



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1222

[Document Number AMS-SC-18-0072]

Paper and Paper-Based Packaging Promotion, Research and Information Order; Change in Membership and Nominations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule changes the membership and nomination procedures of the Paper and Packaging Board (Board). The Paper and Paper-Based Packaging Promotion, Research and Information Order (Order) is administered by the Board with oversight by the U.S. Department of Agriculture (USDA). This rule also makes administrative changes to other provisions of the Order.

DATES: Effective: [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: This rule affecting 7 CFR part 1222 (the Paper and Paper-Based Packaging Promotion, Research and Information Order (Order)) is authorized under the Commodity

Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

Executive Orders 12866, 13563, and 13771

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. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

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 review reveals

that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

Executive Order 12988

This 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 rule reduces the size of the Board from 12 members to 8 members, reduces the number of regions for manufacturer representation on the Board from four (South, Northeast, Midwest, and West) to two (South and Other parts of the United States), eliminates the at-large seat, and changes the nomination process under the Order. The Order is administered by the Board with oversight by USDA. Under the Order, assessments are collected from manufacturers and importers and used for projects to promote the use of paper and paper-based packaging.

Board Membership and Regional Representation

Currently, the 1996 Act and § 1222.40(c) require the Board to review its membership and size of the Board to reflect changes in its geographical distribution and quantity of paper and paper-based packaging manufactured in the U.S. and the quantity of paper and paper-based packaging imported into the U.S. This is the first review of the Board's membership and size since the Board's implementation in 2014. The Board reviewed data to determine if the geographical distribution of

paper and paper-based packaging manufactured in the U.S. and the quantity imported into the U.S. and Board membership needed to be changed. The proposed action was unanimously recommended by the Board in June 2018 and will contribute to the effective administration of the program.

Section 1222.40 provides that the Board should consist of 12 members - 11 manufacturers and 1 importer. Section 1222.40 also requires that the Board be comprised of manufacturers and importers of paper and paper-based packaging that manufacture or import 100,000 short tons or more of paper and paper-based packaging during the year. Of the 11 manufacturers, 10 shall be from the following four regions: South - 6 members; Northeast - 1 member; Midwest - 2 members; and West - 1. One manufacturer at-large member may be from any region and shall manufacture at least 100,000 short tons but no more than 250,000 short tons of paper and paper-based packaging. If there are no eligible nominees, the seat shall be allocated to the largest producing region.

In 2017, approximately 61.3 million short tons of U.S. paper and paper-based packaging was produced and covered under the program. Of the 61.3 million short tons, it is estimated that 64 percent was manufactured in the South, 17 percent was manufactured in the Midwest, 9 percent was manufactured in the Northeast, and 10 percent was manufactured in the West. While

the U.S. production of paper and paper-based packaging has dropped from 66.1 million short tons in 2014 to 61.3 million short tons in 2017, the number of domestic companies that pay assessments into the program has decreased from 53 to 39, which equals a 26 percent decrease in three years. Due to the consolidation in the industry, the Board believes that the proposed changes to the Board size and its regions would better reflect the distribution of the manufacturing of paper and paper-based packaging and the imports of paper and paper-based packaging.

With this amendment, the total number of Board members will decrease from the current 12 members to 8 members. The 8-member Board will be comprised of 7 manufacturers and 1 importer. Of the 7 manufacturers, 4 members will be from the South, and 3 members will be from all other parts of the U.S. According to the Board, this action will make the reduced number of seats easier to fill and reflect the current distribution of the industry.

The Board recommended a transitional approach to reduce the Board from 12 members to 8 members over a three-year period. The 2019 Board currently has 12 members. The 2020 Board will have 10 members consisting of 5 members representing the South, 4 members representing the other parts of the U.S., and 1 importer. This will require the Board to fill two seats in the

South region whose terms will expire December 31, 2019. The original recommendation was for the 2021 Board to have 8 members consisting of 4 members representing the South, 3 members from other parts of the U.S., and 1 importer. However, this would require half of the board seats to be filled in one year, the five commenters requested that the 2021 Board have 9 members consisting of 5 members representing the South, 3 members representing other parts of the U.S., and 1 importer; and the 2022 Board and subsequent Boards have 8 members consisting of 4 members representing the South, 3 members representing other parts of the U.S., and 1 importer. These changes are authorized under § 1222.40(c). Lastly, the Board recommended one seat from the South whose term will expire on December 31, 2021, be for a two-year term rather than a three-year term. Section 515 of the 1996 Act (7 U.S.C. 7414) and § 1222.42 state that members shall serve for a term of three-years, except for the initial appointments. Therefore, a term shorter than three-years is not being implemented as recommended.

Nomination Process

Sections 1222.41 and 1222.46 provide authority for the Board to recommend amendments to the Order. Nominations to the Board are currently made by an election process. This process is conducted by the Board, which notifies all known manufacturers and importers of 100,000 short tons or more of

paper and paper-based packaging annually of the open Board seats. Manufacturers and importers may nominate eligible persons from their own company or any other eligible company for a seat on the Board. Once the Board receives the nominees, the Board conducts an election by mail ballot in each region where there is a vacancy. The votes are tabulated by region, with nominees receiving the highest number of votes placed at the top of the list, in descending order. Due to consolidation of companies from 53 to 39, the pool of eligible manufacturers to fill board seats has decreased, therefore the number of eligible nominees has decreased too. The Board recommended a new nomination process to help alleviate this situation.

The Board will conduct outreach and issue a call for nominations for all open seats to all known manufacturers and importers of 100,000 short tons or more of paper and paper-based packaging. The Board will evaluate all the nominees and recommend at least two names for each open seat as their first and second choice to be placed on the nomination slate. Other qualified persons interested in serving in the open seats, but not recommended by the Board, will be submitted and designated as additional nominees for consideration by the Secretary.

In addition, this proposal will change the OMB control number in §§ 1222.88 and 1222.108 from 0581-0281 to 0581-0093,

the control number assigned by OMB. This change will reflect the accurate OMB control number.

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 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 (SBA) 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 (first handlers and importers) as those having annual receipts of no more than \$7.5 million.

According to the Board, there are 39 manufacturers in the United States that produce the types of paper and paper-based packaging covered under the Order. Using an average price of \$784 per short ton¹, a manufacturer who produces less than about 9,560 short tons of paper and paper-based packaging per year would be considered a small entity. It is estimated that no more than three manufacturers produced less than 9,560 short

¹ Industry sources do not publish information on average price for paper and paper-based packaging. A reasonable estimate for average price of paper and paper-based packaging is the value per ton of paper and paper-based packaging exports. According to U.S. Census data, the average value of paper and paper-based packaging exports in 2017 was approximately \$784 per short ton.

tons per year in 2017. Thus, the majority of manufacturers would not be considered small businesses.

Based on U.S. Customs and Border Protection (Customs) data, it is estimated that in 2017 there were approximately 1700 importers of paper and paper-based packaging. Fifty importers, or about 3 percent, imported more than \$7.5 million worth of paper and paper-based packaging. Thus, the majority of importers would be considered small entities. However, all of the 20 entities that imported 100,000 short tons or more (the Order's exemption threshold) also imported more than \$7.5 million worth of paper and paper-based packaging. Therefore, none of the 20 importers covered under the Order would be considered small businesses.

Based on domestic production of approximately 61.3 million short tons in 2017 and an average price of \$784 per short ton, the domestic paper and paper-based packaging industry is valued at approximately \$48.1 billion. According to Customs data, the value of paper and paper-based packaging imports in 2017 was about \$5.9 billion.

The rule reduces the size of the Board from 12 members to 8, reduces the number of regions for manufacturers from four (South, Northeast, Midwest, and West) to two (South, and other parts of the United States), eliminates the at-large member, and changes the nomination process as specified in §§ 1222.40 and

1222.41. The revisions are administrative in nature; therefore, there should be no economic impact on manufacturers and importers.

Currently, the Order requires 12 Board members, 11 domestic manufacturers and one importer. Of the 11 domestic manufacturers, 6 represent the South, 2 represent the Midwest, 1 represents the Northeast, 1 represents the West, and 1 at-large member represents any region and must manufacture at least 100,000 short tons, but not more than 250,000 short tons. Due to mergers and closings, the number of eligible companies (manufacturers and importers of 100,000 tons or more of paper and paper-based packaging annually) has decreased from 53 to 39 eligible manufacturers since the inception of the Order in 2014. With an overall pool of 39 eligible U.S. manufacturers, an 8-member Board can effectively represent the interest of the paper and paper-based packaging industry.

The revised 8-member Board will be comprised of 7 manufacturers and 1 importer. Of the 7 manufacturers, 4 members will be from the South, and 3 members will be from all other parts of the U.S. According to the Board, this action makes the reduced number of seats easier to fill and reflects the current distribution of the industry.

This rule is also changing the nomination procedures. The Board unanimously recommended eliminating the election process

and recommended a new nomination process, whereby all the submitted names of the eligible candidates are submitted to the Secretary with recommendations by the Board. This action allows the Board the flexibility to provide a slate that reflects the diverse membership of the paper and paper-based packaging industry in terms of various segments of the industry.

The new nomination process allows the Board to conduct outreach to all known manufacturers and importers of 100,000 short tons or more of paper and paper-based packaging, whereby the Board evaluates all the nominees and recommends at least two names for each open seat. Other qualified persons interested in serving in the open seats, but not recommended by the Board, are to be submitted and designated as additional nominees for consideration by the Secretary.

The changes to the size of the Board, number of regions, and nomination process are administrative in nature and have no economic impact on entities covered under the program. These changes are thought to help increase the pool of candidates as companies operate in multiple regions and seek nomination for a region of their choice. Eligible manufacturers and importers interested in serving on the Board have to complete a background questionnaire. Those requirements are addressed later in this rule in the section titled ***Reporting and Recordkeeping Requirements.***

Regarding alternatives, the Board considered recommending no changes and considered a variety of mechanisms for nominating candidates. The Board explored whether other industry organizations should be tasked with nominating candidates but determined that it would unnecessarily complicate the nominations process. However, due to mergers and closings, the number of eligible companies has decreased, making it more difficult to fill Board seats. Therefore, the Board concluded that reducing the Board size, reducing the number of regions, eliminating the at-large member, and revising the nomination process will establish a Board that better reflects the industry.

Lastly, this rule makes changes to §§ 1222.80 and 1222.108 to correct the OMB control numbers that are assigned to the Paper and Packaging Board by OMB.

Reporting and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements that are imposed by the part have been previously approved by OMB under OMB control number 0581-0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved and does not impose additional reporting requirements or recordkeeping burden on manufacturers or importers of paper and paper-based packaging.

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 rule. 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 for citizen access to Government information and services, and for other purposes.

The Board met on June 28, 2018, and unanimously recommended reducing the size of the Board, reducing the number of regions, and eliminating the election process for nominations and using a new nominations process. The Board meetings are open to the public and interested persons are invited to participate and express their views.

A proposed rule concerning this action was published in the *Federal Register* on April 12, 2019 (84 FR 14891). A 30-day comment period ending May 13, 2019, was provided to allow interested persons to submit comments.

Analysis of Comments

Five comments were received in response to the proposed rule. All of the comments supported reducing the size of the Board from 12 to 8 members, reducing the number of regions from 5 (South, Northeast, Midwest, West, and at-large) to 2 (South

and all other parts of the U.S.), and revising the nomination process. All of the comments also stated their support for a transitional approach in reducing the Board from 12 to 8 members. They were supportive of the Board's original proposal to have a two-year term for a member from the South region during the transition; however, as stated previously, the 1996 Act and Order require members serve for a term of three-years, except for the initial appointments, so this change is not being implemented.

All five commenters stated their concern that losing half of the Board in a single year would be disruptive and cause a sudden loss of institutional knowledge within the Board. Therefore, in the alternative, they suggested adding an additional year to the transitional period, for a total of three years. So, the 2020 Board would have 10 members consisting of 5 members representing the South, 4 members representing the other parts of the U.S., and 1 importer. The 2021 Board would have 9 members consisting of 5 members representing the South, 3 members representing other parts of the U.S., and 1 importer. Finally, the 2022 Board and subsequent Boards would have 8 members consisting of 4 members representing the South, 3 members representing other parts of the U.S., and 1 importer. We agree with the commenters that adding an additional year to transition from a current 12 member Board to an 8 member Board

in 2022 and beyond will make it less disruptive to the Board's operations going forward. Accordingly, we are adopting the modifications and this final rule with changes to the composition of the Board from the current Board of 12 members to 8 members over the next three-years, reducing the number of manufacturing regions from 5 (South, Northeast, Midwest, West and at-large) to 2 (South and all other parts of the U.S.), and modifications to the nomination process.

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.

List of Subjects in 7 CFR Part 1222

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Paper and paper-based packaging promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1222 is amended as follows:

PART 1222—PAPER AND PAPER-BASED PACKAGING PROMOTION, RESEARCH AND INFORMATION ORDER

1. The authority citation for part 1222 continues to read as follows:

Authority: 7 U.S.C. 7411-7425; 7 U.S.C. 7401.

2. Revise § 1222.40(b) to read as follows:

§ 1222.40 Establishment and membership.

* * * * *

(b) *Composition of Board.* The 2020 Board shall be composed of 10 members. The 2021 Board shall be composed of 9 members. The 2022 Board and each subsequent Board shall be composed of 8 members. The Boards shall be established as follows:

(1) Manufacturers. For the 2020 Board, 9 members shall be manufacturers. For the 2021 Board, 8 members shall be manufacturers, and for the 2022 Board and each subsequent Board, 7 members shall be manufacturers, from the following two regions:

(i) Five members shall be from the South for the 2020 Board, five members shall be from the South for the 2021 Board, and four members shall be from the South for the 2022 Board and each subsequent Board. The South shall consist of the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia; and

(ii) Four members shall be from all other parts of the United States for the 2020 Board, and three members shall be from all other parts of the United States for the 2021 Board and each subsequent Board. All other parts of the United States consist of those states not listed in paragraph (b)(1)(i) of this section.

(2) Importers. One member shall be an importer.

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3. Revise § 1222.41(c) to read as follows:

§ 1222.41 Nominations and appointments.

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(c) Subsequent nominations shall be conducted as follows:

(1) The Board shall conduct outreach to all known manufacturers and importers manufacturing or importing 100,000 short tons or more of paper and paper-based packaging in a marketing year. Manufacturers and importers may submit nominations to the Board;

(2) Manufacturer and importer nominees may provide the Board a short background statement outlining their qualifications to serve on the Board;

(3) Nominees may seek nomination to the Board for all vacant seats for which the nominees are qualified;

(4) For domestic seats allocated by region, domestic manufacturers must manufacture paper and paper-based packaging

in the region for which they seek nomination. Nominees that manufacture in both regions may seek nomination in one region of their choice. The Board will issue the call for nominations to all known manufacturers and recommend nominees for each open seat and the additional nominees to the Secretary;

(5) Nominees that are both a manufacturer and an importer may seek nomination to the board as either a manufacturer or importer so long as they meet the qualifications. The Board will issue the call for nominations to all known importers and recommend nominees for each open seat and the additional nominees to the Secretary;

(6) The Board will evaluate all the nominees and recommend at least two names for each open seat. Other qualified persons interested in serving in the open seats, but not recommended by the Board, will be designated by the Board as additional nominees for consideration by the Secretary;

(7) The Board must submit nominations to the Secretary at least six months before the new Board term begins. From the nominations submitted by the Board, the Secretary shall select the members of the Board;

(8) Any manufacturer or importer nominated to serve on the Board shall file with the Secretary at the time of the nomination a background questionnaire;

(9) From the nominations made pursuant to this section, the Secretary shall appoint members of the Board on the basis of representation provided in §1222.40(b);

(10) No two members shall be employed by a single corporation, company, partnership or any other legal entity; and,

(11) The Board may recommend to the Secretary modifications to its nomination procedures as it deems appropriate. Any such modification shall be implemented through rulemaking by the Secretary.

4. Revise § 1222.88 to read as follows:

§ 1222.88 OMB control number.

The control numbers 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, are OMB control number 0505-0001 (Board nominee background statement) and OMB control number 0581-0093.

5. Revise § 1222.108 to read as follows:

§ 1222.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. is OMB control number 0581-0093.

Dated: June 25, 2019.

Bruce Summers
Administrator

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