



## **Agricultural Marketing Service**

### **7 CFR Part 1218**

**[Document Number AMS-SC-21-0022]**

#### **Blueberry Promotion, Research and Information Order; Change in Membership, Nomination Procedures, and Term of Office**

**AGENCY:** Agricultural Marketing Service, Department of Agriculture (USDA).

**ACTION:** Final rule.

**SUMMARY:** This rule changes the membership of the U.S. Highbush Blueberry Council (Council) under the Blueberry Promotion, Research and Information Order (Order), by removing the first handler member and alternate position and adding two exporter member and alternate positions. Conforming changes will be made to the nomination procedures. In addition, this rule will allow members and alternates to remain in office until a successor is appointed. The Council administers the Order with oversight by the U.S. Department of Agriculture (USDA).

**DATES:** *Effective date:* [INSERT DATE ONE DAY AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Jeanette Palmer, Marketing Specialist, Mid Atlantic Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue, SW, Room 1406-S, Stop 0244, Washington, DC 20250-0244; Telephone: (202) 720-5976; or Email: [Jeanette.Palmer@usda.gov](mailto:Jeanette.Palmer@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under the Order (7 CFR part 1218). The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

**Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

### **Executive Order 13175**

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The Agricultural Marketing Service (AMS) has assessed the impact of this proposed rule on Indian tribes and determined that this rule would not have tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the proposed changes to the regulations was shared during a quarterly call, and tribal leaders were informed about the proposed revisions to the regulation and the opportunity to submit comments. AMS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to this change to the Order.

### **Executive Order 12988**

In addition, this final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act (7 U.S.C. 7418), a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

## **Background**

This final rule changes the Council's membership under the Order. The Council administers the Order with oversight by USDA. Under the program, assessments are collected from domestic producers and importers and used for research and promotion projects designed to increase the demand for highbush blueberries. This final rule will remove the first handler member and alternate position and add two exporter members and alternate positions. This will help ensure that the Council reflects the distribution of domestic blueberry production and imports into the United States (U.S.) Conforming changes will be made to the nomination procedures. This rule will also allow members and alternates to remain in office until a successor is appointed. This change will permit the Council to continue administration of the Order should appointments be delayed beyond the specified term of office. The two actions were unanimously recommended by the Council at its meetings on November 18, 2020, and June 9, 2021.

## **Change in Membership**

Section 1218.40(a) of the Order currently specifies that the Council be comprised of no more than 20 members and alternates appointed by the Secretary of Agriculture (Secretary). Twelve of the 20 members and alternates are producers. One producer member and alternate are from each of the following regions within the U.S.: Region #1 Western Region; Region #2 Midwest Region; Region #3 Northeast Region; and Region #4 Southern Region. One producer member and alternate are from each of the top eight blueberry producing states, based upon the average of the total tons produced over the previous three years. Currently, these states include California, Florida, Georgia, Michigan, New Jersey, North Carolina, Oregon, and Washington.

Of the remaining eight Council members and alternates, four members and alternates are importers. Two members and alternates must be an exporter, defined in § 1218.40(a)(4) as a blueberry producer currently shipping blueberries into the U.S. from the two largest foreign blueberry production areas, based on a three-year average (currently Chile and Canada). One member and alternate must be a first handler, defined in § 1218.40(a)(5) as a U.S. based independent or cooperative organization which is a producer/shipper of domestic blueberries. Finally, the Order provides that one member and alternate must represent the public. The public member representation on research and promotion boards is optional as provided for in the 1996 Act.

Section 1218.40(b) of the Order specifies that, at least once every five years, the Council will review the geographical distribution of the production of blueberries in the United States and the quantity of imports. The review is conducted through an audit of state crop production figures and Council assessment records. If warranted, the Council will recommend to the Secretary that its membership be altered to reflect changes in the geographical distribution of domestic blueberry production and the quantity of imports.

The Council met on November 18, 2020, and then again on June 9, 2021, to review domestic production data, import data, and assessment data for the past three years (2017-2019). This data is summarized in Table 1 below:

Table 1 - U.S. and Import Quantities and Assessment Data

Year	U.S. Crop - Utilized Production <sup>1</sup> (1,000 lbs)	Imports (1,000 lbs) <sup>2</sup>	Domestic (U.S.) Assessments <sup>3</sup>	Import Assessments <sup>3</sup>
2017	512,740	398,190	\$3,968,438	\$3,577,559
2018	562,300	473,073	\$4,263,177	\$4,229,333
2019	673,050	579,181	\$5,172,055	\$5,040,722
3-year average	582,697	483,481	\$4,467,890	\$4,282,538

Sources: <sup>1</sup>National Agricultural Statistics Service (NASS); <sup>2</sup>U.S. Customs and Border Protection; <sup>3</sup>Council Financial Audit Records 2019-2020

As shown in Table 1, the quantity of imported blueberries, as well as import assessments collected, has increased in recent years.

In that time, there has been a substantial increase of imported product from both Peru and Mexico, with Peru exports into the U.S. surpassing Canada in 2019, as shown in Table 2.

Table 2 - Quantity of Blueberries from Foreign Production Areas

Foreign blueberry production areas shipping into the United States	Quantity (1,000 lbs)			
	2017	2018	2019	3-year average
Chile	162,932	181,951	164,872	169,918
Canada	111,979	110,755	142,425	121,720
Peru	41,516	82,273	154,288	92,692
Mexico	54,212	72,537	93,840	73,530
Argentina	26,099	23,581	22,130	23,937
All Other Countries	1,451	1,976	1,627	1,685

Source: U.S. Customs and Border Protection

In 2015, the Council, after reviewing import and domestic production and assessment data, recommended changes to the membership; one such change included adding an additional exporter seat. At that time, data indicated considerable increased imports from Chile. The addition of the second exporter member allowed exporters from

both Chile and Canada, the two countries shipping the greatest volume of blueberries into the U.S., to be represented on the Council. The Council took a similar approach when reviewing and recommending this recent change in membership. It recognized the significant volume of imports from Peru and Mexico, discussing the need to add representatives from those production areas to the Council. Given the decision to try to maintain its current size and based on the data reviewed, it concluded it was important to have foreign producer representation similar to the structure of the state producer representation. Therefore, it recommended the addition of two exporter members. Four exporter member positions will provide the four largest foreign producing areas importing into the U.S., which represents ninety-five percent of the total volume of blueberries imported into the U.S., a voice on the Council. This will realign the Council's membership to better reflect the distribution of domestic production and the quantity of imports into the U.S.

The Council conducts nominations two out of every three years. The Council is currently conducting nominations for seven member and alternate positions (year-one cycle) whose three-year term of office begins January 1, 2022, ending December 31, 2024. These include the four regional producer members, one exporter member, one importer member, the public member, and respective alternates. The Council will conduct nominations in 2022 for 13 member and alternate positions (year-two cycle) whose three-year term of office begins January 1, 2023, ending December 31, 2025. This will include one member from each of the top eight producing states, three importer members, one exporter member, the first handler member, and respective alternates. To help ensure a smooth transition, while aligning with the Council's nomination schedule, the term of office for the recommended additional exporter member positions will begin January 1, 2023. Therefore, solicitation for the two additional exporter position nominees will be included in the nominations scheduled to be conducted in 2022. Since

the first handler member position is being removed, nominations for this position will not be conducted during the 2022 solicitation period. The first handler member and alternate member positions will terminate December 31, 2022.

USDA has recommended that the initial term of office for the two additional exporter positions will be two years, instead of the prescribed three-year term of office for all Council member and alternate positions. The additional two exporter member and alternate term of office will begin January 1, 2023, ending December 31, 2024. As noted above, the Council conducts nominations two out of every three years, with seven positions to be filled in year-one, and thirteen in year-two. With including the nominations for the exporter positions in the year-two cycle, total positions to be filled will be 14 of the 21-member Council. Having an initial two-year term will align these two additional exporter positions with the year-one nomination cycle, reestablishing the distribution between the two nomination cycles. Year-one nomination cycle will include solicitation for nine positions: four regional producer member positions, one importer member position, three exporter member positions, one public member position, and respective alternates. The year-two nomination cycle will include solicitation for 12 positions: one member from each of the top eight producing states, three importer members, one exporter member, and respective alternates.

The 2022, 20-member Council would consist of one producer member from each of the four regions (Western, Midwest, Northeast, Southern), one producer member from each of the top eight producing states, four importer members, two exporter members, first handler member, public member, and respective alternates.

The 2023 and subsequent 21-member Council will consist of one producer member from each of the four regions (Western, Midwest, Northeast, Southern), one producer member from each of the top eight producing states, four importer members,

four exporter members, one public member, and respective alternates. The provisions at 7 CFR 1218.40 will be revised accordingly.

### **Nomination Procedures**

Section 1218.41 establishes the procedures for nominations to obtain Council nominees for appointment by the Secretary. Section 1218.41(c) provides for the nomination process for importer, exporter, first handler, and public member and alternate positions. Section 1218.41(d) requires producer, handlers, and importer nominees to be compliant with the Order provisions regarding payment of assessments and filing of reports. With the proposed removal of the first handler position, references to first handler member will be removed from these sections.

### **Term of Office**

Section 1218.42 provides that Council nominations and appointments will take place in two out of every three years, with each term of office ending on December 31, and new terms of office beginning January 1. The Council recommended allowing members and their alternates to remain in office until a successor is appointed. Currently, if successors are not appointed by the January 1 date, those positions remain vacant until the successors are named. The Order requires a minimum of 11 members to hold a Council meeting. For the nomination year with 12 positions expiring, if not appointed by the January 1 start date, the Council will be unable to meet until such appointments were made. This could cause a lapse in the Council's ability to properly administer the provisions of the Order. Allowing members to serve until their successor is appointed will allow the Council to continue administration should appointments be delayed beyond the specified term of office. This change is similar to authority provided for in other research and promotion orders.

### **Final Regulatory Flexibility Act Analysis**



In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of the final rule on small entities. Accordingly, AMS has considered the economic impact of this action on such entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$1,000,000 and small agricultural service firms (first handlers and importers) as those having annual receipts of no more than \$30 million.

There are approximately 1,547 domestic producers, 71 first handlers and 271 importers of highbush blueberries covered under the program. Dividing the highbush blueberry crop value for 2019, \$919 million,<sup>1</sup> by the number of producers (1,547) yields an average annual producer revenue estimate of \$594,053. It is estimated that in 2019, about 99 percent of the first handlers shipped under \$30 million worth of highbush blueberries. Based on 2019 U.S. Border and Customs (Customs) data, it is estimated that over 99 percent of the importers shipped under \$30 million worth of highbush blueberries. Based on the foregoing, the majority of producers, first handlers and importers may be classified as small entities. We do not have information concerning the number of exporters and their size.

Regarding value of the commodity, as mentioned above, based on 2019 NASS data, the value of the domestic highbush blueberry crop was about \$919 million. According to Customs data, the value of 2019 imports was about \$1.04 billion.

It is not anticipated that this action will impose additional costs on industry members. Eligible producers, importers and exporters interested in serving on the

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<sup>1</sup> Noncitrus Fruits and Nuts 2019 Summary

Council will have to complete a background questionnaire. Those requirements are addressed later in this rule.

This rule is revising §§ 1218.40, 1218.41, and 1218.42 of the Order regarding Council membership, nominations, and term of office, respectively. The Council administers the Order with oversight by USDA. Under the program, assessments are collected from domestic producers and importers and used for research and promotion projects designed to increase the demand for highbush blueberries. This rule will remove the first handler and alternate position and add two exporter member and alternate positions. This will help ensure that the Council reflects the distribution of domestic blueberry production and imports into the U.S. Conforming changes will be made to the nomination procedures. This rule will also allow members and alternates to remain in office until a successor is appointed. This change will allow the Council to continue administration of the Order should appointments be delayed beyond the specified term of office. Authority for this action is provided in §§ 1218.40(b) and 1218.47(m) of the Order and section 7414 of the 1996 Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are imposed by the Order have been approved previously under OMB control number 0581-0093 and 0505-0001. Eligible producers, importers, exporters, first handler and public member interested in serving on the Council are required to complete a background questionnaire (Form AD-755) to verify their eligibility. Adding an exporter member and alternate member to the Council will require four additional exporters to submit background questionnaire (AD-755) to USDA, once every three years, in order to be considered for appointment to the Council. The Secretary requires two names to be submitted for each open seat on the Council. The public reporting burden is estimated to increase the total burden hours by less than one hour. This additional burden will be included in the existing information

collection approved for use under OMB control number 0581-0093. In addition, serving on the Council is optional, and the burden of submitting the background questionnaire will be offset by the benefits of additional representation on the Council.

The previously approved background questionnaire will be revised eliminating the first handler section. It will impose an increase of the total reporting and recordkeeping burden hours by less than one hour on blueberry producers, importers, or exporters.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

Regarding alternatives, the Council has been discussing its membership and potential changes to reflect the distribution of domestic production and imports for the past few years. The Council's Executive Committee met to formulate and consider various options. One option was to replace two of the four regional producer positions, with the exporter positions, reallocating the two regions as East and West, with one position for each region. Another option considered was to eliminate the first handler and public member positions; reallocate the regions to East and West, with one position for each region; and add two importer positions and two exporter positions. The Council also considered maintaining the status quo. It concluded, upon reviewing the domestic production and import statistics, that it was important to have foreign producer representation from the top four countries importing highbush blueberries into the U.S. represented on the Council. Thus, the Council recommended revising the Order to remove the first handler and alternate position and add two exporter member and alternate positions.

Regarding outreach efforts, this action was discussed by the Council at meetings in October 2018, as well as by the Council and committees in 2019 and 2020. The Council met in November 2020 and in June 2021 and unanimously made its recommendation. All of the Council's meetings are open to the public and interested persons are invited to participate and express their views.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities or citizen access to Government information and services, and for other purposes.

USDA has determined that this rule is consistent with and would effectuate the purpose of the 1996 Act.

A proposed rule concerning this action was published in the Federal Register on July 22, 2021 (86 FR 38590). A 60-day comment period ending September 20, 2021, was provided to allow interested person to respond to the proposal. The proposal was made available through the Internet by USDA and the Office of the Federal Register. One comment was received, but it did not pertain to this proposal. Accordingly, no changes were made to the rule as proposed, based on the comments received.

After consideration of all relevant material presented, including the information and recommendations submitted by the Board, the comments received, and other available information, it is hereby found that this rule, as hereinafter set forth, is consistent with and will effectuate the purposes of the 1996 Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until one day after publication in the Federal Register because the Council begins their 2022 nomination process in December of 2021. This will allow for the two new exporter seats created by this regulation to be filled in the 2022 nomination cycle and be seated in January 2023. In addition, soliciting nominees for these two new exporter seats will realign the Council's membership to

better reflect the distribution of domestic production and the quantity of imports into the U.S.

### **List of Subjects in 7 CFR Part 1218**

Administrative practice and procedure, Advertising, Agricultural research, Blueberries, Consumer protection, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 1218 as follows:

### **PART 1218 — BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION**

1. The authority citation for 7 CFR part 1218 continues to read as follows:

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

2. Revise the heading for part 1218 to read as set forth above.

#### **Subpart A - Blueberry Promotion, Research, and Information Order**

3. Revise § 1218.13 to read as follows:

#### **§ 1218.13 Part and subpart.**

The Blueberry Promotion, Research, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order comprise this part. The Order is this subpart.

4. In § 1218.40, paragraph (a) is revised to read as follows:

#### **§ 1218.40 Establishment and membership.**

(a) *Establishment of the U.S. Highbush Blueberry Council.* There is hereby established a U.S. Highbush Blueberry Council, hereinafter called the Council, shall be comprised of no more than 20 members and alternates for the 2022 Council, and comprised of no more than 21 members and alternates for the 2023 Council and each subsequent Council, appointed by the Secretary from nominations as follows:

(1) The 2022 Council shall be comprised of:

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

(A) 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.

(B) 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.

(C) 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.

(D) 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.

(ii) One producer member and alternate from each of the top eight blueberry producing states, based on the average of the total tons produced over the previous three years. Average tonnage will be based upon production and assessment figures generated by the Council.

(iii) Four importers and alternates.

(iv) Two exporters and alternates will be filled by foreign blueberry producers currently shipping blueberries into the United States from the two largest foreign blueberry production areas, respectively, based on a three-year average.

(v) 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.

(vi) One public member and alternate. The public member and alternate public member may not be a blueberry producer, handler, importer, exporter, or have a financial interest in the production, sales, marketing or distribution of blueberries.

(2) The 2023 and subsequent Council shall be composed of:

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

(A) 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.

(B) 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.

(C) 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.

(D) 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.

(ii) One producer member and alternate from each of the top eight blueberry producing states, based on the average of the total tons produced over the previous three

years. Average tonnage will be based upon production and assessment figures generated by the Council.

(iii) Four importers and alternates.

(iv) Four exporters and alternates will be filled by foreign blueberry producers currently shipping blueberries into the United States from the four largest foreign blueberry production areas, respectively, based on a three-year average.

(v) One public member and alternate. The public member and alternate public member may not be a blueberry producer, handler, importer, exporter, or have a financial interest in the production, sales, marketing or distribution of blueberries.

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5. In § 1218.41, paragraphs (c) and (d) are revised to read as follows:

**§ 1218.41 Nominations and appointments.**

\* \* \* \* \*

(c) *Importer, exporter, and public members.* Nominations for the importer, exporter, and public member positions will be made by the Council. Two nominees for each member and each alternate position will be recommended to the Secretary for consideration. Other qualified persons interested in serving in these positions but not recommended by the Council will be designated by the Council as additional nominees for consideration by the Secretary.

(d) *Producers and importers.* Producer and importer nominees must be in compliance with the Order's provisions regarding payment of assessments and filing of reports. Further, producers and importers must produce or import, respectively, 2,000 pounds or more of highbush blueberries annually.

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6. Section 1218.42 is revised to read as follows:

**§ 1218.42 Term of office.**



Council members and alternates will serve for a term of three years and be able to serve a maximum of two consecutive terms. A Council member may serve as an alternate during the years the member is ineligible for a member position. When the Council is first established, the state representatives, first handler member, and their respective 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. Council 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. Council members and alternates shall serve during the term of office for which they have been appointed and qualified, and until their successors are appointed.

**Erin Morris,**

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*Agricultural Marketing Service.*

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