

Regional Equity States will be available until April 1 of each fiscal year, after which date the remaining funds may be re-allocated at the discretion of the Chief.

Signed this 30th day of November, 2009, in Washington, DC.

**Dave White,**

*Chief, Natural Resources Conservation Service.*

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1207

[Doc. No. AMS-FV-09-0024; FV-09-706FR]

#### Potato Research and Promotion Plan; Assessment Increase

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

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Potato Research and Promotion Plan (Plan) to increase the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight. This increase is provided for under the Plan which is authorized by the Potato Research and Promotion Act (Act). The National Potato Promotion Board, which administers the Plan, recommended this action to sustain and expand their promotional, research, advertising and communications programs.

**DATES:** *Effective:* December 7, 2009.

**FOR FURTHER INFORMATION CONTACT:**

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*Deborah.simmons@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Potato Research and Promotion Plan [7 CFR part 1207]. The Plan is authorized under the Potato Research and Promotion Act [7 U.S.C. 2611-2627]. This rule increases the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight.

#### 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act allows handlers and importers subject to the Plan to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with the law. In any petition, the person may request a modification of the Plan or an exemption from the Plan. 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.

#### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such action in order that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than \$7 million. According to the Board, there are approximately 1,600 potato growing operations, 1,143 handlers and 252 importers who are subject to the provisions of the Plan. According to the National Agricultural Statistics Service (NASS), data from the 2008 crop year shows that approximately 395 cwt. of potatoes were produced per acre. The 2008 grower price published by NASS was \$9.46 per cwt. Thus the value of potato production per acre in 2008 averaged \$3,736.70 (395 times \$9.36 cwt). At that average price, a producer would have to farm over 201 acres to receive an annual income from potatoes of \$750,000 (\$750,000 divided by \$3,736.70 per acre equals 201 acres). Thus, it can be concluded that most producers, handlers and importers

would not be classified as small businesses under the criteria established by the SBA.

Producers of less than 5 acres of potatoes are exempt from this program. Potato and potato products used for nonhuman food purposes, other than seed, are exempt from assessment but are subject to the disposition of exempted potatoes provisions of section 1207.515 of the regulations.

Under the current Plan, potato handlers and importers are required to pay an assessment of 2.5 cents per hundredweight. Handlers may collect assessments from the producer or deduct assessments from proceeds paid to the producer on whose potatoes the assessments are made. No more than one assessment shall be made on any potatoes or potato products. Funds collected by the board shall be used for research, development, advertising or promotion of potatoes and potato products and such other expenses for the administration, maintenance and functioning of the Board as may be authorized by the Secretary. The assessment at the current 2.5 cents per hundredweight generates about \$10 million in annual revenues. The 2.5 cents per hundredweight assessment rate was established in August 2006 when the Plan was amended. The Plan is administered by the Board under U.S. Department of Agriculture supervision.

According to the Board, additional revenue is required in order to sustain and expand the promotional, research, advertising and communications programs. The Board approved the assessment rate increase at its March 13, 2009, meeting. This increase is consistent with section 1207.342(a) of the Plan which states that funds to cover the Board's expenses shall be acquired by the levying of assessments upon handlers and importers as designated in regulations recommended by the Board and issued by the Secretary. Such assessments shall be levied at the rate fixed by the Secretary which shall not exceed one-half of one per centum of the immediate past ten calendar years United States average price received for potatoes by growers as reported by the Department of Agriculture. Currently, section 1207.510 of the Plan states that an assessment of 2.5 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States and an assessment rate of 2.5 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes. An assessment rate of 2.5 cents per hundredweight shall be levied on the fresh weight equivalents of

imported frozen or processed potatoes for ultimate consumption by humans. Further, not more than one such assessment may be collected on any potatoes or potato products.

In March 2007, the Board conducted its most recent "Evaluation of Grower-Funded Value-Added Activities by the United States Potato Board." This study was completed by Dr. Timothy Richards and Dr. Paul Patterson of the Morrison School of Management and Agribusiness at Arizona State University. The study presented an econometric evaluation of the demand impact of board marketing, public relations and research activities and a simulation model that estimates the return on grower investment in board programs. The primary objective of this research was to estimate the long-run return on grower's investment in each board activity, in both domestic and export marketing.

The U.S. potato market was volatile over the five year period (CY 2002–CY 2006). According to USDA data, the per capita consumption of potatoes, of all forms in the U.S., changed very little over this period. Grower prices, on the other hand, were strong in 2001, but fell through the 2004 marketing season. High prices may have been due to the activities of a newly formed potato industry cooperative comprising some 65% of the U.S. potato supply. In 2001 the Board adopted a new business model for increasing potato consumption, eschewing traditional generic advertising programs for retail partnerships, public relations, marketing research, product development and active export promotion programming. The objective of this study was to determine the return on investment to grower funds invested in board marketing activities. The relevant markets for U.S. potatoes are defined as the domestic retail market (frozen, refrigerated, chips, bagged fresh, bulk fresh and dehydrated potatoes), the domestic food service market (skins, chips, formed products, hash browns, mashed, frozen, French fries, and whole potatoes), and export marketing for fresh (table stock and chipping stock), frozen, dehydrated and seed potatoes.

Econometric models were used to estimate the demand impact of board activities. Five models were created for this purpose: Domestic Retail, Domestic Foodservice model, Domestic "Best Practices" model to estimate the effect of targeted category management programs, and two export marketing models: One for Fresh, Frozen and Dehydrated potatoes and another for Seed potatoes. All models are estimated with data made available from board

records and include retail scanner data, food service supplier survey data and USDA export data.

The study found that U.S. potato growers have received a significantly positive return on their investment in USPB activities over the FY 2002–FY 2006 period covered by the analysis. The study found that each is highly effective in increasing potato demand, although the final return varies widely among them. On a per dollar of investment basis; the most likely estimate of the return to the Domestic Retail program is \$4.4743 in long run grower profit, while the Foodservice program provides a return of \$3.035 per dollar of investment. Considering the Best Practices program on its own, which is part of the Domestic Retail effort; category management investments provide incremental revenue of \$1.018 per dollar of program cost. On the export side, Frozen Consumer program generate a return of \$1.27, while Frozen Trade activities return \$1.11 and \$1.19, respectively, while Fresh Consumer and Trade activities yield \$10.36 and \$6.93 per dollar. In all cases, these Returns on Investments estimates are at least as high as growers could earn on investments elsewhere and, in many cases, several times greater.

The Board's Executive Committee collectively recognized the need to sustain the momentum of current board programs, which continue to "Maximize Return on Grower Investment." According to the Board, the board's domestic and global market strategies to increase demand for U.S. Potatoes and Potato Products have been highly successful, but industry and economic conditions have eroded the board's ability to fund the future needs of all its programs. The Board's Executive Committee proposed the 1/2-cent increase in the assessment rate in order to maintain the value in all programs. Over the last three fiscal years, however, several trends have asserted downward pressure on the board programs continued ability to sustain the industry recognized high level of return. Acreage decreases, produced by right-sizing supply with demand, and competition for acres to produce other crops, has reduced revenues' to the board. Higher costs, driven by worldwide inflation have increased the expenses of implementing board programs. The weakened U.S. dollar, in relation to the exchange rates of foreign currencies, has reduced the Board's purchasing power in obtaining needed goods and services to operate international marketing programs in foreign markets.

Alternatives were also considered by the Board, which included cutting back funding of marketing programs, international programs, and the new "Potatoes Goodness Unearthed" campaign. All of the alternatives were rejected by the Board. The Board believes that programs should not be reduced at a time when it's absolutely critical that they continue providing them, that it's a reasonable cost for keeping programs going and that the Board needs to maintain adequate reserves to handle food safety issues and other projects. The Board feels the direction it is going is in line with the grower's vision and that the assessment fee is money well invested. The Board believes that in order to continue to fund these and new programs, an increase in the assessment rate by 1/2 cent per hundredweight is needed.

Using the USDA previous 10-year average potato prices formula in the Plan, the assessment rate can be increased to 3.08 cents per hundredweight. However, it was determined that the rate would be increased 1/2 cent from 2.5 cents to 3 cents per hundredweight and that 1/2 cent would be easy to understand, communicate and ultimately to put into a collection system and at a full year of collection will deliver enough revenue to maintain the current programs with modest expansion. The 1/2-cent increase falls within the allowed limits in the Plan.

Using the 10-year average market price and average yield values of potatoes in the U.S., the increase in assessment rate to 3 cents per hundredweight will result in an average cost to growers of \$11.93 per acre, which represents less than one-half of one percent (0.445 percent) of potato revenue per acre. Calculated at the current market price for potatoes of \$8.36 per cwt: At the 3 cents per cwt assessment the total assessment for growers would be 0.359 percent of gross revenue per acre.

All potatoes are assessed the same assessment rate into the program regardless of origin—either U.S. grown or imported as fresh potatoes or potato products. The same assessments for domestic production and imports will be unchanged by the rate increase.

In order to sustain and expand the promotional, research, and communication programs, the Board decided to propose an increase in the assessment rate of 1/2 cent per hundredweight for a total assessment rate of 3 cents per hundredweight on all domestic and imported potatoes and potato products.

This rule does not impose additional recordkeeping requirements on handlers or importers of potatoes. Producers of fewer than 5 acres of potatoes annually are exempt.

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

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 are imposed by the Plan have been approved previously under OMB control number 0581-0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved.

### Background

Under the Plan, which became effective March 9, 1972, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen potatoes competitive position and expand domestic and foreign markets for potatoes and potato products. This program is financed by assessments on handlers and importers of potatoes and potato products. The Plan specifies that handlers are responsible for collecting and submitting assessments to the Board, reporting their handling of potatoes, and maintaining records necessary to verify their reporting. Handlers may collect assessments from producers or deduct assessments from the proceeds paid to the producer on whose potatoes the assessments are made. Importers are responsible for payment of assessments to the Board on potatoes imported into the United States through the U.S. Customs Service and Border Protection.

Based on the most recent data available in March 2009 from USDA, the average price received for potatoes for the period 1999 to 2008 was \$6.74 per hundredweight. One-half of 1 per centum of this average price would allow a maximum assessment rate of \$0.0337 cents per hundredweight. If the board had elected to use \$0.0337 cents per hundredweight in its fiscal year 2008, when 449.7 million hundredweight of potatoes were assessed, the Board would have realized assessment dollars of \$15,155,963 (vs. \$11,243,296 actual collected in FY 2008), an increase in assessment revenue of \$3.9 million.

A proposed rule was published in the **Federal Register** on July 27, 2009 [74 FR 36952]. Copies of the rule were made

available through the Internet by the Department and the Office of the Federal Register. That rule provided a sixty-day comment period which ended September 25, 2009. Four comments were received by the deadline.

This rule increases the assessment rate by 1/2 cent per hundredweight for handlers and importers. Currently, the assessment rate is 2.5 cents per hundredweight levied on potatoes handled within the 50 States of the United States and 2.5 cents per hundredweight on imports of potatoes and potato products. According to the Board, in order to sustain and expand the promotion, research, and communications programs at present levels, the Board contends that additional revenue is required. The 1/2 cent per hundredweight assessment rate increase is estimated to generate \$1 to \$1.5 million in new revenue, depending upon production levels.

Based on assessments collected for crop year 2008, about 87 percent of this production total was from domestic assessments, with the remainder from imports. The Board states that the assessment rate increase would enable it to expand media services, educational programs, research programs, and establish, maintain, and expand domestic and foreign markets for potatoes. Some of the additional revenue, the Board states, would be used to increase the reserve fund over a two-year period to provide for adequate cash flow. Based on the 2008 crop year production figures, the Board would have received \$13,491,955 in total assessments at the 3 cents per hundredweight assessment rate on potatoes.

In addition, the Board, whose members represent all potato producing states as well as importers, voted to propose the assessment rate increase at its March 13, 2009 meeting which was open to the public like all other meetings. The vote to recommend the assessment increase was 68 in favor and 7 against of the Board members present at the meeting. Most of the dissenting votes concerned the impact the increase would have on small growers.

### Summary of Comments

In response to the proposed rule, the Department received four comments regarding the proposed amendment to the Plan to increase the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight. Three comments were received from current Board members who state that being on the Board gives them a unique perspective on how the Board is helping to increase the demand

for potato and potato products in the domestic and international markets. One comment was received from a trade association that represents the potato industry. All four of the comments were in favor of the proposed amendment, citing the need for the increased assessment rate to fund programs that will continue to be successful and increase demand for potatoes and potato products in domestic and international markets.

The Department has considered all of the comments and is not making any changes to the proposed rule based on them.

Pursuant to 5 U.S.C. 553, it is also found that good cause exists for not postponing the effective date of this action until one day after publication in the **Federal Register** because (1) the Board's Finance Committee needs the new assessment rate by the beginning of the calendar year so that they may develop a timely budget recommendation; (2) the Board needs the additional assessments for sustaining ongoing projects and developing new projects to create demand for potatoes and potato products in foreign and domestic markets; and (3) all comments supported the proposed assessment increase.

### List of Subjects in 7 CFR Part 1207

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

■ For the reasons set forth in the preamble, Part 1207, Chapter XI of Title 7 is amended as follows:

### PART 1207—POTATO RESEARCH AND PROMOTION PLAN

■ 1. The authority citation for 7 CFR part 1207 continues to read as follows:

**Authority:** 7 U.S.C. 2611-2627 and 7 U.S.C. 7401.

■ 2. Section 1207.510 is amended by revising paragraphs (a)(1), (b)(1) and the Table in paragraph (b)(3) as follows:

#### § 1207.510 Levy of assessments.

(a) \* \* \* (1) An assessment rate of 3 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States.

\* \* \* \* \*

(b) \* \* \* (1) An assessment rate of 3 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes imported into the United

States. An assessment rate of 3 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. The

importer of imported tablestock potatoes, potato products, or seed potatoes shall pay the assessment to the board through the U.S. Customs Service and Border Protection at the time of

entry or withdrawal for consumption of such potatoes and potato products into the United States.

\* \* \* \* \*  
(3) \* \* \*

Tablestock potatoes, frozen or processed potatoes, and seed potatoes	Assessment	
	Cents/cwt	Cents/kg
0701.10.0020	3.0	0.066
0701.10.0040	3.0	0.066
0701.90.1000	3.0	0.066
0701.90.5010	3.0	0.066
0701.90.5020	3.0	0.066
0701.90.5030	3.0	0.066
0701.90.5040	3.0	0.066
0710.10.0000	6.0	0.132
2004.10.4000	6.0	0.132
2004.10.8020	6.0	0.132
2004.10.8040	6.0	0.132
2005.20.0070	4.716	0.104
0712.90.3000	21.429	0.472
1105.10.0000	21.429	0.472
1105.20.0000	21.429	0.472
2005.20.0040	21.429	0.472
2005.20.0020	12.240	0.27
1108.13.0010	27.0	0.595

\* \* \* \* \*  
Dated: November 30, 2009.

**Rayne Pegg,**  
*Administrator.*  
[FR Doc. E9-28924 Filed 12-3-09; 8:45 am]  
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**DEPARTMENT OF ENERGY**

**10 CFR Part 609**  
**RIN 1901-AB27**

**Loan Guarantees for Projects That Employ Innovative Technologies**

**AGENCY:** Office of the Chief Financial Officer, Department of Energy.  
**ACTION:** Final rule.

**SUMMARY:** On August 7, 2009, the Department of Energy (DOE or the Department) published a Notice of Proposed Rulemaking and Opportunity for Comment (NOPR) to make certain changes to the existing regulations for the loan guarantee program authorized by Section 1703 of Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary) to make loan guarantees for projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” Section 1703 of

Title XVII also identifies ten categories of technologies and projects that are potentially eligible for loan guarantees. The two principal goals of section 1703 of Title XVII are to encourage commercial use in the United States of new or significantly improved energy-related technologies and to achieve substantial environmental benefits. DOE believes that commercial use of these technologies will help sustain and promote economic growth, produce a more stable and secure energy supply and economy for the United States, and improve the environment.

Through experience gained implementing the loan guarantee program authorized by section 1703 of Title XVII, and information received from industry indicating the wide variety of ownership and financing structures which participants would like to employ in implementing projects seeking loan guarantees, DOE believes it is appropriate to make certain changes to the existing regulations to provide flexibility in the determination of an appropriate collateral package to secure guaranteed loan obligations, facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions regarding DOE’s treatment of collateral, consistent with the intent and purposes of Title XVII. Having considered all of the comments submitted to DOE in response to the NOPR, the Department today is issuing this final rule.

**DATES:** This rule is effective December 4, 2009.

**FOR FURTHER INFORMATION CONTACT:** David G. Frantz, Director, Loan Guarantee Program Office, 1000 Independence Avenue, SW., Washington, DC 20585-0121, e-mail: [lgprogram@hq.doe.gov](mailto:lgprogram@hq.doe.gov); or Susan S. Richardson, Chief Counsel for the Loan Guarantee Program, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585-0121, e-mail: [lgprogram@hq.doe.gov](mailto:lgprogram@hq.doe.gov).

- SUPPLEMENTARY INFORMATION:**
- I. Introduction and Background
  - II. Public Comments on the NOPR and DOE’s Responses
    - A. Definition of Eligible Project
    - B. Definition of Intercreditor Agreement
    - C. Shorter Amortization for Non-Guaranteed Obligations
    - D. Opposition to the Rule Change
  - III. Regulatory Review
    - A. Executive Order 12866
    - B. National Environmental Policy Act of 1969
    - C. Regulatory Flexibility Act
    - D. Paperwork Reduction Act
    - E. Unfunded Mandates Reform Act of 1995
    - F. Treasury and General Government Appropriations Act, 1999
    - G. Executive Order 13132
    - H. Executive Order 12988
    - I. Treasury and General Government Appropriations Act, 2001
    - J. Executive Order 13211
    - K. Congressional Notification
    - L. Approval by the Office of the Secretary of Energy

**I. Introduction and Background**

Today’s final rule amends the regulations implementing the loan