

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1223**

[Document Number AMS–SC–20–0013; FR]

**Pecan Promotion, Research, and Information Order****AGENCY:** Agricultural Marketing Service.**ACTION:** Final rule.

**SUMMARY:** This rule establishes the Pecan Promotion, Research, and Information Order (Order). This rule also establishes the procedures for conducting a referendum to determine whether the continuation of the proposed Order is favored by domestic producers and importers of pecans. In addition, this rule announces the Agricultural Marketing Service's (AMS) approval of new pecan information collection requirements by the Office of Management and Budget (OMB) for the operation of the Order.

**DATES:** Effective Date February 12, 2021. Collection of assessments as required by §§ 1223.52 and 1223.53 and compliance with reporting and recordkeeping requirements under §§ 1223.60 and 1223.61 will begin October 1, 2021.

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**SUPPLEMENTARY INFORMATION:** This is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

As part of this rulemaking process, a proposed rule was published in the **Federal Register** on September 22, 2020 (85 FR 59610). That rule provided for a 60-day comment period, which ended on November 23, 2020. Fifty-four comments were received. All comments are addressed later in this final rule.

**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,

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 will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

**Executive Order 12988**

This action 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.

Section 519 of the 1996 Act (7 U.S.C. 7418) provides that a person subject to an order may file a written petition with the U.S. Department of Agriculture (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, must be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner would 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 establishes the Pecan Promotion, Research, and Information Order (7 CFR part 1223) (Order). The purpose of the program is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. The proposal was submitted to USDA by the National Pecan Federation (NPF), an organization representing pecan growers and shellers across the United States whose mission is to promote, protect, and improve business conditions for the pecan industry. The program will be financed by an assessment on producers and importers and will be administered by a board of industry members selected by the Secretary. The initial assessment rate will be \$0.02 per pound of inshell pecans and \$0.04 per pound of shelled pecans produced within or imported to the United States. Entities that produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) will be exempt from the payment of assessments. Assessment collection, along with the appropriate reporting and recordkeeping, will become effective October 1, 2021. This date aligns with the Order's fiscal period.

A referendum will be conducted among producers and importers to determine if pecan producers and importers favor the continuation of the program three years after the collection of assessment begins.

**Legal Basis for Action**

The Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities.

The 1996 Act provides several optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 1996 Act provides for orders applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments).

Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; a provision for reserve funds; a provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. Pursuant to section 518 of the 1996 Act, an order may also provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board from among producers, first handlers and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, (7 CFR part 986) which is authorized under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The

purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problems, and to improve profitability. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

The purpose of research and promotion programs, in general, is to provide a framework for agricultural industries to pool their resources and combine efforts to develop new markets, strengthen existing markets and conduct important research and promotion activities. The pecan research and promotion program will be national in scope, financed by an assessment on pecan producers and importers, and authorize research and promotion activities. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

#### **Industry Background**

The pecan industry is comprised of producers, shellers, accumulators, wholesalers, and importers that produce, process, and supply pecans for market. Pecans include any and all varieties or subvarieties, inshell or shelled, of *Carya illinoensis*. Pecans are grown primarily in Alabama, Arkansas, Arizona, California, Florida,

Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. According to the most recent Census of Agriculture (2017), there are 15,608 operations with bearing acreage of pecans. Bearing acreage is greatest in Georgia with about 30 percent of the nationwide total, followed by Texas at 27 percent, Oklahoma at 22 percent, New Mexico at 11 percent, and Arizona at 4 percent. These five states generally account for about 95 percent of U.S. pecan production.

#### *U.S. Supply and Consumption*

Pecans are an alternate bearing crop, causing variability in production from year to year. Based on data from the National Agricultural Statistics Service (NASS), the 2014 to 2019 six-year average of total U.S. pecan production was almost 265 million pounds on an inshell basis, as shown in Table 1. Together, Georgia and New Mexico produced more than half of pecan volume nationwide.

From 2013 through 2016, pecan production averaged about 263 million pounds per year, and reached a peak in 2017 at nearly 305 million pounds. The following year, however, domestic production dropped 21 percent due to the destruction of the Georgia pecan crop by Hurricane Michael. The trend of U.S. pecan production is depicted in Chart 1.

**BILLING CODE 3410-02-P**

Table 1. State Pecan Production	
State	1,000 Lbs. Inshell basis
Georgia	88,000
New Mexico	80,150
Texas	42,517
Arizona	26,717
Oklahoma	13,533
Louisiana	7,406
California	4,686
Arkansas	2,850
Alabama	1,850
Mississippi	1,150
Missouri	1,090
South Carolina	350
Florida	145
Total U.S. <sup>1</sup>	264,765
Source: NASS, 2014-2019 average.	
Note: <sup>1</sup> Sum may not equal Total U.S. due to rounding.	

In 2018, Hurricane Michael swept across the southern half of Georgia as a Category 3 storm. According to the University of Georgia Pecan Extension, this storm resulted in a loss of nearly half the expected 2018 crop and a loss of 17 percent of the state's pecan

acreage. The effects of Hurricane Michael remain present as the 2019 Georgia crop was down nearly 30 percent from the average production of the six years prior to the storm. Prior to Hurricane Michael, Georgia was the top pecan-producing state in the U.S.

Considering this, along with the state's recovery efforts, the University of Georgia Pecan Extension expects Georgia pecan production to rebound in the coming years. Pecan production nationwide began to increase in 2019, climbing six percent from 2018.

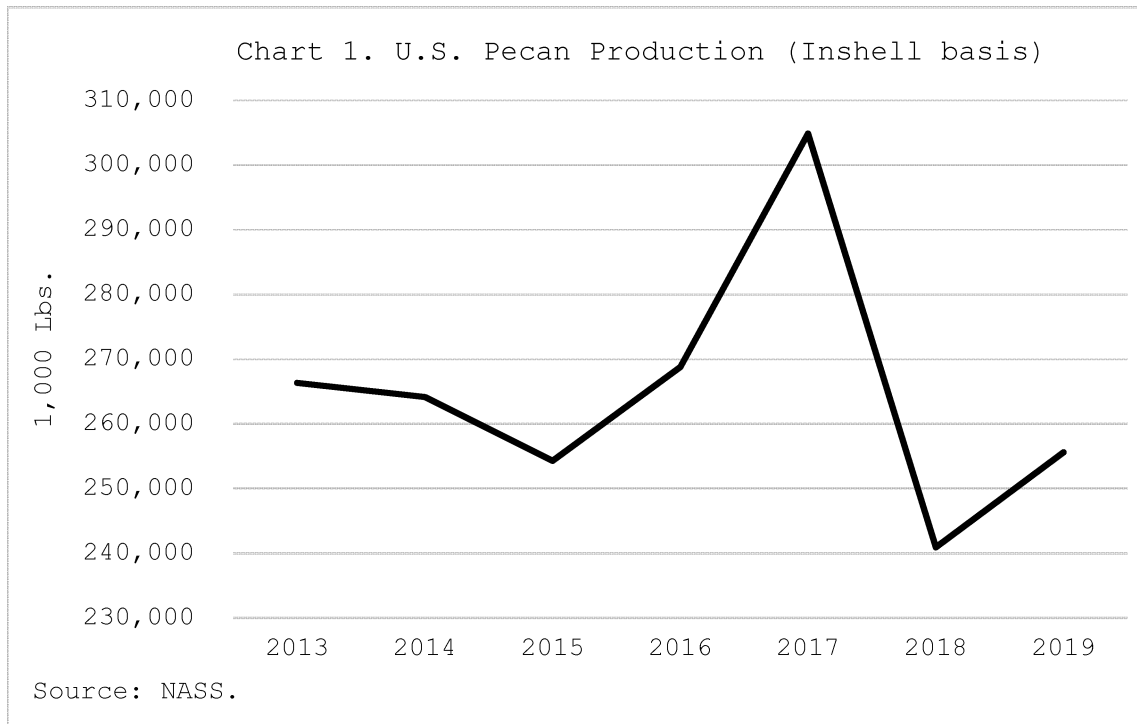


Table 2 shows U.S. pecan supply and utilization. Domestic production generally accounts for about 40 percent of the domestic supply, while imports

account for nearly one-third, with beginning stocks just under 30 percent. Almost all pecans imported into the U.S. are from Mexico. Of these, 70

percent are shelled, and 30 percent are inshell.

Table 2. U.S. Supply and Utilization of Pecans (1,000 Lbs., Inshell basis)								
Year	Production <sup>1</sup>	Beginning Stocks <sup>1</sup>	Imports <sup>2</sup>	Supply <sup>3</sup>	Ending Stocks <sup>1</sup>	Exports <sup>4</sup>	Utilization <sup>5</sup>	Per Capita Consumption (Lbs.) <sup>6</sup>
2013	266,330	183,840	143,285	593,455	166,909	156,450	270,095	0.85
2014	264,150	166,909	186,619	617,678	174,874	167,701	275,103	0.86
2015	254,290	174,874	170,574	599,738	181,390	157,208	261,140	0.81
2016	268,770	181,390	220,069	670,229	204,288	160,469	305,471	0.95
2017	304,850	204,288	176,122	685,260	183,984	188,116	313,160	0.96
2018	240,930	183,984	230,899	655,813	203,341	135,256	317,216	0.97
2019	255,600	203,341	265,287	724,228	180,055	151,370	392,803	1.20
2014-2019 6-yr avg	264,765	185,798	208,262	658,824	187,989	160,020	310,815	0.96
Pct of supply	40%	28%	32%		29%	24%	47%	
2019 v 2018	6%	11%	15%	10%	-11%	12%	24%	23%
2019 v 2013-2018 6-yr avg	-4%	11%	41%	14%	-3%	-6%	35%	33%
Sources: <sup>1</sup> NASS; <sup>2</sup> Customs and Border Protection; <sup>4</sup> Foreign Agricultural Service.								
Notes: <sup>3</sup> Production + Beginning Stocks + Imports; <sup>5</sup> Supply - (Ending Stocks + Exports);								
<sup>6</sup> Utilization / U.S. Population.								

Nearly half of the U.S. supply of pecans is consumed domestically each year. Per capita consumption has trended upward for the last four years, reaching a high of 1.20 inshell pounds in 2019. Compared to 2018 and to the 2013 to 2018 six-year average, 2019 per capita consumption is up 23 percent and 33 percent, respectively.

#### Exports

The U.S. exports about 24 percent of its pecan supply on average each year. Shelled pecans make up 60 percent of

U.S. pecan exports, while inshell are 40 percent. Europe and Canada are the primary markets for shelled pecans with, on average, 49 percent and 24 percent, respectively, of total shelled exports. In Europe, the largest consumers of U.S. shelled pecans are the Netherlands, the United Kingdom, and Germany with 39 percent, 24 percent, and 15 percent, respectively, of total shelled exports to Europe. On average, about 94 percent of U.S. inshell exports go to Asia. Together, Hong Kong

and China make up 72 percent of the Asian market for inshell pecan exports from the United States.

#### Competition

The pecan industry competes with other tree nut industries such as almonds, pistachios and walnuts. As Table 3 illustrates, sales by volume of pecans are 95 percent lower than sales of almonds, 74 percent lower than sales of walnuts, but 40 percent higher than sales of pistachios.

Year	Pecans	Almonds <sup>1</sup>	Pistachios	Walnuts
2013	106,569	2,010,000	45,400	306,000
2014	101,858	1,870,000	50,800	374,000
2015	87,225	1,900,000	33,100	400,000
2016	116,930	2,140,000	114,400	438,000
2017	126,396	2,270,000	52,807	390,000
2018	88,373	2,280,000	121,000	450,000
2019	115,937	2,550,000	82,000	412,000
2014-2019 6-yr avg	106,120	2,168,333	75,685	410,667
Pecan comparison		-95%	40%	-74%
Source: NASS.				
Note: <sup>1</sup> Almonds is shelled utilized production.				

Prices received by growers, as shown in Table 4, are 25 percent lower for pecans than for almonds. Compared to other nuts, grower-received prices for pecans are 18 percent lower than those for pistachios, but double those for walnuts.

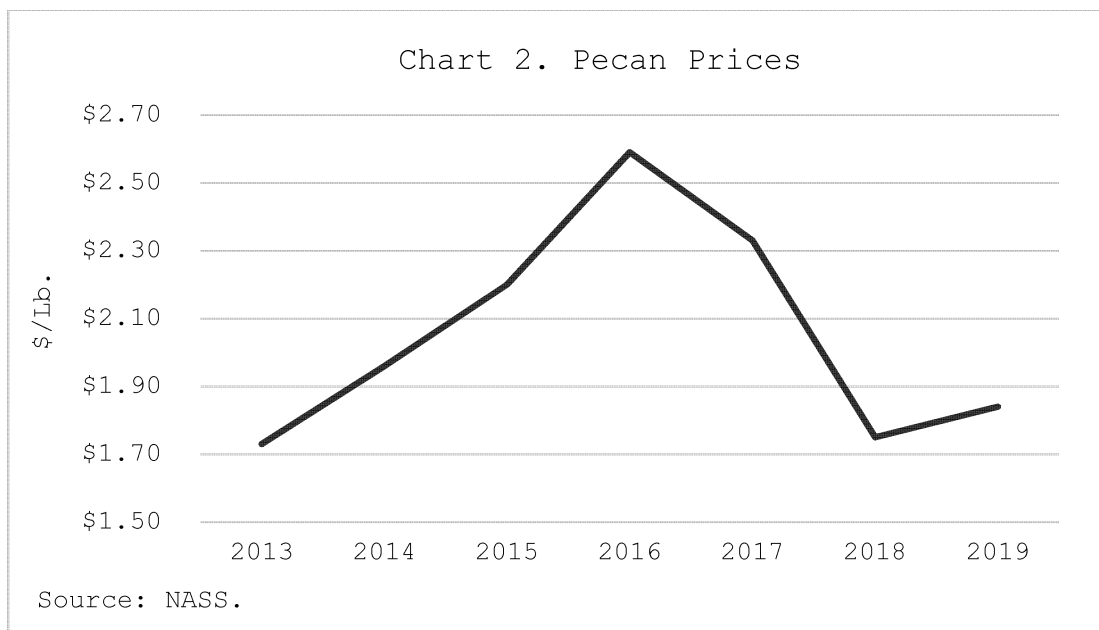
Year	Pecans	Almonds	Pistachios	Walnuts
2013	\$ 1.73	\$ 3.21	\$ 3.48	\$ 1.86
2014	\$ 1.96	\$ 4.00	\$ 3.57	\$ 1.67
2015	\$ 2.20	\$ 3.13	\$ 3.29	\$ 0.84
2016	\$ 2.59	\$ 2.39	\$ 1.68	\$ 0.93
2017	\$ 2.33	\$ 2.53	\$ 1.69	\$ 1.25
2018	\$ 1.75	\$ 2.50	\$ 2.65	\$ 0.68
2019	\$ 1.84	\$ 2.43	\$ 2.62	\$ 0.99
2014-2019 6-yr avg	\$ 2.11	\$ 2.83	\$ 2.58	\$ 1.06
Pecan comparison		-25%	-18%	100%
Source: NASS.				

#### Price Trends

Chart 2 shows the trend of prices for pecans from 2013 to 2019. In recent

years, pecan prices were at their highest in 2016 before dropping in the following two years. Prices increased slightly

between 2018 and 2019 but are still down about 12 percent compared to the average of the previous six years.

**BILLING CODE 3410-02-C****Need for a Program**

According to the NPF, the greatest challenge the pecan industry is facing is supply surpassing demand. Data from the International Nut and Dried Fruit Council and from the research compiled by the Boston Consulting Group, contracted by the NPF, show that the supply of pecans may exceed demand by 19 percent in 2028.<sup>1</sup> The NPF believes the establishment of a national research and promotion program for pecans will help the industry address this challenge. NPF concluded that without a program funded by assessments from both domestically produced and imported pecans, the industry will not be able to meet the challenge of the approaching supply and demand imbalance.

In 2016, the U.S. pecan industry favored the establishment of a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The program authorizes collection of industry data; research and promotion activities; regulation of grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area. Over the past several years the marketing order program has launched marketing campaigns to

<sup>1</sup> Based on historic compound annual growth rates (CAGR's) in global pecan supply and demand for 10 years from 2008 to 2018; resultant CAGR's of 6 percent for global supply and demand applied to 2018 estimates to forecast 2028 figures.

increase demand for pecans. According to the NPF, the research and promotion program will benefit domestic producers and importers of pecans, thereby justifying the collection of assessments on both domestic production and imports.

The NPF proposal indicates that imported product accounts for approximately 39 percent of pecans being supplied to the U.S., with domestic production accounting for the other 61 percent. With mandatory assessments being collected only on domestic production, this has created a gap in the dollars available to fund marketing campaigns focused on creating increased demand for pecans in the U.S. and globally. Per the NPF, the increase in domestic production and imports has created the need for a robust promotion campaign, which would only be accomplished through financial contribution by both domestic producers and importers. The NPF concluded that the marketing order would continue to have an important role within the industry and the intent is that the two programs would work together to benefit the entire pecan industry.

**Provisions of Program**

Pursuant to section 513 of the 1996 Act, §§ 1223.1 through 1223.25 of 7 CFR part 1223 (referred to as the "Order") define certain terms that will be used throughout the Order. Several of the terms are common to all research and promotion programs authorized under the 1996 Act, while other terms are specific to the pecans Order.

Pursuant to section 515 of the 1996 Act, §§ 1223.40 through 1223.47 of the Order detail the establishment of the American Pecan Promotion Board (Board), nominations and appointments, the term of office, removal and vacancies, procedure, compensation and reimbursement, powers and duties, and prohibited activities.

Pursuant to sections 516 and 517 of the 1996 Act, §§ 1223.50 through 1223.54 of the Order detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from assessments.

The Board's programs and expenses shall be funded through assessments on producers and importers, other income, and other funds available to the Board. The Order provides for an initial assessment rate of \$0.02 per pound on all inshell pecans and \$0.04 per pound on all shelled pecans. Each producer will pay on the amount of pecans produced in the United States. The importer of record will pay assessments based on the amount of pecans imported to the United States.

The Order provides that it is the responsibility of the first handler to collect and remit assessments owed to the Board. First handlers will collect assessments from each producer based on pounds of pecans received. The first handler will remit those assessments, along with the required reports, to the Board. If a producer is acting as its own first handler, the producer will be required to remit its individual assessments. Assessments owed will be due to the Board by the 10th calendar day of the month following the end of

the previous month. As an example, assessments for pecans received in June will be due to the Board by July 10th.

Importer assessments will be collected through Customs and Border Protection (Customs). If Customs does not collect the assessment from an importer, the importer will be responsible for paying the assessment directly to the Board by the 10th calendar day of the month following the month the pecans were imported into the United States.

The Order provides authority for the Board to impose a late payment charge and interest for assessments not received within 30 calendar days of the date assessments were due. The late payment charge and rate of interest are prescribed in Subpart C of the Order.

The Order provides for two exemptions from assessment requirements. First, producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) will be exempt. Producers or importers seeking an exemption shall apply to the Board for an exemption prior to the start of the fiscal period. This is an annual exemption; entities must reapply each year. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible producer or importer.

The second exemption under the Order is for organic pecans. The exemption applies to all certified "organic" or "100 percent organic" pecans, regardless of whether the pecans are produced by a person who produces conventional or nonorganic pecans. Likewise, an importer who imports pecans that are certified as "organic" or "100 percent organic" under the NOP, or certified as "organic" or "100 percent organic" under a U.S. equivalency arrangement established under the NOP, will be exempt from the payment of assessments.

Pursuant to section 516 of the 1996 Act, §§ 1223.55 through 1223.57 of the Order detail requirements regarding promotion, research and information programs, plans and projects authorized under the Order.

Pursuant to section 515 of the 1996 Act, §§ 1223.60 through 1223.62 of the Order specify the reporting and recordkeeping requirements under the Order as well as requirements regarding confidentiality of information.

Pursuant to section 518 of the 1996 Act, § 1223.71(a)(1) of the Order specifies that a referendum will be conducted not later than three years

after assessments first begin under the Order. The Order will not continue unless it is approved by a majority of those persons voting in the referendum for approval.

Section 1223.71(b) of the Order specifies criteria for subsequent referenda. Under the Order, a referendum will be held to ascertain whether the program should continue, be amended, or terminated.

Sections 1223.70 and 1223.72 through 1223.78 describe the rights of the Secretary; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers. These provisions are common to all research and promotion programs authorized under the 1996 Act.

Sections 1223.100 through 1223.107 of the Order specify procedures for the conduct of referenda. The sections cover the definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

#### Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612), USDA has considered the economic impact of this action on small entities. USDA has prepared this Final Regulatory Flexibility Analysis, the purpose of which is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

#### Need for Regulation

NPF stated in its proposal that the greatest challenge facing the pecan industry is supply outpacing demand. Based on worldwide planting and crop data, NPF estimated that supply would exceed demand by 15 percent in 2027. NPF believes that the establishment of a national research and promotion program for pecans, funded by assessments on both domestic producers and importers, will help the industry address this challenge.

In 2016, the U.S. pecan industry favored the establishment of a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The program authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the

production area. Over the past several years, the marketing order program has launched marketing campaigns to increase demand for pecans.

According to the NPF, the research and promotion program will benefit domestic producers and importers of pecans, thereby justifying the collection of assessments on both domestic production and imports. The NPF proposal indicates that imported product accounts for approximately 39 percent of pecans being supplied to the United States. With mandatory assessments applied to both domestic production and imports, the Order will be able to fund marketing campaigns focused on creating increased demand for pecans in the United States and globally. The NPF concluded that the marketing order would continue to have an important role within the industry and the intent is that the two programs would work together for the benefit of the entire pecan industry. The research and promotion program would concentrate its efforts on activities that would maintain and expand markets for pecans, strengthening its position in the marketplace. The marketing order would continue its primary responsibility of collection and distribution of industry data to empower stakeholders with accurate and timely information. Additionally, the marketing order provides the authority for the pecan industry to make recommendations on grade, size, quality, pack and container requirements.

#### Objectives of the Action

The purpose of the Order is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans.

#### Legal Basis for Action

The Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities.

USDA currently administers a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas which is authorized under the Agricultural Marketing

Agreement Act of 1937. The purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problem, improving profitability. Marketing order programs' mandatory assessments are paid by handlers within the designated production areas. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

The pecan research and promotion program is national in scope, financed by an assessment on pecan producers and importers, and authorizes research and promotion activities. The purpose of the Order is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. USDA has not identified any relevant Federal rules

that duplicate, overlap, or conflict with this rule.

#### Potentially Affected Small Entities

In 13 CFR part 121, the Small Business Administration (SBA) defines the threshold at which an operation would be considered "small" based on its North American Industry Classification System (NAICS) Code. For Tree Nut Farming operations (NAICS Code 111335) and Fruit and Tree Nut Combination Farming operations (NAICS Code 111336), an operation is considered to be "small" if its annual receipts total no more than \$1 million. This standard applies to U.S. pecan producers.

Importers and first handlers of inshell and shelled pecans (HTS Codes 0802901000 and 0802901500, respectively) belong to the industry classification of Postharvest Crop Activities (NAICS Code 115114). "Postharvest crop activities" include nut hulling and shelling, sorting,

grading, packing, and cooling. An operation that meets this definition is considered to be "small", per the SBA, if its annual receipts equal no more than \$30 million. Table 5 depicts the number of pecan producers, importers, and handlers that would be considered small under these SBA standards.

According to the 2017 Census of Agriculture, published by NASS in 2019, there were 15,608 farms with pecan bearing acreage. Of these 15,608 farms, 440 sold pecans whose market value met or exceeded \$1 million. Based on these figures, 97 percent of U.S. pecan producers are considered to be "small" under the SBA standards. USDA recognizes the potential inclusion in its count of "small" farms those farms whose sales of pecans were exactly \$1 million in market value; however, USDA lacks the data to remedy this, and the number of farms who meet this criterion is likely quite small.

Entities	Total	Small	Large
Producers <sup>1</sup>	15,608	15,168	440
Importers <sup>2</sup>	190	186	4
Handlers <sup>3</sup>	104	78	26
Total	15,902	15,432	470

Sources: <sup>1</sup>NASS 2017 Census of Agriculture; <sup>2</sup>Customs and Border Protection, 2014-2019 average; <sup>3</sup>American Pecan Council, 2018 crop year.

Notes: <sup>1</sup>Small is annual receipts no greater than \$1 million; <sup>2,3</sup>Small is annual receipts no greater than \$30 million.

According to data from Customs, there were 190 importers of inshell and shelled pecans from 2014 to 2019. Of these, four importers had a six-year average sales value of pecans which exceeded \$30 million. The portion of pecan importers that would be considered to be "small" under the SBA standards, therefore, is 98 percent.

The definition of a "small" importer also applies to a first handler; that is, annual receipts which exceed \$30 million. According to the American Pecan Council (APC), there were 104 first handlers who reported pecans handled in crop year 2018. Of these, the APC estimates that about 75 percent recorded annual receipts exceeding \$30 million.

Of the 15,902 total entities expected to be impacted by this action, including producers, importers, and first handlers, about 97 percent would be considered to be "small" according to their respective SBA size standards. While the benefits of the Order are difficult to

quantify, the benefits are expected to outweigh the program's costs.

#### Compliance Requirements

This action imposes a reporting and recordkeeping burden on producers, importers, and first handlers of pecans. Producers and importers who domestically produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) may submit to the Board an application for exemption from paying assessments. Of the 15,168 domestic producers considered to be small under SBA standards, 14,618 of them, or 96 percent, produced less than 50,000 pounds, inshell, of pecans, and will be exempt from assessment. Of the 186 importers considered to be small under SBA standards, 119 of them, or 64 percent, imported less than 50,000 pounds, inshell of pecans, and will also

be exempt from assessment. The reporting and recordkeeping burden to file an application for exemption from assessment will impact a total of 14,737 producers and importers considered to be small under their respective SBA size standards. Importers, and first handlers, who collect the assessments from producers, will be required to file a report listing pecans imported or received from each producer. This report will place a reporting and recordkeeping burden on a total of 149 importers and first handlers considered to be small under their SBA size standard of annual receipts of no more than \$30 million.

These forms have been submitted to OMB for approval under OMB Control No. 0581-NEW. Specific burdens for the forms are detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and



duplication by industry and public sector agencies.

#### *Alternatives To Minimize Impacts of the Rule*

Regarding alternatives, USDA considered de minimis exemptions of 30 acres of pecans, 1,000 pounds, inshell, of pecan volume, and \$1 million in annual pecan sales receipts. These alternatives, which are fully discussed in the section titled De Minimis in the proposed rule, were rejected in favor of the industry-proposed de minimis exemption of 50,000 pounds, inshell, or 25,000 pounds, shelled. USDA also considered the alternative of no action; that is, the status quo. This alternative, however, would leave the pecan industry without the tools of a research and promotion program to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. In place of a research and promotion program, the NPF discussed amending the Agricultural Marketing Agreement Act of 1937, which provides authority for the pecan marketing order. The NPF stated in its proposal for a pecan research and promotion program that it decided not to move forward with this alternative due to the time and costs involved in amending U.S. law.

#### *Outreach*

Regarding outreach efforts, NPF conducted sessions earlier in 2020 throughout the United States in different States and regions. Many were held in conjunction with regional and state organization meetings where both pecan producers and importers participated. They also presented at the National Pecan Shellers Association (NPSA) mid-winter conference. NPSA supports and promotes the interest of pecan shellers and the global industry. Approximately 13 sessions were held across the United States. NPF also had information regarding the proposed program published in April 2020 editions of the "The Pecan Grower" and "Pecan South" magazines. "The Pecan Grower" is the official publication of the Georgia Pecan Growers Association, with nearly three thousand subscribers including growers, researchers, extension agents and agribusinesses. "Pecan South" is a magazine for growers, processors, commercial vendors, and those interested in pecans. It provides to its more than forty-six hundred subscribers U.S. pecan production information; industry news and events; and market-related issues, both domestic and international. In the articles, NPF elaborated the work it has

been doing to establish a research and promotion program for pecans that would assess producers and importers.

On June 9, 2020, AMS published a Notice to Trade alerting the industry that it had received a proposal from the NPF requesting the establishment of a research and promotion program for pecans. A proposed rule providing a 60-day comment period was published in the **Federal Register** on September 22, 2020 (85 FR 59610). AMS published a Notice to Trade on September 22, 2020, alerting the industry that it was seeking comments on the proposal.

Subsequently, AMS sent a postcard and an email to all known pecan producers and importers notifying them of the **Federal Register** published proposal.

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.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35), AMS requested approval of new information collection and recordkeeping requirements for the pecan program.

*Title:* Advisory Committee or Research and Promotion Background Information.

*OMB Number for background form AD-755:* (Approved under OMB No. 0505-0001).

*Expiration Date of Approval:* 03/31/2022.

*Title:* National Research, Promotion, and Consumer Information Programs.  
*Expiration Date of Approval:* 3 years from approval date.

*Type of Request:* New information collection for research and promotion programs.

*Abstract:* The information collection requirements in the request are essential to carry out the intent of the 1996 Act. The information collection concerns a new national research and promotion program for the pecan industry. The program will be financed by an assessment on pecan producers and importers and will be administered by a board of industry members selected by the Secretary. The program will provide for an exemption for producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). A referendum will be held among eligible

producers and importers to determine whether they favor implementation of the program not later than three years after assessments first begin under the Order. The purpose of the program will be to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans within the United States.

In summary, the information collection requirements under the program concern Board nominations, exemption applications, the collection and refund of assessments, and referenda. For Board nominations, producers and importers interested in serving on the Board will be asked to submit a "Nomination Form" to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Interested persons may also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, producers and importers will have the opportunity to submit a "Nomination Ballot" to the Board where they will vote for candidates to serve on the Board. Nominees will also have to submit a background information form, "AD-755," to the Secretary to ensure they are qualified to serve on the Board. Organizations representing importers will be able to be certified by the Secretary and have an opportunity to nominate importer members. Those such organizations must submit the form "Application for Certification of Organization."

Regarding assessments, producers and importers who domestically produce and import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods), will be exempt from assessments. Producers or importers shall apply to the Board for an exemption prior to the start of the fiscal period. This will be an annual exemption; entities will have to reapply each year. Producers or importers may submit a request, "Application for Exemption from Assessments," to the Board for an exemption from paying assessments. Producers and importers who qualify as "organic" or "100 percent organic" under the NOP may submit an "Organic Exemption Form" to the Board and request an exemption from assessments.

First handlers who receive assessments from producers will be asked to submit a "First Handler/Importer Report" that will accompany their assessments paid to the Board and report the quantity of pecans received

during the applicable period, the quantity for which assessments were paid, contact information for whom they collected the assessment, and the country of export (for imports). Additionally, only importers who pay their assessments directly to the Board will be required to submit a report. As previously mentioned, the majority of importer assessments will be collected by Customs. Customs will remit the funds to the Board and the other information will be available from Customs (*i.e.*, country of export, quantity of pecans imported).

Importers and producers who are exempt and whose assessments were collected, either by Customs or a first handler, may also request a refund of any assessments paid to the Board. Producers and importers may also file a form to request a refund of assessments paid if the referendum fails to pass. A referendum will be conducted not later than three years after the assessments first begin to determine if producers and importers favor continuance of the Order.

Lastly, producers and importers eligible to vote in a referendum will have to complete a ballot to determine whether the research and promotion program would continue.

Information collection requirements that are included in this rule include:

(1) Nomination Form

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

(2) Background Statement

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

(3) Nomination Ballot

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 225 hours.

(4) Background Information Form AD-755 (OMB Form No. 0505-0001)

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 0.5 hour per response for each Board nominee.

*Respondents:* Producers and importers.

*Estimated number of Respondents:* 11 (34 for initial nominations to the Board, 0 for the second year, and up to 11 annually thereafter).

*Estimated number of Responses per Respondent:* 1 every 3 years. (0.3)

*Estimated Total Annual Burden on Respondents:* 17 hours for the initial nominations to the Board, 0 hours for the second year of operation, and up to 5.5 hours annually thereafter.

(5) Application for Certification of Organization

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour.

*Respondents:* Importer organizations.

*Estimated Number of Respondents:* 5.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2.5 hours.

(6) Application for Exemption From Assessments

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour per producers or importer reporting on pecans produced domestically or imported. Upon approval of an application, producers and importers would receive exemption certification.

*Respondents:* Producers and importers who produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods).

*Estimated number of Respondents:* 14,737.

*Estimated number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 3,684 hours.

(7) Organic Exemption Form

*Estimate of Burden:* Public recordkeeping burden for this collection

of information is estimated to average 0.5 hours per exemption form.

*Respondents:* Organic producers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 25 hours.

(8) First Handler/Importer Report

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour per first handler or importer.

*Respondents:* First handlers who collect assessments from producers who produce over 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the current fiscal period and the previous three fiscal periods) and importers that do not remit through Customs.

*Estimated number of Respondents:* 175.

*Estimated number of Responses per Respondent:* 12.

*Estimated Total Annual Burden on Respondents:* 525 hours.

(9) Application for Reimbursement of Assessments

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 170.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 42.5 hours.

(10) Application for Refund of Assessments Paid From Escrow

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 225 hours.

(11) Referendum Ballot

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

*Estimated Number of Responses per Respondent:* 0.14 (after first referendum one would occur once every 7 years).

*Estimated Total Annual Burden on Respondents:* 31.50 hours.

(12) A Requirement To Maintain Records Sufficient To Verify Reports Submitted Under the Order

*Estimate of Burden:* Public recordkeeping burden for keeping this information is estimated to average 0.5 hours per record keeper maintaining such records.

*Recordkeepers:* Producers, first handlers and importers.

*Estimated number of recordkeepers:* 15,902.

*Estimated total recordkeeping hours:* 7,951 hours.

As noted above, under the program, producers through first handlers, and importers will be required to pay assessments and file reports with and submit assessments to the Board (importers through Customs). While the Order will impose certain recordkeeping requirements on producers, first handlers, and importers, information required under the Order may be compiled from records currently maintained. Such records shall be retained for at least three years beyond the fiscal period of their applicability.

An estimated 15,902 respondents will provide information to the Board (15,608 producers, 104 first handlers, and 190 importers). The estimated cost of providing the information to the Board by respondents would be \$606,046. This total has been estimated by multiplying 12,753.5 hours by (\$36.08 hourly wage × 0.317 benefits = \$11.44 (benefits) + \$36.08 (wage) = \$47.52), \$47.52 for the average mean hourly earnings of producers and importers plus benefits.

Data for computation of the hourly rate for producers (Occupation Code 11-9013: Farmers, Ranchers, and other Agricultural Managers = \$38.63) and importers (Occupation Code 13-1020: Buyers and Purchasing Agents = \$33.53) was obtained from the U.S. Department of Labor's Bureau of Labor Statistics. The average of the producer and importer wages is \$36.08. Data for computation of this hourly wage were obtained from the U.S. Department of Labor Statistics' publication, "May 2019 National Occupation Employment and Wage Estimates in the United States," updated May 31, 2019. This publication can also be found at the following website: [https://www.bls.gov/oes/current/oes\\_nat.htm#45-0000](https://www.bls.gov/oes/current/oes_nat.htm#45-0000). Data for the benefit costs of 31.7 percent was obtained by U.S. Department of Labor's

Bureau of Labor Statistics press release dated Dec. 14, 2018.

The Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs. USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, which is authorized under the Agricultural Marketing Agreement Act of 1937. This program collects information to facilitate the administration of the program. The information collected by the marketing order has been carefully reviewed and it was determined that the information collected could not be utilized to facilitate the administration of the research and promotion program. The forms will require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms will be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly will coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for three years is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers, first handlers and importers who are subject to the provisions of the 1996 Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

In the September 22, 2020, proposed rule, comments were also invited on the information collection requirements prescribed in the Paperwork Reduction Act section of this rule. Specifically, comments were solicited on: (a) Whether the collection of information is necessary for the proper performance of

functions of the Order and USDA's oversight of the Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal producing areas in the United States for pecans; (d) the accuracy of USDA's estimate of the number of producers, first handlers and importers of pecans that will be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Four comments were received regarding information collection. All four commenters believed that the estimated recordkeeping burden of 7,951 hours was overstated by 100 percent. They reasoned that none of the information required by the Order would be in addition to any of the information normally kept and already required by normal accounting, state and Federal Tax preparation and other USDA programs. The estimated recordkeeping burden hours are the hours associated with maintaining records to verify reports required by the Order. While it is understood that some of the information required under the Order may be compiled from records currently maintained, there may be additional records not currently maintained that would be needed to verify the reports required by the Order. Furthermore, the estimated burden is nominal and is a customary estimated burden associated with programs such as these. In addition, three of the commenters stated that the First Handler/Importer Report should be estimated at .08333 hours per record keeper, not the .5 hours in the proposed rule. This was based on their experience of having to file similar forms as required by the Federal marketing order. After further review of the form and similar forms required under other research and promotion programs, USDA decreased the burden estimate to 0.25 hours. This has been reflected in the PRA section above.

#### Analysis of Comments

Fifty-four comments were received in response to the proposed rule. Of those 54 comments, 28 indicated support for the proposed action, 16 provided general feedback or suggested changes,

six opposed the action, two were outside the scope of the rulemaking, one was a duplicate, and there was one standalone comment regarding the PRA section.

#### *General Comments in Support*

A majority of the commenters expressed their confidence that the proposed program would grow consumer demand for pecans, expanding markets, while helping offset the current imbalance between supply and demand. Several commenters found that being able to assess both domestic and imported product would increase the resources available to create demand and would allow a more unified strategy. Comments were received from several state and national pecan associations voicing their support for the proposed program, agreeing that the proposed research and promotion program will provide the pecan industry with more funds to help promote and drive demand. Commenters discussed the challenges the pecan industry has faced the last several years, and that while the proposed program will not address all of these challenges, it is a step in the right direction. Six commenters simply expressed their support for the proposed program.

#### *Comments in Opposition*

Six comments received were opposed to the program. Four of the commenters stated that producers are already paying an assessment for the Federal marketing order program, which is tasked with promoting pecans, and are not in favor of having another promotion program that will assess producers. One commenter noted that the pecan industry already has many national and state level trade organizations and that the industry does not need another. Instead of the proposed program, the commenter advocated for a consolidated effort and strategy between these organizations to insure a more efficient research, promotion and marketing effort. As is addressed in this rule, Federal marketing orders and research and promotion orders are created pursuant to different laws and provide for different activities. The Federal marketing order assessment obligations are imposed on handlers, although some of the costs may be passed on to producers. Producers and importers are obligated to pay the assessment under the research and promotion Order. A comment submitted by the American Pecan Council (APC) (the Federal marketing order governing body) committed to ensuring, with the establishment of the new Order, that the domestic pecan industry does not pay

more than the total assessment amount that is currently obligated under the Federal marketing order. It indicated it would therefore recommend reducing the assessment obligated under the Federal marketing order should the research and promotion program be established. Under Federal marketing orders assessment rates are intended to be applicable to each fiscal year. The pecan marketing order fiscal period is October 1 through September 30, which is the same as the Order. With the assessment obligation under the Order beginning October 1, 2021, this would allow the APC adequate time to review and recommend its assessment rate for its 2021–22 fiscal year, ensuring its commitment to the industry.

Commenters noted the continued decline in producer price over the last couple of years and that producers cannot afford to fund this program. According to NASS statistics, grower received price per pound (in shell basis) for the six-year period from 2013–2019, have ranged from a low of \$1.73 in 2013, to a high of \$2.59 in 2016, with the six-year average of \$2.11. The reported prices for years 2017, 2018, and 2019, were \$2.33, \$1.75, and \$1.84, respectively. Based on this historical information, pecan grower received prices for upcoming years could range between \$1.73 and \$2.59 per pound. Utilizing these historical figures, the estimated assessment cost as a percentage of grower received price, could range from approximately 1.15 percent to .78 percent (\$0.02 divided by \$1.73 and \$2.59, respectively). While there is a cost associated with the program, they are expected to be offset by the identified benefits of the Order. As was stated previously, the purpose of the Order would be to create increased demand for pecans, strengthening the overall viability of the industry. One comment stated that the government should fund the program instead of producers. The 1996 Act prescribes that such programs are financed by an assessment on producers and importers, and does not provide the authority for the government to pay for such programs.

One commenter expressed concern that exempt producers will not be aware of the need to submit a form to apply for the exemption and that it is too much of a burden on the handler to secure those forms from the exempt producers. It would be the task of the Board to educate the industry on the Order provisions, working directly with producers who would be required to submit the exemption forms.

Several commenters expressed concern regarding the composition of

the proposed Board, stating that assurances need to be made that for the producer member positions just growers, not dual-role entities such as grower/shellers or grower/marketers, are represented on the Board. In making recommendations to the Secretary for appointments to the Board, the Order states that industry members should consider operation size, production and distribution methods, and other factors to ensure adequate representation of assessed entities. In addition, the Order provides that the Board has the authority to consider recommending additional eligibility requirements for members of the Board.

#### *General Comments and Suggested Modifications*

Some comments provided general comments or/and suggested modifications to the Order. One commenter suggested that the establishment of the American Pecan Promotion Board should be apportioned equally among the three identified regions, citing that this adjustment accounts more fairly for the nature of pecan production as an alternate-year bearing crop. The 1996 Act requires that the composition of the board reflect the geographical distribution of production. As was discussed in the proposed rule in the *Establishment of the Board* section, USDA did an in-depth analysis of production data from the past six years to account for the nature of pecans being an alternate bearing crop. The analysis took into consideration the crop loss in Georgia due to the hurricane in 2018 by applying lesser weight to the production volumes of 2018 and 2019 and placing greater weight on the production volumes of 2014 through 2017. Based on the analysis of the available data, the distribution of seats among the regions reflects the distribution of production in those regions. The Order allows for the Board to revisit the distribution of seats on the Board at least once every five years and recommend any changes to the Secretary for consideration.

Three commenters suggested that eligible producer members should have a majority of their income derived from the production of pecans to ensure that producer interests are represented on the Board. The commenters noted that it is common to have vertically integrated businesses that do not solely identify as producers, but also as shellers. The commenters argued that to be eligible to represent producers on the Board, the majority of income derived needs to be from the production of pecans and not shelling. One commenter believed that industry

members should not be able to serve on the American Pecan Council and the Board at the same time. As was previously mentioned, the Order provides that when making recommendations to the Secretary for appointment of members to the Board industry members should consider size of operations, methods of production and distribution, and other factors to ensure adequate representation of assessed entities. The Order also provides that the Board may recommend amendments to the representation of membership provisions. Once the Board is established, it could consider recommending additional eligibility requirements for producer members.

Three commenters stated that the assessment should be higher on imported product. The 1996 Act requires that, should imports be assessed, the rate be comparable to that of the domestic product. Two commenters sought clarification regarding the entity obligated to pay the assessment rate required under the Federal marketing order in comparison to the assessment rate under the research and promotion program. Domestic handlers are obligated to pay assessments under the Federal marketing order. Domestic producers are obligated to pay assessments under the research and promotion program. In addition, the laws authorizing these programs do not allow for the assessment obligation to be met by a different entity than those subject to its respective law.

One commenter raised concerns over the entity that would conduct referenda under the Order, specifically stating that the proposed rule did not clearly define "referendum agents." All referenda are administered by the USDA and its employees. Referendum agents are those USDA employees who conduct the referendum.

Several commenters expressed that the program should first and foremost support domestic producers. As was stated in the *Background* section of this rule, the purpose of research and promotion programs, in general, is to provide a framework for agricultural industries to pool their resources and combine efforts to develop new markets, strengthen existing markets and conduct important research and generic promotion activities.

One commenter expressed concerns regarding the proposed assessment's impact on small growers in Mexico. The commenter stated that while importers of record will be obligated to pay the assessment, the cost will eventually be passed-on to the grower. The Order

obligates the importer of record to pay the assessment. Although, some of the costs may be passed on to producers, these costs are expected to be offset by the benefits derived by the operation of the Order. Furthermore, contracts between grower and importers are individual business decisions between the two parties. Such business decisions are outside the scope of the Order.

One commenter asked that all marketing logos and marketing materials be made available, with Board approval, to Mexican shellers and importers, for promoting pecans in the international marketplace. Once a Board is appointed, it will work with the industry to develop marketing materials and logos for industry use to generically promote pecans in the marketplace.

Two commenters asked several questions regarding the different initiatives regarding research, development of uses of pecans, and strategic planning. With the establishment of the Order and appointment of the Board, the Board will begin implementing programs, plans, and projects addressing research and marketing priorities.

Three commenters raised issues that are outside the scope of the authority of the Order. Two commenters voiced concerns regarding labeling regulations, while one commenter suggested working with Customs and Border Protection to develop new Harmonized Tariff codes for pecans.

In the proposed rule, USDA specifically requested comments on the proposed de minimis exemption, particularly on whether the proposed level was appropriate to ensure equitable contribution by and representation of both domestic producers and importers, or if modification to the exemption level was needed, asking commenters to provide data to substantiate any recommendations. One commenter opposed any exemption from the payment of assessments. The commenter did not provide data to substantiate its recommendation.

After review and consideration of the comments received, USDA is not making any changes to the proposed rule based on those comments. The USDA has determined that this Order is consistent with and will effectuate the purposes of the 1996 Act.

#### List of Subjects in 7 CFR Part 1223

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Pecan promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, title 7, chapter XI of the Code of Federal Regulations is amended by adding part 1223 to read as follows:

### PART 1223—PECAN PROMOTION, RESEARCH, AND INFORMATION ORDER

#### Subpart A—Pecan Promotion, Research, and Information Order

##### Definitions

Sec.	
1223.1	Act.
1223.2	American Pecan Council.
1223.3	American Pecan Promotion Board.
1223.4	Conflict of interest.
1223.5	Customs or CBP.
1223.6	Department or USDA.
1223.7	First handler.
1223.8	Fiscal period.
1223.9	Importer.
1223.10	Information.
1223.11	Inshell pecans.
1223.12	Market or marketing.
1223.13	Order.
1223.14	Part and subpart.
1223.15	Pecans.
1223.16	Person.
1223.17	Producer.
1223.18	Programs, plans, and projects.
1223.19	Promotion.
1223.20	Research.
1223.21	Secretary.
1223.22	Shelled pecans.
1223.23	Suspend.
1223.24	Terminate.
1223.25	United States.

##### American Pecan Promotion Board

1223.40	Establishment and membership.
1223.41	Nominations and appointments.
1223.42	Term of office.
1223.43	Vacancies.
1223.44	Procedure.
1223.45	Compensation and reimbursement.
1223.46	Powers and duties.
1223.47	Prohibited activities.

##### Expenses and Assessments

1223.50	Budget and expenses.
1223.51	Financial statements.
1223.52	Assessments.
1223.53	Exemption procedures.
1223.54	Refund escrow accounts.

##### Promotion, Research, and Information

1223.55	Programs, plans, and projects.
1223.56	Independent evaluation.
1223.57	Patents, copyrights, trademarks, information, publications, and product formulations.

##### Reports, Books, and Records

1223.60	Reports.
1223.61	Books and records.
1223.62	Confidential treatment.

##### Miscellaneous

1223.70	Right of the Secretary.
1223.71	Referenda.
1223.72	Suspension and termination.
1223.73	Proceedings after termination.
1223.74	Effect of termination or amendment.

- 1223.75 Personal liability.  
 1223.76 Separability.  
 1223.77 Amendments.  
 1223.78 OMB control numbers.

#### Subpart B—Referendum Procedures

- 1223.100 General.  
 1223.101 Definitions.  
 1223.102 Voting.  
 1223.103 Instructions.  
 1223.104 Subagents.  
 1223.105 Ballots.  
 1223.106 Referendum report.  
 1223.107 Confidential information.

#### Subpart C—Administrative Provisions

- 1223.520 Late payment and interest charges for past due assessments.

**Authority:** 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

#### Subpart A—Pecan Promotion, Research, and Information Order

##### Definitions

##### § 1223.1 Act.

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

##### § 1223.2 American Pecan Council.

*American Pecan Council* or *APC* means that governing body of the Federal Marketing Order established pursuant to 7 CFR part 986 unless otherwise noted.

##### § 1223.3 American Pecan Promotion Board.

*American Pecan Promotion Board* or the *Board* means the administrative body established pursuant to § 1223.40.

##### § 1223.4 Conflict of interest.

*Conflict of interest* means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

##### § 1223.5 Customs or CDP.

*Customs* or *CBP* means Customs and Border Protection, an agency of the United States Department of Homeland Security.

##### § 1223.6 Department or USDA.

*Department* or *USDA* means the U.S. Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

##### § 1223.7 First handler.

*First handler* means any person who receives, shells, cracks, accumulates, warehouses, roasts, packs, sells,

consigns, transports, exports, or ships (except as a common or contract carrier of pecans owned by another person), or in any other way puts inshell or shelled pecans in the stream of commerce. The term first handler includes a producer who handles or markets pecans of the producer's own production.

##### § 1223.8 Fiscal period.

*Fiscal period* means October 1 to September 30, or such other period as recommended by the Board and approved by the Secretary.

##### § 1223.9 Importer.

*Importer* means any person who imports pecans into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles pecans outside of the United States for sale in the United States, and who is listed in the import records as the importer of record for such pecans.

##### § 1223.10 Information.

*Information* means information and programs that are designed to increase efficiency in processing and to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of pecans on a national or international basis. These include:

(a) *Consumer information*, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of pecans; and

(b) *Industry information*, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the pecan industry, and activities to enhance the image of the pecan industry.

##### § 1223.11 Inshell pecans.

*Inshell pecans* are nuts whose kernel is maintained inside the shell.

##### § 1223.12 Market or marketing.

(a) *Marketing* means the sale or other disposition of pecans in any channel of commerce.

(b) *To market* means to sell or otherwise dispose of pecans in interstate, foreign, or intrastate commerce.

##### § 1223.13 Order.

*Order* means an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, and information regarding agricultural commodities authorized under the Act.

##### § 1223.14 Part and subpart.

This *part* is comprised of all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Pecan Promotion, Research, and Information Order comprises *subpart A* of this part.

##### § 1223.15 Pecans.

*Pecans* means and includes any and all varieties or subvarieties, inshell or shelled, of *Carya illinoensis* grown or imported into the United States.

##### § 1223.16 Person.

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

##### § 1223.17 Producer.

*Producer* is synonymous with grower and means any person engaged in the production and sale of pecans in the United States who owns, or who shares in the ownership and risk of loss of such pecans.

##### § 1223.18 Programs, plans, and projects.

*Programs, plans, and projects* mean those research, promotion, and information programs, plans, or projects established pursuant to this subpart.

##### § 1223.19 Promotion.

*Promotion* means any action taken to present a favorable image of pecans to the general public and the food industry for the purpose of improving the competitive position of pecans both in the United States and abroad and stimulating the sale of pecans. This includes paid advertising and public relations.

##### § 1223.20 Research.

*Research* means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of pecans, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value, health research, and marketing of pecans.

##### § 1223.21 Secretary.

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

##### § 1223.22 Shelled pecans.

*Shelled pecans* are pecans whose shells have been removed leaving only edible kernels, kernel pieces or pecan

meal. One pound of shelled pecans is the equivalent of two pounds inshell pecans.

**§ 1223.23 Suspend.**

*Suspend* means to issue a rule under section 553 of title 5, U.S.C., to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

**§ 1223.24 Terminate.**

*Terminate* means to issue a rule under section 553 of title 5, U.S.C., to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

**§ 1223.25 United States.**

*United States* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

**American Pecan Promotion Board**

**§ 1223.40 Establishment and membership.**

(a) *Establishment of the American Pecan Promotion Board.* There is hereby established an American Pecan Promotion Board, called the Board in this part, comprised of seventeen (17) members, appointed by the Secretary from nominations as follows:

(1) Ten (10) producer members: Three (3) each from the Eastern Region and Central Region and four (4) from the Western Region as follows:

(i) Eastern Region shall mean the States of Alabama, Florida, Georgia, North Carolina, South Carolina plus any states in the United States, the majority of whose land mass is in the Eastern Time Zone, plus any U.S. territories in the Atlantic Ocean;

(ii) Central Region shall mean the States of Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Texas plus any states in the United States, the majority of whose land mass is in the Central Time Zone; and

(iii) Western Region shall mean the States of Arizona, California, New Mexico plus any states in the United States, the majority of whose land mass is in the Mountain or Pacific Time Zones, plus Alaska and Hawaii and any U.S. territories in the Pacific Ocean.

(2) Seven (7) importers.

(b) *Adjustment of membership.* At least once every five years, the Board will review the geographical distribution of United States production of pecans and the quantity or value of imports. The review will be conducted through an audit of state crop production and Customs figures and Board assessment records. If warranted, the Board will recommend to the

Secretary that the membership on the Board be altered to reflect any changes in the geographical distribution of domestic pecan production and the quantity or value of imports. If the level of imports fluctuates versus domestic pecan production, importer members may be added to or reduced from the Board.

(c) *Board's ability to serve the diversity of the industry.* When making recommendations for appointments, the industry should take into account the diversity of the population served and the knowledge, skills, and abilities of the members to serve a diverse population, size of the operations, methods of production and distribution, and other distinguishing factors to ensure that the recommendations of the Board take into account the diverse interest of persons responsible for paying assessments, and others in the marketing chain, if appropriate.

**§ 1223.41 Nominations and appointments.**

(a) Initial nominations for producers will be submitted to the Secretary by the American Pecan Council (APC), or the Department if appropriate. Before considering any nominations, the APC shall publicize the nomination process, using trade press or other means it deems appropriate, to reach out to all known producers for the U.S. market. The APC may use regional caucuses, mail or other methods to elicit potential nominees. The APC shall submit the nominations to the Secretary and recommend two nominees for each Board position specified in paragraph (a)(1) of § 1223.40. The Department will conduct initial nominations for the importer members. The Secretary shall appoint the members of the Board.

(b) Subsequent nominations shall be conducted as follows:

(1) Nomination of producer members will be conducted by the Board. The Board staff will seek nominations for each vacant producer seat from each region from producers who have paid their assessments to the Board in the most recent fiscal period and who produced more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which nominations are being conducted and the previous three fiscal periods). Producers who produce pecans in more than one region may seek nomination only in the region in which they produce the majority of their pecans. Nominations will be submitted to the Board office and placed on a ballot that will be sent to producers in each region for a vote. Producers may only vote in the region in which they produce the

majority of their pecans. The votes shall be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. Two candidates for each position shall be submitted to the Secretary; and

(2) Nomination of importer members will be conducted by the Board. All qualified national organizations representing importer interests will have the opportunity to nominate members to serve on the Board. If the Secretary determines that there are no qualified national organizations representing importer interests, individual importers who have paid assessments to the Board in the most recent fiscal period and imported more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which nominations are being conducted and the previous three fiscal periods) may submit nominations. The names of importer nominees shall be placed on a ballot and mailed to importers for a vote. The votes shall be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. Two candidates for each importer Board position shall be submitted to the Secretary. To be certified by the Secretary as a qualified national organization representing importer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(i) The organization's voting membership must be comprised primarily of importers of pecans;

(ii) The organization has a history of stability and permanency and has been in existence for more than one year;

(iii) The organization must derive a portion of its operating funds from importers;

(iv) The organization must demonstrate it is willing and able to further the Act and Order's purposes; and

(v) To be certified by the Secretary as a qualified national organization representing importer interests, an organization must agree to take reasonable steps to publicize to non-members the availability of open Board importer positions.

(c) Producer and importer nominees may provide the Board a short background statement outlining their qualifications to serve on the Board.

(d) Nominees must be in compliance with the applicable provisions of this subpart.

(e) The Board must submit nominations to the Secretary at least six

months before the new Board term begins. The Secretary shall appoint the members of the Board.

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

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

#### § 1223.42 Term of office.

(a) With the exception of the initial Board, each Board member will serve a three-year term or until the Secretary selects his or her successor. Each term of office shall begin on October 1 and end on September 30. No member may serve more than two consecutive terms, excluding any term of office less than three years.

(b) For the initial board, the terms of Board members shall be staggered for two, three, and four years. Determination of which of the initial members shall serve a term of two, three, or four years shall be determined at random. Those members serving an initial term of two, three, or four years may serve one successive three-year term.

#### § 1223.43 Vacancies.

(a) In the event that any member of the Board ceases to work for or be affiliated with the category of members from which the member was appointed to the Board, such position shall automatically become vacant.

(b) If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Board shows adequate cause, the Secretary shall remove such member from office.

(c) Without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the continued failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

(d) Should the position of a member become vacant, successors for the unexpired terms of such member shall be appointed in the manner specified in §§ 1223.40 and 1223.41, except that said nomination and replacement shall not

be required if said unexpired terms are less than six months.

#### § 1223.44 Procedure.

(a) At a Board meeting, it will be considered a quorum when a majority of members are present.

(b) At the start of each fiscal period, the Board will select a chairperson and vice chairperson who will conduct meetings and appoint committee membership throughout that period.

(c) All Board and committee members will receive a minimum of 10 days advance notice of all Board and committee meetings, unless an emergency meeting is declared by the Chairperson.

(d) Each member of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by one vote more than 50 percent of the total votes represented by the Board members present.

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Committees may also consist of individuals other than Board members and such individuals may vote in committee meetings. These committee members shall be appointed by the Chairperson and shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

(f) In lieu of voting at a properly convened meeting and, when in the opinion of the Chairperson of the Board such action is considered necessary, the Board may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or any other means of communication, and all telephone votes shall be confirmed promptly in writing. In that event, all members and the Secretary must be notified, and all members must be provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All votes shall be recorded in Board minutes.

(g) There shall be no voting by proxy.

(h) The Chairperson shall be a voting member.

(i) The organization of the Board and the procedures for the conducting of meetings of the Board shall be in accordance with its bylaws, which shall be established by the Board and approved by the Secretary.

#### § 1223.45 Compensation and reimbursement.

The members of the Board when acting as members, shall serve without

compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board, incurred by them in the performance of their duties as Board members.

#### § 1223.46 Powers and duties.

The Board shall have the following powers and duties:

(a) To administer this subpart in accordance with its terms and conditions and to collect assessments;

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer this subpart, including activities authorized to be carried out under this subpart;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines to be appropriate;

(d) To employ persons, other than the Board members, or to enter into contracts, other than with Board members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons, or to determine the contractual terms of such parties;

(e) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and make such other reports available as the Board or the Secretary considers relevant. Any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other



reports as the Secretary or the Board may require;

(3) The Secretary may audit the records of the contracting or agreeing party periodically; and

(4) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor;

(f) To prepare and submit for approval of the Secretary fiscal period budgets in accordance with § 1223.50;

(g) To invest assessments collected under this part in accordance with § 1223.50;

(h) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(i) To cause its books to be audited by a competent auditor at the end of each fiscal period and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(j) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Board to the Secretary;

(k) To act as intermediary between the Secretary and any producer, first handler, or importer;

(l) To furnish to the Secretary any information or records that the Secretary may request;

(m) To receive, investigate, and report to the Secretary complaints of violations of this subpart;

(n) To recommend to the Secretary such amendments to this subpart as the Board considers appropriate; and

(o) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the pecan industry's position in the marketplace; maintain and expand existing markets and uses for pecans; and to carry out programs, plans, and projects designed to provide maximum benefits to the pecan industry.

#### § 1223.47 Prohibited activities.

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(a) Any action that would be a conflict of interest; and

(b) Using funds collected by the Board under this subpart to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments, other than recommending to the Secretary amendments to this subpart.

(c) No program, plan, or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Pecans of all origins shall be treated equally.

#### Expenses and Assessments

##### § 1223.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal period, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal period covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project;

(2) A summary of anticipated revenue, with comparative data for at least one preceding year (except for the initial budget);

(3) A summary of proposed expenditures for each program, plan, or project; and

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this subpart.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another. Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(d) The Board is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the

Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

(g) The Board may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, for authorized activities.

(h) The Board shall reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration, and supervision of this subpart, including all referendum costs in connection with this subpart.

(i) For fiscal periods beginning three (3) or more years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and functioning of the Board in any fiscal period an amount that exceeds 15 percent of the assessments and other income received by the Board for that fiscal period. Reimbursements to the Secretary required under paragraph (h) of this section are excluded from this limitation on spending.

(j) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established: *Provided* that the funds in the reserve do not exceed the last two fiscal periods' budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this part.

(k) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Board may invest assessments and all other revenues collected under this part in:

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System;

(4) Obligations fully guaranteed as to principal interest by the United States; or

(5) Other investments as authorized by the Secretary.

**§ 1223.51 Financial statements.**

(a) The Board shall prepare and submit financial statements to the Secretary on a monthly or quarterly basis or at any other time as requested by the Secretary. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Secretary within 30 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal period to which it applies.

**§ 1223.52 Assessments.**

(a) The funds to cover the Board's expenses shall be paid from assessments on producers and importers, other income of the Board, and other funds available to the Board including those collected pursuant to § 1223.57 and subject to the limitations contained in § 1223.57.

(b) Each producer shall pay an assessment per pound of pecans produced in the United States. The collection of assessments on pecans produced in the United States will be the responsibility of the first handler receiving the pecans from producers. In the case of the producer acting as its own first handler, the producer will be required to collect and remit its individual assessments.

(1) First handlers may remit assessments to a third-party collection agent under this subpart.

(2) First handlers may also remit assessments directly to the Board.

(c) Such assessments shall be levied at \$0.02 per pound on all inshell pecans and \$0.04 per pound on all shelled pecans. The assessment rate may be reviewed and modified with the approval of the Secretary. A change in the assessment rate is subject to rulemaking by the Secretary.

(d) All assessment payments and reports will be submitted to the office of the Board. All assessment payments for a fiscal period are to be received no later than the 10th of the month following the end of the previous month. A late payment charge shall be imposed on any producer and importer who fails to remit to the Board, the total amount for which any such producer and importer is liable on or before the due date established by the Board on forms approved by the Secretary. In addition to the late payment charge, an interest

charge shall be imposed on the outstanding amount for which the producer and importer is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

(e) Each importer of pecans shall pay an assessment to the Board on pecans imported for marketing in the United States, through Customs.

(1) The assessment rate for imported pecans shall be the same or equivalent to the rate for pecans produced in the United States.

(2) The import assessment shall be uniformly applied to imported pecans that are identified by the number 0802.90.10.00 and 0802.90.15.00 in the Harmonized Tariff Schedule (HTS) of the United States or any other numbers used to identify pecans in that schedule.

(3) In the event that any HTS number is subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of pecans, assessment will continue to be collected based on the new numbers.

(4) The assessment due on imported pecans shall be paid when they enter, or are withdrawn from warehouse, for consumption in the United States.

(5) If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment directly to the Board no later than the 10th of the month following the month the assessed pecans were imported into the United States.

(f) Persons failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures.

(g) The Board may authorize other organizations to collect assessments on its behalf with the approval of the Secretary.

**§ 1223.53 Exemption procedures.**

(a) *De minimis.* An exemption from payment of assessments as provided in § 1223.52, shall be provided to producers that domestically produce and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) as follows:

(1) Any producer who desires to claim an exemption from assessments shall file an application on a form provided by the Board, for a certificate of exemption for each fiscal period claiming an exemption. Such producer shall certify that it will domestically produce less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four

fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). It is the responsibility of the producer to retain a copy of the certificate of exemption.

(2) Any importer who desires to claim an exemption from assessments shall file an application on a form provided by the Board, for a certificate of exemption for each fiscal period claiming an exemption. Such importer shall certify that it will import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). It is the responsibility of the importer to retain a copy of the certificate of exemption.

(3) On receipt of an exemption application, the Board shall determine whether an exemption may be granted for that fiscal period. The Board will then issue, if deemed appropriate, a certificate of exemption to the producer or importer which is eligible to receive one covering that fiscal period. The Board may request persons applying for the exemption to provide supporting documentation, such as past sales receipts or import data.

(4) The Board, with the Secretary's approval, may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt pecans and, in the case of importers, proof of payment of assessments.

(5) The exemption will apply immediately following the issuance of the certificate of exemption.

(6) Producers and importers who received an exemption certificate from the Board but domestically produced or imported more than 50,000 pounds of inshell pecans (25,000 shelled of pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) during the fiscal period shall pay the Board the applicable assessments owed and submit any necessary reports to the Board pursuant to § 1223.60.

(b) *Assessment refunds.* Importers and producers who are exempt from assessment shall be eligible for a refund of assessments collected, either by Customs or a first handler. Requests for such assessment refunds must be submitted to the Board within 90 days of the last day in the fiscal period when assessments were collected on such producer's or importer's pecans. No interest will be paid on such assessments. The Board shall refund such assessments no later than 60 calendar days after receipt by the Board

of information justifying the exemption from assessment.

(c) *Organic.* (1) A producer who domestically produces pecans under an approved National Organic Program (7 CFR part 205) (NOP) organic production system plan may be exempt from the payment of assessments under this part, provided that:

(i) Only agricultural products certified as “organic” or “100 percent organic” (as defined in the NOP) are eligible for exemption;

(ii) The exemption shall apply to all certified “organic” or “100 percent organic” (as defined in the NOP) products of a producer regardless of whether the agricultural commodity subject to the exemption is produced by a person that also produces conventional or nonorganic agricultural products of the same agricultural commodity as that for which the exemption is claimed;

(iii) The producer maintains a valid certificate of organic operation as issued under the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) (OFPA) and the NOP regulations issued under OFPA (7 CFR part 205); and

(iv) Any producer so exempted shall continue to be obligated to pay assessments under this part that are associated with any agricultural products that do not qualify for an exemption under this section.

(2) To apply for exemption under this section, an eligible producer shall submit a request to the Board on an *Organic Exemption Request Form* (Form AMS–15) at any time during the fiscal period initially, and annually thereafter on or before the start of the fiscal period, for as long as the producer continues to be eligible for the exemption.

(3) A producer request for exemption shall include the following:

(i) The applicant’s full name, company name, address, telephone and fax numbers, and email address;

(ii) Certification that the applicant maintains a valid certificate of organic operation issued under the OFPA and the NOP;

(iii) Certification that the applicant produces organic products eligible to be labeled “organic” or “100 percent organic” under the NOP;

(iv) A requirement that the applicant attach a copy of their certificate of organic operation issued by a USDA-accredited certifying agent;

(v) Certification, as evidenced by signature and date, that all information provided by the applicant is true; and

(vi) Such other information as may be required by the Board, with the approval of the Secretary.

(4) If a producer complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(5) An importer who imports pecans that are eligible to be labeled as “organic” or “100 percent organic” under the NOP, or certified as “organic” or “100 percent organic” under a U.S. equivalency arrangement established under the NOP, may be exempt from the payment of assessments. Such importer may submit documentation to the Board and request an exemption from assessment on certified “organic” or “100 percent organic” pecans on an *Organic Exemption Request Form* (Form AMS–15) at any time initially, and annually thereafter on or before the beginning of the fiscal period, as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of a producer in paragraph (c)(3) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer within the applicable timeframe. Any importer so exempted shall continue to be obligated to pay assessments under this part that are associated with any imported agricultural products that do not qualify for an exemption under this section.

(6) If Customs collects the assessment on exempt product under paragraph (c)(5) of this section that is identified as “organic” by a number in the Harmonized Tariff Schedule, the Board must reimburse the exempt importer the assessments paid upon receipt of such assessments from Customs. For all other exempt organic product for which Customs collects the assessment, the importer may apply to the Board for a reimbursement of assessments paid, and the importer must submit satisfactory proof to the Board that the importer paid the assessment on exempt organic product.

(7) The exemption will apply immediately following the issuance of the Certificate of Exemption.

#### **§ 1223.54 Refund escrow accounts.**

(a) The Board shall establish an interest bearing escrow account with a financial institution that is a member of the Federal Reserve System and will deposit into such account an amount equal to 10 percent of the assessments collected during the period beginning on the effective date of the Order and

ending on the date the Secretary announces the results of the required referendum.

(b) If the Order is not approved by the required referendum, the Board shall promptly pay refunds of assessments to all producers and importers that have paid assessments during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in paragraph (c) of this section.

(c) If the amount deposited in the escrow account is less than the amount of all refunds that producers and importers subject to this subpart have a right to receive, the Board shall prorate the amount deposited in such account among all producers and importers who desire a refund of assessments paid no later than 90 days after the required referendum results are announced by the Secretary.

(d) Any producer or importer requesting a refund shall submit an application on the prescribed form to the Board within 60 days from the date the results of the required referendum are announced by the Secretary. The producer and importer shall also submit documentation to substantiate that assessments were paid. Any such demand shall be made by such producer or importer in accordance with the provisions of this subpart and in a manner consistent with the regulations in this part.

(e) If the Order is approved by the required referendum conducted under § 1223.71 then:

(1) The escrow account shall be closed; and,

(2) The funds shall be available to the Board for disbursement under § 1223.50.

#### **Promotion, Research, and Information**

##### **§ 1223.55 Programs, plans, and projects.**

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to pecans; and

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing of pecans, and the creation of new products thereof, to the end that the marketing and use of pecans may be

encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of pecans.

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

#### **§ 1223.56 Independent evaluation.**

The Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other programs conducted by the Board pursuant to the Act. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this section.

#### **§ 1223.57 Patents, copyrights, trademarks, information, publications, and product formulations.**

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1223.73 shall apply to determine disposition of all such property.

#### **Reports, Books, and Records**

##### **§ 1223.60 Reports.**

(a) Each first handler, producer, or importer subject to this subpart shall be required to provide to the Board periodically such information as required by the Board, with the approval of the Secretary, which may

include but not be limited to the following:

(1) First handler must report or producer acting as its own first handler:

- (i) Number of pounds handled;
- (ii) Number of pounds on which an assessment was collected;
- (iii) Name, address and other contact information from whom the first handler has collected the assessments on each pound handled; and
- (iv) Date collection was made on each pound handled.

(2) Unless provided by Customs, importer must report:

- (i) Number of pounds imported;
- (ii) Number of pounds on which an assessment was paid;
- (iii) Name, address, and other contact information of the importer; and
- (iv) Date assessment was paid on each pound imported.

(b) These reports shall accompany the payment of the collected assessments.

##### **§ 1223.61 Books and records.**

Each producer, first handler, and importer subject to this subpart shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this part, including such records as are necessary to verify any reports required. Such records shall be retained for at least 3 years beyond the fiscal period of their applicability.

##### **§ 1223.62 Confidential treatment.**

All information obtained from books, records, or reports under the Act and this part shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, producers, importers, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements will not identify the

information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of this subpart violated by such person.

#### **Miscellaneous**

##### **§ 1223.70 Right of the Secretary.**

All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

##### **§ 1223.71 Referenda.**

(a) *Required referendum.* For the purpose of ascertaining whether the persons subject to this subpart favor the continuation, suspension, amendment, or termination of this subpart, the Secretary shall conduct a referendum among persons subject to assessments under § 1223.52 who, during a representative period determined by the Secretary, have engaged in the production or importation of pecans:

(1) The required referendum shall be conducted not later than 3 years after assessments first begin under the Order; and

(2) The Order will be approved in a referendum if a majority of producers and importers vote for approval in the referendum.

(b) *Subsequent referenda.* The Secretary shall conduct subsequent referenda:

(1) For the purpose of ascertaining whether producers and importers favor the continuation, suspension, or termination of the Order;

(2) Every seven years the Secretary shall hold a referendum to determine whether producers and importers of pecans favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval in the referendum who have been engaged in the production or importation of pecans;

(3) At the request of the Board established in this subpart;

(4) At the request of 10 percent or more of the number of persons eligible to vote in a referendum as set forth under the Order; or

(5) At any time as determined by the Secretary.

##### **§ 1223.72 Suspension and termination.**

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof if the Secretary finds that this part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if

the Secretary determines that this part or subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal period whenever the Secretary determines that its suspension or termination is approved or favored by a majority of producers and importers voting for approval who, during a representative period determined by the Secretary, have been engaged in the production or importation of pecans.

(c) If, as a result of a referendum the Secretary determines that this subpart is not approved, the Secretary shall:

(1) Not later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under this subpart; and

(2) As soon as practical, suspend or terminate, as the case may be, activities under this subpart in an orderly manner.

#### § 1223.73 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than three of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contracts or agreements entered into pursuant to this subpart;

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and the trustees, to such person or persons as the Secretary may direct; and

(4) Upon request of the Secretary execute such assignments or other instruments necessary and appropriate to vest in such person's title and right to all funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligations imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of

liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to the pecan producer organizations in the interest of continuing pecan promotion, research, and information programs.

#### § 1223.74 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this part, or the issuance of any amendment to this part, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen, or which may thereafter arise in connection with any provision of this part; or

(b) Release or extinguish any violation of this part; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any other persons, with respect to any such violation.

#### § 1223.75 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

#### § 1223.76 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

#### § 1223.77 Amendments.

Amendments to this subpart may be proposed from time to time by the Board or by any interested person affected by the provisions of the Act, including the Secretary.

#### § 1223.78 OMB control numbers.

The control number 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, is OMB control number 0581-NEW, except for the Board nominee background statement form which is assigned OMB control number 0505-0001.

### Subpart B—Referendum Procedures

#### § 1223.100 General.

Referenda to determine whether eligible pecan producers and importers

favor the issuance, amendment, suspension, or termination of the Pecan Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

#### § 1223.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employees of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Eligible importer* means any person who, during the representative period, was subject to the Order and required to pay assessments on pecans imported into the United States.

(c) *Eligible producer* means any person who, during the representative period, was subject to the Order and required to pay assessments on pecans produced in the United States.

(d) *Order* means subpart A of this part, the Pecan Promotion, Research, and Information Order.

(e) *Pecans* means and includes any and all varieties or subvarieties, inshell and shelled, of *Carya illinoensis* grown or imported into the United States.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this paragraph (f), the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a pecan farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

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

(h) *Representative period* means the period designated by the Secretary.

(i) *United States* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

#### § 1223.102 Voting.

(a) Each person who is an eligible producer or an eligible importer, as defined in this subpart, at the time of

the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce pecans, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

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

(c) All ballots are to be cast by mail, overnight delivery, electronic mail, facsimile, or by other means as instructed by the Secretary.

#### **§ 1223.103 Instructions.**

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

(a) Determine the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

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

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

(d) Mail to eligible producers and eligible importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

#### **§ 1223.104 Subagents.**

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing the referendum agent's functions listed in this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

#### **§ 1223.105 Ballots.**

The referendum agent and subagents shall accept all ballots cast. However, if the agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

#### **§ 1223.106 Referendum report.**

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

#### **§ 1223.107 Confidential information.**

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Act and the voting list shall be held confidential and shall not be disclosed.

### **Subpart C—Administrative Provisions**

#### **§ 1223.520 Late payment and interest charges for past due assessments.**

(a) A late payment charge will be imposed on any producer, first handler or importer who fails to make timely remittance to the Board of the total assessments for which they are liable. The late payment will be imposed on any assessments not received within 30 calendar days of the date when assessments are due. This one-time late payment charge will be 5 percent of the assessments due before interest charges have accrued.

(b) In addition to the late payment charge, 1 percent per month interest on the outstanding balance, including any late payment and accrued interest, will be added to any accounts for which payment has not been received within 30 calendar days of the date when assessments are due. Interest will continue to accrue monthly until the outstanding balance is paid to the Board.

**Bruce Summers,**

*Administrator, Agricultural Marketing Service.*

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