

(III) **DIRECT SALES BY PRODUCERS.**—Subject to subclause (IV), in the case of a direct sale to a consumer by a producer, the amount of the sale shall be equal to an amount determined by multiplying the price paid by the consumer by a uniform percentage established by the order to represent the cost of producing the article and the mark-up of a wholesale handler on a sale to a retailer.

(IV) **CHANGES IN UNIFORM PERCENTAGES.**—Any change in a uniform percentage referred to in subclause (II) or (III) may become effective after—

(aa) recommendation by the PromoFlor Council; and

(bb) approval by the Secretary after public notice and opportunity for comment in accordance with section 553 of title 5, United States Code, and without regard to sections 556 and 557 of such title.

(2) **ASSESSMENT RATES.**—With respect to assessment rates, the order shall contain the following terms:

(A) **INITIAL RATE.**—During the first 3 years the order is in effect, the rate of assessment on each sale or transfer of cut flowers or cut greens shall be  $\frac{1}{2}$  of 1 percent of—

(i) the gross sales price of the cut flowers or cut greens sold; or

(ii) in the case of transactions described in paragraph (1)(C)(ii), the amount of each transaction calculated as provided in paragraph (1)(C)(ii).

(B) **CHANGES IN THE RATE.**—

(i) **IN GENERAL.**—After the first 3 years the order is in effect, the uniform assessment rate may be increased or decreased annually by not more than .25 percent of—

(I) the gross sales price of a product sold; or

(II) in the case of transactions described in paragraph (1)(C)(ii), the amount of each transaction calculated as provided in paragraph (1)(C)(ii),

except that the assessment rate may in no case exceed 1 percent of the gross sales price or 1 percent of the transaction amount.

(ii) **REQUIREMENTS.**—Any change in the rate of assessment under this subparagraph—

(I) may be made only if adopted by the PromoFlor Council by at least a  $\frac{2}{3}$  majority vote and approved by the Secretary as necessary to achieve the objectives of this Act (after public notice and opportunity for comment in accordance with section 553 of title 5, United States Code, and without regard to sections 556 and 557 of such title);

(II) shall be announced by the PromoFlor Council not less than 30 days prior to going into effect; and

(III) shall not be subject to a vote in a referendum conducted under section 7.

(3) **TIMING OF SUBMITTING ASSESSMENTS.**—The order shall provide that each person required to pay assessments under this subsection shall remit, to the PromoFlor Council, the assessment due from each sale by the person of cut flowers or cut greens that is subject to an assessment within such time period after the sale (not to exceed 60 days after the end of the month in which the sale took place) as is specified in the order.

(4) **REFUNDS FROM ESCROW ACCOUNT.**—

(A) **ESTABLISHMENT OF ESCROW ACCOUNT.**—The order shall provide that the PromoFlor Council shall—

(i) establish an escrow account to be used for assessment refunds, as needed; and

(ii) place into the account an amount equal to 10 percent of the total amount of assessments collected during the period beginning on the date the order becomes effective, as provided in section 4(b)(3)(B), and ending on the date the initial referendum on the order under section 7(a) is completed.

(B) **RIGHT TO RECEIVE REFUND.**—

(i) **IN GENERAL.**—The order shall provide that, subject to subparagraph (C) and the conditions specified in clause (ii), any qualified handler shall have the right to demand and receive from the PromoFlor Council out of the escrow account a one-time refund of any assessments paid by or on behalf of the qualified handler during the time period specified in subparagraph (A)(ii), if—

(I) the qualified handler is required to pay the assessments;

(II) the qualified handler does not support the program established under this Act;

(III) the qualified handler demands the refund prior to the conduct of the referendum on the order under section 7(a); and

(IV) the order is not approved by qualified handlers in the referendum.

(ii) **CONDITIONS.**—The right of a qualified handler to receive a refund under clause (i) shall be subject to the following conditions:

(I) The demand shall be made in accordance with regulations, on a form, and within a time period specified by the PromoFlor Council.

(II) The refund shall be made only on submission of proof satisfactory to the PromoFlor Council that the qualified handler paid the assessment for which the refund is demanded.

(III) If the amount in the escrow account required under subparagraph (A) is not sufficient to refund the total amount of assessments demanded by all qualified handlers determined eligible for refunds and the order is not approved in the referendum on the order under section 7(a), the PromoFlor Council shall prorate the amount

of all such refunds among all eligible qualified handlers that demand the refund.

(C) PROGRAM APPROVED.—The order shall provide that, if the order is approved in the referendum conducted under section 7(a), there shall be no refunds made, and all funds in the escrow account shall be returned to the PromoFlor Council for use by the PromoFlor Council in accordance with the other provisions of the order.

(5) USE OF ASSESSMENT FUNDS.—The order shall provide that assessment funds (less any refunds expended under the terms of the order required under paragraph (4)) shall be used for payment of costs incurred in implementing and administering the order, with provision for a reasonable reserve, and to cover the administrative costs incurred by the Secretary in implementing and administering this Act.

(6) POSTPONEMENT OF COLLECTIONS.—

(A) AUTHORITY.—

(i) IN GENERAL.—Subject to the other provisions of this paragraph and notwithstanding any other provision of this Act, the PromoFlor Council may grant a postponement of the payment of an assessment under this subsection for any qualified handler that establishes that the handler is financially unable to make the payment.

(ii) REQUIREMENTS AND PROCEDURES.—A handler described in clause (i) shall establish that the handler is financially unable to make the payment in accordance with application and documentation requirements and review procedures established under rules recommended by the PromoFlor Council, approved by the Secretary, and issued after public notice and opportunity for comment in accordance with section 553 of title 5, United States Code, and without regard to sections 556 and 557 of such title.

(B) CRITERIA AND RESPONSIBILITY FOR DETERMINATIONS.—The PromoFlor Council may grant a postponement under subparagraph (A) only if the handler demonstrates by the submission of an opinion of an independent certified public accountant, and by submission of other documentation required under the rules established under subparagraph (A)(ii), that the handler is insolvent or will be unable to continue to operate if the handler is required to pay the assessment when otherwise due.

(C) PERIOD OF POSTPONEMENT.—

(i) IN GENERAL.—The time period of a postponement and the terms and conditions of the payment of each assessment that is postponed under this paragraph shall be established by the PromoFlor Council, in accordance with rules established under the procedures specified in subparagraph (A)(ii), so as to appropriately reflect the demonstrated needs of the qualified handler.

(ii) EXTENSIONS.—A postponement may be extended under rules established under the procedures specified in subparagraph (A)(ii) for the grant of initial postponements.

(i) **PROHIBITION.**—The order shall prohibit the use of any funds received by the PromoFlor Council in any manner for the purpose of influencing legislation or government action or policy, except that the funds may be used by the PromoFlor Council for the development and recommendation to the Secretary of amendments to the order.

(j) **BOOKS AND RECORDS; REPORTS.**—

(1) **IN GENERAL.**—The order shall provide that each qualified handler shall maintain, and make available for inspection, such books and records as are required by the order and file reports at the time, in the manner, and having the content required by the order, to the end that such information is made available to the Secretary and the PromoFlor Council as is appropriate for the administration or enforcement of this Act, the order, or any regulation issued under this Act.

(2) **CONFIDENTIALITY REQUIREMENT.**—

(A) **IN GENERAL.**—Information obtained from books, records, or reports under paragraph (1) or subsection (h)(6), or from reports required under section 6(b)(3), shall be kept confidential by all officers and employees of the Department of Agriculture and by the staff and agents of the PromoFlor Council.

(B) **SUITS AND HEARINGS.**—Information described in subparagraph (A) may be disclosed to the public only—

(i) in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, involving the order; and

(ii) to the extent the Secretary considers the information relevant to the suit or hearing.

(C) **GENERAL STATEMENTS AND PUBLICATIONS.**—Nothing in this paragraph may be construed to prohibit—

(i) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected from the reports, if the statements do not identify the information furnished by any person; or

(ii) the publication, by direction of the Secretary, of the name of any person who violates the order, together with a statement of the particular provisions of the order violated by the person.

(3) **LISTS OF IMPORTERS.**—

(A) **REVIEW.**—The order shall provide that the staff of the PromoFlor Council shall periodically review lists of importers of cut flowers and cut greens to determine whether persons on the lists are subject to the order.

(B) **CUSTOMS SERVICE.**—On the request of the PromoFlor Council, the Commissioner of the United States Customs Service shall provide to the PromoFlor Council lists of importers of cut flowers and cut greens.

(k) **CONSULTATIONS WITH INDUSTRY EXPERTS.**—

(1) **IN GENERAL.**—The order shall provide that the PromoFlor Council, from time to time, may seek advice from and consult with experts from the production, import, wholesale, and retail segments of the cut flowers and cut greens industry to assist in the development of promotion, consumer information, and related research plans and projects.

**(2) SPECIAL COMMITTEES.—**

(A) **IN GENERAL.**—For the purposes described in paragraph (1), the order shall authorize the appointment of special committees composed of persons other than PromoFlor Council members.

(B) **CONSULTATION.**—A committee appointed under subparagraph (A)—

(i) may not provide advice or recommendations to a representative of an agency, or an officer, of the Federal Government; and

(ii) shall consult directly with the PromoFlor Council.

(1) **OTHER TERMS OF THE ORDER.**—The order shall contain such other terms and provisions, consistent with this Act, as are necessary to carry out this Act (including provision for the assessment of interest and a charge for each late payment of assessments under subsection (h) and for carrying out section 6).

**SEC. 6. EXCLUSION; DETERMINATIONS.**

7 USC 6805.

(a) **EXCLUSION.**—An order shall exclude from assessments under the order any sale of cut flowers or cut greens for export from the United States.

Exports.

(b) **MAKING DETERMINATIONS.**—

(1) **IN GENERAL.**—For the purpose of applying the \$750,000 annual sales limitation to a specific person in order to determine the status of the person as a qualified handler or an exempt handler under section 3(4), or to a specific facility in order to determine the status of the facility as an eligible separate facility under section 7(b)(2), an order issued under this Act shall provide that—

(A) a determination of the annual sales volume of a person or facility shall be based on the sales of cut flowers and cut greens by the person or facility during the most recently-completed calendar year, except as provided in subparagraph (B); and

(B) in the case of a new business or other operation for which complete data on sales during all or part of the most recently-completed calendar year are not available to the PromoFlor Council, the determination may be made using an alternative time period or other alternative procedure specified in the order.

(2) **RULE OF ATTRIBUTION.**—

(A) **IN GENERAL.**—For the purpose of determining the annual sales volume of a person or a separate facility of a person, sales attributable to a person shall include—

(i) in the case of an individual, sales attributable to the spouse, children, grandchildren, parents, and grandparents of the person;

(ii) in the case of a partnership or member of a partnership, sales attributable to the partnership and other partners of the partnership;

(iii) in the case of an individual or a partnership, sales attributable to any corporation or other entity in which the individual or partnership owns more than 50 percent of the stock or (if the entity is not a corporation) that the individual or partnership controls; and



(iv) in the case of a corporation, sales attributable to any corporate subsidiary or other corporation or entity in which the corporation owns more than 50 percent of the stock or (if the entity is not a corporation) that the corporation controls.

(B) STOCK AND OWNERSHIP INTEREST.—For the purpose of this paragraph, stock or an ownership interest in an entity that is owned by the spouse, children, grandchildren, parents, grandparents, or partners of an individual, or by a partnership in which a person is a partner, or by a corporation more than 50 percent of the stock of which is owned by a person, shall be treated as owned by the individual or person.

(3) REPORTS.—For the purpose of this subsection, the order may require a person who sells cut flowers or cut greens to retailers to submit reports to the PromoFlor Council on annual sales by the person.

7 USC 6806.

**SEC. 7. REFERENDA.**

(a) REQUIREMENT FOR INITIAL REFERENDUM.—

(1) IN GENERAL.—Not later than 3 years after the issuance of an order under section 4(b)(3), the Secretary shall conduct a referendum among qualified handlers required to pay assessments under the order, as provided in section 5(h)(1), subject to the voting requirements of subsection (b), to ascertain whether the order then in effect shall be continued.

(2) APPROVAL OF ORDER NEEDED.—The order shall be continued only if the Secretary determines that the order has been approved by a simple majority of all votes cast in the referendum. If the order is not approved, the Secretary shall terminate the order as provided in subsection (d).

(b) VOTES PERMITTED.—

(1) IN GENERAL.—Each qualified handler eligible to vote in a referendum conducted under this section shall be entitled to cast 1 vote for each separate facility of the person that is an eligible separate facility, as defined in paragraph (2).

(2) ELIGIBLE SEPARATE FACILITY.—For the purpose of paragraph (1):

(A) SEPARATE FACILITY.—A handling or marketing facility of a qualified handler shall be considered to be a separate facility if the facility is physically located away from other facilities of the qualified handler or the business function of the facility is substantially different from the functions of other facilities owned or operated by the qualified handler.

(B) ELIGIBILITY.—A separate facility of a qualified handler shall be considered to be an eligible separate facility if the annual sales of cut flowers and cut greens to retailers and exempt handlers from the facility are \$750,000 or more.

(C) ANNUAL SALES DETERMINED.—For the purpose of determining the amount of annual sales of cut flowers and cut greens under subparagraph (B), subparagraphs (A) and (C) of section 3(4) shall apply.

(c) SUSPENSION OR TERMINATION REFERENDA.—If an order is approved in a referendum conducted under subsection (a), effective

beginning on the date that is 3 years after the date of the approval, the Secretary—

(1) at the discretion of the Secretary, may conduct at any time a referendum of qualified handlers required to pay assessments under the order, as provided in section 5(h)(1), subject to the voting requirements of subsection (b), to ascertain whether qualified handlers favor suspension or termination of the order; and

(2) if requested by the PromoFlor Council or by a representative group comprising 30 percent or more of all qualified handlers required to pay assessments under the order, as provided in section 5(h)(1), shall conduct a referendum of all qualified handlers required to pay assessments under the order, as provided in section 5(h)(1), subject to the voting requirements of subsection (b), to ascertain whether qualified handlers favor suspension or termination of the order.

(d) **SUSPENSION OR TERMINATION.**—If, as a result of the referendum conducted under subsection (a), the Secretary determines that the order has not been approved by a simple majority of all votes cast in the referendum, or as a result of a referendum conducted under subsection (c), the Secretary determines that suspension or termination of the order is favored by a simple majority of all votes cast in the referendum, the Secretary shall—

(1) not later than 180 days after the referendum, suspend or terminate, as appropriate, collection of assessments under the order; and

(2) suspend or terminate, as appropriate, activities under the order as soon as practicable and in an orderly manner.

(e) **MANNER OF CONDUCTING REFERENDA.**—Referenda under this section shall be conducted in such manner as is determined appropriate by the Secretary.

#### **SEC. 8. PETITION AND REVIEW.**

7 USC 6807.

(a) **PETITION AND HEARING.**—

(1) **PETITION.**—A person subject to an order may file with the Secretary a petition—

(A) stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law; and

(B) requesting a modification of the order or an exemption from the order.

(2) **HEARING.**—The petitioner shall be given the opportunity for a hearing on a petition filed under paragraph (1), in accordance with regulations issued by the Secretary. Any such hearing shall be conducted in accordance with section 10(b)(2) and be held within the United States judicial district in which the residence or principal place of business of the person is located.

(3) **RULING.**—After a hearing under paragraph (2), the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) **REVIEW.**—

(1) **COMMENCEMENT OF ACTION.**—The district courts of the United States in any district in which a person who is a petitioner under subsection (a) resides or conducts business shall have jurisdiction to review the ruling of the Secretary on the petition of the person, if a complaint requesting the

review is filed not later than 20 days after the date of the entry of the ruling by the Secretary.

(2) **PROCESS.**—Service of process in proceedings under this subsection shall be conducted in accordance with the Federal Rules of Civil Procedure.

(3) **REMAND.**—If the court in a proceeding under this subsection determines that the ruling of the Secretary on the petition of the person is not in accordance with law, the court shall remand the matter to the Secretary with directions—

(A) to make such ruling as the court shall determine to be in accordance with law; or

(B) to take such further action as, in the opinion of the court, the law requires.

(c) **ENFORCEMENT.**—The pendency of proceedings instituted under this section shall not impede, hinder, or delay the Attorney General or the Secretary from obtaining relief under section 9.

7 USC 6808.

**SEC. 9. ENFORCEMENT.**

(a) **JURISDICTION.**—A district court of the United States shall have jurisdiction to enforce, and to prevent and restrain any person from violating, this Act or an order or regulation issued by the Secretary under this Act.

(b) **REFERRAL TO ATTORNEY GENERAL.**—A civil action brought under subsection (a) shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General a violation of this Act, or an order or regulation issued under this Act, if the Secretary believes that the administration and enforcement of this Act would be adequately served by administrative action under subsection (c) or suitable written notice or warning to the person who committed or is committing the violation.

(c) **CIVIL PENALTIES AND ORDERS.**—

(1) **CIVIL PENALTIES.**—

(A) **IN GENERAL.**—A person who violates a provision of this Act, or an order or regulation issued by the Secretary under this Act, or who fails or refuses to pay, collect, or remit any assessment or fee required of the person under an order or regulation issued under this Act, may be assessed by the Secretary—

(i) a civil penalty of not less than \$500 nor more than \$5,000 for each violation; and

(ii) in the case of a willful failure to remit an assessment as required by an order or regulation, an additional penalty equal to the amount of the assessment.

(B) **SEPARATE OFFENSES.**—Each violation shall be a separate offense.

(2) **CEASE AND DESIST ORDERS.**—In addition to or in lieu of a civil penalty under paragraph (1), the Secretary may issue an order requiring a person to cease and desist from continuing a violation of this Act, or an order or regulation issued under this Act.

(3) **NOTICE AND HEARING.**—No penalty shall be assessed or cease and desist order issued by the Secretary under this subsection unless the Secretary gives the person against whom the penalty is assessed or the order is issued notice and opportunity for a hearing before the Secretary with respect to the



violation. Any such hearing shall be conducted in accordance with section 10(b)(2) and shall be held within the United States judicial district in which the residence or principal place of business of the person is located.

(4) FINALITY.—The penalty assessed or cease and desist order issued under this subsection shall be final and conclusive unless the person against whom the penalty is assessed or the order is issued files an appeal with the appropriate district court of the United States in accordance with subsection (d).

(d) REVIEW BY DISTRICT COURT.—

(1) COMMENCEMENT OF ACTION.—

(A) IN GENERAL.—Any person against whom a violation is found and a civil penalty is assessed or a cease and desist order is issued under subsection (c) may obtain review of the penalty or order by, within the 30-day period beginning on the date the penalty is assessed or order issued—

(i) filing a notice of appeal in the district court of the United States for the district in which the person resides or conducts business, or in the United States District Court for the District of Columbia; and

(ii) sending a copy of the notice by certified mail to the Secretary.

(B) COPY OF RECORD.—The Secretary shall promptly file in the court a certified copy of the record on which the Secretary found that the person had committed a violation.

(2) STANDARD OF REVIEW.—A finding of the Secretary shall be set aside under this subsection only if the finding is found to be unsupported by substantial evidence.

(e) FAILURE TO OBEY AN ORDER.—

(1) IN GENERAL.—A person who fails to obey a cease and desist order issued under subsection (c) after the order has become final and unappealable, or after the appropriate United States district court has entered a final judgment in favor of the Secretary, shall be subject to a civil penalty assessed by the Secretary of not more than \$5,000 for each offense, after opportunity for a hearing and for judicial review under the procedures specified in subsections (c) and (d).

(2) SEPARATE VIOLATIONS.—Each day during which the person fails to obey an order described in paragraph (1) shall be considered as a separate violation of the order.

(f) FAILURE TO PAY A PENALTY.—

(1) IN GENERAL.—If a person fails to pay a civil penalty assessed under subsection (c) or (e) after the penalty has become final and unappealable, or after the appropriate United States district court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General for recovery of the amount assessed in any United States district court in which the person resides or conducts business.

(2) SCOPE OF REVIEW.—In an action by the Attorney General under paragraph (1), the validity and appropriateness of the civil penalty shall not be subject to review.

(g) ADDITIONAL REMEDIES.—The remedies provided in this Act shall be in addition to, and not exclusive of, other remedies that may be available.