

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1255**

**[Document Number AMS-SC-16-0112; PR-A1]**

**RIN 0581-AD55**

**Organic Research, Promotion, and Information Order**

**AGENCY:** Agricultural Marketing Service.

**ACTION:** Proposed rule.

**SUMMARY:** This rulemaking proposes the establishment of an industry-funded promotion, research, and information program for certified organic products. The purpose of the program would be to strengthen the position of certified organic products in the marketplace, support research to benefit the organic industry, and improve access to information and data across the organic sector. The proposed program, the Organic Research, Promotion, and Information Order (proposed Order), was submitted to the U.S. Department of Agriculture (USDA) by the Organic Trade Association (OTA). Under the proposed Order, certified producers (producers) and certified handlers (handlers) with gross sales in excess of \$250,000 for the previous marketing year of certified organic agricultural commodities would pay an assessment of one-tenth of one percent of net organic sales. Importers importing greater than \$250,000 in transaction value of organic products for the previous marketing year would pay an assessment of one-tenth of one percent of the transaction value of certified organic products reported to the U.S. Customs and Border Protection (Customs or CBP). Producers, handlers, and importers that fall below these thresholds could choose to pay assessments into the program as a “voluntarily assessed” entity. The proposed program would be implemented under the Commodity Promotion, Research, and

Information Act of 1996 (the Act) and would be administered by a board of assessment payers and one public member appointed by the Secretary of Agriculture (Secretary). An initial referendum would be held among mandatorily and voluntarily assessed entities (i.e. domestic producers, handlers, and importers) to determine whether they favor implementation of the program prior to it going into effect. This proposed rule also announces the Agricultural Marketing Service's (AMS) intent to request approval from the Office of Management and Budget (OMB) of new information collection requirements to implement the program.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Pursuant to the Paperwork Reduction Act (PRA), comments on the information collection burden that would result from this proposal must be received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments may be submitted on the Internet at: <http://www.regulations.gov> or to the Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue, SW., Room 1406-S, Stop 0244, Washington, D.C. 20250-0244; facsimile: (202) 205-2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection, including name and address, if provided, in the above office during regular business hours or it can be viewed at <http://www.regulations.gov>.

Pursuant to the PRA, comments regarding the accuracy of the burden estimate, ways to minimize the burden, including the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information, should be sent to

the above address. In addition, comments concerning the information collection should also be sent to the Desk Office for Agriculture, Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street, N.W., Room 725, Washington, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Heather Pichelman, Division Director, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue, SW., Room 1406-S, Stop 0244, Washington, D.C. 20250-0244; facsimile: (202) 205-2800; or electronic mail: [Heather.Pichelman@ams.usda.gov](mailto:Heather.Pichelman@ams.usda.gov).

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

### **Executive Summary**

This action invites comments on a proposed industry-funded research, promotion, and information program for certified organic products. Organic products are products produced under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and its implementing regulations at 7 CFR part 205. The organic market includes a range of agricultural commodities such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods as well as non-food items such as fiber (linen and clothing), personal care products, pet food, and flowers. The program would be financed by an assessment on domestic producers, handlers and importers of organic products and would be administered by a board of industry members nominated by organic stakeholders and appointed by the Secretary. The proposed initial assessment rate would be one tenth of one percent of net organic sales for producers and handlers, and one tenth of one percent of the transaction value of organic products imported into the United States for importers. Citing domestic supply shortages, challenges with viable pest management, and market confusion,

program proponents have proposed an organic research and promotion program for the purposes of: (1) developing and financing an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintaining and expanding existing markets for organic commodities.

A referendum would be held among eligible domestic producers, handlers and importers to determine whether they favor implementation of the program prior to it going into effect. The proposal was submitted to USDA by the Organic Trade Association (OTA), a membership business association, in collaboration with the 7-member GRO Organic Core Committee. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations, distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee. It included OTA subcommittee chairs and other industry leaders who built on the outreach and input from the larger committee to guide the development of a proposed Order.

This proposed rule also announces AMS's intent to request approval from OMB of new information collection requirements to implement the program.

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## **I. General Information**

### **A. An overview of “organic”**

Organic is a labeling term that indicates that a food or other agricultural product has been produced in accordance with the Organic Foods Production Act of 1990 (OFPA) and the regulations in 7 CFR part 205. USDA certified organic products have strict production and labeling requirements, and must be grown and processed according to federal regulations which

address, among many factors, soil quality, animal husbandry practices, pest and weed control, and use of additives. Organic producers rely on natural substances and physical, mechanical, or biologically based farming methods to the fullest extent possible. Certified organic handlers must use certified organic ingredients (for a minimum of 95 percent of the product) and only approved non-organic ingredients to label processed products as organic. Organic producers and handlers must prevent commingling and contact of organic ingredients and products with non-organic products and substances not allowed under the USDA organic regulations.

To make an organic claim or use the USDA Organic Seal, the final product must follow the applicable production, handling and labeling regulations and go through the organic certification process specified at 7 CFR part 205. To become certified, producers and handlers must apply to a USDA-accredited certifying agent, develop and implement an organic system plan, and be inspected. Organic certification allows producers and handlers to sell their raw or processed agricultural products as organic. Each production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the USDA organic regulations (7 CFR part 205)<sup>1</sup>.

#### B. Does this action apply to me?

You may be potentially affected by this action if you are engaged in the organic industry.

Potentially affected entities may include, but are not limited to:

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<sup>1</sup> The USDA organic regulations at 7 CFR 205.101 provides for some exclusions and exemptions from certification. For example, a production or handling operation that sells agricultural products as “organic” but whose gross agricultural income from organic sales totals \$5,000 or less annually is exempt from certification but must comply with the applicable organic production and handling requirements as specified at 7 CFR 205.101(a)(1).

- Persons (entities) that are currently certified to produce or handle organic products under the USDA organic regulations (7 CFR part 205);

This includes entities that are currently eligible for organic assessment exemption under the regulations of 25 Federal marketing orders and 22 research and promotion (R&P) programs.<sup>2</sup>

Exempt commodities under R&P Programs	Exempt commodities under Federal Marketing Orders
Beef—7 CFR part 1260; Christmas trees—7 CFR part 1214; Cotton—7 CFR part 1205; Dairy—7 CFR part 1150; Eggs—7 CFR part 1250; Fluid milk—7 CFR part 1160; Hass Avocados—7 CFR part 1219; Highbush Blueberries—7 CFR part 1218; Honey—7 CFR part 1212; Lamb—7 CFR part 1280; Mangos—7 CFR part 1206; Mushrooms—7 CFR part 1209; Paper and Paper-Based Packaging—7 CFR part 1222; Peanuts—7 CFR part 1216; Popcorn—7 CFR part 1215; Pork—7 CFR part 1230; Potatoes—7 CFR part 1207; Processed Raspberries—7 CFR part 1208; Softwood Lumber—7 CFR part 1217; Sorghum—7 CFR part 1221; Soybeans—7 CFR part 1220; and Watermelons—7 CFR part 1210.	Florida citrus—7 CFR part 905; Texas citrus—7 CFR part 906; Florida avocados—7 CFR part 915; California—kiwifruit 7 CFR part 922; Washington apricots—7 CFR part 922; Washington sweet cherries—7 CFR part 923; Southeastern California grapes—7 CFR part 925; Oregon/Washington pears—7 CFR part 927; Cranberries grown in the States of Massachusetts, <i>et al.</i> —7 CFR part 929; Tart cherries grown in the States of Michigan, <i>et al.</i> —7 CFR part 930; California olives—7 CFR part 932; Colorado potatoes—7 CFR part 948; Georgia Vidalia onions—7 CFR part 955; Washington/Oregon Walla Walla onions—7 CFR part 956; Idaho-Eastern Oregon onions—7 CFR part 958; Texas onions—7 CFR part 959; Florida tomatoes—7 CFR part 966; California almonds—7 CFR part 981; Oregon-Washington hazelnuts—7 CFR part 982; California walnuts—7 CFR part 984; Far West spearmint oil—7 CFR part 985; California dates—7 CFR part 987; Pecans grown in the States of Alabama, <i>et al.</i> —7 CFR part 986; California raisins—7 CFR part 989; and California dried prunes—7 CFR part 993

- Persons (entities) that import USDA certified organic products into the U.S.
- Persons (entities) that import products into the U.S. under an organic equivalency arrangement.<sup>3</sup>

### C. What should I consider as I prepare my comments for AMS?

<sup>2</sup> Section 10004 of the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113-79) amended Section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) (7 U.S.C. 7401) on February 7, 2014. AMS issued Final Rule “Exemption of organic products from assessment under a commodity promotion law” (80 FR 82006) on December 31, 2015.

<sup>3</sup> The U.S. has established organic equivalency trade partnerships with Canada, European Union, Japan, Republic of Korea, and Switzerland (accessed on August 24, 2016). For more information on current partnerships, refer to the “*International Trade Partners*” page available at [www.ams.usda.gov/NOPIInternationalAgreements](http://www.ams.usda.gov/NOPIInternationalAgreements).

Your comments should clearly indicate whether or not you support any or all of the provisions put forth for the research and promotion program being proposed. You should clearly indicate the reason(s) for the stated position(s). Your comments should also offer any recommended language changes that would be appropriate for your position. Please include relevant information and data to further support your position (e.g. industry and impact information, etc.). Specifically, AMS is requesting comments on the following items:

1. Under the proposed Order, importers importing greater than \$250,000 in transaction value of organic products for the previous marketing year would pay an assessment.

AMS is seeking:

- a. Comments from importers on the proposed order, including their level of support and any alternatives for AMS to consider.
  - b. Given the limitations of organic trade data, comments regarding the accuracy of information in the proposal and any other data sources that AMS should consider.
  - c. Comments on AMS' proposed approach of using transaction value rather than the proponents proposal to use gross organic sales for the purpose of determining assessments;
2. Under the proposed Order, both organic food and organic non-food items (e.g., flowers, pet food, and personal care products) would be subject to assessment. AMS is seeking:
    - a. Comments on the inclusion of organic non-food items under the proposed program.
    - b. Comments regarding additional data that could support further analysis of the impacts and implementation of a program that includes organic non-food items.

3. Under the proposed Order, producers, handlers, and importers, including those with trade in “dual-covered commodities” (i.e., commodities for which an existing commodity promotion program exists), could be subject to assessment. AMS is seeking:
  - a. Comments on the proposed assessment approach, on the scenarios describing how entities, including those with “dual-covered commodities”, could be assessed or exempted from the program, and on any tools that AMS should consider to minimize the burden of calculating assessments on the affected entities.
  - b. Comments on additional procedures that would address assessments to be paid by or refunded to entities with “dual-covered commodities” that operate on different fiscal year calendars.
  - c. Comments on the proposed de minimis level and its effects on the proposed program.
4. The Regulatory Flexibility Act analysis, particularly on the number and size of entities covered under the proposed Order.
5. The proposed definitions for “gross organic sales” and “net organic sales” given that these would be used to determine exemptions and calculation of assessments owed. In particular, AMS is interested on the impacts of using “gross organic sales” in instances when profits could be low.
6. The proposed requirement that “voluntarily assessed entities” would need to pay assessments for the majority of years after initial referendum and leading up to any subsequent referenda. AMS is also interested in comments about the requirement that such entities would need to be active assessment payers should they serve on the Board.
7. The proposed approach for the distribution of Board seats.

## **II. Executive Order 12988**

This rulemaking has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the Act provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the Act, 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, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 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.

## **III. Background**

### **A. Statutory and Regulatory Authority**

The Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522), as amended, provided the authority for USDA to establish the USDA organic regulations at 7 CFR part 205. The regulations in 7 CFR part 205 define 'organic' as a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) and the

regulations in 7 CFR part 205.

The Act 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. To date, there are 10 commodity promotion programs (i.e., research and promotion programs or R&P programs) operating under the authority of the Act. On February 7, 2014, section 10004 of the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113–79) amended section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), which authorizes generic commodity promotion programs under the various commodity promotion laws, to allow for an organic commodity promotion order. Specifically, the definition of “agricultural commodity” under section 513(1)(E) of the Act was amended to include “products, as a class, that are produced on a certified organic farm (as defined in 7 U.S.C. 6502); and certified to be sold or labeled as “organic” or “100 percent organic” (as defined in part 205 of title 7, Code of Federal Regulations (or a successor regulation)). Should this proposed rule become final, pursuant to section 10004 of the 2014 Farm Bill, the regulatory language currently exempting organic commodities from assessment by generic commodity promotion programs created under the various commodity promotion laws (7 U.S.C. 7401(e)) shall no longer be in effect. Such commodities would then become “dual-covered commodities”, and persons producing, handling and importing them would need to elect to pay assessments to the commodity-specific program, or the organic commodity promotion program. For example, an organic blueberry producer that is currently exempt under the Blueberry Research and Promotion Order may no longer be exempt upon finalization of an organic research and promotion order. If a blueberry producer would be subject

to assessment under both the Blueberry Promotion, Research, and Information Order and the proposed organic Order, they would need to select which program to pay their assessments into and submit the required forms to effectuate that election. AMS provides several scenarios for how the “dual-covered commodities” provision would work in the “Expenses and Assessments” section of this proposed rule and requests public comments on this issue.

The Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 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; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the 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. An order also may 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.

This proposed rule also announces AMS’s intent to request approval by the OMB of new information collection requirements to implement the program.

## B. Overview of Proposal

The 2014 Farm Bill amended the Act to allow the organic industry to submit a proposal for an organic R&P program. As the membership-based business association for the organic industry in North America, the OTA took on the role as a proponent group in the development of an organic R&P program proposal. OTA represents businesses across the organic supply chain and addresses all things organic, including food, fiber/textiles, personal care products, and new sectors as they develop. To develop the proposal, OTA established and collaborated with the 7-member GRO Organic Core Committee. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee. It included OTA subcommittee chairs and other industry leaders who built on the outreach and input from the larger committee to guide the development of a proposed Order.

Following the signing of the Farm Bill in February 2014, AMS met with OTA and other industry stakeholders, where they were informed that AMS works with program proponents once an industry proposal is submitted, and that implementing a program takes approximately 24-36 months from the time a final proposal is submitted to AMS for review. Of note, AMS also shared that the timing for promulgation of an order depends mostly on industry support, the number of comments received, and whether the proposal becomes controversial.

On May 15, 2015, OTA submitted a formal proposal for an organic R&P program to AMS. In its petition for a proposed organic R&P program, OTA outlined its outreach to the industry to garner whether there was support for the program. OTA stated that it, among other things, facilitated six webinars, six panel debates and twenty town hall meetings across the country between 2012 and 2013. OTA said that it continued through 2014 and 2015 with its outreach through participation in gatherings of the organic industry such as the Western Organic

Dairy Producers Alliance Conference in California, the Minnesota Department of Agriculture Organic Conference, and the Pennsylvania Farmers Union Annual Convention, staffing booths and participating in panels at these events. OTA also sent direct mailings to over 17,000 organic operations with information regarding a proposed organic R&P program in May and June of 2014, with a follow up mailing to over 11,000 organic operations in August 2014 based on feedback from the first mailing. OTA also conducted phone surveys of over 3,700 organic operations in 2014. According to OTA, of those who responded to these surveys, twice as many certified organic operations supported the establishment of an organic R&P program as opposed the establishment of such a program. The proponent estimates that the completed surveys constitute a statistically representative sample with 11 percent of crop certificate holders, 13 percent of livestock certificate holders, and 8 percent of handling certificate holders completing the survey. The proponent group did not specify if any of these certificate holders were importers. AMS requests comments from importers conveying their views on this proposal.

While OTA's advocacy for an R&P program for organic products has garnered many supporters in the organic community, AMS has also heard from some farmers and farm organizations expressing opposition. In the interest of correctly gauging the level and specific topics of support and opposition, AMS issued an announcement inviting the public to submit alternative proposals or partial proposals on May 18, 2015. AMS allowed 60 days for submissions and received eight partial proposals. Since this time, AMS has maintained communication with OTA as the agency evaluated the proposal and researched how to propose such a new and complex order in a manner that is both equitable and functionally sound.

On April 1, 2016, AMS issued a Notice to Trade announcing a new procedure of posting all proposals for new R&P programs on the AMS website, with the first proposal being OTA's

proposed organic R&P program.<sup>4</sup> The eight partial proposals were also made publicly available.<sup>5</sup> On May 3, 2016, OTA submitted a letter to the AMS Administrator to formally amend its proposal to include some stakeholder feedback and language from the partial proposals. OTA submitted an amended proposal along with its letter.<sup>6</sup> In its amended proposal, OTA revised its proposed definition of “research” to ensure it included agronomic and other production oriented research. The proponents also revised its proposed allocation of expenditures to ensure the majority of funds for research would go to agricultural research and the majority of funds for information would go to producer information. In its revision, OTA clarified that regional organic producer Board members establish the priorities, including regional considerations, for investments in agricultural research. Finally, OTA made a number of technical edits such as staggering Board terms.

Based on the information provided to date, AMS is publishing this proposed rule to invite comments on a proposed industry-funded research, promotion and information program for organic agricultural commodities. The program would cover the range of organic products that are certified and sold per the OFPA and its implementing regulations as well as organic products imported into the U.S. under an organic equivalency arrangement. Based on OTA’s proposal, organic products would include both food items (e.g. fruits, vegetables, dairy, meat, poultry,

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<sup>4</sup> OTA’s May 15, 2015 proposal is available on the AMS website at:

[https://www.ams.usda.gov/sites/default/files/media/OTAOrganicCheckoffApplicationUSDA\\_Combined.pdf](https://www.ams.usda.gov/sites/default/files/media/OTAOrganicCheckoffApplicationUSDA_Combined.pdf)

<sup>5</sup> The eight partial proposals submitted are available on the AMS website at: <https://www.ams.usda.gov/rules-regulations/research-promotion/proposals/organic>. The following organizations submitted partial proposals: Food & Water Watch (FWW), the Food & Water Watch (FWW), the Midwest Organic & Sustainable Education Service (MOSES), the National Farmers Union (NFU), the Northeast Organic Dairy Producers Alliance (NODPA), the Northeast Organic Farming Association (NOFA), the Ohio Ecological Food & Farming Association (OEFFA), the Organic Farmers’ Agency for Relationship Marketing (OFARM), and the Western Organic Dairy Producers Alliance (WODPA).

<sup>6</sup> OTA’s May 2016 amended proposal is available on the AMS website at:

<https://www.ams.usda.gov/sites/default/files/media/Revised%20Organic%20OTA%20Proposal%20Bundle%2005%2002%2016.pdf>

bread, grains, snack foods, condiments, beverages, and packaged and prepared foods)<sup>7</sup>, and non-food items (fiber (linen and clothing), supplements, personal care products, pet food, household products, and flowers). While the USDA organic regulations do not detail standards specific to non-food items, items that are agricultural products (e.g., pet food) and that meet the certification requirements of the USDA organic regulations can be certified and labeled “organic”, irrespective of the end use of the product.<sup>8</sup> AMS seeks comments about the inclusion of non-food items in the proposed Order and any data that could support AMS analysis of the impacts and implementation of a program on the non-food organic sector.

The program would be financed by an assessment on domestic producers, handlers and importers of organic products and would be administered by a board of industry members nominated by organic stakeholders and selected by the Secretary. The initial assessment rate would be one tenth of one percent of net organic sales for producers and handlers with gross annual organic sales greater than \$250,000, and one tenth of one percent of the declared transaction value of organic products imported into the United States for importers of organic products declaring a transaction value greater than \$250,000 for the previous marketing year. While the program would provide for an exemption for (a) producers and handlers with gross organic sales of \$250,000 or less for the previous marketing year, and (b) importers with \$250,000 or less in transaction value of imported organic products during the prior marketing year, it would also allow for such entities to voluntarily participate in the program by committing to pay assessments for the majority of years until the next referendum. While the proponent

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<sup>7</sup> Of note, the USDA organic regulations at 7 CFR part 205 do not currently provide for organic certification of fish. Only upon issuance of a final rule on organic certification of fish would these commodities be subject to assessment under this proposed Order.

<sup>8</sup> In August 2005, the NOP issued a Policy Memorandum 11-2 to certifying agents, stating that agricultural products which meet the NOP certification standards can be certified and labeled “organic,” irrespective of the end use of the product. Policy Memo 11-2 is available on the AMS website in the NOP Handbook at: <http://www.ams.usda.gov/rules-regulations/organic/handbook>.

indicated a preference for mandating voluntarily assessed entities' participation for the seven years following the initial referendum, AMS has modified this period to a majority of years for the purpose of consistency with subsequent referenda. Exports from the United States would also be exempt from assessments. The purpose of this program would be to: (1) develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintain and expand existing markets for organic commodities.

A referendum would be held among eligible domestic producers, handlers and importers to determine whether they favor implementation of the program prior to it going into effect.

### C. Industry Background

#### The Organic Marketplace

Organic foods and non-food items started out as a niche market primarily sold in direct-to-consumer markets. Double-digit annual growth in consumer demand in most years since the 1990s have allowed organic products to expand from direct-to-consumer markets and specialty food stores to conventional supermarkets.<sup>9</sup> In the following paragraphs, AMS used multiple data sources to describe the domestic production, imports, and export markets for organic products used to build the baseline and quantitative estimates for this proposed rule. Much of AMS' analysis for this rule focuses on organic production, which produces raw agricultural commodities, livestock feed, and ingredients for food and non-food items (e.g., organic grains could be used for flour, for animal feed, or for pet food). Further, food items are covered in greater detail as they comprise the majority of the organic market and data on non-food items is

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<sup>9</sup> Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified April 07, 2014), see *Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture.aspx>.

more limited. AMS invites comments on the justification and limitations associated with each data source provided and any additional information on the non-food organic sector.

OTA’s 2016 Organic Industry Survey was used as a data source in several sections of this proposed rule owing to its focus on summarizing market information and trends within the organic industry across both food and non-food sectors. The Nutrition Business Journal conducts this survey on behalf of OTA. Data from the 2016 Organic Industry Survey (Table 1) shows that total organic food and non-food sales in the U.S. tripled from 2005 to 2015.

Table 1: U.S. organic sales (\$1,000,000)											
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Food	13,260	15,629	18,188	21,571	22,497	24,123	26,336	29,023	32,335	35,952	39,754
Non-food	745	938	1,182	1,649	1,800	1,974	2,195	2,455	2,770	3,152	3,555
Total	14,005	16,567	19,370	23,220	24,297	26,097	28,531	31,478	35,105	39,104	43,309
Growth (percent)											
Food	19%	18%	16%	19%	4%	7%	9%	10%	11%	11%	11%
Non-food	33%	26%	26%	40%	9%	10%	11%	12%	13%	14%	13%
Total	20%	18%	17%	20%	5%	7%	9%	10%	12%	11%	11%

Source: OTA 2016 Organic Industry Survey, conducted 1/7/2016-3/25/2016

Also shown in Table 1, sales of organic non-food items in 2015 were nearly five times what they were in 2005. Between 2005 and 2015, organic sales increased most significantly from 2005 to 2008. Non-food sales had its highest point in 2008 at 40 percent growth from the previous year. In 2009, growth of organic non-food sales fell to 9 percent, and leveled off to between 10 and 14 percent in 2010 to 2015. Similarly, food sales hit a high point in 2008 at 19 percent growth before falling to 4 percent in 2009. Between 2010 and 2015, organic food sales experienced growth of 7 to 11 percent in each year.

Sales of all food, organic and conventional, as shown in Table 2, has increased between 3 and 5 percent in each of the last five years. In 2005, about 2 percent of total food sales was organic; in 2015, organic food made up about 5 percent of total food sales. On average, organic food sales make up about 93 percent of total organic sales.

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Organic food	13,260	15,629	18,188	21,571	22,497	24,123	26,336	29,023	32,335	35,952	39,754
Total food	566,791	598,136	628,219	659,012	669,556	677,354	713,985	740,450	760,486	787,575	807,998
Growth (percent)											
Organic food	19%	18%	16%	19%	4%	7%	9%	10%	11%	11%	11%
Total food	4%	6%	5%	5%	2%	1%	5%	4%	3%	4%	3%

Source: OTA 2016 Organic Industry Survey, conducted 1/7/2016-3/25/2016

Organic foods continue to receive a price premium over their conventional counterparts, though the price premium fluctuates significantly depending upon the commodity. Organic produce and milk receive some of the highest price premiums over their conventional counterparts. These categories are also the top organic food sales categories.<sup>10</sup> For the majority of organic produce, the price premium represents less than a 30 percent price differential. Milk, on the other hand, has been documented receiving a price premium anywhere from 60 to 109 percent.<sup>11</sup>

Studies show that the vast majority of American consumers purchase organic food products, with a 2014 Consumer Reports survey showing that 84 percent of American consumers purchase organic food. The frequency at which they purchase organic food products, however, varies significantly. Of those surveyed, 18 percent purchase organic food every week. Another 18 percent purchase organic food two to three times a month, while 9 percent said they purchase organic food once a month. Thirty-nine percent said they purchased organic food rarely and 15 percent said they never purchase organic food. One percent said they did not know or were unsure. Almost half of the 84 percent who buy organic foods, do so rarely.<sup>12</sup> A study conducted by OTA and KIWI magazine from 2009 to 2015 on U.S. parent consumer attitudes and beliefs

<sup>10</sup> Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified April 07, 2014), see *Organic Market Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx>.

<sup>11</sup> Ibid.

<sup>12</sup> National Research Center, *Organic Food Labels Survey*, Consumer Reports (March 2014), p. 3, available at <http://www.greenerchoices.org/pdf/CR2014OrganicFoodLabelsSurvey.pdf>.

showed that 83 percent of parents say they have purchased organic products, and 40 percent of parents are “making a great deal of effort” to choose organic foods and products.<sup>13</sup>

Domestic Producers and Production

AMS also utilized information from the National Agricultural Statistics Service (NASS) 2014 Organic Production Survey.<sup>14</sup> In this survey, NASS reports acreage, production and sales data for organic crops and livestock for the 2014 production year. While NASS data from the 2015 production year became available on September 15, 2016, AMS has primarily used data sources for 2014 to produce a conservative estimate of the quantity of assessments that would be collected from covered entities through this proposed program. Given the increase in organic acreage, sales and value of organic products in 2015, the quantity of assessments is likely higher than our conservative estimate.<sup>15</sup> A high-level comparison of 2014 and 2015 survey data is provided in Table 3.

Table 3: Value of sales of certified organically produced commodities			
	2014	2015	% Growth
Crops, including nursery and greenhouse	\$ 3,290,188,000	\$ 3,509,632,000	7%
Livestock, poultry and their products	\$ 2,164,792,000	\$ 2,653,840,000	23%
Total value of agricultural products sold	\$ 5,454,979,000	\$ 6,163,472,000	13%
Source: NASS 2014 Organic Survey and NASS 2015 Certified Organic Survey			

Prior to NASS’s 2014 Organic Survey, USDA's Economic Research Service (ERS) collected information on U.S. organic production. Through analysis of USDA’s Agricultural Resource Management Survey (ARMS) data, ERS continues to compare the costs of production and returns for organic and conventional production in major crop/livestock sectors, and analyzes other economic characteristics of organic agriculture. Accordingly, this proposed rule

<sup>13</sup> Organic Trade Association, *2015 U.S. Families’ Organic Attitudes and Beliefs – 2015 Tracking Study* (March 2015), available at <https://ota.com/resources/consumer-attitudes-and-beliefs-study>

<sup>14</sup> National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>

<sup>15</sup> This is also true with regard to with regard to AMS’s analysis on imports.

references both NASS and ERS data on organic production where appropriate.

According to the NASS 2014 Organic Survey, there are 14,093 USDA-certified organic and exempt operations in the U.S. Exempt operations are those with annual sales of less than \$5,000, which are not certified, but may use the term “organic” to market their products. Exempt operations are prohibited from using the “USDA Organic” seal. The total of certified organic producers in the U.S. amounts to 12,634 farms, with the remaining 1,459 operations exempt from certification.

Across the U.S., California has the greatest number of certified organic producers with 2,632 farms, 21 percent of the total U.S. population of certified organic producers. The next greatest is Wisconsin at 9 percent, followed by New York at 7 percent. The states of Iowa, Pennsylvania, and Washington each had 5 percent of total U.S. certified organic producers while Maine, Minnesota, Ohio, Oregon, and Vermont each have 4 percent. The following states have between 1 and 2 percent of total U.S. certified organic producers: Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, South Dakota, Texas, Utah and Virginia. The remaining 15 of 50 states have less than 1 percent of total U.S. certified organic producers.

Because the proposed rule aims to cover all organic commodities, there are a variety of units of measurement that cannot be compared as they stand. For example, the unit of measurement for cotton is the U.S. Gin Universal Density Bale (bale), which is equal to 500 lbs. of lint cotton, while the unit of measurement for dairy products is the hundredweight (cwt). In an effort to address the Act requirement to quantify the geographical distribution of organic production in the United States, AMS used the 1992 ERS publication “Weights, Measures, and

Conversion Factors for Agricultural Commodities and Their Products” to convert all data from the 2014 NASS Organic Production Survey into the measurement unit of pounds. While conversion factors for many commodities can change from year to year, this is the most up-to-date publication by ERS with regard to conversion factors. The conversion factors for poultry and cattle, according to ERS, are as follows:

- 1 dozen eggs = 1.6 pounds
- 1 head of chicken = 4.3 pounds
- 1 head of turkey = 20.56 pounds
- 1 head of cattle = 1,091 pounds

Using production data converted into a single, comparable unit, AMS has prepared an analysis of different aspects of the composition of organic industry production in the U.S. in 2014. Starting with Table 4, AMS estimated the makeup of the U.S. organic industry by production volume on a per pound basis.

Table 4: U.S. Certified organic production by agricultural commodity category					
	Fruits	Vegetables	Field Crops	Dairy	Poultry
U.S.	7%	13%	47%	30%	2%
Source: NASS 2014 Organic Survey; units of measure converted lbs. by AMS using ERS conversion factors					

In terms of organic production volume in the U.S., field crops is largest with 47 percent of total volume, followed by dairy at 30 percent, vegetables at 13 percent, fruits at 7 percent, and poultry at 2 percent. Organic production of beef cattle, nuts and turkey makes up the remaining 1 percent of total organic production volume.

Figure 1. Certified Organic Production by State, 2014

# Certified Organic Production by State, 2014

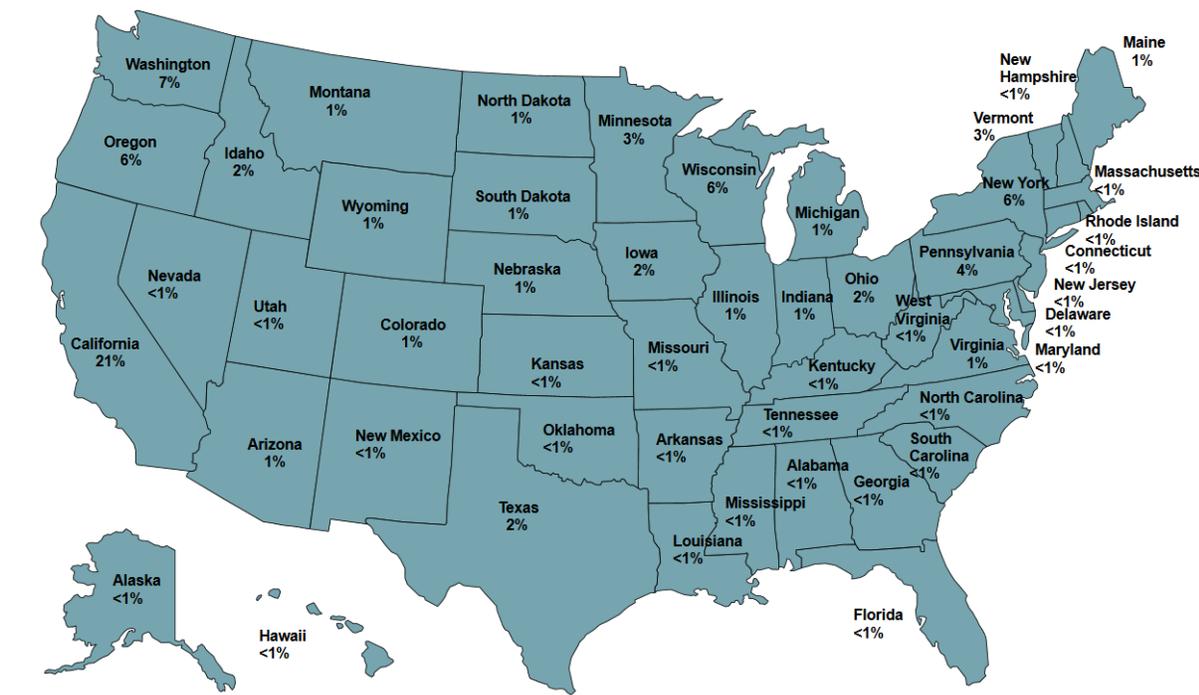


Figure 1 above shows the distribution of organic production by volume across the U.S. Of total organic production across the U.S., California accounts for 21 percent. Based on NASS 2014 Organic Survey data, California produces the majority of the volume in most agricultural commodities. In descending order, California produced the following portion of organic agricultural commodities across the U.S.: 63 percent of nuts, 57 percent of vegetables, 50 percent of poultry (excluding eggs), 27 percent of fruit, 23 percent of dairy products, 23 percent of beef cattle, and 10 percent of field crops.

After California, Washington State is the next largest producer of organic commodities in the U.S. with 7 percent of total volume. The majority of Washington’s production is in fruit, with 64 percent of the total organic non-citrus fruit production volume in the U.S. Florida’s citrus industry accounts for 2 percent of all organic fruit production and 16 percent of U.S. organic citrus production. Washington also accounts for 12 percent of egg production, 6 percent

production of vegetables, 5 percent of beef cattle, 3 percent of dairy products, and 1 percent of field crops.

New York, Oregon, and Wisconsin each produce 6 percent of total organic volume in the U.S. Second only to California, Oregon produces 8 percent of organic vegetables. After California, New York and Oregon have the highest production of dairy products at 9 percent of total production each. New York and Oregon also produce 7 and 6 percent, respectively, of organic field crops. Wisconsin follows California in field crop production at 9 percent and in beef cattle at 3 percent. Wisconsin also produces 5 percent of organic dairy products, behind Pennsylvania at 6 percent and California.

In summary, production of organic agriculture in the U.S. is primarily concentrated in five states: California with 21 percent; Washington with 7 percent; and New York, Oregon, and Wisconsin with 6 percent total organic production each. In addition to these five top-producing states, 19 states produced between 1 and 5 percent of total production. The remaining 26 states produced less than 1 percent of total certified organic production in the U.S. The total sum of production data at the state level does not equal total production as reported for the entire U.S. Rather, production data reported by state in each of the categories discussed previously makes up 80 percent of total production data as reported at the national level. The reason for this limitation is the withholding of data by state by NASS for proprietary reasons. The 20 percent absent data represent information that if disclosed by NASS would violate the anonymity of some of its survey respondents in their given states. This 20 percent absent data is mainly attributable to three commodities: eggs, poultry, and cattle/beef, which amounts to less than 2.1% of total production. The missing 20 percent, however, would not likely alter the portions of production by state as they relate to each other as there are production values missing for 49 out of the 50

states. As discussed in §§ 1255.40 through 1255.47 of the proposed Order, which details the establishment and membership of the proposed Organic Research and Promotion Board, adding 2% of production to any of the proposed production regions would not alter the distribution of board seats. We invite comments on the determination that the 20 percent absent data would not be so significant as to modify the distribution of Board membership by production region.

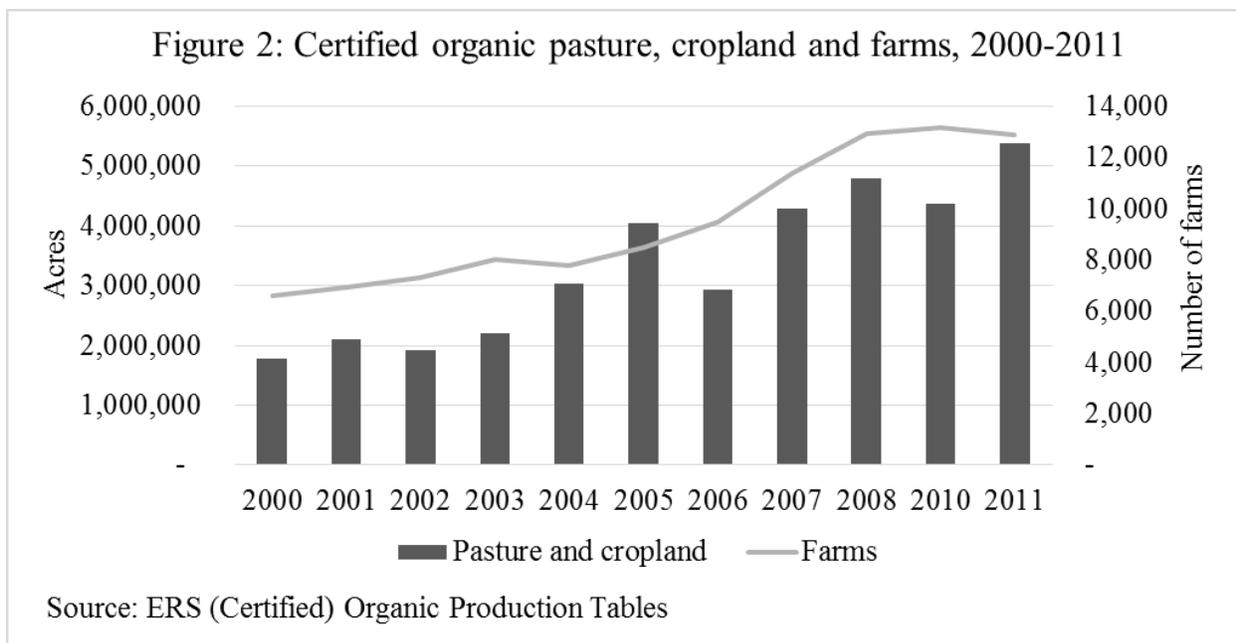
#### Domestic Acreage

The U.S. had less than 1 million acres of certified organic farmland in 1990. This number doubled between 1990 and 2002, and doubled again between 2002 and 2005. Figure 2 below shows combined certified organic pasture and cropland and farm operations for 2000 to 2011, using data from ERS.<sup>16</sup> No data exists for 2009. Between 2005 and 2011, the amount of organic pasture and rangeland fluctuated, but certified organic cropland expanded by close to 80 percent. The organic livestock sector experienced even faster growth during the same time period. In 2011, there were roughly 5.4 million acres of certified organic farmland – with 3.1 million acres of cropland and 2.3 million acres of rangeland/pasture.<sup>17</sup> Despite the growth in certified organic farmland over the last decade, certified organic farmland remains below one percent of the total farmland acreage in the U.S.

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<sup>16</sup> Catherine Greene, *Organic Production*, Economic Research Service, U.S. Department of Agriculture, see Table 4. Certified organic producers, pasture, and cropland.

<sup>17</sup> Catherine Greene, *Organic Production*, Economic Research Service, U.S. Department of Agriculture (last modified September 27, 2013), see Documentation, available at <http://ers.usda.gov/data-products/organic-production/documentation.aspx>.



Organic acreage data from ERS stops at 2011. NASS released its first report on organic production with certified operations segregated from exempt operations in 2011. Data from ERS and NASS overlap in 2011 only. According to NASS, 2011 certified organic acreage totaled about 3.65 million acres, which included 2.03 million acres of cropland and 1.62 million acres of pasture and rangeland.<sup>18</sup> In 2014, total certified organic acres operated was 3.64 million acres, a slight decrease from three years prior.<sup>19</sup> As referenced earlier, data recently released by NASS in September 2015 shows a trend toward increased organic acreage (e.g., from 3.64 million acres in 2014 to 4.36 million acres in 2015).

The number of U.S. farms with acres in operation for certified organic production, however, increased 38 percent from 9,140 farms in 2011 to 12,595 farms in 2014. The amount of land transitioning to organic in 2014 was 122,175 acres on 1,365 farms, down from 2008 at

<sup>18</sup> National Agricultural Statistics Service, *2011 Certified Organic Production Survey*, U.S. Department of Agriculture (October 2012), p. 7, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-10-04-2012.pdf>.

<sup>19</sup> National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>; of note, NASS data only accounts for acres harvested, not acres under organic certification, which may cause organic acreage as reported in the survey to be underrepresented.

194,384 acres on 1,938 farms.<sup>20,21</sup> Land transitioning to organic was not reported by NASS in 2011.

Organic production has grown not only when measured in terms of acreage, but also when measured by the number of certified organic operations. When USDA first started certifying organic operations under the USDA organic regulations, which provided the authority for the National Organic Program (NOP), there were just over 7,000 certified organic operations. NASS reported 2011 total sales of organic products at more than \$3.5 billion.<sup>22</sup> In 2014, total certified organic sales were nearly \$5.5 billion, up 54 percent from three years previously.<sup>23</sup> It should be noted that sales as reported by NASS represent sales by producers or farmers only. The figures aforementioned do not encompass sales by handlers, manufacturers, or retailers.

#### Geographic Distribution of U.S. Certified Operations

One of the limitations of the NASS 2014 survey is that it does not include all certified organic handlers. Thus, a list of certified organic producers and handlers was obtained from the “2014 Annual Count of USDA-NOP Certified Organic Operations” report from the Organic Integrity Database managed by NOP.<sup>24</sup> The 2014 data show a total U.S. certified organic operations (producers and handlers) at 19,465 entities, up 5 percent from 2013. As Figure 3 shows, the majority of certified operations are in California with more than 4,000 entities, or 21 percent of the U.S. total. Wisconsin had more than 1,500 certified operations or 8 percent of the

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<sup>20</sup> National Agricultural Statistics Service, *2008 Organic Survey*, U.S. Department of Agriculture, p. 1, available at [https://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Organics/organics\\_1\\_01.pdf](https://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Organics/organics_1_01.pdf)

<sup>21</sup> There is a three year transition period to convert conventional farmland into organic farmland. During the transition period, the farm must adhere to all organic practices, but it is not allowed to use the organic seal on products grown on that land during transition.

<sup>22</sup> National Agricultural Statistics Service, *2011 Certified Organic Production Survey*, U.S. Department of Agriculture (October 2012), p. 7, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-10-04-2012.pdf>.

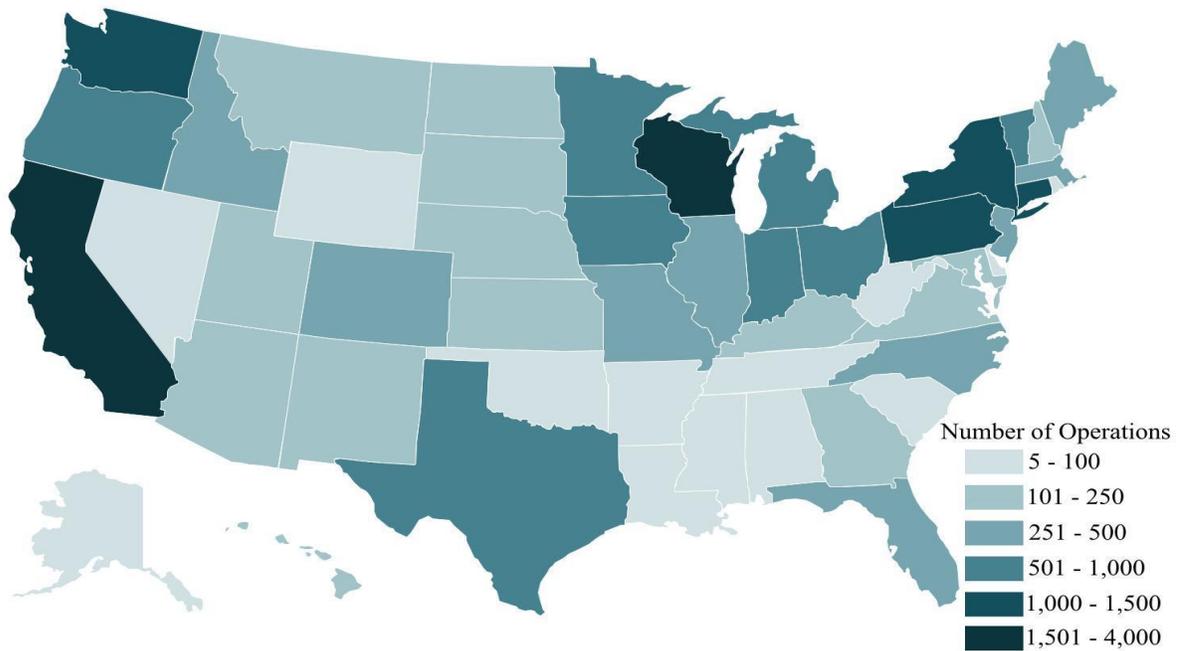
<sup>23</sup> National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 10, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>

<sup>24</sup> NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/Integrity/Reports/Reports.aspx>

total. New York and Washington each had 6 percent of total U.S. certified operations with more than 1,000 entities apiece.

Figure 3. U.S. Certified Operations, 2014

## Certified Organic Operations by State, 2014



### International Markets

Products produced in foreign countries can also be USDA certified organic under the USDA organic regulations and imported into the U.S. In addition, products produced in foreign countries can be certified to a foreign standard and imported into the U.S. under an organic equivalency arrangement. Given that importers would be assessed under a proposed organic R&P program, a baseline understanding of the international market for organic products is valuable.

The Foreign Agricultural Service (FAS) reports on imports and exports of agricultural commodities flowing into and out of the U.S. Specific trade data is available by FAS through its Global Agricultural Trade System (GATS).<sup>25</sup> Trade data for over 30 selected organic commodities show that U.S. organic exports measured more than \$553 million in value, while imports were about \$1.2 billion in value in 2014. The majority of U.S. organic exports go to Canada and Mexico at 48 percent and 30 percent, respectively, but the U.S. also exports organic products to over 80 countries. Exports of organic products to Canada amounted to more than \$265 million in 2014, while organic exports to Mexico totaled nearly \$166 million in value. The top exports of organic agricultural products in 2014 were fresh apples, lettuce, and grapes at 21 percent, 13 percent, and 12 percent, respectively.

A key point of distinction between importers and organic producers and handlers is that under the regulations at 7 CFR part 205, a person that only sells, transports, stores, receives, or acquires products that are received in and remain in a container without being processed is “excluded” from certification (i.e., does not need to be certified). This means that, in many cases, an importer who is only acquiring products to then sell in the U.S. in an existing container (e.g., functioning as a broker) are not themselves certified. Such entities would not appear in NOP’s database of certified operations and can only be captured through other data sources (e.g., through the U.S. Customs and Border Protection (CBP) database). According to data from CBP, there were more than 2,135 importers of organic products with codes in the Harmonized Tariff Schedule (HTS) in 2014. As reported by the U.S. Department of Commerce, Census Bureau, Foreign Trade Statistics data, organic products in the GATS database represent over \$1.2 billion in imports for 2014. More generally, USDA reports that all agricultural imports were valued at

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<sup>25</sup> Report to the Organic Trade Association – Preliminary Analysis of USDA’s Organic Trade Data: 2011 to 2014. Edward C. Jaenicke, Iryna Demko, April 2015  
[http://ota.com/sites/default/files/indexed\\_files/OTAJaenickeMay2015\\_TradeDataReport.pdf](http://ota.com/sites/default/files/indexed_files/OTAJaenickeMay2015_TradeDataReport.pdf)

\$111.7 billion in 2014. Organic coffee, soybeans, bananas, and olive oil were the top organic imports.<sup>26</sup> It is important to note that due to the limited number of established HTS codes for organic products, the organic export and import figures do not capture all international trade for organic products.

AMS acknowledges that the limited organic trade data indicates that the number of importers of organic products is underreported. For this reason, AMS is requesting comments on how to obtain information on these importers for the purposes of this program.

#### D. Need for a Program

In the following paragraphs, AMS summarizes three lines of reasoning OTA provided as evidence of the need for the establishment of a national organic research and promotion program. OTA's justification includes 1) domestic supply shortages of organic products, particularly feed and ingredients; 2) the need for viable pest management in organic production; and 3) market confusion.

#### Domestic Supply Shortages

Today, 93 percent of organic sales take place in conventional and natural food supermarkets and chains.<sup>27</sup> Organic foods are currently available in three out of four traditional grocery stores and about 20,000 natural food stores across the U.S.<sup>28</sup> The remaining 7 percent of organic food sales occur in farmers' markets, foodservice, and marketing channels other than retail stores. The dramatic increase in conventional store participation in organic sales is not due to any decrease of direct-to-consumer markets. Farmers' markets, to the contrary, have grown

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<sup>26</sup> Foreign Agricultural Service. Global Agricultural Trade System (GATS) database. U.S. Department of Agriculture. Available at <http://www.fas.usda.gov/gats>.

<sup>27</sup> Catherine Greene, *Organic Agriculture*, Economic Research Service, USDA (last modified April 07, 2014), see *Organic Market Overview*, available at <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx>.

<sup>28</sup> Ibid.

steadily from 1,755 markets in 1994 to 8,144 in 2013.<sup>29</sup> According to a USDA survey, farmers' market managers believed that more organic farmers were needed to meet consumer demand.<sup>30</sup> According to a 2004 ERS report, "44 percent of organic handlers reported short supplies of needed ingredients or products" and "13 percent were unable to meet market demand for at least one of their organic products that year."<sup>31</sup> In addition, 52 percent of organic companies said that "a lack of dependable supply of organic raw materials has restricted their company from generating more sales of organic products." In a nutshell, overcoming the challenge of meeting the demand for U.S. organic supply requires an increase in: (a) certified organic farmers, (b) organic acreage, and (c) viable pest management options.

U.S. producers have been challenged to keep pace with growing consumer demand for organic products for over a decade, and new statistics from the U.S. Department of Commerce show that organic imports play a key role in meeting U.S. demand. Among all organic product imports, soybeans showed the biggest jump in value from 2011 to 2012, more than doubling to \$90.2 million, and imports of organic rice, wheat, and other U.S. staple crops also grew.<sup>32</sup> There has also been increasing news coverage of the organic supply shortage. In 2014, demand for organic eggs was up, but there were not enough U.S. farmers growing organic soybeans and organic corn to feed the organic chickens. As a result, organic egg producers cut back on production or bought foreign organic feed as reported by *NPR*.<sup>33</sup> *Bloomberg* recently wrote about

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Catherine Green, Carolyn Dimitri, Biing-Hwan Lin, William McBride, Lydia Oberholtzer, and Travis Smith, *Emerging Issues in the U.S. Organic Industry*, Economic Research Service, USDA (June 2009) available at [https://www.ers.usda.gov/webdocs/publications/eib55/17257\\_eib55fm\\_1\\_.pdf](https://www.ers.usda.gov/webdocs/publications/eib55/17257_eib55fm_1_.pdf)

<sup>32</sup> Catherine Greene, *Growth Patterns in the U.S. Organic Industry*, *Amber Waves*, (October 24, 2013), available at <http://www.ers.usda.gov/amber-waves/2013-october/growth-patterns-in-the-us-organic-industry.aspx#.V8WgVTWJVQ>

<sup>33</sup> Dan Charles, *Chickens That Lay Organic Eggs Eat Imported Food, and It's Pricey*, *NPR* (February 27, 2014), available at <http://www.npr.org/blogs/thesalt/2014/02/26/283112526/chickens-laying-organic-eggs-eat-imported-food-and-its-pricey>.

the lack of organic farmers and low supplies of organic feed grain that is restraining organic dairy production across the U.S. and causing “severe shortages in the organic dairy aisle.”<sup>34</sup> Despite potentially higher returns, a 2015 ERS study stated that: “the adoption of organic field crop production has been slow and is challenging due to such factors as achieving effective weed control and the processes involved with organic certification.”<sup>35</sup>

There is a three-year transition period to convert conventional farmland into organic farmland. During the transition period, the farm must adhere to all organic practices, but it is not allowed to market, sell, use the organic seal, or otherwise represent as organic products grown on that land during transition. While there are several USDA programs (e.g. Environmental Quality Incentives Program (EQIP), National Institute of Food and Agriculture (NIFA), and Natural Resources Conservation Service (NRCS)) that are designed to assist farms in the transition process, this three-year period can be difficult. During this time, the farm internalizes the increased production costs of an organic farm without receiving the price premium and, depending on the size and existing practices of the farm, may need to make dramatic changes to farming techniques. The proponent OTA stated its belief that a national industry-funded program could aim at increasing organic acreage by funding farmer education programs on organic certification, organic labeling, and organic farming techniques to help encourage farmers to transition to organic and help them during the transitional period.

### *Viable Pest Management*

Organic and conventional farmers face similar challenges in finding the right combination of tools to help protect their products from pests. Just as in conventional farming,

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<sup>34</sup> Lydia Mulvany, *Grocery Stores Are Running Out of Organic Milk*, Bloomberg Business (February 9, 2015), available at <http://www.bloomberg.com/news/articles/2015-02-10/not-only-hipsters-cry-when-u-s-grocers-run-out-of-organic-milk>.

<sup>35</sup> <http://www.ers.usda.gov/media/1875181/err188.pdf> William McBride, Catherine Greene. The Profit Potential of Certified Organic Field Crop Production, Economic Research Service, USDA (June 2009) available at

organic farming faces very real and imminent threats from invasive species and other types of pests. There was a supply shortage of organic apples across the U.S. in April 2014 due to insect problems and some acreage reduction.<sup>36</sup> Organic farmers are restricted to the pest management substances that are approved in the National List of Allowed and Prohibited Substances (National List), which includes limited approved pest management strategies.

The National Organic Standards Board (NOSB), a Federal Advisory Committee Act (FACA) Committee, makes recommendations for amendments to the National List (List). Under the Sunset Provision of the OFPA, a substance must be reviewed by the NOSB within five years of its addition to the National List or its last sunset review, and renewed by the Secretary, or the substance will sunset. The NOSB also reviews petitions from individuals and organizations to add, remove, or change a listed substance and makes recommendations based on those petitions to the USDA twice a year.<sup>37</sup> The List has been amended several times since it went into effect in 2002. Several synthetic substances that were once allowed on the National List are now prohibited. With the removal of certain substances, organic farmers must reevaluate how to manage particular pests with what remains available to them.

The transition of organic apples and pears from antibiotic to non-antibiotic fire blight management tools is one example of changing pest management strategies that the proponent has said the proposed Order could help organic producers develop. Antibiotic fire blight management tools were phased out of organic production in late 2014. There are a number of completed and ongoing studies on non-antibiotic fire blight management tools with approved substances, but the time lag between when results are released and when they can be translated

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<sup>36</sup> Dan Wheat, *Organic Apples May Run Out Sooner Than Usual*, Capital Press (April 8, 2014), available at <http://www.capitalpress.com/Organic/20140408/organic-apples-may-run-out-sooner-than-usual>.

<sup>37</sup> National Organic Program, *About the National List*, Agricultural Marketing Service, USDA (last modified on February 24, 2015), available at <http://www.ams.usda.gov/AMSV1.0/NOPPetitionedSubstancesDatabase>.

into actual farming practices can leave organic farmers unprotected against some very serious pests.<sup>38</sup> Additional funding for research (via an R&P program) could help farmers during these gaps, and could anticipate changes to the List so that alternative farming techniques can already be in place when a substance is phased out.

The proposed program could also direct additional research dollars towards pest management. Such funds could provide for on-farm research devoted to helping organic farmers develop practices and techniques for current and future pest management issues, such as citrus greening disease. There is currently no strategy, either conventional or organic, that has proven to be 100 percent effective at treating or preventing the spread of citrus greening disease. Organic citrus producers need viable alternatives to the non-National List materials currently being used to treat citrus greening disease and other pest issues.

### Market Confusion

The proponent group states that market confusion is another concern that could be addressed through R&P activities (e.g., consumer information). OTA cited a Consumer Reports survey to show that, while 84 percent of U.S. consumers buy organic foods sometimes, and 45 percent buy them at least once a month, there is a disparity in the marketplace between what the seal means and what consumers think it means.<sup>39</sup> OTA points to a Natural Marketing Institute report that states most consumers are: (a) unaware of the characteristics or regulations of organic products, (b) are unclear about the benefits, or (c) easily confuse it with the term “natural”.<sup>40</sup> In its proposal, the proponent emphasizes that the number of labels and labeling claims in the

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<sup>38</sup> Harold Ostenson and David Granatstein, *Critical Issue Report: Fire Blight Control Programs in Organic Fruit*, The Organic Center (November 2013), see page 4.

<sup>39</sup> National Research Center, *Organic Food Labels Survey*, Consumer Reports (March 2014), p. 3, available at <http://www.greenerchoices.org/pdf/CR2014OrganicFoodLabelsSurvey.pdf>.

<sup>40</sup> Natural Marketing Institute, *2015 Growing the Organic Industry, Strategies for Brand Success* (February 2015), available at <http://www.nmisolutions.com/index.php/research-reports/health-a-wellness-reports/2015-growing-the-organic-industry-strategies-for-brand-success>.

market today contributes to consumer confusion. OTA identifies consumer confusion as the basis for the development of a federal organic law in 1990 and states that there is an ever increasing number of regulated and non-regulated labels that may be used on packaging (e.g. natural, local, non-GMO, etc.).

As one example, OTA cites recent research on U.S. and Canadian consumers showing that 17 percent of the people surveyed incorrectly believed that foods labelled “organic” were also locally grown. Another 23 percent falsely believed that local produce is grown organically.<sup>41</sup>

According to OTA consumer surveys in recent years, new organic consumers (i.e. those who only began purchasing organic products in the past two years) account for between 30 and 40 percent of American families. In 2014, 34 percent of surveyed consumers fell into this category.<sup>42</sup> This means that for sales of organic agricultural commodities to maintain and expand in the long term, the industry must continually invest in educating consumers on the meaning of the USDA organic label.

Through an R&P program, the proponent hopes to educate those who are unaware of the benefits of organic products, as well as clear up confusion among consumers regarding what it means for food to be “organic” – as compared to other regulated and unregulated claims in the marketplace. The assessment is anticipated to generate over \$25 million annually. According to OTA, this assessment is vital to the long-term success of organic so that the resources of the diverse organic community can be pooled together to benefit the entire industry.

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<sup>41</sup> For more information see: Hannah Goldberg, People Still Don’t Know the Difference Between “Organic” and “Local”, Time (July 11, 2014), available at: <http://time.com/2970505/organic-misconception-local/>.

<sup>42</sup> The Organic Trade Association, 2014 U.S. Families’ Organic Attitudes and Beliefs Study (April 2014), available at <https://ota.com/what-ota-does/market-analysis/consumer-attitudes-and-beliefs-study>.

## E. Provisions of Proposed Program

### **i. Definitions**

Pursuant to section 513 of the Act, §§ 1255.1 through 1255.37 of the proposed Order define certain terms that would be used throughout the Order. Several of the terms are common to all R&P programs authorized under the Act while other terms are specific to the proposed Order. The following discussion explains the definitions and provisions of the proposed Order and describes AMS's substantive departures from OTA's proposal.

Sections 1255.11, 1255.13, 1255.22, 1255.27, 1255.33, 1255.34, 1255.35, 1255.36, and 1255.37 would define the terms "conflict of interest," "Department or USDA," "Order," "person," "Secretary," "State," "suspend," "terminate," and "United States," respectively. The definitions are the same as those specified in section 513 of the Act.

Section 1255.1 would define the term "Act" to mean the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

AMS added the term "Agricultural inputs" at section 1255.2 for consistency with the USDA organic regulations at 7 CFR part 205. Examples of agricultural inputs from the NASS 2014 Organic Production Survey description of "production expenses" have also been included for clarity. Lastly, this term also gives context to the term "Net organic sales" at section 1255.21. Thus, "Agricultural inputs" would be defined as: "all substances or materials used in the production or handling of organic agricultural products (e.g. fertilizer, lime, soil conditioners, agricultural chemicals, beneficial insects, other approved materials for pest control, seed, plants, vines, trees, feed purchased for livestock, etc.)".

AMS added the term "Agricultural product" at proposed section 1255.3 for consistency with the USDA organic regulations at 7 CFR part 205. An "agricultural product" would be any

agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, which is marketed in the United States for human or livestock consumption. This term is also necessary to remain consistent with the regulated and recognized terms used by certified entities in the U.S., and to give context to the terms “ingredient” at section 1255.19 and “organic” at section 1255.23.

Consistent with the definition of “covered person” at 7 U.S.C. 7401 which describes who may be subject to an organic commodity promotion order as “a producer, handler, marketer, or importer of an organic agricultural commodity”, the definition for “assessed entity” at section 1255.4 states that this order is applicable to certified organic producers, certified organic handlers, and importers. Under the permissive terms under section 516 of the Act, the term “assessed entity” also provides exemptions for covered persons. More specifically, any certified organic producer or certified organic handler (as defined in §§ 1255.10 and 1255.9) that has gross organic sales in excess of \$250,000 for the previous marketing year must pay assessments to the proposed Board.

OTA’s proposal to assess entities based on the proposed definition of “gross organic sales” (see section 1255.16) makes it challenging to assess importers at the U.S. port of entry, because the importer may engage in a variety of roles (e.g. as a wholesaler that has purchased the product from abroad, but has yet not sold it in the U.S., or as a customs broker that is paid a fee to transact customs business on behalf of others).<sup>43</sup> An importer can, however, report on the

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<sup>43</sup> Customs business. “Customs business” means those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. “Customs business” also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with CBP in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, “customs business” does not include the mere electronic transmission of

transaction value (the price actually paid from the buyer to the seller for the merchandise) for the imported merchandise (19 CFR 152.103). Therefore, AMS determined that domestic importers (§ 1255.17) with a transaction value (“Entered Value” on CBP Form 7501) greater than \$250,000 for organic products during the previous marketing year would be assessed under the proposed Order.<sup>44</sup> AMS seeks comments on this approach.

Additionally, any exempt covered person may elect to participate in the proposed Order by remitting an assessment pursuant to § 1255.52 (see “voluntarily assessed entity” at sections 1255.38 and 1255.52).

Section 1255.5 would define the term “Board” or “Organic Research and Promotion Board” to mean the administrative body established pursuant to § 1255.40, or such other name as recommended by the Board and approved by the Secretary.

Pursuant to the permissive terms under section 516 of the Act, the proposed Order would provide for three exemptions which would need to be applied for annually. The document the Board would use to grant an exemption would be a “certificate of exemption” which is defined as a certificate issued by the Board, pursuant to §1255.53, to an eligible certified organic producer, certified organic handler or importer. The three exemptions are discussed in further detail in the description of section 1255.53.

Organic certification verifies that a farm or handling facility located anywhere in the world complies with OFPA and the USDA organic regulations and allows an entity to sell, label, and represent products as organic. The regulations at 7 CFR part 205 describe the specific standards required for the use of the word “organic” or the USDA organic seal on food, feed, or

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data received for transmission to CBP and does not include a corporate compliance activity.

<https://www.law.cornell.edu/cfr/text/19/111.1>

<sup>44</sup> U.S. Customs and Border Protection relies upon CBP Form 7501 "Entry Summary" to determine relevant information (e.g., transaction value, classification, origin, etc.) regarding the imported commodity. *Available at:* <https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501>.

fiber products. For this reason, AMS added two new terms to the proposed Order for “certification” and “certified operation” for consistency with the regulations at 7 CFR part 205. Additional language regarding the recognition of organic products imported under established organic equivalency arrangements is included in the section 1255.7 definition of “certification or certified”, which is defined as: “a determination made by a USDA-accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto, and which is documented by a certificate of organic operation”.<sup>45</sup> Section 1255.8 defines a “certified operation” as a crop or livestock production operation, wild-crop harvesting or handling operation, or portion of such operation that is certified by a USDA-accredited certifying agent as utilizing a system of organic production or handling as described by the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205. The products that such certified operations are certified to produce and/or handle are documented by a certificate of operation, and are commonly referred to as “certified organic” or “certified” products.

The USDA organic regulations at 7 CFR part 205 provide separate definitions for the terms “handle”, “handler”, “handling operation” and “producer” that share similarities with the Act’s definitions for the terms “first handler” and “producer”. To make a clear distinction between the proposed Order’s terms and the Act’s commonly used terms “first handler” and “producer”, and to reiterate that organic products must be produced by certified entities, AMS departed from OTA’s proposal and has changed the term in section 1255.9 from “organic handler” to “certified organic handler”. A “certified organic handler” would be defined as a

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<sup>45</sup> The United States has trade arrangements with several nations to facilitate the exchange of organic products. These arrangements provide additional market opportunities for USDA organic producers. The current terms of such arrangements are available at: <https://www.ams.usda.gov/services/organic-certification/international-trade>.

person who handles certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.270 through 7 CFR 205.272, and all other applicable requirements of 7 CFR part 205 and receives, sells, consigns, delivers, or transports certified organic products into the current of commerce in the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States. Further, section 1255.10 was changed from “organic producer” to “certified organic producer”, which is defined as a person who produces certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.202 through 7 CFR 205.207 or 7 CFR 205.236 through 7 CFR 205.240, and all other applicable requirements of 7 CFR part 205.

Consistent with the Act, section 1255.11 defines “Conflict of interest” as 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.

OTA’s proposed term “covered entity” was omitted because it was duplicative of the term “assessed entities”.

Section 1255.12 defined “Customs or CBP” as the United States Customs and Border Protection, an agency of the United States Department of Homeland Security.

Section 1255.13 defined “Department” as 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.

The 2014 Farm Bill amendments to 7 U.S.C. 7401 (Commodity promotion and evaluation), which provided the authority for USDA to issue an organic commodity promotion

order, also specified that persons covered by both an organic commodity promotion order and another agricultural commodity promotion order would be allowed to elect which order to be assessed under. Such “dual-covered commodities” include the commodities covered under the 22 research and promotion programs and the 25 marketing orders listed previously in this rule. Consistent with 7 U.S.C. 7401, section 1255.14 would define a “dual-covered commodity” as an agricultural commodity that (a) is produced on a certified organic farm; and (b) is covered under both -- (1) this Part; and (2) any other agricultural commodity promotion order issued under a commodity promotion law.

More simply put, under an organic commodity promotion order, an organic blueberry *producer* (emphasis added) would be producing a “dual-covered commodity”, because there is already a Blueberry Promotion, Research and Information Order (7 CFR part 1218), and that order assesses blueberry *producers* (emphasis added). Under the proposed Order, an organic blueberry producer would have the option to pay into either the blueberry program or the organic program.

However, only covered persons under an applicable commodity promotion order (which can include producers, handlers, first handlers, processors, importers, exporters, feeders, and seed stock producers, depending upon the order) are entitled to such an election. For example, an organic blueberry handler would not have the ability to elect to pay into the blueberry program instead of the organic program, as blueberry handlers are not “covered” by the blueberry program and are not assessed. AMS provides several scenarios for how the “dual-covered commodities” provision would work in the “Expenses and Assessments” section of this proposed rule and requests public comments on this issue. The scenarios include how assessments would work for a person producing both organic and conventional products (i.e., “split operations”) and a person

producing multiple commodities.

Many crop producers use the terms “marketing year” and “crop year” interchangeably.<sup>46</sup> For example, the 2008 wheat crop year, was June 1, 2008, through May 30, 2009. Not only does the crop year vary for each commodity, but it also often does not coincide with the calendar year. For example, for peanuts, which would be a dual-covered commodity under the Order, producers currently pay assessments based on the crop year (August 1 to July 31). For the purposes of this Order, section 1255.15 would define “fiscal year and marketing year” as the 12-month period ending on December 31 or such other period as recommended by the Board and approved by the Secretary. AMS invites public comments on additional procedures that would address assessments to be paid by or refunded to producers, handlers, and importers of dual-covered commodities covered under commodity promotion programs operating under different fiscal year calendars.

The definitions for the terms “gross organic sales” and “net organic sales” at sections 1255.16 and 1255.21, respectively, are highly important to those entities that could potentially be affected should this proposed rule become final. AMS is inviting comments specific to the definitions for these two terms because their wording establishes the structure for: (a) determining which entities are eligible for exemptions, and (b) calculating the assessments certified producers and certified handlers shall pay to the Board.

ERS and NASS employ a variety of terms and measures to describe different aspects of sales and income of U.S. farms. For example, one descriptor of U.S. farms comes from the ERS 2012 Census of Agriculture Farm Typology Report, which uses farm size classifications based on a measure called “gross cash farm income” (GCFI). GCFI includes the farm operator’s sales

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<sup>46</sup> USDA ERS Farm Policy Glossary definition for “crop year” is “the 12-month period starting with the month when the harvest of a specific crop typically begins”. <http://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-policy-glossary.aspx>

of crops and livestock, fees for delivering commodities under production contracts, government payments, and farm-related income. Another measure, which is used in the NASS and RMA's (Risk Management Agency) 2014 Organic Survey, is “value of sales”, which is defined as: “the gross value of sales before taxes and production expenses of all organic agricultural products sold or removed from the place in 2014 regardless of who received the payment. The gross value of sales is at the commodity level and does not include value-added organic products”.<sup>47</sup>

ERS’s 2014 edition of the Structure and Finances of U.S. Farms: Family Farm Report states that gross value of sales “can be much larger than GCFI for farms with livestock production contracts, because the value of the livestock removed is included in gross [value of] farm sales. Contract producers receive a production contract fee for their services, but the fee is a fraction of the value of livestock removed.”<sup>48</sup> In other words, a dairy farmer operating under a production contract to raise heifers, or a poultry operation under a production contract to raise broilers, could both have high gross sales, but low net profit. AMS is requesting public comment on this issue owing to its being highlighted as an issue of concern in a partial proposal submitted to AMS from an organic dairy producers association.<sup>49</sup>

In an effort to reduce the burden of reporting time associated with this proposed program, AMS researched what measures of sales and incomes that private businesses already calculate on an annual basis for the purpose of filing U.S. income tax returns. Consequently, for the purposes of clarity and bringing the definition closer into alignment with the IRS definition of “gross

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<sup>47</sup> USDA NASS, 2012 Census of Agriculture, Special Study: 2014 Organic Survey. Special Tabulation on Certified Organic Farms Sales. Public Survey can be accessed at [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Organics/ORGANICS.pdf](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Organics/ORGANICS.pdf)

<sup>48</sup> Hoppe, Robert A. *Structure and Finances of U.S. Farms: Family Farm Report, 2014 Edition*, EIB-132, U.S. Department of Agriculture, Economic Research Service, December 2014. Accessed at [www.ers.usda.gov/publications/eib-economic-information-bulletin/eib132](http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib132).

<sup>49</sup> Northeast Organic Dairy Producers Alliance, Partial proposal on an organic commodity promotion order. <https://www.ams.usda.gov/sites/default/files/media/OrganicCheckoffPartialProposal%20NODPA%207.18.15.pdf>

receipts”, AMS has chosen not to adopt OTA’s proposed definition for “gross organic revenue”, which was defined as: “total gross sales in organic products”. AMS instead proposes the term: “Gross organic sales”, which would be defined at section 1255.16 as: “the total amount the person received for all organic products during the fiscal year without subtracting any costs or expenses.”

As previously noted, importers currently do not need to be certified. Given this point, section 1255.17 would define an “importer” as: any person who imports certified organic products from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person who produces organic products outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such organic products. Importers of organic products can be identified through organic certificates, import certificates, HTS codes, or any other demonstration that they meet the definition above.

Section 1255.18 would define “information” as information and programs for consumers, the organic industry, and producers. This includes educational activities and information and programs designed to enhance and broaden the understanding of the use and attributes of organic products, increase organic production, support the transition of acres and farms to organic production in the United States, provide technical assistance, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies. These include:

- (a) Consumer education, advertising and information, which means any effort taken to provide information to, and broaden the understanding of, the general public regarding organic products; and

- (b) Industry information, which means information and programs that would enhance the image of the organic industry, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies; and
- (c) Producer information, which means information related to agronomic and animal husbandry practices and certification requirements, and information supporting the sustainable transition of acreage, farms and ranches to organic production in the United States, long-term system management, increasing organic production, direct and local marketing opportunities, export opportunities, and organic research.

AMS notes that the proposed definition incorporates feedback on the definition from a number of partial proposals.

AMS added the term “ingredient” at proposed section 1255.19 for consistency with the USDA organic regulations at 7 CFR part 205 and to give context to the terms “net organic sales” at section 1255.21. An “ingredient” would be defined to mean: any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

Section 1255.20 would define the term “National Organic Program” to mean: the program authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6522) for the purpose of implementing its provisions.

Distinct from the commonly held definition of “net sales”, which can be described as: the amount of sales generated after the deduction of returns, allowances for damaged or missing goods and any discounts allowed, section 1255.21 would define “Net organic sales” to mean: gross sales in organic products minus (a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of organic products and (b) the cost of any non-organic

agricultural ingredients used in the production of organic products.<sup>50</sup>

Section 1255.22 would define “Order” to mean: an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, education and information regarding organic products authorized under the Act.

OTA’s proposed term “organic certificate holder” was omitted because it was duplicative of the terms “certified organic handler” and “certified organic producer”.

For statutory and regulatory consistency, AMS added the term “organic” at section 1255.23 to mean: a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205. The primary purpose of the term “organic” in the proposed Order is as a modifier in reference to products produced by certified organic producers and/or certified organic handlers. For clarification, the phrase “organic products” used throughout the Order are synonymous with the terms: “certified products” or “certified organic products”.<sup>51</sup>

Section 1255.24 would define “organic products” to mean: products produced and certified under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto.

Section 1255.25 would define Organic Trade Association (OTA) as a membership business association who, in collaboration with the GRO Organic Core Committee, petitioned USDA for the Organic Research, Promotion, and Information Order. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations,

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<sup>50</sup> The regulations at 7 CFR Part 205 specify strict conditions for the use of non-organic agricultural ingredients in organic products.

<sup>51</sup> The term “organic” is also used in the terms “certified organic handler” at section 1255.9 and “certified organic producer” at section 1255.10, to more clearly identify the types of products such entities are certified to sell.

distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee. This was added to clarify the organization who would assist the Department with nominations for the initial Board under section 1255.41.

Section 1255.26 would define "part" to mean: the Organic Research, Promotion, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a *subpart* of such part.

Throughout the order, the terms "person/persons" and "entity/entities" are often used interchangeably. Section 1255.27 would define "person" to mean: any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.<sup>52</sup>

Comparable to the same definition at 7 CFR part 205, section 1255.28 would define a "product processor" as: a certified organic handler who cooks, bakes, heats, dries, mixes, grinds, churns, separates, extracts, cuts, ferments, eviscerates, preserves, dehydrates, freezes, or otherwise manufactures organic products, and includes the packaging, canning, jarring, or otherwise enclosing organic food in a container.

Section 1255.29 would define "programs, plans and projects" to mean: those research, promotion, and information programs, plans or projects established pursuant to the Order.

Section 1255.30 would define "promotion" to mean: any action, including paid advertising and the dissemination of information, utilizing public relations or other means, to enhance and broaden the understanding of the use and attributes of organic products for the purpose of maintaining and expanding markets for the organic industry.

Section 1255.31 would define the term "Qualified State Commodity Board" to mean: for

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<sup>52</sup> Under existing research and promotion programs, the identification method for a "person" or "entity" is a taxpayer identification number (TIN) used by the Internal Revenue Service (IRS).

purposes of section 1255.54 governing assessment offsets, an existing or future producer or handler governed entity—

- (a) That is authorized by State law or a State government agency;
- (b) That is organized and operating within a State;
- (c) That is not federally administered; and
- (d) That receives mandatory contributions and conducts promotion, research, and/or

information programs.

In response to stakeholder feedback obtained from the partial proposals previously mentioned, OTA's May 2016 revised proposal broadened the proposed definition of "research" to include agricultural research as a priority. Therefore, section 1255.32 would define "research" to include definitions for both agricultural and other research:

- (a) Agricultural research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to improve organic farm production systems and practices, increase farm profitability and productivity, expand organic farming opportunities, and enhance sustainability for farms, farm families and their communities; enhance plant and animal breeding and varietal development for organic systems and improve the availability of other production inputs; optimize natural resource conservation, biodiversity, ecosystem services, and other environmental outcomes of organic agriculture, and advance organic farm and food safety objectives.
- (b) Other research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to enhance or increase the consumption, image, desirability, use, marketability, or production of

organic products; or to do studies on nutrition, market data, processing, environmental and human health benefits, quality of organic products, including research directed to organic product characteristics and product development, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products.

Section 1255.33 would define “Secretary” to mean: the Secretary of Agriculture of the United States, or any other officer or employee of the Department to whom authority has been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

Section 1255.34 would define “state” as: any of the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

Section 1255.35 would define “suspend” to mean: to issue a rule under 5 U.S.C. 553 to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

Section 1255.36 would define “terminate” to mean: to issue a rule under 5 U.S.C. 553 to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

Section 1255.37 would define “United States” to mean: collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

Section 1255.38 would define a “voluntarily assessed entity” to mean: any covered person with gross organic sales or transaction value of \$250,000 or less for the previous marketing year that elects to participate in the Order by remitting an assessment pursuant to

§1255.52.

## **ii. Establishment of the Board**

Pursuant to section 515 of the Act, §§ 1255.40 through 1255.47 of the proposed Order would detail the establishment and membership of the proposed Organic Research and Promotion Board, nominations and appointments, the term of office, removal and vacancies, procedure, reimbursement and attendance, powers and duties, and prohibited activities.

Section 1255.40 would specify the Board establishment and membership. The Board would be composed of mandatorily and voluntarily assessed entities (i.e. domestic certified organic producers, handlers, and importers for the U.S. market who produce, handle, and import organic products in the United States during a fiscal period). The Board would be comprised of 17 seats as follows: 8 certified organic producer seats (including a voluntarily assessed producer), 7 certified organic handler seats, one importer seat, and one at-large public member, who shall be a non-voting member. Thus, each voting member of the board represents 6.25 percent of the votes.

While OTA's proposal took the approach of distributing the producer seats based on the number of certified operations per state (see Table 5), AMS took a different approach to ensure consistency with section 7414 of the Act. Section 7414 of the Act states that "the composition of each board shall reflect the geographical distribution of the production of the agricultural commodity involved in the United States and the quantity or value of the agricultural commodity imported into the United States". For this reason, AMS combined the commodity-level production data available from the 2014 NASS Organic Production Survey to estimate certified organic production as a whole for each state. As previously mentioned, AMS used ERS conversion factors to convert commodity production volumes (e.g. bushels of blueberries,

gallons of milk, tons of grapes, etc.) to the same measurement of pounds. This made it possible to generate an estimate of the percent certified organic production by state, and combine them into “production regions” representing the number of producer seats that OTA proposed.

Table 5, below, shows the geographical distribution of producer board seats by region as proposed by OTA in May 2016. The portion of total U.S. certified organic production and certified organic farm operations has been calculated to illustrate how the proposed distribution comports with the Act. As previously stated, NASS data on certified organic production at the state level represents around 80 percent of total production at the national level. This is due to proprietary concerns that prevent NASS from publishing data on a more micro level.

Table 5: Geographic regions as proposed by OTA, May 2016				
	States	Portion of U.S. certified organic production	Portion of U.S. certified organic farm operations	Board seats for producers
Region 1	AK, AZ, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY	20%	16%	1
Region 2	CA	21%	21%	1
Region 3	IL, IN, MI, WI	10%	15%	1
Region 4	AR, IA, KA, LA, MN, MO, NE, ND, OK, SD, TX	11%	15%	1
Region 5	AL, DE, DC, FL, GA, KY, MD, MS, NC, NJ, OH, PA, SC, TN, VA, WV	8%	16%	1
Region 6	CT, ME, MA, NH, NY, RI, VT	10%	17%	1
Voluntarily assessed entity				1
Total		80%	100%	7

Source: NASS 2014 Organic Survey data; calculations by AMS

It should be noted that the proponent group revised its proposed regions in July 2016 after discussions with AMS. The revision changed the number of regions to 7, divided as follows:

- (1) AK, AZ, HI, NM, NV, OR, WA, 6 Southern CA counties;
- (2) The remaining counties of CA;
- (3) IL, MI, WI;
- (4) AR, IA, IN, MO, OH;
- (5) MA, ME, NH, NY, VT;

(6) AL, CT, DE, FL, GA, KY, LA, MD, MS, NC, NJ, PA, RI, SC, TN, VA, WV;

(7) CO, ID, KA, MN, MT, ND, NE, OK, SD, TX, UT, WY.

In its July 2016 revision, the proponent group also changed "voluntarily assessed entity" to "voluntarily assessed producer", thereby adding another producer seat to the board and bringing total producer seats to 8 out of 17 total board members. The absence of NASS production data at the county level makes it difficult to estimate the production volume that would result from dividing California into two separate regions.

Table 6 shows an example of the regions similar to OTA's proposal divided by AMS using certified organic production volume rather than number of certified organic entities.

Table 6: Geographic regions divided by production volume				
	States	Portion of U.S. certified organic production	Portion of U.S. certified organic farm operations	Board seats for producers
Region 1	AK, CA, HI	21%	22%	2
Region 2	OR, WA	13%	9%	1
Region 3	AZ, CO, ID, KA, MT, NE, NV, NM, ND, OK, SD, TX, UT, WY	12%	11%	1
Region 4	IA, MN, WI	11%	17%	1
Region 5	AL, AR, DE, FL, GA, IL, IN, KY, LA, MD, MI, MS, MO, NJ, NC, OH, PA, SC, TN, VA, WV	12%	24%	1
Region 6	CT, ME, MA, NH, NY, RI, VT	10%	17%	1
Voluntarily assessed producer				1
Total		80%	100%	8

Source: NASS 2014 Organic Survey data; calculations by AMS

As proposed, of the 8 producer seats, one would be an at-large, voluntarily assessed certified organic producer. The remaining 7 seats were spread among 6 production regions as shown by Table 6. Of the 6 regions, 5 regions represent between 10 and 13 percent of certified organic production in the U.S. Region 1, which represents Alaska, California, and Hawaii, represents 21 percent of certified organic production. Due to the lack of county-level data that would make it possible to divide California into two regions, Region 1 would hold 2 certified organic producer seats. Remaining Regions 2 through 6 would each hold one certified organic



Comparing these two proportions indicates that the share of the single importer seat on the Board (6 percent) is similar to the share of the total estimated assessment revenue that importers would pay into the program (5 percent).

Seven members would be certified organic handlers at large, but of those seven members, two shall be product processors as defined in section 1255.28. OTA chose to have product processor member representation on the Board for the purpose of providing representation for the diversity of the organic value chain. One member shall be an importer of organic products. For clarity, with the exception of the at-large public member, both voluntarily and mandatorily assessed entities are eligible to be nominated for the Board seats for which they meet the definitions. AMS invites comments on the proposed distribution of Board seats for producers, handlers, and importers.

OTA also opted to have no alternate Board members. The proponent stated that it wanted to ensure that industry members who seek representation and serve on the Board are committed to their service and participate in all Board meetings.

At least once in every five-year period, but not more frequently than once in every 3-year period, the Board must review, based on a 3-year average, the geographical distribution of production of organic agricultural commodities and the value of organic agricultural commodities imported into the United States. The review would be conducted using the surveys and databases generated and maintained by USDA (e.g. NASS surveys, the NOP Organic Integrity Database (OID), the GATS database, ITDS/ACE, etc.) and, if available, other reliable reports from the industry. If warranted, the Board would recommend to the Secretary that the Board membership be reapportioned appropriately to reflect such changes. The distribution of production between regions

also shall be considered. Any changes in Board composition would be implemented by the Secretary through rulemaking.

Further, OTA wanted to periodically consider reapportionment based on the participation rate of voluntarily assessed entities. Hence, at least once in every five-year period, but not more frequently than once in every 3-year period, the Board would review the annual assessment receipts for voluntarily assessed entities in order to determine if the size of the Board should be changed to reflect changes in the number of participating voluntarily assessed entities. If warranted, the Board would recommend to the Secretary that the Board membership be reapportioned appropriately to reflect such changes. Any changes in Board composition would be implemented by the Secretary through rulemaking.

Section 1255.41 of the proposed Order would specify Board nominations and appointments. While the proponent proposed for Board candidates to submit nominations for the initial and subsequent Boards directly to the Secretary, this would be inconsistent with the Department's role in the nomination process with respect to the research and promotion programs that were established under the Act. Therefore, the initial nominations would be conducted by OTA with the support of USDA. Before considering any nominations, OTA and USDA would publicize the nomination process, using trade press or other means it deems appropriate, and conduct outreach to all U.S. certified organic producers, certified organic handlers, and importers of organic products. OTA would use meetings, mail or other methods to solicit potential nominees and would work with USDA to help ensure that all interested persons are apprised of the nomination process. Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role for which they meet the definitions provided at sections 1255.9, 1255.10, and 1255.17. Further, voluntarily assessed certified organic producers may seek nomination

to the Board for the voluntarily assessed certified organic producer seat or for the certified organic producer seat for which they are geographically qualified. Once OTA has received all of the nominations, the information will be submitted to the Secretary for appointment. Nominations for the initial Board will be handled by USDA.

Regarding subsequent nominations, the Board would solicit nominations using trade press or other means it deems appropriate, and shall conduct outreach to: (1) all U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 for the previous marketing year, (2) importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and (3) all voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g., “opted into the program”). Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at sections 1255.9, 1255.10, and 1255.17. Further, voluntarily assessed certified organic producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the certified organic producer seat for which they are geographically qualified. All Board nominees would have the opportunity to provide to the Board a short background statement outlining their qualifications and desire to serve on the Board. Entities that are a combination of a certified organic producer, certified organic handler, or importer could also vote in the nomination process described below for the certified organic producer, certified organic handler, and importer nominees, provided they are geographically qualified and meet the definitions provided at 1255.9, 1255.10, and 1255.17. The producer nomination process is described below:

Certified organic producers who produce organic agricultural commodities in more than one region could seek nomination in only the region in which they are domiciled. The names of certified organic producer nominees (producer nominees) would be placed on a ballot by region. For the seven Board seats allocated by geographic region, certified organic producers must be domiciled in the region for which they seek nomination. The names of producer nominees would be placed on a ballot by region. The ballots along with any background statements would be mailed to the certified organic producers with gross organic sales in excess of \$250,000, and any voluntarily assessed certified organic producer in that region that has remitted an assessment pursuant to section 1255.52(d) for the previous marketing year for a vote. Domestic certified organic producers may vote in each region in which they produce organic products. The votes would 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. The top two candidates for each position would be submitted to the Secretary.

The names of the nominees for the “at-large” voluntarily assessed domestic certified organic producer seat would also be placed on a ballot. The ballots along with any background statements would be mailed to all voluntarily assessed certified organic producers for a vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for the position would be submitted to the Secretary.

The names of the nominees for the five “at-large” domestic certified organic handler seats and the two “at-large” product processor seats would also be placed on a ballot. The ballots along with any background statements would be mailed to all certified organic handlers with gross organic sales revenue in excess of \$250,000, and any voluntarily assessed certified organic handlers who have remitted an assessment pursuant to section 1255.52(d) for the previous marketing year for a

vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top ten candidates for the handler positions and the top four candidates for the product-processor seats would be submitted to the Secretary.

The names of the nominees for the importer seat would also be placed on a ballot. The ballots along with any background statements would be mailed to importers who imported a transaction value for organic products in excess of \$250,000, and any voluntarily assessed importers who have remitted an assessment pursuant to 1255.52(d) for the previous marketing year for a vote. The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates would be submitted to the Secretary. The names of the nominees for the “at-large” non-voting public member seat would also be placed on a ballot.

The ballots along with any background statements would be mailed to: (1) all U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year, (2) importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and (3) all voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g. “opted into the program”). The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates would be submitted to the Secretary.

The Board would submit nominations to the Secretary at least 6 months before the new Board term begins. The Secretary would select the members of the Board from the nominations submitted by the Board. OTA also recommended that no two board members be employed by a single corporation, company, partnership or any other legal entity. Further, OTA recommended that Board membership should strive to reflect a wealth of marketing and research experience as well as the wide variety of business attributes reflected throughout the organic supply chain (i.e. quantity

and type of products produced, entity size, etc.). This is to help ensure that representation on the Board is balanced.

In order to provide the Board flexibility, the Board could recommend to the Secretary modifications to its nomination procedures. Any such modifications would be implemented through rulemaking by the Secretary.

Section 1255.42 of the proposed Order would specify the term of office. With the exception of the initial Board, each Board member would serve a three-year term or until the Secretary appointed his or her successor. Each term of office would begin on January 1 and end on December 31. No member could serve more than two consecutive terms, excluding any term of office less than three year terms, and no single corporation, company, partnership or any other legal entity can be represented on the Board by an employee or owner for more than two consecutive terms. For the purpose of ensuring that no more than approximately one-third of the Board members' terms expire in any given year, the terms of the initial Board members would be staggered for two, three and four years and would be recommended to the Secretary by the proponent group.

Section 1255.43 of the proposed Order would specify criteria for the removal of members and for filling vacancies. If a Board member ceased to work for or be affiliated with a certified organic producer, certified organic handler, or importer or ceased to do business in the region he or she represented, such position would become vacant. Additionally, the Board could recommend to the Secretary that a member be removed from office if the member consistently failed or refused to perform his or her duties or engaged in dishonest acts or willful misconduct. The Secretary could remove the member if he or she finds that the Board's recommendation shows adequate cause. If a position became vacant, nominations to fill the vacancy would be

conducted using the nominations process as proposed in § 1255.41 of the Order. A vacancy would not be required to be filled if the unexpired term is less than six months.

Section 1255.44 of the proposed Order would specify procedures of the Board. A majority (9) of the voting Board members would constitute a quorum. If participation by telephone or other means were permitted, members participating by such means would count towards the quorum requirements or other voting requirements as authorized under the Order. Proxy voting would not be permitted. A motion would carry if supported by 9 voting Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which would require affirmation by at least two-thirds (11) of the voting Board members. If the Board has vacant positions, recommendations to change the assessment rate or to adopt a budget would have to pass by an affirmative vote of two-thirds of the voting Board members, exclusive of the vacant seats.

For example, if a 16 voting member Board had a vacancy, there would be 15 voting Board members. If the Board held a meeting, and 6 members were present and 3 participated by telephone, there would be a quorum (9) for the meeting. If the Board were voting on the upcoming year's budget, 10 members ( $.66 \times 15$  members) would have to vote in favor of the budget for it to pass.

The proposed Order would also provide for the Board to take action by mail, telephone, electronic mail, facsimile, or any other electronic means when the chairperson believes it is necessary. Actions taken under these procedures would be valid only if all members and the Secretary were notified of the meeting and all members were provided the opportunity to participate and a majority of Board members voted in favor of the action (unless two-thirds vote were required under the Order). Additionally, all votes would have to be confirmed in writing

and recorded in Board minutes.

The proposed Order would specify that Board members would serve without compensation. However, Board members would be reimbursed for reasonable travel expenses, as approved by the Board, incurred when performing Board business.

Section 1255.46 of the proposed Order would specify powers and duties of the Board. These are similar in promotion programs authorized under the Act. They include, among other things, to administer the Order and collect assessments; to develop bylaws and recommend regulations necessary to administer the Order; to select a chairperson and other Board officers; to create an executive committee and form other committees and subcommittees as necessary; to hire staff or contractors; to provide appropriate notice of meetings to the industry and USDA and keep minutes of such meetings; to develop programs and enter into contracts to implement programs; to submit a budget to USDA for approval 60 calendar days prior to the start of the fiscal year; to borrow funds necessary to cover startup costs of the Order; to invest Board funds appropriately; to recommend changes in the assessment rate as appropriate and within the limits of the Order; to have its books audited by an outside certified public accountant at the end of each fiscal period and at other times as requested by the Secretary; to make public an accounting of funds received and expended; to receive, investigate and report to the Secretary complaints of violations of the Order; and to recommend amendments to the Order as appropriate. Additionally, when researching priorities for each marketing year, the Board will provide public notice using local, state, or regional entities, mail and/or other methods to solicit public input from all covered entities, and will have at least one meeting or conference call to determine the priorities for each marketing year.

Section 1255.47 of the proposed Order would specify prohibited activities that are

common to all promotion programs authorized under the Act. In summary, the Board nor its employees and agents could engage in actions that would be a conflict of interest; use Board funds to lobby (influencing legislation or governmental action or policy, by local, state, national (i.e. the National Organic Standards Board (see 7 U.S.C. 6518)), and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order); and engage in any advertising or activities that may be false, misleading or disparaging to another agricultural commodity. Such prohibitions are outlined in the *Guidelines for AMS Oversight of Commodity Research and Promotion Programs*, which provides the parameters for commodity promotion program activities and restrictions. For example, Section IX titled “Policy on Review and Approval of Promotional and Educational Materials” states that AMS will disapprove advertising that is deemed disparaging to another commodity. It defines “disparaging” as depicting other commodities in a negative or unpleasant light via either overt or subjective video, photography, or statements (excluding those that are strictly comparative).

### **iii. Expenses and Assessments**

Pursuant to sections 516 and 517 of the Act, sections 1255.50 through 1255.54 of the proposed Order detail requirements regarding the Board’s budget and expenses, financial statements, assessments, and exemption from assessments. Proposed section 1255.50 states that at least 60 calendar days before the start of the fiscal period, and as necessary during the year, the Board would submit a budget to USDA covering its projected expenses. The budget must include a summary of anticipated revenue and expenses for each program along with a breakdown of staff and administrative expenses. Except for the initial budget, the Board’s budgets should include comparative data for at least one preceding fiscal period.

The proponents have proposed that no less than 25 percent of the funds shall be allocated

to research; 25 percent of the funds shall be allocated to information; 25 percent of funds shall be allocated to promotion; and 25 percent of the funds shall remain discretionary. Further, in response to stakeholder feedback obtained from partial proposals, OTA revised its description of the funds allocated to research to include the requirement that a majority of such funds be allocated to agricultural research; of the funds allocated to information, a majority shall be allocated to producer information; and the regional organic producer Board members would establish priorities, including regional considerations, for investments in agricultural research. Any funds allocated in a specific area that was not spent during the current fiscal year would carry over to the next fiscal year in the same category.

Each budget, except for the initial budget, would include staff and administrative expense breakdowns, with comparative data for at least one preceding fiscal year. Each budget would provide adequate funds to cover the Board's anticipated expenses as well as to provide for a reserve as stated in the Order. Any amendment or addition to an approved budget would be approved by USDA, including shifting of funds from one program, plan or project to another. Shifts of funds that do not result in an increase to the Board's approved budget would not have to have prior approval from USDA. For example, if the Board's approved budget provided for \$1 million in research projects and \$500,000 in consumer advertising, a shift of \$50,000 from research to consumer advertising would require USDA approval. However, a shift within the \$1 million research line item would not require prior USDA approval. USDA did modify the regulatory text at section 1255.50 to clarify that only shifts in funds within a program, as stated in the example above, did not need USDA approval. Any other amendment or shift in funds to different programs must be approved prior to use of the funds.

The Board would be authorized to incur reasonable expenses for its maintenance and

functioning. During its first year of operation, the Board could borrow funds for startup costs and capital outlay. Any borrowed funds would be subject to the same fiscal, budget and audit controls as other funds of the Board.

The Board could also accept voluntary contributions. Any contributions received by the Board would be free from encumbrances by the donor and the Board would retain control over use of the funds. The Board may also receive other funds provided through USDA or other sources. For example, the Board could receive Federal grant funds, subject to approval by the Secretary, for a specific research project. The Board would also be required to reimburse USDA for costs incurred by USDA in overseeing the Order's operations, including all costs associated with referenda.

The Board would be limited to spending no more than 15 percent of its available funds for administration, maintenance, and the functioning of the Board, in accordance with the Act. This limitation would begin three fiscal years after the Board's first meeting. Reimbursements to USDA would not be considered administrative costs. As an example, if the Board received \$30 million in assessments during fiscal year 5, and had available \$1 million in reserve funds, the Board's available funds would be \$31 million. In this scenario, the Board would be limited to spending no more than \$4.65 million ( $0.15 \times \$31$  million) on administrative costs. Additionally, no program, plan or project shall expend on administrative costs more than 15 percent of the total funds allocated for that specific program, plan or project.

The Board could also maintain a monetary reserve and carry over excess funds from one fiscal period to the next. However, such reserve funds could not exceed one fiscal year's budgeted expenses. For example, if the Board's budgeted expenses for a fiscal year were \$30 million, it could carry over no more than \$30 million in reserve. With approval of the Secretary,

reserve funds could be used to pay expenses.

The Board could invest its revenue collected under the Order in the following: 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; 4) Obligations fully guaranteed as to principal interest by the United States; and 5) Other investments as authorized by the Secretary.

Section 1255.51 states that the Board would be required to submit to USDA financial statements on a quarterly basis, or at any other time as requested by the Secretary. Financial statements must include, at a minimum, a balance sheet, income statement, and expense budget that shows expenditures during the specified period, year-to-date and unexpended budget. Financial statements would be submitted to USDA within 30 calendar days after the time period to which it applies. The Board would also submit an annual financial statement within 90 calendar days after the fiscal year to which it applies.

### **Assessments**

Under section 1255.52, the Board's programs and expenses would be funded through assessments on certified organic producers, certified organic handlers, and importers of organic products in the U.S. market. The proposed Order would provide for an initial assessment rate of one-tenth of one percent of net organic sales for domestic producers and handlers with gross annual organic sales greater than \$250,000 in the previous marketing year. Per the proposed definition at section 1255. 21, net organic sales would be equal to total gross sales in certified organic products minus (a) the cost of certified organic ingredients, feed, and inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used

in the production of certified products. The proposed Order would provide for an initial assessment rate of one-tenth of one percent of transaction value for importers with transaction value greater than \$250,000 in the previous marketing year.

To facilitate audience understanding of the method of assessment being proposed, OTA provided a sample self-assessment worksheet which outlines the process for calculating cost deductions, net organic sales, and subsequent assessments to be paid to the Board. The worksheet is accessible as a “Related Document” on [www.regulations.gov](http://www.regulations.gov) as well as on the AMS website. AMS is seeking public comments on the proposed assessment approach, particularly on the calculations described below and any tools that would be helpful to minimize the burden on producers, handlers and importers.

#### Assessments – Organic Producers

Organic producers would first calculate their net organic sales by taking their total gross organic sales and subtracting the cost of any certified organic ingredients, feed, and agricultural input costs. Examples of organic input costs that may be deducted from gross sales include fertilizer, lime, and soil conditioners; agricultural chemicals and other organic materials for pest control; seeds, plants, vines and trees; livestock purchased or leased; and organic feed purchased for livestock and poultry. Once the producer has calculated their net organic sales, he/she would multiply this by one-tenth of one percent (i.e., 0.001) to determine the assessment that would be paid to the organic R&P program. For example, an organic dairy producer would take their bulk organic milk sales and subtract the cost of organic feed, hay and any other agricultural input costs to obtain their net organic milk sales. The producer did not use any non-organic agricultural ingredients that need to be subtracted. Finally, the producer would multiply their net organic milk sales by one-tenth of one percent to determine the assessment owed.

## Assessments – Organic Handlers

Organic handlers would also first need to calculate their net organic sales for all certified organic products. For processed products, handlers would take the total gross sales in certified products and subtract the cost of certified organic ingredients and the cost of any non-organic agricultural ingredients used in its products. For example, if Company A was processing and selling a certified “organic” blended orange juice per 7 CFR 205.301, they would take their total gross organic sales and first subtract the cost of certified organic ingredients (e.g., cost of organic oranges and organic mangoes). Assuming the product does not include any non-organic agricultural ingredients per 7 CFR 205.606 of the National List, the handler would not have any non-organic agricultural ingredients to subtract from gross organic sales. In this case, the calculation for net organic sales is simply the total gross organic juice sales minus the cost of organic oranges and organic mangoes. By deducting the cost of organic ingredients purchased from producers, assessments will only be paid on the value added to the organic commodity as it moves through the supply chain.

If Company B was processing and selling the same certified “organic” juice, but in this case used a non-organic agricultural ingredient to improve color (e.g., carrot juice color as provided for by 7 CFR 205.606), then the handler would take the total gross organic sales of the “organic” juice and subtract the cost of organic oranges and mangoes and the cost of the carrot juice color to determine their net organic sales. The non-organic carrot juice color is subtracted to ensure only the value added for organic content of a product is assessed for the organic R&P program. In both examples, the handler would then multiply their net organic juice sales by one-tenth of one percent to determine the assessment owed.

Handlers of “made with organic” products would use a similar approach with an

additional step to determine their assessment. “Made with organic” products are certified and must contain at least 70% certified organic ingredient content, but can use non-organic agricultural ingredients as part of product composition per the requirements at 7 CFR 205.301(c). Understanding that section 7412(1)(E)(ii) of the Act specified that the scope of an “agricultural commodity” as limited to products that are “certified to be sold or labeled as “organic” or “100 percent organic”, this proposal would assess only the value added of the certified organic ingredient content of “made with organic” products rather than the entire certified product.

For example, Company C has a line of “made with organic” granola bars. The granola bar is composed of 70% certified “organic” oats and grains, but uses non-organic sugar and non-organic raisins. Under this proposal, Company C would first take its gross organic sales of the granola bar and subtract the cost of organic ingredients (oats and grains) and the cost of the non-organic agricultural ingredients (sugar and raisins) to obtain net organic sales. Because the granola bar is a “made with organic” product, the handler would have the additional step of multiplying the net organic sales by the percent organic ingredient content (i.e., 70% or the share of organic ingredients subject to assessment under the Act). After applying the percent organic ingredient content to net organic sales, the handler would multiply their adjusted net organic sales by one-tenth of one percent to determine the assessment owed.

#### Assessments – Importers

The proponent group proposed a similar approach for importers calculating assessments. In its proposal, OTA states that importers would pay one-tenth of one percent of net organic sales minus the cost of organic ingredients. Their proposal also stated that the assessment would occur when the importer took custody of the certified organic goods. Importer assessments would be collected through Customs. If Customs does not collect the assessment from an

importer, then the importer would be responsible for paying the assessment directly to the Board within 90 calendar days after the end of the marketing year.

As previously discussed, OTA's proposal to assess importers using this approach would be challenging to implement. Since importers engage in a variety of roles (e.g. as a wholesaler that has purchased the product from abroad, but has yet not sold it in the U.S., or as a customs broker that is paid a fee to transact customs business on behalf of others but does not take ownership of the product), it is difficult to always know the gross organic sales and thus, net organic sales. An importer can, however, report on the transaction value (the price actually paid from the buyer to the seller for the merchandise) for the imported merchandise (19 CFR 152.103). Therefore, AMS is proposing that domestic importers (§ 1255.17) use transaction value ("Entered Value" on CBP Form 7501) to determine assessments owed under the proposed Order.

For example, Importer A is importing two organic products: certified organic bananas and coffee. The transaction value shown on the CBP Form 7501 for these products is \$200,000 and \$400,000 respectively. Importer A would add the transaction value for all organic commodities (\$200,000 plus \$400,000) to obtain a total transaction value (\$600,000) for all organic products. Importer A would then multiply the total transaction value by one-tenth of one percent to determine the assessment owed.

As another example, Importer B is importing processed products: organic chocolate bars and "made with organic" granola bars (i.e., 70% organic ingredient content). The transaction value shown on the CBP Form 7501 for these products is \$600,000 and \$400,000 respectively. In this case, Importer B would need to reduce the transaction value for the granola bars to assess only the organic ingredient content. This is obtained by multiplying the transaction value

(\$400,000) by 0.70 to determine the adjusted transaction value for granola bars (\$280,000). Importer B would then add the granola bar transaction value (\$280,000) to the chocolate transaction value (\$600,000) to obtain a total transaction value (\$880,000) for the purposes of calculating its organic assessment. Importer B would multiply the total transaction value by one-tenth of one percent to determine the assessment owed.

#### Assessment Review and Collection

Two years after the Order becomes effective and periodically thereafter, the Board would review the assessment rate and, if appropriate, recommend a change in the rate. At least two-thirds of the Board members would have to favor a change in the assessment rate. Any change in the assessment rate would be subject to rulemaking by the Secretary.

Assessments would be collected by the Board on a quarterly or yearly basis. Importers and domestic producers and handlers would be required to pay their assessments owed to the Board no later than 90 days following the marketing year in which the organic product was imported, produced or handled. If a certified organic producer, certified organic handler or importer fails to pay the assessment within 90 calendar days of the date it is due, the Board may impose a late payment charge and interest. The late payment charge and rate of interest would be prescribed in the Order's regulations issued by the Secretary.

Certified organic producers and handlers with gross organic sales of \$250,000 or less in the prior marketing year may choose to participate in the Order as voluntarily assessed entities by remitting one-tenth of one percent of net organic sales. Similarly, importers of organic products whose transaction value is \$250,000 or less may elect to participate in the Order by paying assessment on one-tenth of one percent of the transaction value of organic products. All payments must be received no later than 90 days after the end of the year in which the product

was produced, handled or imported.

In summary, AMS is seeking public comments on the proposed assessment approach, particularly on the calculations and any additional examples or tools that could be provided to assist producers, handlers and importers should this program be implemented.

## **Exemptions**

### *De minimis*

The Order would provide for three exemptions from assessment. The first exemption is for entities at a de minimis level. Certified organic producers, certified organic handlers and importers of organic products whose gross organic sales and transaction value was \$250,000 or less during the prior fiscal year would be exempt from paying assessment. Domestic producers, handlers and importers would apply to the Board for an exemption prior to the start of the new fiscal year. This would be an annual exemption; entities would have to reapply each year. They would have to certify that they had gross sales or transaction value from sales of organic products that were \$250,000 or less in the previous fiscal year. They would submit to the Board past shipment or import data to support the exemption request. The Board would then issue, if deemed appropriate, a certificate of exemption to the eligible producer, handler or importer.

Once approved, domestic producers, handlers and importers would not have to pay assessments to the Board for the applicable fiscal year. Any assessments of approved importers collected by Customs would be refunded by the Board within 60 calendar days after receipt of such assessments by the Board. No interest would be paid on the assessments collected by Customs.

Producers, handlers and importers who did not apply to the Board for an exemption and had gross revenue or transaction value of \$250,000 or less in organic product sales during the

prior fiscal year would receive a refund from the Board for the applicable assessments within 90 calendar days after the end of the current fiscal year. Board staff would determine the assessments paid and issue refunds accordingly. No interest would be paid on the assessments collected by the Board.

The Board could recommend additional procedures to administer the exemption as appropriate. Any procedures would be implemented through rulemaking by the Secretary.

USDA considers several factors when evaluating the merits of a proposed de minimis quantity. These factors include an estimate of the total quantity (or value) of the respective agricultural commodity covered under the proposed commodity promotion program order (value assessed and value exempt); free rider implications; the impact of program requirements on small businesses; and available funding to support a viable program under the order. USDA reviews these factors in light of all available data and information to determine whether a proposed exemption threshold is de minimis in quantity when viewed in the context of an effective and functioning commodity promotion program.

The Organic Industry Survey, which was carried out by the Nutrition Business Journal (NBJ) on behalf of OTA, reported 2014 retail sales of all organic commodities at \$39.1 billion. The survey included responses from manufacturers, producers, ranchers, and retailers of organic products. Results were supplemented with data from the Natural Foods Merchandiser's annual industry survey, the analytic consulting firms SPINS and the IRI Group, and with information from public financial statements and media reports. The proponent group estimated the revenue that would be earned by the program through assessments of certified organic producers, certified organic handlers, and importers. They assumed a retail price markup of 40 percent over

the price at the handler level.<sup>53</sup> Applying the assumed 40 percent markup to the total organic retail sales figure, as reported in the Organic Industry Survey, results in an estimate of combined organic sales of producers, handlers and importers equal to \$27.9 billion.

In its proposal for a research and promotion program, the proponent group initially stated that it expected the program to generate \$30 million through assessments. In discussions with AMS, the proponent group adjusted the estimated revenue of the program to be \$28.1 million. AMS used a similar method to that of the proponent group to calculate the potential assessment income of the program; however, the estimates by AMS are lower than those of the proponent group. One reason for this is that while OTA used 2014 data to estimate producer assessment income and 2015 data to estimate assessment income of importers and handlers, AMS used 2014 data only for consistency in estimating potential assessment income at producer, handler and importer levels. Secondly, AMS has access to more detailed reports by the U.S. Customs and Border Protection than what is publicly accessible through the GATS database. These detailed reports allowed AMS to deduct importers whose organic shipment sales values were no more than \$250,000, and who would be exempt from assessment.

As previously mentioned, this proposal proposes a de minimis level of \$250,000 in annual gross sales of organic products for domestic producers and handlers and in annual transaction value for importers of organic products. AMS conducted analysis on this and other levels for de minimis including \$500,000 and \$750,000. Table 7 shows potential assessment revenue from producers, importers and handlers at different exemption levels. Again, this analysis uses data for 2014, which is the year for which most recent and complete data is available from multiple sources.

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<sup>53</sup> OTA cited a 2012 study by the United States Agency for International Development (USAID) titled U.S. Specialty Foods End-Market Analysis for the 40 percent retail markup assumption.

Table 7: Potential assessment revenue at exemption levels			
	\$ 250,000	\$ 500,000	\$ 750,000
Producers <sup>1</sup>	\$ 3,502,602,536	\$ 3,153,346,208	\$ 2,923,278,884
Handlers <sup>2</sup>	\$ 20,656,445,878	\$ 19,943,407,378	\$ 19,375,473,888
Importers <sup>3</sup>	\$ 1,184,783,076	\$ 1,139,594,905	\$ 1,100,966,481
Total	\$ 25,343,831,491	\$ 24,236,348,490	\$ 23,399,719,252
Assessment revenue	\$ 25,343,831	\$ 24,236,348	\$ 23,399,719
<sup>1</sup> 2014 Organic Survey, NASS			
<sup>2</sup> 2016 Industry Survey, OTA; 2012 County Business Patterns and 2012 Economic Census, Census Bureau			
<sup>3</sup> U.S. Customs and Border Protection; Global Agricultural Trade Statistics, FAS			

Assessment revenue that would be collected at each of the de minimis exemption levels would be approximately \$23.4 million at \$750,000, \$24.2 million at \$500,000, and \$25.3 million at \$250,000. At the proposed exemption level of \$250,000, about 14 percent of the assessment revenue would come from producers, 81 percent would come from handlers, and 5 percent would be from importers. Producer assessable sales was calculated by subtracting estimated input costs from total sales in organic products at revenue levels of \$250,000, \$500,000, and \$750,000. No expense data exists for handlers, so input costs have not been deducted from total sales at the handler level. This means that handler assessable sales is likely lower than what is reported in the table above; however, all assumptions made in estimating potential assessment revenue have been made to generate the most conservative figure. Specifically, the assumption at the beginning of this analysis that assumes a retail markup in price of 40 percent ultimately results in lower total sales revenue for handlers than if the analysis assumed a lower retail price markup.<sup>54</sup> Secondly, retail sales of organic commodities increased nearly 11 percent between 2014 and 2015, according to findings in OTA 2016 Industry Survey. Data released in the NASS 2015 Certified Organic survey in September 2016 show that producer value of certified organic

<sup>54</sup> USAID, U.S. Specialty Foods End-Market Analysis, 2012.

agricultural products sold in 2015 increased 13 percent from 2014 to almost \$6.2 billion. From the growth in sales from 2014, which is the year for which data was analyzed to estimate assessment revenue, and the restrained assumption of a 40 percent retail markup over handler prices, AMS believes that the proposed program has the potential to collect at least \$25.3 million in assessment revenue at an exemption level of \$250,000 in annual sales.

While Table 7 shows the potential revenues generated from producers, importers and handlers that would be subject to assessment, Table 8 shows the portions of sales value and entities at the producer, importer and handler levels that would be exempt from assessment at each exemption level.

Table 8: Portion of value and entities exempt from assessment at exemption levels								
	Producers <sup>1</sup>		Handlers <sup>2</sup>		Importers <sup>3</sup>		Total	
	Value	Entities	Value	Entities	Value	Entities	Value	Entities
\$ 250,000	12%	76%	3%	40%	4%	85%	5%	63%
\$ 500,000	21%	87%	6%	64%	8%	90%	9%	78%
\$ 750,000	26%	91%	9%	70%	11%	92%	12%	83%
<sup>1</sup> 2014 Organic Survey, NASS; Organic Integrity database, NOP								
<sup>2</sup> 2016 Industry Survey, OTA; 2012 County Business Patterns and 2012 Economic Census, Census Bureau								
<sup>3</sup> U.S. Customs and Border Protection; Global Agricultural Trade Statistics, FAS								

At the proposed exemption level of \$250,000 in gross annual revenue, 12 percent of certified organic sales value from producers would be exempt, and 76 percent of producers would be exempt. For handlers, 3 percent of certified organic sales value and 40 percent of entities would be exempt. Of total importers of organic products, 4 percent of organic sales value would be exempt, and 85 percent of entities would be exempt. For comparison, the portion of entities and sales value that would be exempt under de minimis levels of \$500,000 and \$750,000 were also evaluated. At exemption levels of gross annual sales revenue in excess of \$250,000, \$500,000, and \$750,000, the total values of exempt sales would be 5 percent, 9 percent and 12

percent, respectively. Most research and promotion programs with de minimis thresholds in place exempt between 3 and 11 percent of total assessable quantity. The portion of total sales value that would be exempt at any of the three exemption levels evaluated in Table 8 all within or just barely outside this range. The proposed de minimis amount relative to total sales value is comparable to those of the majority of research and promotion programs overseen by AMS.

In the field of economics, a free rider is an entity who benefits from a service without having to pay for it. The free rider problem occurs in many different scenarios, including in research and promotion programs. In this case, the “free riders” would be those entities that do not pay assessments into the program, but benefit from the program’s existence. Ideally, the de minimis level excludes entities for whom the compliance cost of collecting the assessment would outweigh the amount of the assessment itself that would be due to the Board from these entities.

Based on the same data used to generate the figures in Tables 7 and 8, AMS estimates that the average assessment that would be collected from a producer, handler, or importer whose gross organic sales or transaction value was less than or equal to \$250,000 would amount to \$94 per entity annually. This means that at the de minimis level of \$250,000, as proposed by the proponent, the average amount in assessments that the Board would not collect from exempt entities would be \$94 apiece. AMS was unable to determine the cost of compliance on a single case basis to compare with the potential assessment revenue per entity with less than or equal to \$250,000 in gross annual sales or transaction value. AMS did, however, find that the annual compliance costs of other Boards with generic promotion programs ranges between about 0.5 and 3 percent of the Boards’ total revenue. Applying these proportions to the estimated total revenue (\$25.3 million) of the proposed Order would result in annual compliance costs ranging between \$126,719 and \$760,315. Compliance costs vary depending on the complexity of each

case, and a single case could require staff, auditor, AMS, and USDA Office of General Counsel time and expenses, as well as associated court fees. Based on these estimates, AMS seeks comments on whether the costs of enforcing compliance among smaller entities (those with less than or equal to \$250,000 in gross annual sales or transaction value) would outweigh the value in assessments the Board would collect from those entities.

Another potential instance of free riders is importers of organic products without HTS codes. Importers of organic products that are not among those currently in the HTS system would have the responsibility to report to the Board any assessments on transaction value in excess of \$250,000 annually. There are currently 38 HTS codes representative of imported organic agricultural products. These codes and their product descriptions are listed in the table below.

HTS Code	HTS Description
0409000005	NATURAL HONEY, CERTIFIED FOR ORGANIC
0703200005	GARLIC, FRESH WHOLE BULBS, CERTIFIED ORGANIC
0709604015	SWT BELL PEPPER, FRT OF CAPSICUM/PIMENTA, GRNHSE, CERT ORGANIC
0709604065	SWT BELL PEPPER, OTH, FRUIT, CAPSICUM/PIMENTA, CERT ORGANIC, OTHER
0802120005	SHELLED ALMONDS, CERTIFIED ORGANIC
0803900025	FRESH BANANAS, CERTIFIED ORGANIC
0804400020	AVOCADOS, HASS & HASS LIKE, CERTIFIED ORGANIC
0804504045	FRESH MANGOES ENTERED SEPT 1 TO MAY 31, CERTIFIED ORGANIC
0804506045	FRESH MANGOES ENTERED JUNE 1 TO AUG 31, CERTIFIED ORGANIC
0808100045	APPLES, FRESH, VALUED > \$0.22 PER KG, CERTIFIED ORGANIC
0808302015	PEARS, ORGANIC, ENTERED 4/1 - 6/30, FRESH
0808304015	PEARS, ORGANIC, ENTERED 7/1 - 3/31 FRESH
0808402015	QUINCES; FRESH, APR 1 THRU JUNE 30, CERTIFIED ORGANIC
0808404015	QUINCES, ORGANIC, ENTERED 7/1 - 3/31, FRESH
0810400026	BLUEBERRIES, FRESH, CULTIVATED, CERTIFIED ORGANIC
0901110015	ARABICA COFFEE NOT ROAST/DECAFFEINATED, CERTIFIED ORGANIC
0901110045	COFFEE, NOT ROASTED, NOT DECAFFEINATED, OTHER, CERTIFIED ORGANIC
0901120015	COFFEE, DECAFFEINATED, NOT ROASTED, CERTIFIED ORGANIC
0901210035	COFFEE, ROASTED; NOT DECAFFEINATED, <= 2KG RET CONT, CERT ORGANIC
0901210055	COFFEE, ROASTED, N/DECAFFEINATED, NOT 2KG OR LESS, CERT ORGANIC
0901220035	COFFEE, ROASTED, DECAFFEINATED, <= 2 KG RETAIL CONT, CERT ORGANIC
0902101015	FLAVORED GREEN TEA IMMEDIATE PACKING NOT EXCEED 3KG, CERT ORGANIC
0902109015	GREEN TEA (NOT FERMENTED) IMMEDIATE PACKINGS NOT EXCEED 3KG, N/FLAVOR, CERT ORGANIC
0902209015	OTHER GREEN TEA (NOT FERMENTED), N/FLAVORED, CERTIFIED ORGANIC
0902300015	BLACK TEA FERMENT/PART FERMENTED, IN TEA BAGS, <= 3KG, CERT ORGANIC
0910110010	GINGER, NOT GROUND, CERTIFIED ORGANIC
1001190025	DURUM WHEAT, CERTIFIED ORGANIC, EXCEPT SEED
1005902015	CORN (MAIZE) - YELLOW DENT CORN, CERTIFIED ORGANIC
1006309015	RICE: OTHER SEMI OR WHOLLY MILLED POLISHED OR NOT, CERT ORGANIC
1201900010	SOYBEANS, ORGANIC, WHETHER OR NOT BROKEN, NESOI
1204000025	FLAXSEED (LINSEED), FOR USE AS OIL STOCK, WITH OR WITHOUT BROKEN, ORGANIC
1509102030	CER OR LB EX VIRGIN OLIVE OIL N/CHEM MOD CONT LT 18 KG
1509102040	OLIVE OIL, NOT CHEM MOD. VIRGIN, WT < 18KG, ORG, OTH THAN XTRA VIR
1509104030	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH, CERT ORG, LAB EXTRA VIRGIN
1509104040	OLIVE OIL, NOT CHEM MOD, VIRGIN, OTH, CERT ORG, NOT LAB EXTRA VIR
2204100065	SPARKLING WINE, OF FRESH GRAPES VALUED > \$1.59 PER LITER, ORG
2204215035	RED WINE, > \$1.05 PER L, ALCHL STRNGTH BY VOLM <= 14%, CONT <= 2L, ORG
2204215050	WHITE WINE > \$1.05/L, ALCHOL STRNGTH BY VOLUM <= 14%, CONT <= 2L, ORG

In general, AMS seeks comments on the proposed de minimis level and its effect on the proposed program.

### *Exports*

The second exemption under the proposed Order would be for exports, or sales of certified organic commodities by domestic producers and handlers to locations outside of the United States. The Board would develop procedures for approval by USDA for refunding assessments that may be inadvertently paid on such sales and establish any necessary safeguards as appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking. If the Board determined that exports should be assessed, it would make that recommendation to the Secretary. Any such action would be implemented by USDA through notice and comment rulemaking.

### *Dual-covered commodities*

The third exemption from assessment under the proposed Order would be for dual-covered commodities. Should this proposed rule become final, the regulatory language currently exempting organic commodities from assessment by generic commodity promotion programs created under the various commodity promotion laws would no longer be in effect. AMS would conduct rulemaking to implement such a change. Such commodities would then become “dual-covered commodities”, and persons producing, handling and importing them would need to elect to pay assessments to the commodity-specific program (e.g., highbush blueberries, beef, dairy, almonds, etc.), or the organic commodity promotion program. Certified organic producers, handlers and importers of dual-covered commodities would apply to the Secretary, on a form provided by the Board, for an assessment exemption prior to the start of the marketing year. This would be an annual exemption and certified organic producers, certified organic handlers and importers would need to reapply each year to perpetuate their exemption. Such entities would be required to certify that they have remitted an assessment for the dual-covered commodity

pursuant to a commodity promotion law. Upon receipt of an application for exemption, the Secretary would determine whether an exemption may be granted. The Secretary may request documentation providing proof of the remittance of the assessment for the dual-covered commodity. The Secretary would issue, if deemed appropriate, a certificate of exemption to the eligible certified organic producer, handler or importer. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

### **Assessment scenarios**

Based on the proposed definitions, assessment provisions and exemptions described thus far, AMS developed the following scenarios to aid public understanding of how a proposed Order would be implemented. AMS invites public comments on this aspect of the proposed Order and the following scenarios.

#### **Scenario 1 – Jane Smith’s Organic Strawberry Farm**

Jane Smith is a certified organic producer, producing only organic strawberries on her farm and has gross organic sales of \$500,000 for the previous marketing year. To determine whether she is required to pay assessments and to who, Jane needs to answer the following questions: 1) whether she is an “assessed entity” under the proposed Order; 2) whether she produces a commodity subject to assessment under another agricultural commodity promotion order; and 3) if she does, whether she is subject to assessment under that agricultural commodity promotion order. For question 1, she is considered an “assessed entity” because she is a certified organic producer with gross organic sales in excess of \$250,000 for the previous marketing year. Further, because she is above the \$250,000 de minimis exemption threshold, she cannot claim a de minimis exemption and, thus, would be subject to the proposed Order. For question 2, she does not produce a commodity subject to another agricultural commodity promotion program as

strawberries do not have such a program in place. As a result, she does not need to address question 3. As a producer with gross organic sales above \$250,000 for the previous marketing year, she would be required to remit assessments under the proposed Order.

#### Scenario 2 – Jane Smith’s Organic Blackberry Farm

Jane Smith is a certified organic producer, producing only organic blackberries on her farm and has gross organic sales of \$100,000 for the previous marketing year. To determine whether she is required to pay assessments and to who, Jane first needs to answer question 1 about whether she is an “assessed entity” under the proposed Order. While she is a certified organic producer, she does not have gross organic sales in excess of \$250,000 for the previous marketing year. Therefore, she could either a) apply for exemption from paying assessments under the proposed de minimis provision at proposed section 1255.53 or b) opt into the proposed Order as a “voluntarily assessed entity” per proposed section 1255.38 and pay assessments on her \$100,000 gross organic sales for the previous marketing year. In this scenario, questions 2 and 3 do not apply because there is currently no blackberry promotion program in place.

#### Scenario 3 – Jane Smith’s Organic Blueberry Farm (A “Dual-Covered Commodity”)

Jane Smith is a certified organic producer, producing only organic blueberries on her farm and has gross organic sales of \$500,000 for the previous marketing year. These sales equate to approximately 147,000 pounds of organic blueberries (assuming an organic price of \$3.40 per pound).<sup>55</sup> To determine whether she is required to pay assessments and to who, Jane needs to answer the same questions: 1) whether she an “assessed entity”; 2) whether she produces a commodity subject to assessment under another agricultural commodity promotion order; and 3) if she does, whether she is subject to assessment under the other promotion order.

For question 1, she is considered an “assessed entity” because she is a certified organic

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<sup>55</sup> Price derived from data published in the NASS 2014 Organic Production Survey (09/17/2015)

producer with gross organic sales in excess of \$250,000 for the previous marketing year and she cannot claim the de minimis exemption. For question 2, unlike the strawberry example in Scenario 1, she does produce a commodity subject to assessment under another commodity promotion order, the Blueberry Promotion, Research and Information Order (7 CFR part 1218) (Blueberry Order). For question 3, she is a “producer” per section 1218.16 of the Blueberry Order and would be subject to assessment per section 1218.52 which states that the funds for the order are paid from assessments on producers and importers. Further, because she produces about 147,000 pounds of blueberries for the previous marketing year, she is above the 2,000 pound per year de minimis exemption for the Blueberry Order (section 1218.53) and, therefore would be subject to assessment. Given that Jane meets the criteria to be assessed under both the proposed Order and the existing Blueberry Order, she can decide which program she would like to pay into, remit assessments to that program and file for an exemption with USDA for the other one.

#### Scenario 4 – Jane Smith’s Mixed Berry Farm (A “Split Operation”)

Jane Smith is a berry producer, producing both organic and conventional blueberries and organic strawberries. This can be considered a “split operation” because she produces both organic and conventional products. Jane has a total of \$500,000 in blueberry sales for the previous marketing year, of which \$300,000 is from organic blueberries (about 80,000 pounds at \$3.40 per pound) and \$200,000 is from conventional blueberries (about 103,000 pounds at \$1.95 per pound). Organic strawberry sales are \$300,000 for the previous marketing year.

To determine whether she is required to pay assessments and to who, Jane needs to answer the same questions: 1) whether she is an “assessed entity” under the proposed Order; 2) whether she produces a commodity subject to assessment under another commodity promotion

order; and 3) if she does, whether she is subject to pay assessments to it. Jane's total gross organic sales are \$600,000 (the \$300,000 in organic blueberries plus the \$300,000 in organic strawberries). For question 1, she is considered an "assessed entity" because she is a certified organic producer with gross organic sales in excess of \$250,000 for the previous marketing year. Further, because she is above the \$250,000 de minimis exemption threshold, she cannot claim a de minimis exemption and, thus, would be subject to the proposed Order.

For question 2, Jane does produce a commodity subject to assessment under another commodity promotion order, the Blueberry Order. For question 3, she is a "producer" per section 1218.16 of the Blueberry Order and would be subject to assessment per section 1218.52. She produces in excess of the 2,000 pound per year de minimis exemption for the Blueberry Order (section 1218.53) and, therefore, could not claim an exemption from the Blueberry Order.

Under this scenario, Jane is clearly required to pay the assessment on the 103,000 pounds of conventional blueberries; this assessment is owed under the Blueberry Order regardless of the proposed Order. For the organic portion of her split operation, she has a total of \$600,000 in gross organic sales. Jane can either: a) pay assessments on the \$300,000 in organic blueberries (i.e., about 80,000 pounds) under the Blueberry Order and pay assessments on the \$300,000 in organic strawberry sales under the proposed Order or b) pay assessments on the \$600,000 in gross organic sales under the proposed Order. In either case, Jane must file for exemptions from the respective program that she is not paying into but would otherwise be subject to assessment under.

If the scenario were slightly different and, instead of \$300,000 in organic strawberry sales, Jane's organic strawberry sales are \$100,000, the decision point would remain the same. Jane can either: a) pay assessments on the \$300,000 in organic blueberries (i.e., about 80,000

pounds) under the Blueberry Order and pay assessments on the \$100,000 in organic strawberry sales under the proposed Order or b) pay assessments on the \$400,000 in gross organic sales under the proposed Order. While \$100,000 in organic strawberry sales is less than the \$250,000 de minimis threshold for the proposed Order, entities cannot opt into a program for the purpose of becoming exempt under the other program's de minimis exemption. In general, unless an entity for a “dual-covered commodity” would be considered de minimis under both the proposed Order and the commodity promotion program, that entity must pay assessments under one or both programs.

#### Scenario 5 – Joe Smith’s Beef Operation (Another “Dual-Covered Commodity”)

Joe Smith is a certified organic producer, producing only organic beef on his operation and has gross organic sales of \$100,000 for the previous marketing year. To determine whether he is required to pay assessments and to who, Joe first needs to answer question 1 about whether he is an “assessed entity” under the proposed Order. While he is a certified organic producer, he does not have gross organic sales in excess of \$250,000 for the previous marketing year. For question 2, he does produce a commodity subject to assessment under another commodity promotion order, the Beef Promotion and Research Order (7 CFR part 1260) (Beef Order). For question 3, he is a “producer” per section 1260.116 of Beef Order and would be subject to assessment per section 1260.172 which states that the funds for the order are paid from assessments on producers at a rate of one dollar per head of cattle. There is no de minimis exemption under the Beef Order. While \$100,000 in organic beef sales is less than the \$250,000 de minimis threshold for the proposed Order, Joe cannot claim he is exempt from the Beef Order because he is planning to pay into the proposed Order only to then claim he is also exempt from the proposed Order. Under this scenario, Joe could either a) pay his assessments into the Beef

Order or b) pay assessments on the \$100,000 in organic beef sales to the proposed Order.

While these scenarios focus on agricultural producers, the examples above could be utilized with organic handlers and importers. In the case of importers, the entity would need to look at transaction value rather than gross organic sales. However, as previously noted in the case of “dual-covered commodities”, one must determine in any scenario whether the entity is “covered” under an applicable commodity promotion order (which can include producers, handlers, first handlers, processors, importers, exporters, feeders, and seed stock producers, depending upon the order). Only “covered” entities are entitled to make a choice between paying into a proposed organic Order and the commodity specific promotion order. For example, an organic blueberry handler would not have the ability to elect to pay into the blueberry program instead of the organic program, as blueberry handlers are not “covered” by the blueberry program and are, therefore, not assessed. In this instance, the organic blueberry handler would need to pay into the organic program if it had gross organic sales in excess of \$250,000 for the previous marketing year or, if less than \$250,000 in gross organic sales, chose to participate as a “voluntarily assessed entity”.

#### **Assessment offset**

AMS is inviting public comment on the proposed provision to provide for an assessment offset for those entities subject to the Order that also pay a state promotion assessment. Section 1255.54 states that the Board, with approval of the Secretary, can credit an organic producer or handler up to 25 percent of the amount to be remitted to the Board pursuant to section 1255.52 to offset collection and compliance costs relating to such assessments and for fees paid to Qualified State Commodity Boards required by State law. The proponent group proposed the level of the offset at 25 percent. The offset would only be for monies that go to research and promotion

programs and not for dues or quality specifications. AMS is specifically interested in comments regarding the proposed offset for collection and compliance costs and how this would be implemented.

Under this proposal, organic producers and handlers who have an obligation to pay into a state commodity promotion program would be able to offset part of their assessment obligation. A Qualified State Commodity Board is defined as a State program, authorized by State law or State government agency that receives mandatory contributions and conducts promotion, research and/or information. These state programs do not need to be specifically for organic research and promotion. For example, if there is an Idaho state potato research and promotion program, an Idaho organic potato producer could hypothetically be required to pay a \$30 assessment annually to the state program. Under this proposed Order, that same producer also may be obligated under section 1255.52 to pay \$100 to the federal organic research and promotion program. In this scenario, the producer would be allowed to offset 25 percent or \$25 of the \$100 owed under the federal program, and thus pay \$75 to the federal program and \$30 to the state program. It should be noted that the producer would not be able to offset the total amount of the state obligation; rather, only up to 25 percent of what he or she owed under the federal program.

It is important that stakeholders be aware that USDA does not control state or regional commodity promotion programs. Furthermore, USDA does not address such programs in Federal regulations to maintain a clear separation of jurisdictions, authorities, and powers. However, USDA acknowledges that some state and regional commodity promotion programs work in concert with Federal programs. As such, USDA will encourage the boards/committees/councils that oversee the Federal commodity promotion programs to remind entities that request a Federal

organic assessment exemption that there may be state and regional commodity promotion program assessments that are not exempted as part of a Federal program exemption.

#### **iv. Promotion, Research and Information**

Pursuant to section 516 of the Act, sections 1255.60 through 1255.62 of the proposed Order would detail requirements regarding promotion, research and information programs, plans and projects authorized under the Order. The Board would develop and submit to the Secretary for approval programs, plans and projects regarding promotion, research, information and other activities including consumer and industry information and advertising (designed to, among other things, build markets and develop new products, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products). No program, plan or project would be implemented prior to USDA approval. The Board would be required to evaluate each plan and program to ensure that it contributes to an effective and coordinated research, promotion and information program. Such activities that are found not to contribute to an effective program would be terminated.

As stated in section 1255.61, at least once every five years, the Board would fund an independent evaluation of the effectiveness of the Order and programs conducted by the Board. The Board would submit to USDA, and make public, the results of this periodic evaluation. Finally, section 1255.62 states that any patents, copyrights, trademarks, inventions, product formulations and publications developed through the use of funds received by the Board would be the property of the U.S. Government, as represented by the Board. These along with any rents, royalties and the like from their use would be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board, and could be licensed with approval of the Secretary. This provision of the proponent's proposal was modified to ensure its compliance with

AMS policy for all research and promotion programs.

#### **v. Reports, Books, and Records**

Pursuant to section 515 of the Act, sections 1255.70 through 1255.72 specify the reporting and recordkeeping requirements under the proposed Order as well as requirements regarding confidentiality of information.

Section 1255.70 states that organic producers, handlers and importers would be required to submit periodically to the Board certain information as the Board may request. Specifically, organic producers and handlers would submit a report that would include, but not be limited to, the entity's name, address, and telephone number and the value of net organic sales of its organic products. Organic producers and handlers would submit this report at the same time they remit their assessments to the Board (no later than 90 days following the end of the year in which the organic product was produced or handled).

Likewise, importers would be required to submit a report to the Board that would include, but not be limited to, the importer's name, address, and telephone number; the transaction value of imported organic products; and the country/countries of export. Importers would submit this report at the same time they remit their assessments. Importers who paid their assessments through Customs would not have to submit such reports to the Board because Customs would collect this information upon entry.

Under section 1255.71, certified organic producers, certified organic handlers, and importers of organic products, including those who were exempt, would be required to maintain books and records needed to carry out the provisions of the proposed program, including for verification of any required reports. Such books and records must be made available during normal business hours for inspection by the Board's or USDA's employees or agents. Certified

organic producers, certified organic handlers, and importers of organic products would be required to maintain such books and records for two years beyond the applicable fiscal year to which they apply.

Under section 1255.72, all information obtained from persons subject to the Order as a result of proposed recordkeeping and reporting requirements would be kept confidential by all persons, including all current and former employees of the Board, all current and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. This information would not be available to Board members or certified organic producers, certified organic handlers, and importers. Only those persons with a specific need for the information would have access to it and for the sole purpose of administering the proposed program. Such information could only be disclosed if the Secretary considered it relevant, and the information was revealed in a judicial proceeding or administrative hearing brought at the direction or at the request of the Secretary or to which the Secretary or any officer of the United States is a party. Other exceptions for disclosure of confidential information would include the issuance of general statements based on reports or on information relating to a number of persons subject to the proposed Order, if the statements did not identify the information furnished by any person, or the publication, by direction of the Secretary, of the name of any person violating the proposed Order and a statement of the particular provisions of the Order violated.

#### **vi. Miscellaneous Provisions**

##### *Referenda*

Pursuant to section 518 of the Act, § 1255.81(a) of the proposed Order specifies that the program would not go into effect unless it is approved by a majority of assessed entities voting in the referendum. For example, if 10,000 organic producers, handlers, and importers voted in a

referendum, 5,001 would have to vote in favor of the Order for it to pass in the referendum. It is proposed that a single assessed entity may cast one vote in the referendum. A single entity is recognized by its individual tax identification number. This is a modification from the proponent's proposal, which recommended that a single assessed entity could cast one vote for each organic certificate held.

USDA made this modification to ensure consistency with other research and promotion programs under USDA oversight. Because organic certifying agents who certify producers and handlers vary as to the number of organic certificates issued to an entity upon certification, it would be difficult to ensure equity in the number of votes across entities. For example, a certified organic producer of blueberries and beef may receive one certificate from Certifying Agent A covering both the crops and livestock component of their operation. However, if the producer was certified by Certifying Agent B, they may receive two certificates—one for crops and one for livestock. The USDA organic regulations do not specify the number of certificates to be provided, only that the entity has met the requirements to be certified organic. Therefore, this modification to the proposed Order is intended to ensure that each entity is represented appropriately in any referendum.

The proposed Order states that each ballot request by an importer would have to include an affidavit attesting to that importer's participation in the organic industry, and a voluntarily assessed entity in an initial referendum would have to include in a ballot request a commitment to be assessed for the majority of years until the next continuance referendum. This is a modification from the proponent's proposal, which stated that voluntarily assessed entities voting in an initial referendum would have to commit to be assessed for all of the next seven years (until the next continuance referendum). Upon review, AMS determined that requiring voluntarily

assessed entities who vote in the initial referendum to pay into the program every year thereafter until the next referendum would not align with how the same type of entities would be treated that began paying assessments after the initial referendum. Accordingly, AMS is proposing that, at initial referendum, voluntarily assessed entities would need to commit to pay in for a majority of years until the next referendum, consistent with how voluntarily assessed entities would be treated in subsequent referenda. The proposed Order also states that bloc voting would be prohibited

Section 1255.81(b) of the proposed Order specifies criteria for subsequent referenda. Under the Order, a referendum would be held to ascertain whether the program should continue, be amended, or be terminated. This section specifies that a referendum would be held every seven years, which is in accordance with the Act. The Order would continue if favored by a majority of the assessed entities voting.

Additionally, a referendum shall be conducted by the Secretary if requested by 10 percent or more of all assessed entities. As in the initial referendum, each importer ballot request would include an affidavit attesting to that importer's participation in the organic industry, and a voluntarily assessed entity would have to include in a ballot request a commitment to be assessed for the majority of the next seven years (until the next continuance referendum). It also states that bloc voting would be prohibited.

All assessed entities in good standing would be eligible to vote in a subsequent referendum. It states that to be in good standing:

- (1) A dual-covered entity would have to demonstrate that it has paid into the proposed program for a majority of the years since the most recent referendum; or
- (2) A voluntarily assessed entity would have to demonstrate that it has paid into the proposed

program for a majority of the years since the most recent referendum; or

(3) An entity would have to demonstrate that it attained its organic certification since the most recent referendum; or

(4) An assessed entity that did not meet any of the above descriptions would have to demonstrate that it has paid into the proposed program every year since the most recent referendum.

For example, given these provisions and assuming that an organic R&P program passed its initial referendum and was implemented in 2017, a subsequent referendum would need to be held by 2024. Both dual-covered entities and voluntarily assessed entities who voted in the initial referendum would need to pay assessments into the organic program for at least four of the seven years leading up to 2024 in order to vote in the 2024 referendum. If a dual-covered entity decided to start paying into the organic program (rather than the commodity specific program) in 2020 (i.e., between 2017 and 2024), then that entity would have to show that it paid assessments for all four of the remaining years leading up to 2024. This would equally apply for voluntarily assessed entities who join in between the initial and any subsequent referendum. In other cases, a dual-covered commodity or voluntarily assessed entity could pay assessments for 2018, 2019, 2020, and 2022 (i.e., staggered/not continuous) and would be eligible to vote in a 2024 referendum since they paid for a majority of years since the initial referendum. While not addressed in the proponent's proposal, AMS expects that nominees for Board positions would be active program participants (i.e. paying assessments) during the years for which they may be selected to serve on the Board. AMS seeks comments on this issue and on the proposal for entities to pay in for a majority of years to vote in referenda.

Section 1255.80 and sections 1255.82 through 1255.88 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 Act. It is noted that section 1255.87, regarding amendments, states that any changes to the assessment rate proposed by the Board would be subject to referendum but that any other amendments to this subpart may be proposed by the Board. Additionally, a list of all amendments made since the last referendum would be sent to all assessed entities in advance of each referendum.

#### **IV. Executive Order 12866 and Executive Order 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563. The Office of Management and Budget designated this action “not significant” and therefore, has not reviewed this proposed rule.

#### **V. Initial Regulatory Flexibility Act Analysis**

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

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to

such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural support services firms (handlers and importers) as those having annual receipts of no more than \$7.5 million.

In 2014, there were a total of 19,466 certified organic operations in the U.S. and its territories.<sup>56</sup> This total includes both certified organic producers and certified organic handlers. The number of operations that were certified solely as organic handlers, according to NOP, totaled 8,327 entities. The remaining 11,139 certified organic entities include operations that are certified only as producers and operations that are certified as both producers and handlers. Producers of certified organic commodities are required to be certified as organic handlers if they sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

Data from the NASS 2014 Organic Survey show that about 91 percent of certified organic producers had 2014 organic sales value of \$750,000 or less.<sup>57</sup> Applying this proportion to the 11,139 certified organic producers referenced earlier results in 10,126 producing entities being considered small.

There is no one catch-all definition by the SBA of what constitutes a small handler of agricultural products. Therefore, to maintain consistency with other federal programs and marketing orders, AMS defines a small handler as one which has no more than \$7.5 million in annual receipts as defined by the SBA under subsector 115 of the North American Industry

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<sup>56</sup> NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/integrity/>.

<sup>57</sup> National Agricultural Statistics Service, *2014 Organic Survey*, U.S. Department of Agriculture (September 2015), p. 1, available at <http://usda.mannlib.cornell.edu/usda/current/OrganicProduction/OrganicProduction-09-17-2015.pdf>

Classification System (NAICS), “Support Activities for Agriculture and Forestry”.<sup>58</sup> According to the 2012 County Business Patterns and 2012 Economic Census released June 22, 2015, about 95 percent of firms classified under subsector 115 of NAICS had less than \$7.5 million in annual receipts and would be considered small. Applying this proportion to the number of certified organic handlers results in an estimated 7,895 handler operations out of 8,327 being considered small under the SBA definition.

According to data from Customs, there were 2,135 importers of organic products with HTS codes in 2014. Of these, about 98 percent had annual sales revenue of less than \$7.5 million in 2014. Adding the 2,135 number of organic importers to the 19,466 combined number of certified organic producers and handlers results in a total of 21,601 operations with sales of certified organic products in the U.S. Of this total, 20,121 entities, or 93 percent, would be considered to be small under the SBA definitions.

This rule proposes an industry-funded research, promotion, and information program for organic products. Organic products include food items, such as fruits, vegetables, dairy, meat, poultry, breads, grains, snack foods, condiments, beverages, and packaged and prepared foods, and non-food items, such as fiber for linen and clothing, supplements, personal care products, pet food, household products, and flowers. The purpose of this program would be to: (1) develop and finance an effective and coordinated program of research, promotion, industry information, and consumer education regarding organic commodities; and (2) maintain and expand existing markets for organic commodities. The program would be financed by an assessment on certified organic domestic producers and handlers and importers. The proposed program would be implemented under Act and would be administered by a board of mandatorily and voluntarily

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<sup>58</sup> U.S. Small Business Administration, “Table of Small Business Size Standards Matched to North American Industry Classification System Codes”, February 26, 2016.

assessed industry members selected by the Secretary. Under the proposed Order, certified producers and handlers with gross sales in excess of \$250,000 for the previous marketing year of organic agricultural commodities would pay one-tenth of one percent of net organic sales (total gross sales in organic products minus (a) the cost of certified organic ingredients and agricultural inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of organic products). Entities importing greater than \$250,000 in transaction value of organic products for the previous marketing year would pay one-tenth of one percent of the transaction value of organic products reported to U.S. Customs. An initial referendum will be held among mandatorily and voluntarily assessed entities (i.e. domestic producers, handlers, and importers) to determine whether they favor implementation of the program prior to it going into effect.

The proposed program is expected to grow markets for organic products by increasing the number of certified organic farmers, increasing the amount of organic acreage, conducting research into viable pest management tools, and educating consumers on the meaning of the USDA organic label. The revenue generated by the assessment is expected to finance these activities to help increase the supply of organic commodities. According to the proponent group, the organic industry cannot keep pace with consumer demand for organic products. To solve this issue, the proposed program would use its assessment revenue to expand the supply of certified organic commodities through the aforementioned activities. While the benefits of the proposed program are difficult to quantify, the benefits are expected to outweigh the costs.

In its overview of the organic industry, OTA stated that it had partnered with the GRO Organic Core Committee to facilitate preliminary discussions among stakeholders to determine whether there is a need for an organic promotion and research order. As part of its outreach,

OTA and the GRO Organic Core Committee held six webinars, three panel debates, and 20 town hall meetings in 2012 and 2013. In the spring and summer of 2014, OTA and the GRO Organic Core Committee engaged in direct outreach to all organic certificate holders across the U.S. The proponents mailed brochures and postcards with information on the emerging framework for an organic research and promotion order to 17,500 organic producers and handlers. OTA and the GRO Organic Core Committee conducted two rounds of surveys by mail and telephone to gauge support of the program. Of the survey respondents, twice as many certified operators supported the establishment of an organic research and promotion order than were opposed, according to the proponent. The survey respondents represented 11 percent of crop certificate holders, 13 percent of livestock certificate holders, and 8 percent of handling certificate holders. OTA also received feedback indicating that there was disagreement among industry producer members as to whether covered certified producers should be assessed, or only those whose gross organic sales exceeds \$250,000. In an effort to gather metrics on this particular issue of concern to the industry, OTA reached out to 2,000 certified organic producers who indicated that they fell below \$250,000 in gross organic sales with a combination of phone and mail surveys. OTA received responses from roughly 1,200 of those surveyed, 13 percent of which favored the removal of the \$250,000 threshold. Consequently, the proponents rejected the proposal to assess all certified producers.

In lieu of a research and promotion program, the proponents considered a voluntary trade association promotion program to be overseen by OTA, a federal marketing order, and encouraging each organic crop to create its own research and promotion program. The proponents concluded that a research and promotion program that would encompass all organic products would best meet the needs of the organic industry in an administratively efficient

manner with all benefiting parties paying their fair share.

Establishment of this program would impose an additional reporting and recordkeeping burden on importers and domestic producers and handlers of organic products. Importers and domestic certified organic producers and handlers interested in serving on the Board would 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 could also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, importers and domestic certified organic producers and handlers would have the opportunity to cast a ballot and vote for candidates to serve on the Board. Nominees would also have to submit a background information form to the Secretary to ensure they are qualified to serve on the Board.

Additionally, importers whose annual transaction value does not exceed \$250,000, and domestic producers and handlers whose gross organic sales do not exceed \$250,000 could submit a request to the Board for an exemption from paying assessments on this value. An entity whose commodity is currently represented under a different commodity promotion program or marketing order could submit to the Board its election of the program into which it will pay assessments. Mandatorily and voluntarily assessed entities would be asked to submit either an “Organic Import Report” or an “Organic Production and Handling Report” that would accompany their assessments paid to the Board and report the net organic sales and/or transaction value for organic products during the applicable period. Entities granted an exemption from assessments from the Board would not be required to submit these reports.

Finally, domestic producers, handlers, and importers who wanted to participate in a referendum to vote on whether the Order should become effective would have to complete a

registration form for submission to the Secretary. These forms are being 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. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

While AMS has performed this initial RFA analysis regarding the impact of the proposed rule on small entities, in order to have as much data as possible for a more comprehensive analysis, we invite comments concerning potential effects. AMS is also requesting comments regarding the number and size of entities covered under the proposed Order.

## **VI. Executive Order 13175**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

## **VII. Civil Rights Impact Analysis**

Consideration has been given to the potential civil rights implications of this proposed rule on affected parties to ensure that no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status or protected genetic information. Although detailed

demographic information is not available on the importers and domestic certified organic producers and handlers who would be subject to the program, broad consideration was given to the employees of such entities and those individuals who wish to use information collected under this mandatory program. This proposed rule does not require affected entities to relocate or alter their operations in ways that could adversely affect such persons or groups. Moreover, the program would not exclude from participation any persons or groups, deny any persons or groups the benefits of the program, or subject any persons or groups to discrimination.

### **VIII. Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request an approval of a new information collection and recordkeeping requirements for the proposed organic program.

Title: Organic Research, Promotion, and Information Order.

OMB Number: 0581-NEW.

Expiration Date of Approval: 3 years from approval date.

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

Abstract: The information collection requirements in the request are essential to carry out the intent of the Act. The information collection concerns a proposal received by USDA for a national research and promotion program for the organic industry. The program would be financed by assessments levied upon domestic certified organic producers, certified organic handlers, and importers of organic products, and would be administered by a board of industry members selected by the Secretary. The program would provide for an assessment exemption for: (a) certified organic producers and certified organic handlers with gross organic sales of \$250,000 or less for the previous marketing year, (b) importers of organic products declaring a

transaction value equal to \$250,000 or less for the previous marketing year, (c) shipments of certified organic commodities by domestic certified organic producers and certified organic handlers to locations outside of the United States, and (d) producers, handlers, and importers of dual-covered commodities (e.g., highbush blueberries, beef, dairy, almonds, etc.) who elect to pay assessments under other applicable commodity promotion programs. A referendum would be held among assessed domestic certified organic producer, certified organic handler entities, and importers to determine whether they favor implementation of the program prior to it going into effect. The purpose of the program would be to promote organic goods, educate the public, and support market and agricultural research.

In summary, the information collection requirements under the program concern Board nominations, the collection of assessments, and referenda. Regarding assessments, domestic certified organic producers, certified organic handlers, and importers would submit an “entity registration statement and application for exemption from assessment” form for the purpose of registering with the Board and, if desired, to apply for an exemption from paying assessments. The application for exemption portion of the form would need to be submitted to the board annually. Persons producing, handling and importing dual-covered commodities that opt to remit assessments to existing commodity promotion programs would annually submit a “Dual-Covered Commodity Application for Exemption from Assessments” form to the Secretary. Mandatorily and voluntarily assessed entities would also be asked to submit either an “Organic Import Report” or an “Organic Production and Handling Report” that would accompany their assessments paid to the Board and report the net organic sales and/or transaction value for organic products during the applicable period. Entities granted an exemption from assessments from the Board would not be required to submit these reports.

For Board nominations, importers and domestic certified organic producers and handlers interested in serving on the Board would 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 could also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, importers and domestic certified organic producers and handlers would have the opportunity to submit a “Nomination Ballot” to the Board where they would vote for candidates to serve on the Board. Nominees would also have to submit a background information form, “AD-755,” to the Secretary to ensure they are qualified to serve on the Board.

There would also be an additional burden on importers and domestic certified organic producers and handlers voting in referenda. The referendum ballot, which represents the information collection requirement relating to referenda, is addressed in a proposed rule on referendum procedures which is published separately in this issue of the **Federal Register**. The following estimates are based on an assumption that there is no participation by voluntarily assessed entities. Per the Initial Regulatory Flexibility Analysis, of the 11,139 producers, 8,327 handlers, and 2,135 importers, it is estimated that about 2,691 producers, 5,015 handlers, and 326 importers would pay assessments under the Order and thus be eligible to vote in the referendum.

Information collection requirements that are included in this proposal include:

**(1) ORGANIC PRODUCTION & HANDLING REPORT**

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 hours per certified organic producer or certified organic handler.

Respondents: Domestic certified organic producers and certified organic handlers.

Estimated number of Respondents: 7,706.

Estimated number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 92,472 hours.

**(2) ORGANIC IMPORTER REPORT**

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 3 hour per importer.

Respondents: Importers.

Estimated number of Respondents: 326.

Estimated number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 3,912 hours.

**(3) ENTITY REGISTRATION STATEMENT AND APPLICATION FOR EXEMPTION FROM ASSESSMENT**

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.8782 hours per application.

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 21,601.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 18,970 hours.

**(4) DUAL-COVERED COMMODITY APPLICATION FOR EXEMPTION FROM ASSESSMENTS**

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per importer or domestic producer or handler reporting on organic products produced or imported. Upon approval of an application, such entities would receive exemption certification.

Respondents: Domestic producers, handlers, and importers.

Estimated number of Respondents: 1,021.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,021 hours.

**(5) NOMINATION FORM**

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

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 275.

Estimated Number of Responses per Respondent: 0.33.

Estimated Total Annual Burden on Respondents: 22.69 hours.

**(6) NOMINATION BALLOT**

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

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 8,032.

Estimated Number of Responses per Respondent: 0.33.

Estimated Total Annual Burden on Respondents: 662.64 hours.

**(7) 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 hours per response for each Board nominee.

Respondents: Domestic producers, handlers, and importers.

Estimated number of Respondents: 32 (32 for initial nominations to the Board, 0 for the second year, 5 for the third year, and up to 6 annually thereafter).

Estimated number of Responses per Respondent: 1 every 3 years.

Estimated Total Annual Burden on Respondents: 16 hours for the initial nominations to the Board, 0 hours for the second year of operation, and up to 6 hours annually thereafter.

## **(8) BACKGROUND STATEMENT**

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

Respondents: Domestic producers, handlers, and importers.

Estimated Number of Respondents: 275.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 68.75 hours.

## **(9) 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 1 hours per recordkeeper maintaining such records.

Recordkeepers: Domestic producers and handlers (19,466), importers (2,135).

Estimated number of recordkeepers: 21,601.

Estimated total recordkeeping hours: 21,601 hours.

As noted above, under the proposed program, domestic certified organic producers, certified organic handlers, and importers would be required to pay assessments to and file reports with the Board. While the proposed Order would impose certain recordkeeping requirements on certified organic producers, certified organic handlers, and importers, information required under

the proposed Order could be compiled from records currently maintained. Such records shall be retained for at least 5 years beyond the fiscal year of their applicability.

An estimated 21,601 respondents would provide information to the Board (19,466 domestic certified organic producers and handlers, and 2,135 importers). Data for the list of certified organic producers and handlers was obtained from the 2014 NASS Organic Survey and the “2014 Annual Count of USDA-NOP Certified Organic Operations” report from the Organic Integrity Database.<sup>59</sup> Data to establish the list of importers of organic products in 2014 was obtained from the USDA AMS International Trade Data System/Automated Commercial Environment (ITDS/ACE).<sup>60</sup> The estimated cost of providing the information to the Board by respondents would be \$4,989,011.35. This total has been estimated by adding the cost of the hours required for producer and handling reporting (135,638.17 hours multiplied by \$34.89, the mean hourly earnings of certified producers and handlers) and importer reporting (8,490.92 hours multiplied by \$30.22, the average mean hourly earnings of importers). Data for computation of the hourly rate for producers and handlers (Occupation Code 11-9013: Farmers, Ranchers, and other Agricultural Managers) and importers (Occupation Code 13-1020: Buyers and Purchasing Agents) was obtained from the U.S. Department of Labor’s Bureau of Labor Statistics.

The proposed 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.

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<sup>59</sup> NOP Organic Integrity database. Available at: <https://apps.ams.usda.gov/Integrity/Reports/Reports.aspx>

<sup>60</sup> U.S. Customs and Border Protection ACE and Automated Systems. Available at: <https://www.cbp.gov/trade/automated>.

The proposed forms would 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 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 would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly would likely 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 five years is consistent with OFPA section 6511 (d)(1) requirements for the production and handling of agricultural products sold or labeled as organically produced. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual domestic certified organic producers, certified organic handlers and importers who are subject to the provisions of the Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

#### **Request for Public Comment under the Paperwork Reduction Act**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal production areas in the United States for organic commodities; (d) the accuracy of

USDA's estimate of the number of domestic certified organic producers, handlers, and importers of organic products that would 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.

Comments concerning the information collection requirements contained in this action should reference OMB No. 0581-NEW. In addition, the docket number, date, and page number of this issue of the **Federal Register** also should be referenced. Comments should be sent to the same addresses referenced in the **ADDRESSES** section of this rule.

OMB is required to make a decision concerning the collection of information contained in this rule between 30 and 60 days after publication. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

USDA made modifications to the proponent's proposal to conform to other similar national research and promotion programs implemented under the Act.

While the proposal set forth below has not received the approval of USDA, it is determined that this proposed Order is consistent with and would effectuate the purposes of the Act.

As previously mentioned, for the proposed Order to become effective, it must be approved by a majority of domestic certified organic producers, handlers, and importers voting in the referendum.

Referendum procedures will be published separately in this issue of the **Federal Register**.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received in response to this rule by the date specified will be considered prior to finalizing this action.

## **IX. List of Subjects in 7 CFR Part 1255**

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

For the reasons set forth in the preamble, it is proposed that Title 7, Chapter XI of the Code of Federal Regulations be amended by adding part 1255 to read as follows:

### **PART 1255—ORGANIC RESEARCH, PROMOTION AND INFORMATION ORDER**

#### **Subpart A—Organic Research, Promotion, and Information Order**

##### **Definitions**

Sec.

1255.1 Act.

1255.2 Agricultural inputs.

1255.3 Agricultural product.

1255.4 Assessed entity.

1255.5 Board.

1255.6 Certificate of exemption.

1255.7 Certification or certified.

1255.8 Certified operation.

1255.9 Certified organic handler.

1255.10 Certified organic producer.

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1255.12 Customs or CBP.

1255.13 Department.

1255.14 Dual-covered commodity.

1255.15 Fiscal year and marketing year.

1255.16 Gross organic sales.

1255.17 Importer.

1255.18 Information.

1255.19 Ingredient.

1255.20 National Organic Program.

1255.21 Net organic Sales.

1255.22 Order.

1255.23 Organic.

1255.24 Organic products.

1255.25 Organic Trade Association.

1255.26 Part and subpart.

1255.27 Person.

1255.28 Product processor.

1255.29 Programs, plans and projects.

1255.30 Promotion.

1255.31 Qualified State Commodity Board.

1255.32 Research.

1255.33 Secretary.

1255.34 State.

1255.35 Suspend.

1255.36 Terminate.

1255.37 United States.

1255.38 Voluntarily assessed entity.

### **Organic Research and Promotion Board**

1255.40 Establishment and membership.

1255.41 Nominations and appointments.

1255.42 Term of office.

1255.43 Removal and vacancies.

1255.44 Procedure.

1255.45 Reimbursement and attendance.

1255.46 Powers and duties.

1255.47 Prohibited activities.

### **Expenses and Assessments**

1255.50 Budget and expenses.

1255.51 Financial statements.

1255.52 Assessments.

1255.53 Exemption from assessment.

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

1255.60 Programs, plans and projects.

1255.61 Independent evaluation.

1255.62 Patents, copyrights, trademarks, inventions, product formulations, and publications.

## **Reports, Books and Records**

1255.70 Reports.

1255.71 Books and records.

1255.72 Confidential treatment.

## **Miscellaneous**

1255.80 Right of the Secretary.

1255.81 Referenda.

1255.82 Suspension or termination.

1255.83 Proceedings after termination.

1255.84 Effect of termination or amendment.

1255.85 Personal liability.

1255.86 Separability.

1255.87 Amendments.

1255.88 OMB control numbers.

## **Subpart B [Reserved]**

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

## **Subpart A – Organic Research, Promotion and Information Order**

### **DEFINITIONS**

#### **§ 1255.1 Act.**

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

#### **§ 1255.2 Agricultural inputs.**

*Agricultural inputs* means all substances or materials used in the production or handling

of organic agricultural products (e.g. fertilizer, lime, soil conditioners, agricultural chemicals, beneficial insects, other approved materials for pest control, seed, plants, vines, trees, feed purchased for livestock, etc.).

**§ 1255.3 Agricultural product.**

*Agricultural product.* Any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock, that is marketed in the United States for human or livestock consumption.

**§ 1255.4 Assessed entity.**

*Assessed entity* means any certified organic producer or certified organic handler that has gross organic sales in excess of \$250,000 for the previous marketing year, any importer with a transaction value greater than \$250,000 in organic products for the previous marketing year, and any voluntarily assessed entity.

**§ 1255.5 Board.**

*Board* means the Organic Research and Promotion Board established pursuant to §1255.40, or such other name as recommended by the Board and approved by the Secretary.

**§ 1255.6 Certificate of exemption.**

*Certificate of exemption* means a certificate issued by the Board, pursuant to §1255.53, to a certified organic producer, certified organic handler or importer that:

(a) Has gross organic sales less than or equal to \$250,000 for the previous marketing year,

(b) Has imported a transaction value less than or equal to \$250,000 in organic products during the previous marketing year, or

(c) Entity that produces, handles or imports dual-covered commodities. Certificates of

exemptions issued to entities that opt to pay into dual-covered commodity research and promotion programs or marketing orders are issued by the Secretary.

**§ 1255.7 Certification or certified.**

*Certification or certified.* A determination made by a USDA-accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto, and which is documented by a certificate of organic operation.

**§ 1255.8 Certified operation.**

*Certified operation.* A crop or livestock production operation, wild-crop harvesting or handling operation, or portion of such operation that is certified by a USDA-accredited certifying agent as utilizing a system of organic production or handling as described by the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205.

**§ 1255.9 Certified organic handler.**

*Certified organic handler* means a person who handles certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR 205.270 through 7 CFR 205.272, and all other applicable requirements of part 205 and receives, sells, consigns, delivers, or transports certified organic products into the current of commerce in the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

**§ 1255.10 Certified organic producer.**

*Certified organic producer* means a person who produces certified organic products in accordance with the definition specified in 7 CFR 205.100, the requirements specified in 7 CFR

205.202 through 7 CFR 205.207 or 7 CFR 205.236 through 7 CFR 205.240, and all other applicable requirements of part 205.

**§ 1255.11 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.

**§ 1255.12 Customs or CBP.**

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

**§ 1255.13 Department.**

*Department* 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.

**§ 1255.14 Dual-covered commodity.**

*Dual-covered commodity* means an agricultural commodity that is produced on a certified organic farm and is covered under this part and any other agricultural commodity promotion order issued under a commodity promotion law.

**§ 1255.15 Fiscal year and marketing year.**

*Fiscal year and marketing year* means the 12-month period ending on December 31 or such other period as recommended by the Board and approved by the Secretary.

**§ 1255.16 Gross organic sales.**

*Gross organic sales* means the total amount the person received for all organic products during the fiscal year without subtracting any costs or expenses.

**§ 1255.17 Importer.**

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

Organic importers can be identified through organic certificates, import certificates, HTS codes, or any other demonstration that they meet the definition above.

**§ 1255.18 Information.**

*Information* means information and programs for consumers, the organic industry, and producers. This includes educational activities; and information and programs designed to enhance and broaden the understanding of the use and attributes of organic products, increase organic production, support the transition of acres and farms to organic production in the United States, provide technical assistance, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies. These include:

(a) Consumer education, advertising and information, which means any effort taken to provide information to, and broaden the understanding of, the general public regarding organic products; and

(b) Industry information, which means information and programs that would enhance the image of the organic industry, maintain and expand existing markets, engage in crisis management, and develop new markets and marketing strategies; and

(c) Producer information, which means information related to agronomic and animal husbandry practices and certification requirements, and information supporting the sustainable transition of acres, farms and ranches to organic production in the United States, long-term

system management, increasing organic production, direct and local marketing opportunities, export opportunities, and organic research.

**§ 1255.19 Ingredient.**

*Ingredient* means any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

**§ 1255.20 National Organic Program.**

*“National Organic Program”* means the program authorized by the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6522) for the purpose of implementing its provisions.

**§ 1255.21 Net organic sales.**

*Net organic sales* means total gross sales in organic products minus (a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of certified products and (b) the cost of any non-organic agricultural ingredients used in the production of certified products.

**§ 1255.22 Order.**

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

**§ 1255.23 Organic.**

*Organic* means a labeling term that refers to an agricultural product produced in accordance with the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205.

**§ 1255.24 Organic products.**

*Organic products* means products produced and certified under the authority of the Organic Foods Production Act of 1990 (7 U.S.C. 6501-6522) and the regulations in 7 CFR part 205 or to an authorized international standard, and any amendments thereto.

**§ 1255.25 Organic Trade Association.**

*Organic Trade Association (OTA)* means a membership business association who, in collaboration with the GRO Organic Core Committee, petitioned USDA for the Organic Research, Promotion, and Information Order. OTA is a membership-based trade organization representing growers, processors, certifiers, farmers associations, distributors, importers, exporters, consultants, retailers, and others involved in the organic sector. The GRO Organic Core Committee is a subset of OTA's larger Organic Research and Promotion Program Steering Committee.

**§ 1255.26 Part and subpart.**

*Part* means the Organic Research, Promotion, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a *subpart* of such part.

**§ 1255.27 Person.**

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

**§ 1255.28 Product processor.**

*Product processor* means a certified organic handler who cooks, bakes, heats, dries, mixes, grinds, churns, separates, extracts, cuts, ferments, eviscerates, preserves, dehydrates, freezes, or otherwise manufactures organic products, and includes the packaging, canning, jarring, or otherwise enclosing organic food in a container.

**§ 1255.29 Programs, plans and projects.**

*Programs, plans and projects* means those research, promotion, and information programs, plans or projects established pursuant to the Order.

**§ 1255.30 Promotion.**

*Promotion* means any action, including paid advertising and the dissemination of information, utilizing public relations or other means, to enhance and broaden the understanding of the use and attributes of organic products for the purpose of maintaining and expanding markets for the organic industry.

**§ 1255.31 Qualified State Commodity Board.**

*Qualified State Commodity Board* means, for purposes of §1255.54 governing assessment offsets, an existing or future producer or handler governed entity—

- (a) That is authorized by State law or a State government agency;
- (b) That is organized and operating within a State;
- (c) That is not federally administered; and
- (d) That receives mandatory contributions and conducts promotion, research, and/or

information programs.

**§ 1255.32 Research.**

*Research* includes both agricultural and other research.

(a) Agricultural research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to improve organic farm production systems and practices, productivity, expand organic farming opportunities, and enhance sustainability for farms, farm families and their communities; enhance plant and animal breeding and varietal development for organic systems and improve the availability of other

production inputs; optimize natural resource conservation, biodiversity, ecosystem services, and other environmental outcomes of organic agriculture, and advance organic farm and food safety objectives.

(b) Other research includes any type of investigation, study, evaluation or analysis (including related education, extension, and outreach activities) designed to enhance or increase the consumption, image, desirability, use, marketability, or production of organic products; or to do studies on nutrition, market data, processing, environmental and human health benefits, quality of organic products, including research directed to organic product characteristics and product development, including new uses of existing organic products, new organic products or improved technology in the production, processing and packaging of organic products.

**§ 1255.33 Secretary.**

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

**§ 1255.34 State.**

*State* means any of the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

**§ 1255.35 Suspend.**

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

**§ 1255.36 Terminate.**

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

**§ 1255.37 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.

**§ 1255.38 Voluntarily assessed entity.**

*Voluntarily assessed entity* means any covered person with gross organic sales or transaction value of \$250,000 or less for the previous marketing year and thus not subject to assessment under this part, but elects to participate in the Order by remitting an assessment pursuant to §1255.52.

**Organic Research and Promotion Board**

**§1255.40 Establishment and membership.**

(a) *Establishment of the Board.* There is hereby established an Organic Research and Promotion Board to administer the terms and provisions of this Order. Seats on the Board shall be apportioned as set forth in paragraph (b) of this section. There shall be no alternate Board members.

(b) The Board shall be composed of 17 members and shall be established as follows:

(1) Two members shall be certified organic producers (assessed mandatorily or voluntarily) from Region 1, which consists of the states of Alaska, California, and Hawaii;

(2) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 2, which consists of the states of Oregon and Washington;

(3) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 3, which consists of the states of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming;

(4) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 4, which consists of the states of Iowa, Minnesota, and Wisconsin;

(5) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 5, which consists of the states of Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia;

(6) One member shall be a certified organic producer (assessed mandatorily or voluntarily) from Region 6, which consists of the states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Washington D.C., Puerto Rico, and U.S. Virgin Islands, and all other parts of the United States not listed in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(5) and (b)(6) of this section;

(7) One member shall be a voluntarily assessed certified organic producer at large, who shall have gross organic sales of \$250,000 or less;

(8) Five members shall be certified organic handlers at large (assessed mandatorily or voluntarily);

(9) Two members shall be product processors (assessed mandatorily or voluntarily);

(10) One member shall be an importer (assessed mandatorily or voluntarily); and

(11) One member shall be an at-large public member, who shall be a non-voting member.

(c) At least once in every five-year period, but not more frequently than once in every three-year period, the Board will review the participation rate of voluntarily assessed entities.

The review will be conducted using the Board's annual assessment receipts. If warranted, the

Board will recommend to the Secretary that the membership or size of the Board be adjusted to

reflect changes in the number of participating voluntarily assessed entities. Any changes in Board

composition shall be implemented by the Secretary through rulemaking.

(d) At least once in every five-year period, but not more frequently than once in every 3-year period, the Board must review, based on a 3-year average, the geographical distribution of production of organic agricultural commodities in the United States with respect to the certified organic producer Board member seats; and the value of organic agricultural commodities imported into the United States with respect to the importer seat(s). The review will be conducted using the NOP's list of certified organic operations and, if available, other reliable reports from the industry. If warranted, the Board will recommend to the Secretary that the membership or size of the Board be adjusted to reflect changes in geographical distribution of production of organic agricultural commodities in the United States, and the value of organic agricultural commodities imported into the United States. Any changes in Board composition shall be implemented by the Secretary through rulemaking.

**§1255.41 Nominations and appointments.**

(a) Nominees must be certified organic producers, certified organic handlers, or importers who are mandatorily or voluntarily assessed, except for the voluntarily assessed entity (who must be a voluntarily assessed certified organic producer) and the non-voting at-large public member.

(1) All Board nominees (mandatorily and voluntarily assessed) may provide a short background statement outlining their qualifications to serve on the Board.

(2) Reserved.

(b) Nominations for the initial Board will be handled by the Department and OTA. The nomination process shall be publicized, using trade press or other means deemed appropriate, and shall conduct outreach to all known certified organic producers, certified organic handlers, and importers of organic products, as well as the non-voting at-large public member. Voluntarily

assessed producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the seat for which they are geographically qualified. Entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at §§1255.9, 1255.10, and 1255.17. OTA may use local, state, or regional entities, mail or other methods to solicit potential nominees. The Secretary shall select the initial members of the Board from the nominations submitted.

(c) For subsequent nominations, the Board would solicit nominations using trade press or other means it deems appropriate, and shall conduct outreach to:

(1) All known U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year,

(2) Importers of organic products declaring a transaction value greater than \$250,000 for the previous marketing year, and

(3) All voluntarily assessed entities who have remitted assessments subject to §1255.52(d). Provided they are geographically qualified, entities that are a combination of a certified organic producer, certified organic handler, or importer could seek nomination to the Board in any role (certified organic producer, certified organic handler, and importer) for which they meet the definitions provided at §§1255.9, 1255.10, and 1255.17. Entities that are a combination of a certified organic producer, certified organic handler, or importer could also vote in the nomination process described below for the certified organic producer, certified organic handler, and importer nominees, provided they are geographically qualified and meet the definitions provided at §§1255.9, 1255.10, and 1255.17.

(d) Subsequent certified organic producer nominations (for all geographic regions and the

seat designated for a voluntarily assessed certified organic producer) shall be conducted as follows:

(1) For the Board seats allocated by geographic region, certified organic producers must be domiciled in the region for which they seek nomination. Nominees must specify for which region they are seeking nomination. The names of nominees shall be placed on a ballot by region. The ballots along with any background statements shall be mailed to all certified organic producers who are domiciled in that particular region with gross organic sales in excess of \$250,000 during the previous marketing year, and any certified organic producer in that region that has remitted a voluntary assessment pursuant to §1255.52(d) during the previous marketing year and is currently paying into the program. Certified organic producers may vote in each region in which they produce organic products. The votes shall be tabulated for each region and the nominees shall be listed in descending order by number of votes received. The top two candidates for each position shall be submitted to the Secretary at least six months before the new Board term begins; and

(2) Voluntarily assessed certified organic producers may seek nomination to the Board for the voluntarily assessed certified organic producer seat or for the certified organic producer seat for which they are geographically qualified. For the Board seat allocated to a voluntarily assessed certified organic producer, the names of nominees shall be placed on a ballot. The ballot along with any background statements shall be mailed to all voluntarily assessed certified organic producers. The votes shall be tabulated and the nominees shall be listed in descending order by number of votes received. The top two candidates for this position shall be submitted to the Secretary at least six months before the new Board term begins.

(e) Subsequent certified organic handler and product processor at large nominations shall

be conducted as follows:

(1) The names of the nominees for the five “at-large” domestic certified organic handler seats and the two “at-large” product processor seats shall be placed on a ballot. The ballots along with any background statements would be mailed to all certified organic handlers with gross organic sales in excess of \$250,000, and any voluntarily assessed certified organic handlers who have remitted an assessment pursuant to §1255.52(d) for the previous marketing year for a vote.

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top ten candidates for the certified organic handler positions and the top four candidates for the product processor positions would be submitted to the Secretary.

(f) Subsequent importer nominations shall be conducted as follows:

(1) The names of the nominees for the importer seat shall be placed on a ballot. The ballots along with any background statements shall be mailed to importers who imported a transaction value for organic products in excess of \$250,000, and any voluntarily assessed importers who have remitted an assessment pursuant to §1255.52(d) for the previous marketing year for a vote.

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position would be submitted to the Secretary.

(g) Subsequent non-voting at-large public member nominations shall be conducted as follows:

(1) The names of the nominees for “at-large” non-voting public member seat would also be placed on a ballot. The ballots along with the background statements would be mailed to:

(i) All U.S. certified organic producers and certified organic handlers with gross organic sales in excess of \$250,000 in the previous marketing year,

(ii) Importers of organic products that declared a transaction value greater than \$250,000 for the previous marketing year, and

(iii) All voluntarily assessed entities who have remitted assessments subject to section 1255.52(d) (e.g. “opted into the program”).

(2) The votes would be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates would be submitted to the Secretary.

(h) Any person nominated to serve on the Board shall file with the Board at the time of the nomination a background questionnaire.

(i) From the nominations made pursuant to this section, the Secretary shall appoint the members of the Board on the basis of representation provided in §1255.40.

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

(k) The Board shall recommend to the Secretary nominees for the at-large public member, and the Secretary shall appoint from those recommendations.

(l) 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.

(m) The Board shall strive for diversity in its membership.

**§1255.42 Term of office.**

(a) With the exception of the initial Board, each Board member shall serve for a term of

three years or until the Secretary selects his or her successor. Each term of office shall begin on January 1 and end on December 31. No member may serve more than two full consecutive three-year terms, except as provided in paragraph (b) of this section.

(b) For the initial Board, the terms of the Board members shall be staggered for two, three and four years as follows, so that the terms of approximately one-third of the Board members expire in any given year:

(1) 2-year term – Region #2 certified organic producer, Region #6 certified organic producer, 1 voluntarily assessed certified organic producer, 1 certified organic handler, and 1 product-processor.

(2) 3-year term – Region #1 certified organic producer, Region #4 certified organic producer, 1 at-large public member, 2 certified organic handlers, and 1 product-processor.

(3) 4-year term – Region #1 certified organic producer, Region #3 certified organic producer, Region #5 certified organic producer, 1 importer, and 2 certified organic handlers.

All subsequent terms shall be three-year terms.

(c) No single corporation, company, partnership or any other legal entity can be represented on the Board by an employee or owner for more than two consecutive terms.

#### **§1255.43 Removal and vacancies.**

(a) The Board may recommend to the Secretary that a member be removed from office if the member consistently fails or refuses to perform his or her duties properly or engages in dishonest acts or willful misconduct. If the Secretary determines that any person appointed under this subpart consistently fails or refuses to perform his or her duties properly or engages in acts of dishonesty or willful misconduct, the Secretary may remove the person from office. If a person loses or surrenders his or her valid organic certificate, the Secretary may remove the person from

office. A person appointed under this subpart may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

(b) If a member resigns, is removed from office, or dies, or if any member of the Board ceases to work for or be affiliated with a certified organic producer, certified organic handler or importer, or if a certified organic producer representing regional producers, or if a voluntarily assessed entity no longer chooses to be assessed, such position shall become vacant.

(c) If a position becomes vacant, nominations to fill the vacancy will be conducted using the nominations process set forth in this Order or the Board may recommend to the Secretary that he or she appoint a successor from the most recent list of nominations for the position.

(d) A vacancy will not be required to be filled if the unexpired term is less than six months.

#### **§1255.44 Procedure.**

(a) A majority of the voting Board members (9) shall constitute a quorum.

(b) Each voting member of the Board shall be entitled to one vote on any matter put to the Board and the motion will carry only if supported by a majority of Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which require affirmation by two-thirds of the total number of voting Board members (11).

(c) At an assembled meeting, all votes shall be cast in person, or as otherwise determined by the Board in bylaws.

(d) In lieu of voting at an assembled meeting and when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action only if supported by a majority of members (unless two-thirds is required under the Order) by mail, telephone, electronic mail, facsimile, or any other means of communication. In that event, all members must

be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at an assembled meeting. All votes shall be recorded in Board minutes.

(e) There shall be no proxy voting.

(f) The Board must give members and the Secretary timely notice of all Board, executive and committee meetings.

#### **§1255.45 Reimbursement and attendance.**

Board members shall serve without compensation, but shall be reimbursed for reasonable travel expenses, as approved by the Board, which they incur when performing Board business.

#### **§1255.46 Powers and duties.**

(a) The Board shall have the following powers and duties:

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

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

(3) To meet not less than annually, organize, and select from among the members of the Board a chairperson, vice chairperson, secretary/treasurer, other officers, and committees and subcommittees, as the Board determines appropriate;

(4) To employ or contract with persons, other than the 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 the persons;

(5) To provide notice of all Board meetings through a press release or other means and to

give the Secretary the same notice of Board meetings (including committee, subcommittee, and the like) as is given to members so 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;

(6) To develop and submit programs, plans and projects to the Secretary for the Secretary's approval, and enter into contracts or agreements related to such programs, plans and projects, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs, plans or projects of promotion, research, and information. The payment of costs for such activities shall be from funds collected pursuant to this Order. Each contract or agreement shall provide that:

(i) 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;

(ii) 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;

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

(iv) 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.

(7) To prepare and submit for the approval of the Secretary fiscal year budgets in accordance with §1255.50;

(8) To borrow funds necessary for startup expenses of the Order during the first year of

operation by the Board;

(9) To invest assessments collected and other funds received pursuant to the Order and use earnings from invested assessments to pay for activities carried out pursuant to the Order;

(10) To recommend changes to the assessment rates as provided in this part;

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

(12) To periodically prepare and make public reports of program activities and, at least once each fiscal year, to make public an accounting of funds received and expended;

(13) To maintain such minutes, books and records 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;

(14) To act as an intermediary between the Secretary and any organic industry participant;

(15) To receive, investigate, and report to the Secretary complaints of violations of the Order; and

(16) To recommend to the Secretary such amendments to the Order as the Board considers appropriate.

(b) When researching priorities for each marketing year the Board will provide public notice using local, state, or regional entities, mail and/or other methods to solicit public input from all covered entities and will have at least one meeting or conference call to determine the priorities for each marketing year.

**§1255.47 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;

(b) Using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments or subdivision thereof (including the National Organic Standards Board), other than recommending to the Secretary amendments to the Order; and

(c) Any promotion that is false, misleading or disparaging to another agricultural commodity.

**EXPENSES AND ASSESSMENTS**

**§1255.50 Budget and expenses.**

(a) At least 60 calendar days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Board shall prepare and submit to the Department a budget for the fiscal year covering its anticipated expenses and disbursements in administering this part. The budget for research, promotion or information may not be implemented prior to approval by the Secretary. 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 fiscal year, which shall not include the initial budget;

(3) A summary of proposed expenditures for each program, plan or project. This shall include the following allocation of expenditures, clearly designated within the following buckets:

(i) The funds shall be allocated as follows: no less than 25 percent of the funds shall be allocated to research; 25 percent of the funds shall be allocated to information; 25 percent of the funds shall be allocated to promotion; and 25 percent of the funds shall remain discretionary; and

(ii) Of the funds allocated to research, a majority shall be allocated to agricultural research; and

(iii) Of the funds allocated to information, a majority shall be allocated to producer information; and

(iv) Regional certified organic producer Board members shall establish priorities, including regional considerations, for investments in agricultural research; and

(v) Any expenditures designated for the categories set forth in (i), (ii), and (iii) of this section that are not spent in a fiscal year shall carry over for the same category for the following fiscal year.

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding fiscal 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 Order.

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

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Secretary finds 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 Department, the Board may borrow money for the payment of startup expenses subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed shall be expended only for startup costs and capital outlays and are limited to the first year of operation by the Board.

(f) The Board may accept voluntary contributions. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use. The Board may receive funds from outside sources with approval of the Secretary for specific authorized projects.

(g) The Board may also receive other funds provided through the Department or from other sources, with the approval of the Secretary, for authorized activities.

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

(i) For fiscal years beginning three years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and the functioning of the Board an amount that is greater than 15 percent of the assessment and other income received by and available to the Board for the fiscal year. For purposes of this limitation, reimbursements to the Secretary shall not be considered administrative costs.

(j) Any program, plan or project receiving funds under this section shall not expend for administration an amount that is greater than 15 percent of the total funds allocated to the program, plan or project.

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

(l) 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.

**§1255.51 Financial statements.**

(a) The Board shall prepare and submit financial statements to the Department on a 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 Department within 30 calendar days after the end of the time period to which it applies.

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

**§1255.52 Assessments.**

(a) The Board's programs and expenses shall be paid by assessments on assessed entities, other income of the Board, and other funds available to the Board.

(b) Subject to the offset specified in §1255.54 each certified organic producer or certified organic handler with gross organic sales of greater than \$250,000 during the previous marketing year shall pay one-tenth of one percent of net organic sales to the Board. Each certified organic producer and certified organic handler shall remit to the Board the amount due no later than 90 days following the end of the marketing year in which the organic product was produced or handled and submit any necessary reports to the Board pursuant to §1255.70. Quarterly payments may be accepted.

(c) Importers with greater than \$250,000 in transaction value of organic products imported during the prior marketing year shall remit an assessment of one-tenth of one percent of the transaction value of organic products to Customs at the time of entry into the United States and shall be remitted by Customs to the Board. If Customs does not collect an assessment from an organic importer, the importer is responsible for paying the assessment directly to the Board within 90 calendar days after the end of the year in which the organic products were imported and submit any necessary reports to the Board pursuant to §1255.70. Quarterly payments may be accepted. Such importers that have \$250,000 or less in transaction value of organic products during the marketing year shall automatically receive a refund from the Board for the applicable assessments. The Board shall refund such importers their assessments as collected by Customs no later than 90 calendar days after the end of the marketing year. No interest shall be paid on the assessments collected by Customs or the Board.

(d) Voluntary assessment. (1) Certified organic producers and certified organic handlers

with gross organic sales of \$250,000 or less in the prior marketing year may elect to participate in the Order as a voluntarily assessed entity by remitting an assessment of one-tenth of one percent of net organic sales. The certified organic producer and certified organic handler shall remit to the Board the amount due no later than 90 days following the end of the marketing year in which the organic product was produced or handled and submit any necessary reports to the Board pursuant to §1255.70. Quarterly payments may be accepted.

(2) Importers declaring \$250,000 or less in transaction value of organic products imported during the prior marketing year may elect to participate in the Order as a voluntarily assessed entity by remitting an assessment of one-tenth of one percent of the transaction value of organic products prior to the start of the marketing year. Quarterly payments may be accepted. If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment directly to the Board within 90 calendar days after the end of the year in which the organic products were imported. The importer would also submit any necessary reports to the Board pursuant to §1255.70.

(e) If an entity is a combination of a certified organic producer, certified organic handler and/or an organic importer, such entity's combined gross organic sales and transaction value of organic products declared to Customs during the previous marketing year shall count towards the \$250,000 threshold.

(f) At least 24 months after the Order becomes effective and periodically thereafter, the Board shall review and may recommend to the Secretary, upon an affirmative vote of at least two-thirds of the voting members of the Board, a change in the assessment rate. A change in the assessment rate is subject to referendum.

(g) When a certified organic producer, certified organic handler or importer fails to pay

the assessment within 90 calendar days of the date it is due, the Board may impose a late payment charge and interest. The late payment charge and rate of interest shall be prescribed in regulations issued by the Secretary. All late assessments shall be subject to the specified late payment charge and interest. Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures.

(h) The Board may accept advance payment of assessments from any certified organic producer, certified organic handler, or organic importer that will be credited toward any amount for which that person may become liable. The Board may not pay interest on any advance payment.

(i) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall receive assessments and shall pay such assessments and any interest earned to the Board when it is formed.

**§1255.53 Exemption from assessment.**

(a) *Certified organic producers, certified organic handlers, and importers.* (1) Certified organic producers and certified organic handlers with gross organic sales of \$250,000 or less in the prior marketing year may apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the marketing year. This is an annual exemption and certified organic producers and certified organic handlers must reapply each year. Upon receipt of an application for exemption, the Board shall determine whether an exemption may be granted. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible certified organic producer or certified organic handler. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

(2) Importers declaring \$250,000 or less in transaction value of organic products imported

during the prior marketing year may apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the marketing year. This is an annual exemption and importers must reapply each year. Upon receipt of an application for exemption, the Board shall determine whether an exemption may be granted. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible importer. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

(b) *Exporters*. Shipments of certified organic commodities by domestic producers and handlers to locations outside of the United States are exempt from assessment. The Board shall establish procedures for approval by the Secretary for refunding assessments that may be inadvertently paid on such sales and establish any necessary safeguards as appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking. If the Board determined that exports should be assessed, it would make that recommendation to the Secretary. Any such action would be implemented by USDA through rulemaking.

(c) *Dual-covered* commodities. Certified organic producers; certified organic handlers, and importers of dual-covered commodities may apply to the Secretary, on a form provided by the Board, for a certificate of exemption any time initially, and annually thereafter prior to the January 1 start of the marketing year. The exemption for dual-covered commodities is effective for one marketing year. Entities granted an exemption must reapply each year. Eligible applicants shall certify that they have remitted any and all assessments due for the dual-covered commodity pursuant to the provisions of an agricultural commodity promotion order issued under a commodity promotion law. Within 30 days of receipt of an application for exemption, the Secretary shall determine whether an exemption may be granted. The Secretary may request documentation providing proof of the remittance of the assessment for the dual-covered

commodity. If all requirements have been met, the Secretary will issue a certificate of exemption to the eligible certified organic producer, certified organic handler, or importer effective for the marketing year. If the application is denied, the Secretary will notify the applicant, in writing, within 30 days of application. Such notification must detail the justification for the denial. Applicants notified of denial may reapply for an exemption for the forthcoming marketing year, so long as the reapplication is received prior to the beginning of such marketing year. It is the responsibility of any entity granted an exemption to retain a copy of the certificate of exemption.

**§1255.54 Assessment offset.**

The Board may, with the approval of the Secretary, authorize a credit to a certified organic producer and certified organic handlers of up to 25 percent of the amount to be remitted to the Board pursuant to §1255.52 of this subpart to offset collection and compliance costs relating to such assessments and for fees paid to Qualified State Commodity Boards required by State law. This offset is available only for those monies that go to research and promotion, and not for dues or quality specifications.

**PROMOTION, RESEARCH AND INFORMATION**

**§1255.60 Programs, plans and projects.**

(a) The Board shall develop and submit to the Secretary for approval programs, plans and projects authorized by this subpart. Such programs, plans and projects shall provide for promotion, research, information and other activities including consumer and industry information and advertising.

(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) The Board must evaluate each program, plan and project authorized under this subpart to ensure that it contributes to an effective and coordinated program of research, promotion, and information. The Board must submit the evaluations to the Secretary. If the Board finds that a 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.

**§1255.61 Independent evaluation.**

At least once every five years, the Board shall authorize and fund from funds otherwise available to the Board, an independent evaluation of the effectiveness of all generic promotion, research and information activities undertaken under the Order. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this section.

**§1255.62 Patents, copyrights, trademarks, inventions, product formulations, and publications.**

Any patents, copyrights, trademarks, inventions, product formulations, and publications developed through the use of funds received by the Board under this subpart shall become part 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, inventions, 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, section 1255.83 shall apply to determine disposition of such property.

**REPORTS, BOOKS, AND RECORDS**

### **§1255.70 Reports.**

(a) Certified organic producers, certified organic handlers and importers will be required to provide periodically to the Board such information as the Board, with the approval of the Secretary, may require. Such information may include, but not be limited to:

(1) For certified organic producers and certified organic handlers:

(i) The name, address and telephone number of the certified organic producer and/or certified organic handler and

(ii) The value of net organic sales of the organic products.

(2) For importers:

(i) The name, address and telephone number of the importer;

(ii) The transaction value of the organic products imported by type; and

(iii) The country/countries of export.

(b) For certified organic producers and certified organic handlers, such information shall be reported to the Board no later than 90 days following the end of the year in which the organic product was produced or handled and shall accompany the collected payment of assessments as specified in §1255.52. Quarterly payments may be accepted.

(c) Importers who paid their assessments through Customs would not have to submit such reports to the Board because Customs would collect this information upon entry. For importers who pay their assessments directly to the Board, such information shall accompany the payment of collected assessments within 90 calendar days after the end of the year in which the organic product was imported specified in §1255.52. Quarterly payments may be accepted.

### **§1255.71 Books and records.**

Each certified organic producer, certified organic handler and importer shall maintain any

books and records necessary to carry out the provisions of this subpart and regulations issued thereunder, including such records as are necessary to verify any required reports. Such books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. Certified organic producers, certified organic handlers and importers must maintain the books and records for two years beyond the fiscal year to which they apply.

**§1255.72 Confidential treatment.**

All information obtained from books, records, or reports under the Act, this subpart and the regulations issued thereunder 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 or certified organic producers, certified organic handlers and importers. Only those persons having a specific need for such information solely 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 at 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 do 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 part, together with a statement of the particular provisions of this part violated by such person.

## **MISCELLANEOUS**

### **§1255.80 Right of the Secretary.**

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

### **§1255.81 Referenda.**

(a) *Initial referendum.* The Order shall not become effective unless the Order is approved by a majority of assessed entities voting in the referendum. A single assessed entity may cast one vote in the referendum. All currently certified domestic entities in the list that is maintained by the National Organic Program will be mailed a ballot. Importers of products with organic HTS codes from the last year will also be mailed a ballot. Requests for ballots shall include an affidavit attesting to (a) an importer's participation in the organic industry, and (b) a voluntarily assessed entity's commitment to be assessed for the majority of years until the next referendum. Bloc voting shall be prohibited.

(b) *Subsequent referenda.* (1) Every seven years, the Department shall hold a referendum to determine whether assessed entities favor the continuation, suspension, or termination of the Order. The Order shall continue if it is favored by a majority of the assessed entities voting. The Department will also conduct a referendum if 10 percent or more of all assessed entities request the Department to hold a referendum. Each ballot request shall include an affidavit attesting to:

- (i) An importer's participation in the organic industry, and
- (ii) A voluntarily assessed entity's commitment to be assessed for the majority of the next

seven years. Bloc voting shall be prohibited.

(2) All assessed entities in good standing shall be eligible to vote in a subsequent referendum. To be in good standing:

(i) A dual-covered entity must demonstrate that it has paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(ii) A voluntarily assessed entity must have paid into the organic research and promotion program for a majority of the years since the most recent referendum; or

(iii) An entity must have attained its organic certification since the most recent referendum and have paid into the organic research and promotion program for every year since entering the program; or

(iv) An assessed entity that does not meet any of the above descriptions must demonstrate that it has paid into the organic research and promotion program every year since the most recent referendum.

**§1255.82 Suspension or 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 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 year whenever the Secretary determines that its suspension or termination is favored by a majority of assessed entities voting in the referendum.

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

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

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

**§1255.83 Proceedings after termination.**

(a) Upon termination of this subpart, the Board shall recommend to the Secretary up to five of its members to serve as trustees for the purpose of liquidating the Board's affairs. 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 existing claim 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 the Order;

(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 trustees, to such person or persons as the Secretary directs; and

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

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to the Order 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 one or more organic organizations in the United States whose mission is generic organic promotion, research, and information programs.

**§1255.84 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, 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 subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

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

**§1255.85 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.

**§1255.86 Separability.**

If any provision of this subpart is declared invalid or the applicability of it 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.

**§1255.87 Amendments.**

Any changes to the assessment rate may be proposed by the Board and will be subject to a referendum. Any other amendments to this subpart may be proposed by the Board. A list of all amendments made since the last referendum will be sent to all assessed entities in advance of each subsequent referendum.

**§1255.88 OMB control numbers.**

The control numbers assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, are OMB control number 0505-0001 (Board nominee background statement) and OMB control number 0581-NEW.

**Subpart B [Reserved]**

Dated: January 9, 2017

Elanor Starmer  
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Agricultural Marketing Service

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