg producers voting in the referendum or by a majority of producers voting if they produced two-thirds of the eggs produced by all voters. These procedures would also be used for subsequent referenda. A proposed rule to increase the assessment rate is published separately in this issue of the **Federal Register**. AEB, which administers the Order, recommended this action to sustain and expand its national promotion, research, and consumer information program.

**DATES:** Comments must be received on or before November 27, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at <http://www.regulations.gov> or to Angela C. Snyder, Research and Promotion; Standards, Promotion, & Technology Branch; Poultry Programs, AMS, USDA; 1400 Independence Avenue, SW., Room 3932-S, Stop 0256; Washington, DC 20250-0259; fax (202) 720-2930. Comments should reference the docket number and the date and page number

of this issue of the **Federal Register** and will be available for public inspection at the above address during regular business hours or can be viewed at: <http://www.regulations.gov>. All comments received will be posted without change, including any personal information provided.

#### FOR FURTHER INFORMATION CONTACT:

Angela C. Snyder, Research and Promotion; Standards, Promotion & Technology Branch; Poultry Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 3932-S, Stop 0256; Washington, DC 20250-0256; *telephone:* (202) 720-4476; fax (202) 720-2930; or *e-mail:* [angie.snyder@ams.usda.gov](mailto:angie.snyder@ams.usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

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

##### Executive Order 12988

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Section 14 of the Act allows those subject to the Order to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with the law. In any petition, the person may request a modification of the Order or an exemption from the Order. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's ruling, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

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

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601-612], the AMS has considered the economic impact of this action on the small producers that would be affected by this rule. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.

According to AEB, approximately 245 producers are subject to the provisions of the Order, including paying assessments. Under the current Order, producers in the 48 contiguous United States and the District of Columbia who own more than 75,000 laying hens each pay a mandatory assessment of 10 cents per 30-dozen case of eggs. Assessments under the program are used by AEB to finance promotion, research, and consumer information programs designed to increase consumer demand for eggs in domestic and international markets. At the current rate of 10 cents per case, assessments generate about \$20 million in annual revenues. The Order is administered by AEB under supervision of the U.S. Department of Agriculture.

In 13 CFR part 121, the Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of no more than \$750,000. Under this definition, the vast majority of the egg producers that would be affected by this rule would not be considered small entities. Producers owning 75,000 or fewer laying hens are exempt from this program.

Given that a laying hen produces approximately 22 dozen eggs per year, production from 75,000 laying hens would result in 1.65 million dozen eggs. With a wholesale price of \$0.965 per dozen, total annual receipts would be \$1.59 million, which is well above the definition used to describe a small farm. The wholesale price of eggs would need to drop to approximately \$0.45 per dozen before a producer with 75,000 hens could be classified as a small farm under the SBA definition.

This proposed rule would establish the procedures under which egg producers vote on whether they favor an increase in the assessments they pay to AEB. This proposal would add a new subpart which establishes procedures to conduct this referendum as well as

future referenda. The proposed subpart covers definitions, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

USDA will keep egg producers who are eligible to vote informed throughout the referendum process to ensure that they are aware of and are able to participate. USDA will also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

Voting in the referendum is optional. However, if egg producers choose to vote, the burden of voting is minimal. USDA considered electronic voting, but the use of computers is not universal. Conducting the referendum from one central location by mail ballot would be more cost-effective and reliable.

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

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

We have performed this Initial Regulatory Flexibility Analysis regarding the impact of these proposed referendum procedures on small entities, and we invite comments concerning potential effects of these amendments on small businesses.

### Background

The Egg Research and Consumer Information Act established a national egg research and promotion program—administered by AEB—that is financed through industry assessments and subject to oversight by AMS. This program of promotion, research, and consumer information is designed to strengthen the position of eggs in the marketplace and to establish, maintain, and expand markets for eggs.

This program is financed by assessments on egg producers owning more than 75,000 laying hens. The Egg Research and Promotion Order specifies that handlers are responsible for collecting and remitting the producer assessments to AEB, reporting their handling of eggs, and maintaining records necessary to verify their reports.

Only producers in the contiguous United States are subject to the program, and producers owning 75,000 or fewer

laying hens are exempt from paying assessments.

This proposed rule would establish the procedures under which egg producers may vote on whether they want to increase the assessments they pay to AEB by increasing the rate from 10 cents to 15 cents per 30-dozen case of eggs. A proposed rule to increase the assessment rate is published separately in this issue of the **Federal Register**. This proposed rule would add a new subpart which would establish procedures to be used in this and future referenda. This subpart covers definitions, voting, instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

A 60-day comment period is provided to allow interested parties to respond to this proposal. All written comments received by the date specified in response to this rule will be considered prior to conduct of the referendum.

All written comments received in response to this rule by the date specified will be considered prior to finalizing this action.

### List of Subjects in 7 CFR Part 1250

Administrative practice and procedure, Advertising, Agricultural research, Eggs and egg products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 1250 is proposed to be amended as follows:

### PART 1250—EGG RESEARCH AND PROMOTION

1. The authority citation of Part 1250 continues to read as follows:

**Authority:** 7 U.S.C. 2701–2718 and 7 U.S.C. 2401.

2. Part 1250 is proposed to be amended by adding a new subpart consisting of §§ 1250.200 through 1250.207 and titled “referendum Procedures” to read as follows:

#### Subpart—Referendum Procedures

Sec.	
1250.200	Referenda.
1250.201	Definitions.
1250.202	Voting.
1250.203	Instructions.
1250.204	Subagents.
1250.205	Ballots.
1250.206	Referendum report.
1250.207	Confidential information.

#### Subpart—Referendum Procedures

##### § 1250.200 Referenda.

Referenda for the purpose of ascertaining whether the issuance by the Secretary of Agriculture of an Egg

Research and Promotion Order, or the continuance, termination, or suspension of such an order, is approved or favored by producers shall, unless supplemented or modified by the Secretary, be conducted in accordance with this subpart.

##### § 1250.201 Definitions.

(a) *Act* means the Egg Research and Consumer Information Act and as it may be amended (Pub. L. 93–428, 7 U.S.C. 2701 *et seq.*).

(b) *Administrator* means the administrator of the Agricultural Marketing Service, with power to redelegate, or any other officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator’s stead.

(c) *Egg producer or producer* means any person who either:

(1) Is an egg farmer who acquires and owns laying hens, chicks, and/or started pullets for the purpose of and is engaged in the production of commercial eggs; or

(2) Is a person who supplied or supplies laying hens, chicks, and/or started pullets to an egg farmer for the purpose of producing commercial eggs pursuant to an oral or written contractual agreement for the production of commercial eggs. Such person is deemed to be the owner of such laying hens unless it is established in writing, to the satisfaction of the Secretary or the Egg Board, that actual ownership of the laying hens is in some other party to the contract. In the event the party to an oral contract who supplied or supplies the laying hens cannot be readily identified by the Secretary or the Egg Board, the person who has immediate possession and control over the laying hens at the egg production facility shall be deemed to be the owner of such hens unless written notice is provided to the Secretary or the Egg Board, signed by the parties to said oral contract, clearly stating that the eggs are being produced under a contractual agreement and identifying the party (or parties) under said contract who is the owner of the hens.

(d) *Order* means the order or any amendment thereto promulgated pursuant to the act with respect to which the Secretary has directed that a referendum be conducted.

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

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

(g) *Representative period* means the period designated by the Secretary pursuant to section 9 of the act (7 U.S.C. 2708).

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

#### § 1250.202 Voting.

(a) Each person who is a producer, as defined in this subpart, at the time of the referendum, who was engaged in the production of commercial eggs during the representative period, and who is not exempt from the provisions of the order as provided for in § 1250.348 thereof, shall be entitled to only one vote in the referendum.

(b) Proxy voting is not authorized, but an officer or employee of a corporate producer, or an administrator, executor, or trustee of a producing estate, or an authorized representative of any other entity may cast a ballot on behalf of such producer or estate. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the corporate producer, or an administrator, executor, or trustee of the producing estate, or an authorized representative of such other entity, and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of his authority.

(c) Each producer shall be entitled to cast only one ballot in the referendum.

#### § 1250.203 Instructions.

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

(a) Determine the time of commencement and termination of the period of the referendum, and the time when all ballots must be received by the referendum agent.

(b) Determine whether ballots may be cast by mail, at polling places, at meetings of producers, or by any combination of the foregoing.

(c) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information for ascertaining:

(1) Whether the person voting or on whose behalf the vote is cast, is an eligible voter, and

(2) The total volume of commercial eggs produced during a representative period.

(d) Give reasonable advance notice of the referendum:

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

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

(e) Make available to producers instructions on voting, appropriate registration, ballot, and certification forms, and, except in the case of a referendum on the termination or continuance of an order, a summary of the terms and conditions of the order: *Provided*, That no person who claims to be qualified to vote shall be refused a ballot.

(f) If the ballots are to be cast by mail, cause all the material specified in paragraph (e) of this section to be mailed to each eligible producer whose name and address are known to the Secretary or the referendum agent.

(g) If the ballots are to be cast at polling places or meetings, determine the necessary number of polling or meeting places, designate them, announce the time of each meeting or the hours during which each polling place will be open, provide the material specified in paragraph (e) of this section, and provide for appropriate custody of ballot forms and delivery to the referendum agent of ballots cast.

(h) At the conclusion of the referendum, canvass the ballots, tabulate the results, and except as otherwise directed report the outcome to the Administrator and promptly thereafter submit the following:

(1) All ballots received by the agent and appointees, together with a certificate to the effect that the ballots listed are all of the ballots cast and received by the agent and appointees during the referendum period;

(2) A tabulation of all challenged ballots deemed to be invalid; and

(3) A report of the referendum including a detailed statement explaining the method used in giving publicity to the referendum and showing other information pertinent to the manner in which the referendum was conducted.

#### § 1250.204 Subagents.

The referendum agent may appoint any person or persons deemed necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform, in accordance with the requirements herein set forth, any or all of the following functions (which, in the absence of such appointment, shall be performed by said agent):

(a) Give public notice of the referendum in the manner specified herein;

(b) Preside at a meeting where ballots are to be cast or as poll officer at a polling place;

(c) See the ballots and the aforesaid texts are distributed to producers and receive any ballots which are cast; and

(d) Record the name and address of each person casting a ballot with said subagent and inquire, as deemed appropriate, into the eligibility of such persons to vote in the referendum.

#### § 1250.205 Ballots.

The referendum agent and subagents shall accept all ballots cast; but should they, or any of them, deem that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefor, and the results of any investigations made with respect thereto, and the disposition thereof. Invalid ballots shall not be counted.

#### § 1250.206 Referendum report.

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

#### § 1250.207 Confidential information.

The ballots cast or the manner in which any person voted and all information furnished to, compiled by, or in the possession of the referendum agent shall be regarded as confidential. The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

Dated: September 21, 2009.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

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