



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1223**

**[Document Number AMS-SC-20-0013; PR-A1]**

**Pecan Research, Promotion, and Information Order**

**AGENCY:** Agricultural Marketing Service.

**ACTION:** Proposed rule.

**SUMMARY:** This proposal invites comments on the establishment of the Pecan Research, Promotion, and Information Order (Order). The purpose of the program would be to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. The program would be financed by an assessment on pecan producers and importers. This proposal also invites comments on the procedures for conducting a referendum to determine whether the continuation of the proposed Order is favored by domestic producers and importers of pecans. In addition, this proposal announces the Agricultural Marketing Service's (AMS) intent to request approval by 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 proposed rule. All comments must be submitted through the Federal e-rulemaking portal at <http://www.regulations.gov> and should reference the document number, and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this proposed rule will be included in the rulemaking record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public 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.

**FOR FURTHER INFORMATION CONTACT:** Andrea Ricci, Marketing Specialist, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 755 E. Nees Avenue #25985, Fresno, CA 93720; telephone: (202) 572-1442; or electronic mail: [Andrea.Ricci@usda.gov](mailto:Andrea.Ricci@usda.gov).

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

**Executive Orders 12866, 13563, and 13771**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

**Executive Order 13175**

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and

Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

### **Executive Order 12988**

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Section 519 of the 1996 Act (7 U.S.C. 7418) provides that a person subject to an order may file a written petition with the U.S. Department of Agriculture (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, must be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner would have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court

of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

### **Background**

This proposal invites comments on the establishment of the Pecan Research, Promotion, and Information Order (Order). The program would be financed by an assessment on producers and importers and would be administered by a board of industry members selected by the Secretary. The initial assessment rate would be \$0.02 per pound of inshell pecans and \$0.04 per pound of shelled pecans produced within or imported to the United States. Entities that produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) would be exempt from the payment of assessments.

The purpose of the program would be to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. The proposal was submitted to USDA by the National Pecan Federation (NPF), an organization representing pecan growers and shellers

across the United States whose mission is to promote, protect, and improve business conditions for the pecan industry.

This proposal also invites comments on the procedures for conducting a referendum to determine whether the continuation of the proposed Order is favored by domestic producers and importers of pecans. A referendum would be held among eligible domestic producers and importers no later than three years after assessments begin to determine whether they favor continuation of the program. In addition, this proposal announces the intent of AMS to request approval by OMB of new information collection requirements to implement the program.

#### **Legal Basis for Action**

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

The 1996 Act provides several optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 1996 Act provides for orders

applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments). Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

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

USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New

Mexico, Oklahoma, South Carolina, and Texas, which is authorized under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). The purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problems, and to improve profitability. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

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

### **Industry Background**



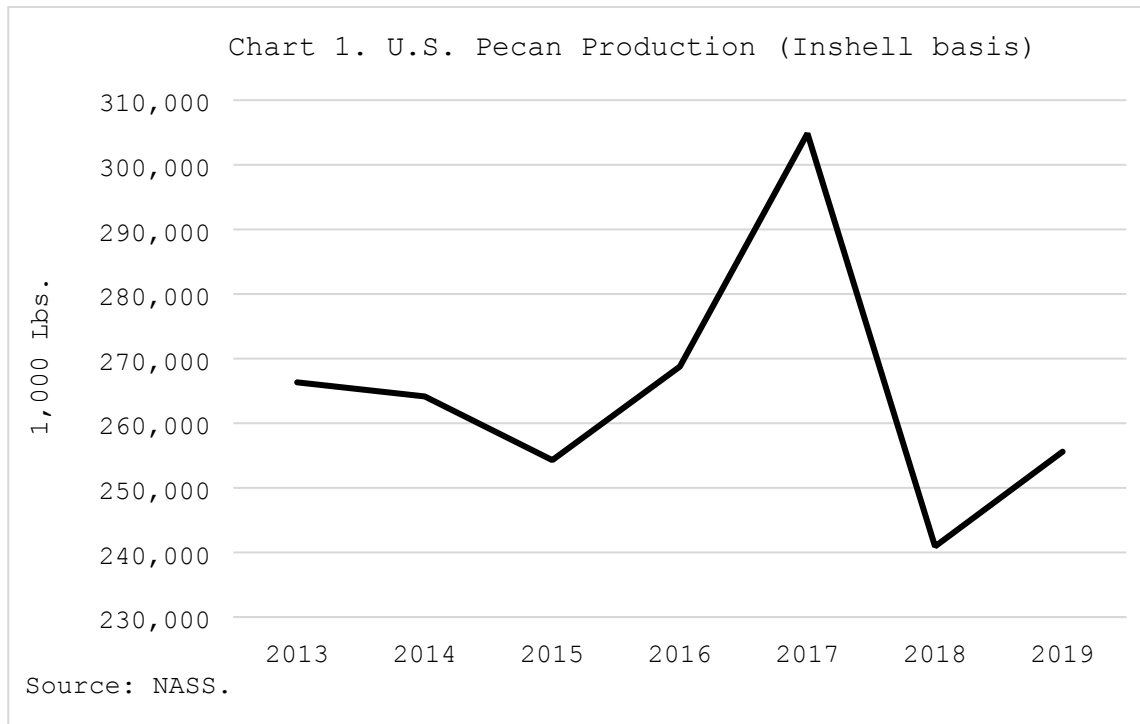
The pecan industry is comprised of producers, shellers, accumulators, wholesalers, and importers that produce, process, and supply pecans for market. Pecans include any and all varieties or sub varieties, inshell or shelled of the Genus, species: *Carya illinoensis*. Pecans are grown primarily in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. According to the most recent Census of Agriculture (2017), there are 15,608 operations with bearing acreage of pecans. Bearing acreage is greatest in Georgia with about 30 percent of the nationwide total, followed by Texas at 27 percent, Oklahoma at 22 percent, New Mexico at 11 percent, and Arizona at 4 percent. These five states generally account for about 95 percent of U.S. pecan production.

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

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

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

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



In 2018, Hurricane Michael swept across the southern half of Georgia as a Category 3 storm. According to the University of Georgia Pecan Extension, this storm resulted in a loss of nearly half the expected 2018 crop and a loss of 17 percent of the state's pecan acreage. The effects of Hurricane Michael remain present as the 2019 Georgia crop was down nearly 30 percent from the average production of the six years prior to the storm. Prior to Hurricane Michael, Georgia was the top pecan-producing state in the U.S. Considering this, along with the state's recovery efforts, the University of Georgia Pecan Extension expects Georgia pecan production to rebound in the coming years. Pecan production nationwide began to increase in 2019, climbing six percent from 2018.

Table 2 shows U.S. pecan supply and utilization. Domestic production generally accounts for about 40 percent of the domestic supply, while imports account for nearly one-third, with beginning stocks just under 30 percent. Almost all pecans imported into the U.S. are from Mexico. Of these, 70 percent are shelled, and 30 percent are inshell.

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

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

### *Exports*

The U.S. exports about 24 percent of its pecan supply on average each year. Shelled pecans make up 60 percent of U.S. pecan exports, while inshell are 40 percent. Europe and Canada are the primary markets for shelled pecans with, on average, 49 percent and 24 percent, respectively, of total shelled exports. In Europe, the largest consumers of U.S. shelled pecans are the Netherlands, the United Kingdom, and Germany with 39 percent, 24 percent, and 15 percent, respectively, of total shelled exports to Europe. On average, about 94 percent of U.S. inshell exports go to Asia. Together, Hong Kong and China make up 72 percent of the Asian market for inshell pecan exports from the United States.

### *Competition*

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

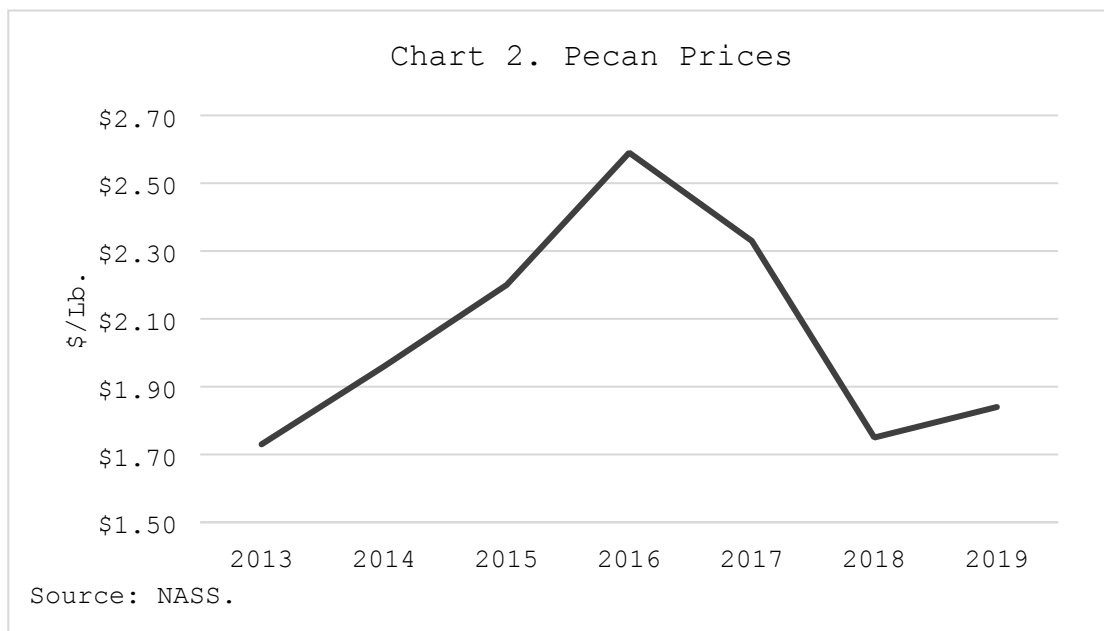
| Table 3. Shelled Nut Sales (1,000 Lbs.)                    |         |                      |            |         |
|--|---------|----------------------|------------|---------|
| Year   | Pecans  | Almonds <sup>1</sup> | Pistachios | Walnuts |
| 2013   | 106,569 | 2,010,000            | 45,400     | 306,000 |
| 2014   | 101,858 | 1,870,000            | 50,800     | 374,000 |
| 2015   | 87,225  | 1,900,000            | 33,100     | 400,000 |
| 2016   | 116,930 | 2,140,000            | 114,400    | 438,000 |
| 2017   | 126,396 | 2,270,000            | 52,807     | 390,000 |
| 2018   | 88,373  | 2,280,000            | 121,000    | 450,000 |
| 2019   | 115,937 | 2,550,000            | 82,000     | 412,000 |
| 2014-2019<br>6-yr avg                                      | 106,120 | 2,168,333            | 75,685     | 410,667 |
| Pecan comparison   |         | -95%                 | 40%        | -74%    |
| Source: NASS.  |         |                      |            |         |
| Note: <sup>1</sup> Almonds is shelled utilized production. |         |                      |            |         |

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

| Table 4. Grower-Received Prices (\$/Lb.) |         |         |            |         |
|--|---------|---------|------------|---------|
| Year                                     | Pecans  | Almonds | Pistachios | Walnuts |
| 2013                                     | \$ 1.73 | \$ 3.21 | \$ 3.48    | \$ 1.86 |
| 2014                                     | \$ 1.96 | \$ 4.00 | \$ 3.57    | \$ 1.67 |
| 2015                                     | \$ 2.20 | \$ 3.13 | \$ 3.29    | \$ 0.84 |
| 2016                                     | \$ 2.59 | \$ 2.39 | \$ 1.68    | \$ 0.93 |
| 2017                                     | \$ 2.33 | \$ 2.53 | \$ 1.69    | \$ 1.25 |
| 2018                                     | \$ 1.75 | \$ 2.50 | \$ 2.65    | \$ 0.68 |
| 2019                                     | \$ 1.84 | \$ 2.43 | \$ 2.62    | \$ 0.99 |
| 2014-2019<br>6-yr avg                    | \$ 2.11 | \$ 2.83 | \$ 2.58    | \$ 1.06 |
| Pecan comparison                         |         | -25%    | -18%       | 100%    |
| Source: NASS.                            |         |         |            |         |

### Price Trends

Chart 2 shows the trend of prices for pecans from 2013 to 2019. In recent years, pecan prices were at their highest in 2016 before dropping in the following two years. Prices increased slightly between 2018 and 2019 but are still down about 12 percent compared to the average of the previous six years.



### Need for a Program

According to the NPF, the greatest challenge the pecan industry is facing is supply surpassing demand. Data from the International Nut and Dried Fruit Council and from the research compiled by the Boston Consulting Group, contracted by the NPF, show that the supply of pecans may exceed demand by 19 percent

in 2028.<sup>1</sup> The NPF believes the establishment of a national research and promotion program for pecans would help the industry address this challenge. NPF concluded that without a program funded by assessments from both domestically produced and imported pecans, the industry would not be able to meet the challenge of the approaching supply and demand imbalance.

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

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



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

## **Provisions of Proposed Program**

### **Definitions**

Pursuant to section 513 of the 1996 Act, §§ 1223.1 through 1223.24 of proposed 7 CFR part 1223 (referred to as the proposed Order) define certain terms that would be used throughout final 7 CFR part 1223 (referred to as the Order). Several of the terms are common to all research and promotion programs authorized under the 1996 Act, while other terms are specific to the proposed Order.

Section 1223.1 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.

Section 1223.2 would define the term "American Pecan Council" or "APC" to mean that governing body of the Federal Marketing Order established pursuant to 7 CFR part 986, unless otherwise noted. As specified in proposed §1223.41, the APC would conduct the initial nominations for producers of the American Pecan Promotion Board and submit them to the Secretary.

Section 1223.3 would define the term "American Pecan Promotion Board" or "Board" to mean the administrative body established pursuant to §1223.40.

Section 1223.5 would define "Customs" or "CBP" to mean the Customs and Border Protection, an agency of the United States Department of Homeland Security.

Section 1223.7 would define "first handler" to mean any person who receives, shells, cracks, accumulates, warehouses, roasts, packs, sells, consigns, transports, exports, or ships (except as a common or contract carrier of pecans owned by another person), or in any other way puts inshell or shelled pecans in the stream of commerce. The term first handler includes a producer who handles or markets pecans of the producer's own production.

Section 1223.8 would define the term "fiscal period" to mean the period from October 1 to September 30, or such other period as recommended by the Board and approved by the Secretary.

Section 1223.10 would define the term "information" to mean information and programs that are designed to increase efficiency in processing and to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of pecans on a national or international basis. This includes consumer information, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of pecans. This would also include industry information, which means information and programs that would lead to the development of new markets, new marketing strategies, or increased efficiency for the pecan industry, and activities to enhance the image of the pecan industry.

Section 1223.11 would define the term "inshell pecans" to mean nuts whose kernel is maintained inside the shell.

Section 1223.12 would define the terms "market" or "marketing." The term "marketing" would mean the sale or other disposition of pecans in any channel of commerce. The term

"market" would mean to sell or otherwise dispose of pecans in interstate, foreign, or intrastate commerce.

Section 1223.14 would define the terms "part" and "subpart." The term "part" would mean all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Pecan Promotion, Research, and Information Order would be a "subpart" (specifically subpart A) of such part.

Section 1223.15 would define the term "pecans" to mean and includes any and all varieties or subvarieties, inshell or shelled, of the Genus, species: *Carya illinoensis* grown or imported into the United States.

Section 1223.17 would define the term "producer" to mean synonymous with grower and any person engaged in the production and sale of pecans in the United States who owns, or who shares in the ownership and risk of loss of such pecans.

Section 1223.18 would define the terms programs, plans, and projects to mean research, promotion and information programs, plans, or projects established under the Order.

Section 1223.19 would define the term "promotion" to mean any action taken to present a favorable image of pecans to the general public and the food industry for the purpose of improving the competitive position of pecans both in the United States and abroad and stimulating the sale of pecans. This includes paid advertising and public relations.

Section 1223.20 would define the term "research" to mean any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of pecans, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value, health research, and marketing of pecans.

Section 1223.22 would define the term "shelled pecans" to mean pecans whose shells have been removed leaving only edible kernels, kernel pieces or pecan meal. One pound of shelled pecans is the equivalent of two pounds inshell pecans.

Sections 1223.4, 1223.6, 1223.9, 1223.13, 1223.16, 1223.21, 1223.23, 1223.24, and 1223.25 would define the terms "conflict of interest," "Department or USDA," "importer," "Order," "person," "Secretary," "suspend," "terminate," and "United States," respectively. The definitions are the same as or are based on the definitions specified in section 513 of the Act.

#### **Establishment of the Board**

Pursuant to section 515 of the 1996 Act, §§ 1223.40 through 1223.47 of the proposed Order would detail the establishment and membership of the proposed American Pecan Promotion Board (Board), nominations and appointments, term of office, removal

and vacancies, procedure, compensation and reimbursement, powers and duties, and prohibited activities.

Section 1223.40 would specify the Board establishment and membership. The 1996 Act requires the composition of a board to reflect the geographical distribution of production of the commodity in the U.S. as well as the quantity or value of the commodity imported into the United States. In accordance with this requirement, the NPF recommended the Board would consist of 17 members: 10 domestic producers and 7 importers.

To determine whether the NPF's proposed board representation is reflective of the appropriate geographical distribution, USDA used the following resources: the NASS for U.S. production data; the 2007, 2012, and 2017 Census of Agriculture (published by NASS) for bearing acreage data by state; Customs import data for shelled and inshell pecans (HTS Codes 0802901500 and 0802901000, respectively); and the Global Agricultural Trade System (GATS) of the Foreign Agricultural Service (FAS) for data on U.S. exports of inshell pecans to Mexico. All data presented in this document is based on a calendar year for consistency in timeframe. Due to the alternate-bearing nature of the crop, USDA concluded that the most appropriate way to illustrate production and import volume is a six-year average of years 2014 through 2019.

## *U.S. Production*

Every five years, following the Census of Agriculture, NASS reviews production for each commodity and evaluates the inclusion of states in its annual estimating program. Given limited available resources, NASS has reduced the number of states included in its annual estimation of pecan production to five states as of 2019, down from 12 states in 2014 after the 2012 Census of Agriculture. NASS had reported annual estimates of pecan production for 15 states as early as 2007.

Using bearing acreage data from the 2007, 2012, and 2017 Census of Agriculture, USDA estimated 2017 production in the seven states for which no data was issued by NASS. USDA calculated an average yield per acre for each of these seven states using bearing acreage data from the 2007 and 2012 Census of Agriculture and NASS production data for the corresponding years. Next, USDA applied these calculations of yield to bearing acreage data from the 2017 Census of Agriculture to estimate 2017 production. Table 5 shows the result.

| Table 5. Pecan Production Volume by State<br>2014-2019 Six-Year Average  |                      |
|--|----------------------|
| States   | Lbs. (Inshell basis) |
| Alabama  | 1,850,000            |
| Arizona  | 26,783,333           |
| Arkansas <sup>1</sup>  | 3,102,365            |
| California   | 4,686,000            |
| Florida <sup>1</sup>   | 1,958,448            |
| Georgia <sup>2</sup>   | 90,900,000           |
| Kansas <sup>1</sup>  | 676,226              |
| Louisiana  | 7,406,000            |
| Mississippi <sup>1</sup>   | 1,217,850            |
| Missouri <sup>1</sup>  | 1,415,427            |
| New Mexico   | 81,950,000           |
| North Carolina <sup>1</sup>  | 216,949              |
| Oklahoma   | 13,300,000           |
| South Carolina <sup>1</sup>  | 714,239              |
| Texas  | 43,366,667           |
| U.S. Total   | 279,543,504          |
| Source: NASS.  |                      |
| Notes: <sup>1</sup> 2017 production estimated by USDA; <sup>2</sup> Georgia production estimated using a weighted average with lower weights applied to production in years 2018 and 2019 to discount anomalous effects of 2018 Hurricane Michael. |                      |

In 2018, Hurricane Michael swept across the southern half of Georgia as a Category 3 storm. According to the University of Georgia Pecan Extension, this storm resulted in a loss of nearly half the expected 2018 crop and a loss of 17 percent of the state's pecan acreage. The effects of Hurricane Michael remain present as the 2019 Georgia crop was down nearly 30 percent from the average production of the six years prior to the storm. To more accurately represent the geographical



distribution of U.S. pecan production, USDA adjusted the six-year average of production for Georgia by applying weights to each year's production figures. Equal weights of 20 percent were applied to years 2014 through 2017, and weights of 10 percent each were applied to years 2018 and 2019. The result, as shown in Table 5, is a six-year weighted average of 90.9 million pounds, inshell, of Georgia production. Prior to Hurricane Michael, Georgia was the top pecan producer in the United States. Considering this, along with the state's recovery efforts, the University of Georgia Pecan Extension expects Georgia pecan production to rebound in the coming years.

According to the proposal, domestic board representation would be split into three regions: Eastern, Central, and Western. The Eastern Region includes Alabama, Florida, Georgia, North Carolina, South Carolina, and any other U.S. states the majority of whose land mass is in the Eastern Time Zone, plus any U.S. territories in the Atlantic Ocean. The Central Region includes Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Texas, and any other U.S. states the majority of whose land mass is in the Central Time Zone. Finally, the Western Region includes Arizona, California, New Mexico, and any other U.S. states the majority of whose land mass is in the Mountain or Pacific Time Zones, plus Alaska, Hawaii, and any U.S. territories in the Pacific Ocean.

Table 6 lists the three regions including their states and territories, along with regional six-year average production, and portion of total U.S. production. The Eastern and Central Regions, with 34 percent and 25 percent of total U.S. production, respectively, would each have three seats on the Board as recommended by the NPF. The Western Region, with 41 percent of total U.S. production would have four seats on the Board as recommended by the NPF, for a total of 10 seats representing domestic U.S. production.

| Table 6. Pecan Production Volume by Region<br>2014-2019 Six-Year Average |                           |                      |           |
|--|---------------------------|----------------------|-----------|
|  | States                    | Lbs. (Inshell basis) | % of U.S. |
| Eastern<br>Region  | Alabama                   | 95,639,636           | 34%       |
|  | Florida                   |                      |           |
|  | Georgia                   |                      |           |
|  | North Carolina            |                      |           |
|  | South Carolina            |                      |           |
|  | Eastern Time Zone States  |                      |           |
|  | Atlantic Territories      |                      |           |
| Central<br>Region  | Arkansas                  | 70,484,535           | 25%       |
|  | Kansas                    |                      |           |
|  | Louisiana                 |                      |           |
|  | Mississippi               |                      |           |
|  | Missouri                  |                      |           |
|  | Oklahoma                  |                      |           |
|  | Texas                     |                      |           |
| Central Time Zone States   |                           |                      |           |
| Western<br>Region  | Arizona                   | 113,419,333          | 41%       |
|  | California                |                      |           |
|  | New Mexico                |                      |           |
|  | Mountain Time Zone States |                      |           |
|  | Pacific Time Zone States  |                      |           |
|  | Alaska                    |                      |           |
|  | Hawaii                    |                      |           |
| Pacific Territories  |                           |                      |           |
| Total U.S. Production  |                           | 279,543,504          |           |
| Source: NASS.  |                           |                      |           |

### *Imports*

Regarding import volume, USDA estimated about 208 million pounds, inshell, using a six-year average for years 2014 through 2019. To arrive at this estimate, USDA considered the routine industry practice of domestic inshell pecans being exported to Mexico for shelling, and then reentering the United States as shelled kernels. These shelled kernels may be documented as

imported product, but they were actually produced in the United States. To account for this scenario, USDA deducted from total imports U.S. exports of inshell pecans to Mexico. This calculation assumes that all U.S. inshell pecan exports to Mexico ultimately return to the United States as shelled kernels. According to the NPF, this is a reasonable assumption. The result of this calculation is shown in Table 7.

| Table 7. Revised Pecan Import Calculation<br>2014-2019 Six-Year Average, Lbs. (Inshell basis)   |                      |                              |
|---|----------------------|------------------------------|
| Total Imports <sup>1</sup>  | Exports <sup>2</sup> | Revised Imports <sup>3</sup> |
| 244,539,780   | 36,278,137           | 208,261,643                  |
| Sources: <sup>1</sup> Customs and Border Protection; <sup>2</sup> Foreign Agricultural Service. |                      |                              |
| Notes: <sup>2</sup> U.S. inshell exports to Mexico; <sup>3</sup> Total Imports - Exports.       |                      |                              |

In Table 8, revised imports are added to domestic production to estimate the total U.S. supply of pecans. With 279.5 million pounds, on an inshell basis, U.S. production accounts for 57 percent of the total domestic supply; and, with just over 208 million pounds, on an inshell basis, imports account for 43 percent of the total U.S. supply. In its proposal, the NPF recommended 17 total board members, including ten domestic producers and seven importers.

| Table 8. Board Representation<br>2014-2019 Six-Year Average, Lbs. (Inshell basis)  |                      |                                |
|--|----------------------|--------------------------------|
| U.S. Production <sup>1</sup>   | Imports <sup>2</sup> | Total U.S. Supply <sup>3</sup> |
| 279,543,504  | 208,261,643          | 487,805,148                    |
| 57%  | 43%                  | 100%                           |
| Sources: <sup>1</sup> NASS; <sup>2</sup> Customs and Border Protection, Foreign Agricultural Service.                        |                      |                                |
| Notes: <sup>2</sup> Revised Imports calculated in Table 7 (Total Imports - Exports); <sup>3</sup> U.S. Production + Imports. |                      |                                |

The NPF proposed to have no alternate Board members. It wants 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 every five years, the Board must review the geographical distribution of United States production of pecans and the quantity or value of imports. The review would be conducted through an audit of state crop production, Customs data, and Board assessment records. If warranted, the Board would recommend to the Secretary of Agriculture 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.

Section 1223.41 of the proposed Order would specify Board nominations and appointments. The initial nominations for producers would be submitted to the Secretary by the American Pecan

Council (APC). The APC would publicize the nomination process, using trade press or other means it deems appropriate. The APC would use regional caucuses, 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. The APC would submit the nominations and recommend two nominees for each Board position for the Secretary's consideration.

USDA would conduct initial importer nominations. This includes publicizing the nomination process, using trade press or other means it deems appropriate, and conducting outreach to all importers. USDA would receive the nominations and submit two nominees for each Board position for the Secretary's consideration.

Regarding subsequent nominations, the Board would solicit nominations as described in the following paragraph. Nominees must produce more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the nominations are being conducted and the previous three fiscal periods).

The Board would seek nominations for each vacant seat from producers who paid their assessments to the Board in the most recent fiscal period. Producers that produce in more than one region could seek nomination in only the region in which they produce the majority of their pecans. Interested producers could also submit a background statement outlining their

qualifications to serve on the Board. The names of producer nominees would be placed on a ballot by region. The ballots, along with any background statements, would be mailed to producers in each respective region for a vote. Producers who produce pecans in more than one region could only vote in the region in which they produce the majority of their pecans. 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. Two candidates for each position would be submitted to the Secretary for consideration.

The Board would also solicit candidates for importer nominees. All qualified national organizations representing importers would have the opportunity to nominate members to serve on the Board. To be certified by the Secretary as a qualified national organization, an organization would have to have been established for more than a year; be comprised primarily of importers of pecans; receive a portion of its operating funds from importers; and demonstrate it would be willing and able to further the Act and Order's purposes. Interested importers could also submit a background statement outlining their qualifications to serve on the Board. The names of importer nominees would then be placed on a ballot. The ballots, along with any background statements, would be mailed to importers 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. Two candidates for each position would then be submitted to the Secretary for consideration.

The Board would submit nominations to the Secretary at least six months before the new Board term begins.

The NPF also recommended that no two Board members be employed by a single corporation, company, partnership, or any other legal entity. The NPF stated this is to help ensure that no one entity has control on the Board.

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 1223.42 of the proposed Order would specify the term of office. Except for the initial Board, each Board member would serve a three-year term or until the Secretary selected his or her successor. Each term of office would begin on October 1 and end on September 30. No member could serve more than two consecutive terms, excluding any term of office less than three years. For the initial Board, the members' terms would be staggered for two, three, and four years and would be determined at random. The initial members would be able to serve one successive three-year term.



Section 1223.43 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 the category of members from which the member was appointed or in the region he or she represented, such position would become vacant. The Board could recommend to the Secretary that a member be removed from office if the member consistently refused to perform his or her duties or engaged in dishonest acts or willful misconduct. Further, without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the continued failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act. If a position became vacant, nominations to fill the vacancy would be conducted using the nomination process as proposed in § 1223.41 of the Order. A vacancy would not be required to be filled if the unexpired term is less than six months.

Section 1223.44 of the proposed Order would specify procedures of the Board. A majority of the Board members (9) would constitute a quorum. A motion would carry if supported by one vote more than 50 percent of the total votes represented by the Board members present. Proxy voting would not be permitted.

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 vote and at least nine Board members voted in favor of the action. 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 1223.46 of the proposed Order would specify powers and duties of the Board. These are similar in promotion programs authorized under the 1996 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 committees and subcommittees as necessary; to hire staff or contractors; to develop programs and enter into contracts to implement programs; to prepare and submit a budget for approval by USDA in accordance with the Order; to invest Board funds appropriately; 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 provide appropriate notice of meetings to the industry and USDA and keep minutes of such meetings; to report its activities to producers and importers; 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.

Section 1223.47 of the proposed Order would specify prohibited activities that are common to all promotion programs authorized under the 1996 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, and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order); or engage in any advertising or activities that may be false, misleading or disparaging to another agricultural commodity.

### **Expenses and Assessments**

Pursuant to sections 516 and 517 of the 1996 Act, §§ 1223.50 through 1223.53 of the proposed Order detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from

assessments. 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.

Each budget must provide for adequate funds to cover the Board's anticipated expenses. Any amendment or addition to an approved budget must 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 in the Board's approved budget would not need prior approval from USDA. For example, if the Board's approved budget provided for \$1 million in consumer advertising and \$500,000 in research projects, a shift of \$50,000 from consumer advertising to research would require USDA approval. However, a shift within the \$1 million consumer advertising line item would not require prior USDA approval.

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 and seek other funding sources to carry out activities authorized under the Order. 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. However, the Board could receive funds from outside sources targeted for specific authorized projects. 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 assessment and other income received for administration, maintenance, and the functioning of the Board for that fiscal period. This limitation would be applicable for fiscal periods beginning three or more years after the establishment of the Board. Reimbursements to USDA would not be considered administrative costs. As an example, if the Board received \$9 million in assessments during fiscal period five, and \$1 million in Federal grant funding, the Board's assessment and other income would be \$10 million for that fiscal period. In this scenario, the Board would be limited to spending no more than \$1.5 million ( $.15 \times \$10$  million) on administrative costs.

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 two fiscal period's budgeted expenses. For example, if the Board's budgeted expenses for a fiscal period were \$8 million, it could carry over no more than \$16 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; and 4) Obligations fully guaranteed as to principal interest by the United States.

The Board would be required to submit to USDA financial statements on a monthly or quarterly basis, or at any other time as requested by the Secretary. Financial statements should include, at a minimum, a balance sheet, statement of activities (budget versus actual), an income statement, and an expense budget.

*Assessments*

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

The Order provides that it is the responsibility of the first handler, as defined in §1223.7, to collect and remit assessments owed to the Board. First handlers would collect assessments from each producer based on pounds of pecans received. The first handler would remit those assessments, along with the required reports, to the Board. As an example, first handler A receives 100,000 pounds inshell pecans from producer X, 250,000 pounds shelled pecans from producer Y, and 750,000 inshell pecans from producer Z. First handler A would collect \$2,000 (100,000 pounds x \$0.02 per pound inshell pecans) from producer X, \$10,000 (250,000 pounds x \$0.04 per pound shelled pecans) from producer Y, and \$15,000 (750,000 pounds x \$0.02 per pound inshell pecan) from producer Z. First handler A would remit the assessment collected totaling \$27,000 (\$2,000 + \$10,000 + \$15,000) to the Board. If a producer is acting as its own first handler, the producer would be required to remit its

individual assessments. Assessments owed would be due to the Board by the 10th calendar day of the month following the end of the previous month. As an example, assessments for pecans received in June would be due to the Board by July 10<sup>th</sup>.

Importer assessments would be collected through Customs. If Customs did not collect the assessment from an importer, the importer would be responsible for paying the assessment directly to the Board by the 10th calendar day of the month following the end of the previous month after the pecans were imported into the United States.

Domestic inshell pecans are routinely exported to Mexico, shelled, and imported into the United States as shelled pecans. The intent of the Order is not to double assess such pecans. For pecans produced in the United States, shipped to locations outside the United States for shelling, and imported back into the United States, assessments would be owed on the pecans produced in the United States and would be remitted by the first handler. If assessments are being collected through Customs, the importer would need to request a refund from the Board and provide proof that assessments had been previously remitted by the first handler. For importers who remit assessments directly to the Board, the importers would have to provide documentation that assessments had been paid by the first handler. As an example, if producer A, acting as its own first handler, exports



100,000 pounds of inshell pecans to Mexico to be shelled, that individual would be required to remit to the Board assessments owed on the 100,000 pounds of inshell pecans. When Importer B imports the 50,000 pounds of shelled pecans, the importer would need to provide documentation that substantiates that assessments were remitted by the producer A.

Section 1223.52(e)(2) of the Order would prescribe the Harmonized Tariff Schedule (HTS) of the United States categories covered under the program. Imported commodities are assigned codes via the HTS with the first numbers denoting the heading, which is a broad description of the commodity, and the subsequent numbers denoting the subheadings, which specify the commodity in greater detail. In the event an HTS number subject to assessment changed and the change is merely a replacement of a previous number and has no impact on the description of the pecans involved, assessments would continue to be collected based on the new number.

Section 1223.520 of the Order would provide authority for the Board to impose a late payment charge and interest for assessments not received within 30 calendar days of the date assessments were due. There would be a one-time late payment charge of five percent of the assessments due. In addition, there would be a one percent per month interest charge on the outstanding balance, including any late payment and accrued

interest. Interest would accrue monthly until the outstanding balance would be paid to the Board.

*De Minimis*

The proposed Order would provide an exemption to assessment of producers whose production volume was less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). The exemption would also apply to importers whose import volume was less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). The Federal Marketing Order (FMO) regulating the handling of pecans defines a producer or grower as one who produces "a minimum of 50,000 pounds of inshell pecans" or who owns "a minimum of 30 pecan acres". Record evidence in the 2015 FMO promulgation hearings -- including witness testimonies and a study entitled "Economic Analysis of the Implementation of a Federal Marketing Order for Pecans" -- verified that 50,000 pounds of inshell pecans or 30 pecan acres was an acceptable threshold for distinguishing a commercial pecan producer from a hobby farmer.

This proposal prescribes an average of four fiscal periods

of production or imports to determine whether an entity is subject to assessment. For quantifying the number of domestic producers of pecans, data from the 2017 Census of Agriculture, representing a single year, is the best resource available to USDA. Regarding importers, USDA used a six-year average instead of a four-year average to maintain consistency across analyses in this proposal. Finally, all data used in this analysis is reflective of a calendar year, not a fiscal year. NASS, who publishes the Census of Agriculture, reports data on a calendar year basis. USDA analyzed Customs data by calendar year for consistency with NASS. In 2017, NASS estimated pecan production for 12 states. Every five years, following the Census of Agriculture, NASS reviews production for each commodity and evaluates the inclusion of states in its annual estimating program.

To determine the number of domestic producers that would be assessed or exempt from assessment, USDA first estimated the minimum number of acres required to produce 50,000 pounds, inshell, of pecans for 12 states. To accomplish this, USDA divided the de minimis threshold of 50,000 pounds, inshell, by the 2017 yield estimates for each of the 12 states. These yield estimates, along with the resulting minimum number of acres to produce 50,000 pounds, inshell, of pecans are shown in Table 9. Next, USDA used each state's minimum number of acres to find the

number of operations that had pecan bearing acreage that would enable them to produce at least 50,000 pounds, inshell, of pecans, based on data from the 2017 Census of Agriculture.

| Table 9. 2017 State Yield and Minimum Acreage for Assessment |       |  |
|--|-------|--|
| State  | Yield | Min. Acres for<br>50,000 Lbs.<br>(Inshell) |
| Alabama  | 220   | 227  |
| Arizona  | 1,750 | 29   |
| Arkansas   | 257   | 195  |
| Florida  | 302   | 166  |
| Georgia  | 892   | 56   |
| Louisiana  | 650   | 77   |
| Mississippi  | 310   | 161  |
| Missouri   | 267   | 187  |
| New Mexico   | 2,115 | 24   |
| North Carolina   | 242   | 207  |
| Oklahoma   | 163   | 307  |
| Texas  | 426   | 117  |
| Source: NASS.  |       |  |

Table 10 depicts the number of producers and importers that would be assessed and exempt from assessment under the de minimis threshold of 50,000 pounds, inshell, of pecans. According to the 2017 Census of Agriculture, there were 15,608 operations with bearing acreage of pecans in the U.S. in 2017. Based on data from Customs and Border Protection (Customs), there were 190 entities that imported shelled or inshell pecans between 2014 and 2019. USDA estimates that of the total 15,798 producers and importers of pecans, 1,061, or seven percent, would be assessed and 14,737, or 93 percent, would be exempt from assessment.

USDA seeks comment on whether this de minimis provides a good representation of the industry for assessments collected and board representation.

| Table 10. Entities Exempt and Assessed at De Minimis Threshold                                   |        |          |        |
|--|--------|----------|--------|
| Entities   | Total  | Assessed | Exempt |
| Producers <sup>1</sup>   | 15,608 | 990      | 14,618 |
| Importers <sup>2</sup>   | 190    | 71       | 119    |
| Total  | 15,798 | 1,061    | 14,737 |
| Sources: <sup>1</sup> NASS, 2017; <sup>2</sup> Customs and Border Protection, 2014-2019 average. |        |          |        |

Using NASS data, USDA estimates 2017 pecan production to amount to more than 316 million pounds, inshell. Customs data shows total imports of shelled and inshell pecans to average 244.5 million pounds, on an inshell basis, from 2014 to 2019.<sup>2</sup> Together, total volume of pecans in the U.S. market is almost 561 million pounds, inshell, as shown in Table 11. Assessed volume amounts to 251 million pounds, inshell, for producers and 244 million pounds, inshell, for importers. Total assessed volume multiplied by the assessment rate of \$0.02 per pound of inshell pecans (equivalent to \$0.04 per pound of shelled pecans) results in a total assessment revenue of nearly \$10 million.<sup>3</sup>

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<sup>2</sup> For quantifying the number of domestic producers of pecans, data from the 2017 Census of Agriculture, representing a single year, is the best resource available to USDA. The Census of Agriculture is only published every five years. Regarding importers, USDA used a six-year average to maintain consistency across analyses in this proposal.

<sup>3</sup> In its proposal, NPF estimated that 4,300 growers would be subject to assessment under this proposed Order, and that assessment revenue would range from \$10.5 million to \$11.6 million. The variance in the number of assessed growers and the amount of assessment revenue estimated by USDA and by NPF is

| Table 11. Estimated Volume and Assessment Revenue  |                              |             |                    |
|--|------------------------------|-------------|--------------------|
| Entities   | Volume (Lbs., Inshell Basis) |             | Assessment Revenue |
|  | Total                        | Assessed    |                    |
| Producers <sup>1</sup>   | 316,171,267                  | 251,309,740 | \$ 5,026,195       |
| Importers <sup>2</sup>   | 244,539,780                  | 243,662,767 | \$ 4,873,255       |
| Total  | 560,711,047                  | 494,972,508 | \$ 9,899,450       |
| Sources: <sup>1</sup> NASS, 2017; <sup>2</sup> Customs and Border Protection, 2014-2019 average. |                              |             |                    |

In addition to the proposed exemption of 50,000 pounds of pecans on an inshell basis or 25,000 pounds of pecans on a shelled basis, USDA considered other options for a de minimis threshold. First, USDA considered a de minimis exemption for growers with less than 30 acres of pecans, aligning with one of the definitions of producer or grower in the FMO. A de minimis exemption of less than 30 acres could not apply to pecan importers, and therefore would not be fairly applied to all those subject to the program. Thus, this exemption is not contained in this proposal.

In the pecan FMO, handlers who handle at least 1,000 pounds of pecans, on an inshell basis, are subject to assessment. If this de minimis exemption of less than 1,000 pounds of pecans, on an inshell basis, were applied to pecan growers, then about 50 percent of growers would be subject to assessment. Of these assessed growers, nearly half would operate between 5 and 15 bearing acres of pecans, therefore placing a significant burden

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due to differing methods of analysis, and different assumptions made.

on smaller growers to fund the program. Thus, this exemption is not contained in this proposal.

Finally, USDA considered a de minimis exemption which mirrors the definition of a small pecan grower and small pecan importer according to the Small Business Administration (SBA). The SBA size standard for a small pecan grower is annual sales receipts of no more than \$1 million. The SBA size standard for small pecan importer (equivalent to "Postharvest crop activities") is annual receipts equal to no more than \$30 million. Tying the de minimis exemption to these differing SBA size standards becomes problematic when considering equitable contributions to the proposed program. This is true not only when evaluating contributions from each sector but also within the respective sectors. A de minimis exemption tied to annual sales receipts may overly burden growers and importers who produce or import high annual sales receipts of pecans.

AMS seeks comments on the proposed de minimis exemption, particularly on whether the proposed level is appropriate to ensure equitable contribution and representation from both domestic producers and importers, or if modification to the exemption level is needed. Please provide data to substantiate any recommendation.

*Exemptions*

The proposed Order would provide for two exemptions. First, as described in the previous section, producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) would be exempt.

Producers or importers seeking an exemption would apply to the Board for an exemption prior to the start of the fiscal period. This would be an annual exemption; entities would have to reapply each year. They would have to certify that they expect to produce domestically or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). The Board could request documentation to support the exemption claim, such as past sales or import data. The Board would then issue, if deemed appropriate, a certificate of exemption to the eligible producer or importer.

Producers and importers who received an exemption but domestically produced or imported more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) during the



fiscal period would be obligated to pay the applicable assessments.

Producers and importers who are exempt from assessments would be eligible for a refund of assessments collected. Requests for assessment refunds would be submitted to the Board within 90 days of the last day of the fiscal period when assessments were collected. The Board would refund such assessments no later than 60 calendar days after receipt of information justifying the exemption.

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

The second exemption under the proposed Order would be for organic pecans. Under section 501 of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) (7 U.S.C. 7401), a producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, and domestically produces pecans that are certified "organic" or "100 percent organic" (as defined in the NOP) would be eligible for exemption. The exemption would apply to all certified "organic" or "100 percent organic" pecans regardless of whether the pecans are produced by a person who produces conventional or nonorganic pecans. Likewise, an importer who imports pecans that are certified as "organic" or "100 percent organic" under the NOP, or certified

as "organic" or "100 percent organic" under a U.S. equivalency arrangement established under the NOP, would be exempt from the payment of assessments.

#### *Refunds from Escrow Account*

Pursuant to section 517 of the 1996 Act, \$1223.54 of the proposed Order would specify the refund procedures if the initial referendum does not pass. The NPF has proposed that the proposed Order be voted in a referendum of producers and importers no later than three years after assessments first begin under the Order. The Board shall establish an interest bearing escrow account with a financial institution that is a member of the Federal Reserve System and would deposit into such account an amount equal to ten percent of the assessments collected during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum.

If the required referendum fails, the Board shall promptly pay refunds of assessments to all producers and importers that have paid assessments during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in the proposed Order. Producers and importers shall notify the Board, in a manner specified by the Secretary, within

60 days after the announcement of the referendum of their demand to receive a refund.

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

If the proposed Order is approved by the required referendum conducted under this section, the Board would close the escrow account and all funds would be available to the Board under §1223.50.

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

Pursuant to section 516 of the 1996 Act, §§ 1223.55 through 1223.57 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, education, and other activities, including consumer and industry information and advertising designed to, among other things, maintain and expand markets for pecans, and develop new uses for pecans. The Board

would be required to evaluate each plan and program to ensure that it contributes to an effective promotion program. The Order would also require that, at least once every five years, the Board fund an independent evaluation of the effectiveness of the Order and programs conducted by the Board.

Finally, the Order would specify 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.

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

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

Producers and first handlers would be required to submit periodically to the Board certain information as the Board may request. Since first handlers would be obligated to collect and remit assessments owed to the Board, the first handlers would be required to submit a report at the time assessments are

remitted. Producers who are acting as their own first handler would also be required to submit a report at the time assessments are remitted. Specifically, the report submitted to the Board would include, but is not be limited to, the producer and handlers' name, address, and telephone number; the pounds produced or handled; and the pounds of pecans for which assessments were paid. Producers who received a certificate of exemption from the Board would not have to submit such a report to the Board.

Likewise, importers who pay their assessments directly to the Board 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 pounds of pecans imported to the United States; the pounds of pecans for which assessments were paid. Importers would submit this report at the same time they remit their assessments to the Board. Importers who paid their assessments through Customs would not have to submit such reports because Customs would collect this information upon entry.

Additionally, producers, first handlers and importers including those who were exempt, would be required to maintain books and records needed to verify any required reports. Such books and records would be required to be made available during normal business hours for inspection by the Board's or USDA's

employees or agents. Producers, first handlers, and importers would be required to maintain such books and records for three years beyond the applicable fiscal period.

The Order would also require that all information obtained from persons subject to the Order as a result of proposed recordkeeping and reporting requirements would be kept confidential by all officers, employees, and agents of the Board and USDA. Such information could only be disclosed if the Secretary considered it relevant, and the information were 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 USDA were 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 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 Order and a statement of the particular provisions of the Order violated.

### **Miscellaneous Provisions**

#### **Referenda**

Pursuant to section 518 of the 1996 Act, § 1223.71(a)(1) of the proposed Order specifies that the program would be implemented, and a referendum conducted not later than three years after assessments first begin under the Order. The Order would continue if approved by a majority of producers and importers voting in the referendum who, during a representative period determined by the Secretary, were engaged in the production or importation of pecans into the United States.

Section 1223.71(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 terminated. This section specifies that a referendum would be held every seven years to determine whether producers and importers favor continuation of the Order. The Order would continue if favored by a majority of producers and importers voting in the referendum. Additionally, a referendum could be conducted at the request of the Board. A referendum could also be conducted at the request of 10 percent or more of the number of persons eligible to vote in a referendum under the Order. Finally, a referendum could be conducted at any time as determined by the Secretary.

#### **Other Miscellaneous Provisions**

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

### **Referenda Procedures**

Sections 1223.100 through 1223.107 of the proposed Order would specify procedures for the conduct of referenda. The sections cover the definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information. Producers and importers eligible to vote in the referenda would mean any person, during the representative period, that was subject to the Order. Each eligible producer or importer would be entitled to cast only one ballot. USDA would conduct the referenda. USDA would announce the voting period; mail ballots to eligible producers and importers; tabulate the results; prepare a report; and announce the results to the public. The ballots and other information or reports that would disclose any person's vote would be held confidential. The procedures would be applicable for the initial referendum and future referenda.



## **Initial Regulatory Flexibility Analysis**

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

## **Need for Regulation**

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

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

grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area. Over the past several years, the marketing order program has launched marketing campaigns to increase demand for pecans.

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

authority for the pecan industry to recommend on grade, size, quality, pack and container requirements.

### **Objectives of the Action**

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

### **Legal Basis for Action**

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

USDA currently administers a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas which is authorized under the Agricultural Marketing Agreement Act of 1937. The purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problem, improving profitability.

Marketing order programs' mandatory assessments are paid by handlers within the designated production areas. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

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

#### **Potentially Affected Small Entities**

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

Importers and first handlers of inshell and shelled pecans (HTS Codes 0802901000 and 0802901500, respectively) belong to the industry classification of Postharvest Crop Activities (NAICS Code 115114). "Postharvest crop activities" include nut hulling and shelling, sorting, grading, packing, and cooling. An operation that meets this definition is considered to be "small", per the SBA, if its annual receipts equal no more than \$30 million. Table 12 depicts the number of pecan producers, importers, and handlers that would be considered small under these SBA standards.

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

| Table 12. Entities Considered Small According to SBA Size Standards |        |        |       |
|---|--------|--------|-------|
| Entities  | Total  | Small  | Large |
| Producers <sup>1</sup>  | 15,608 | 15,168 | 440   |
| Importers <sup>2</sup>  | 190    | 186    | 4     |
| Handlers <sup>3</sup>   | 104    | 78     | 26    |
| Total   | 15,902 | 15,432 | 470   |

Sources: <sup>1</sup>NASS 2017 Census of Agriculture; <sup>2</sup>Customs and Border Protection, 2014-2019 average; <sup>3</sup>American Pecan Council, 2018 crop year.  
Notes: <sup>1</sup>Small is annual receipts no greater than \$1 million; <sup>2,3</sup>Small is annual receipts no greater than \$30 million.

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

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

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

### **Compliance Requirements**

This proposal would impose a reporting and recordkeeping burden on producers, importers, and first handlers of pecans. Producers and importers who domestically produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) could submit to the Board an application for exemption from paying assessments. Of the 15,168 domestic producers considered to be small under SBA standards, 14,618 of them, or 96 percent, produced less than 50,000 pounds, inshell, of pecans, and would be exempt from assessment. Of the 186 importers considered to be small under SBA standards, 119 of them, or 64 percent, imported less than 50,000 pounds, inshell of pecans, and would also be exempt from assessment. The reporting and recordkeeping burden to file an application for exemption from assessment would impact a total of 14,737 producers and importers considered to be small under their respective SBA size standards. Importers, and first handlers, who collect the assessments from producers, would be required to file a report listing pecans imported or received from each producer. This report would place a reporting and recordkeeping burden on a total of 149 importers and first handlers considered to be small under their SBA size standard of annual receipts of no more than \$30 million.

These forms 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.

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

Regarding alternatives, USDA considered de minimis exemptions of 30 acres of pecans, 1,000 pounds, inshell, of pecan volume, and \$1 million in annual pecan sales receipts. These alternatives, which are fully discussed in the section titled De Minimis, were rejected in favor of the industry-proposed de minimis exemption of 50,000 pounds, inshell, or 25,000 pounds, shelled. USDA also considered the alternative of no action; that is, the status quo. This alternative, however, would leave the pecan industry without the tools of a research and promotion program to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. In place of a research and promotion program, the NPF discussed amending the Agricultural Marketing Agreement Act of 1937, which provides authority for the pecan marketing order. The NPF stated in its proposal for a



pecan research and promotion program that it decided not to move forward with this alternative due to the time and costs involved in amending U.S. law.

## **Outreach**

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

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

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

### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act 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 pecan program.

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

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

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

*Title:* National Research, Promotion, and Consumer Information Programs.

*Expiration Date of Approval:* 3 years from approval date.

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

*Abstract:* The information collection requirements in the request are essential to carry out the intent of the 1996 Act. The information collection concerns a proposal received by USDA for a national research and promotion program for the pecan industry. The program would be financed by an assessment on pecan producers and importers and would be administered by a board of industry members selected by the Secretary. The program would provide for an exemption for producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). A referendum would be held among eligible producers and importers to determine whether they favor implementation of the program not later than three years after assessments first begin under the Order. The purpose of the program would be to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans within the United States.

In summary, the information collection requirements under the program concern Board nominations, exemption applications, the collection and refund of assessments, and referenda. For Board nominations, producers and importers interested in serving on the Board 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, producers and importers 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.

Organizations representing importers would be able to be certified by the Secretary and have an opportunity to nominate importer members. Those such organizations would submit form "Application for Certification of Organization."

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

importers who would qualify as "organic" or "100 percent organic" under the NOP could submit an "Organic Exemption Form" to the Board and request an exemption from assessments.

First handlers who receive assessments from producers would be asked to submit a "First Handler/Importer Report" that would accompany their assessments paid to the Board and report the quantity of pecans received during the applicable period, the quantity for which assessments were paid, contact information for whom they collected the assessment, and the country of export (for imports). Additionally, only importers who pay their assessments directly to the Board would be required to submit a report. As previously mentioned, the majority of importer assessments would be collected by Customs. Customs would remit the funds to the Board and the other information would be available from Customs (i.e., country of export, quantity of pecans imported).

Importers and producers who are exempt and whose assessments were collected, either by Customs or a first handler, could also request a refund of any assessments paid to the Board. Producers and importers would also file a form to request a refund of assessments paid if the referendum fails to pass. A referendum is proposed to be conducted three years after the assessments first begin to determine if producers and importers favor continuance of the Order.

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

Information collection requirements that are included in this proposal include:

(1) *NOMINATION FORM*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

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

(2) *BACKGROUND STATEMENT*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

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

(3) *NOMINATION BALLOT*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

*Estimated Number of Responses per Respondent:* 1.

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

(4) *BACKGROUND INFORMATION FORM AD-755 (OMB Form No. 0505-0001)*

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

*Respondents:* Producers and importers.

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

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

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

(5) *APPLICATION FOR CERTIFICATION OF ORGANIZATION*

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

*Respondents:* Importer organizations.

*Estimated Number of Respondents: 5.*

*Estimated Number of Responses per Respondent: 1.*

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

(6) *APPLICATION FOR EXEMPTION FROM ASSESSMENTS*

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

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

*Estimated number of Respondents: 14,737.*

*Estimated number of Responses per Respondent: 1.*

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

(7) *ORGANIC EXEMPTION FORM*

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per exemption form.

*Respondents:* Organic producers and importers.

*Estimated Number of Respondents: 50.*

*Estimated Number of Responses per Respondent: 1.*



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

(8) *FIRST HANDLER/IMPORTER REPORT*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.5 hour per first handler or importer.

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

*Estimated number of Respondents: 175.*

*Estimated number of Responses per Respondent: 12.*

*Estimated Total Annual Burden on Respondents: 1,050 hours.*

(9) *APPLICATION FOR REIMBURSEMENT OF ASSESSMENTS*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents: 170.*

*Estimated Number of Responses per Respondent: 1.*

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

(10) *APPLICATION FOR REFUND OF ASSESSMENTS PAID FROM ESCROW*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

*Estimated Number of Responses per Respondent:* 1.

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

(11) *REFERENDUM BALLOT*

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 900.

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

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

(12) *A REQUIREMENT TO MAINTAIN RECORDS SUFFICIENT TO VERIFY REPORTS SUBMITTED UNDER THE ORDER*

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

*Recordkeepers:* Producers, first handlers and importers.

*Estimated number of recordkeepers:* 15,902.

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

As noted above, under the proposed program, producers through first handlers, and importers would be required to pay assessments and file reports with and submit assessments to the Board (importers through Customs). While the proposed Order

would impose certain recordkeeping requirements on producers, first handlers, and importers, information required under the proposed Order could be compiled from records currently maintained. Such records shall be retained for at least three years beyond the fiscal period of their applicability.

An estimated 15,902 respondents would provide information to the Board (15,608 producers, 104 first handlers, and 190 importers). The estimated cost of providing the information to the Board by respondents would be \$630,994. This total has been estimated by multiplying 13,278.5 hours by ( $\$36.08$  hourly wage  $\times$   $0.317$  benefits =  $\$11.44$  (benefits) +  $\$36.08$  (wage) =  $\$47.52$ ),  $\$47.52$  for the average mean hourly earnings of producers and importers plus benefits.

Data for computation of the hourly rate for producers (Occupation Code 11-9013: Farmers, Ranchers, and other Agricultural Managers= $\$38.63$ ) and importers (Occupation Code 13-1020: Buyers and Purchasing Agents= $\$33.53$ ) was obtained from the U.S. Department of Labor's Bureau of Labor Statistics. The average of the producer and importer wages is  $\$36.08$ . Data for computation of this hourly wage were obtained from the U.S. Department of Labor Statistics' publication, "May 2019 National Occupation Employment and Wage Estimates in the United States," updated May 31, 2019. This publication can also be found at the following website:

[https://www.bls.gov/oes/current/oes\\_nat.htm#45-0000](https://www.bls.gov/oes/current/oes_nat.htm#45-0000). Data for the benefit costs of 31.7 percent was obtained by U.S. Department of Labor's Bureau of Labor Statistics press release dated Dec. 14, 2018.

The 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. USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, which is authorized under the Marketing Agricultural Agreement Act of 1937. This program collects information to facilitate the administration of the program. The information collected by the marketing order has been carefully reviewed and it was determined that the information collected could not be utilized to facilitate the administration of the research and promotion program. The 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 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there

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

**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 producing areas in the United States for pecans; (d) the accuracy of USDA's estimate of the number of producers, first handlers and importers of pecans that 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 with other similar national research and promotion programs implemented under the 1996 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 1996 Act.

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.

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

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

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

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

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

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

**Definitions**

**§ 1223.1 Act.**

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

**§ 1223.2 American Pecan Council.**

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

**§ 1223.3 American Pecan Promotion Board.**

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

**§ 1223.4 Conflict of interest.**

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

**§ 1223.5 Customs or CBP.**

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

**§ 1223.6 Department or USDA.**

*Department* or *USDA* means the U.S. Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom

authority may hereafter be delegated, to act in the Secretary's stead.

**§ 1223.7 First handler.**

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

**§ 1223.8 Fiscal period.**

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

**§ 1223.9 Importer.**

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

**§ 1223.10 Information.**

*Information* means information and programs that are designed to increase efficiency in processing and to develop new

markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of pecans on a national or international basis. These include:

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

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

**§ 1223.11 Inshell pecans.**

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

**§ 1223.12 Market or marketing.**

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

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

**§ 1223.13 Order.**

*Order* means an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion,

research, and information regarding agricultural commodities authorized under the Act.

**§ 1223.14 Part and subpart.**

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

**§ 1223.15 Pecans.**

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

**§ 1223.16 Person.**

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

**§ 1223.17 Producer.**

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

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

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

**§ 1223.19 Promotion.**

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

**§ 1223.20 Research.**

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

**§ 1223.21 Secretary.**

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

**§ 1223.22 Shelled pecans.**

*Shelled pecans* are pecans whose shells have been removed leaving only edible kernels, kernel pieces or pecan meal. One pound of shelled pecans is the equivalent of two pounds inshell pecans.

**§ 1223.23 Suspend.**

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

**§ 1223.24 Terminate.**

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

**§ 1223.25 United States.**

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

**American Pecan Promotion Board**

**§ 1223.40 Establishment and membership.**

(a) *Establishment of the American Pecan Promotion Board.*

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

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

(i) Eastern Region shall mean the States of Alabama, Florida, Georgia, North Carolina, South Carolina plus any states in the United States, the majority of whose land mass is in the



Eastern Time Zone, plus any U.S. territories in the Atlantic Ocean;

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

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

(2) Seven (7) importers.

(b) *Adjustment of membership.* At least once every five years, the Board will review the geographical distribution of United States production of pecans and the quantity or value of imports. The review will be conducted through an audit of state crop production and Customs figures and Board assessment records. If warranted, the Board will recommend to the Secretary that the membership on the Board be altered to reflect any changes in the geographical distribution of domestic pecan production and the quantity or value of imports. If the level of imports fluctuates versus domestic pecan production, importer members may be added to or reduced from the Board.

(c) *Board's ability to serve the diversity of the industry.*

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

**§1223.41 Nominations and appointments.**

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

(b) Subsequent nominations shall be conducted as follows:

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

(2) Nomination of importer members will be conducted by the Board. All qualified national organizations representing importer interests will have the opportunity to nominate members to serve on the Board. If the Secretary determines that there are no qualified national organizations representing importer interests, individual importers who have paid assessments to the

Board in the most recent fiscal period and imported more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which nominations are being conducted and the previous three fiscal periods) may submit nominations. The names of importer nominees shall be placed on a ballot and mailed to importers for a vote. The votes shall be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. Two candidates for each importer Board position shall be submitted to the Secretary. To be certified by the Secretary as a qualified national organization representing importer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

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

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

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

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

(v) To be certified by the Secretary as a qualified national organization representing importer interests, an

organization must agree to take reasonable steps to publicize to non-members the availability of open Board importer positions.

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

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

(e) The Board must submit nominations to the Secretary at least six months before the new Board term begins. The Secretary shall appoint the members of the Board.

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

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

**§1223.42 Term of office.**

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

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

**§ 1223.43 Vacancies.**

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

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

(c) Without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the continued failure by a member to submit reports or remit assessments required under this part, if the Secretary

determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

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

**§ 1223.44 Procedure.**

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

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

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

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

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Committees may also consist of

individuals other than Board members and such individuals may vote in committee meetings. These committee members shall be appointed by the Chairperson and shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

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

(g) There shall be no voting by proxy.

(h) The Chairperson shall be a voting member.

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

**§ 1223.45 Compensation and reimbursement.**



The members of the Board when acting as members, shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board, incurred by them in the performance of their duties as Board members.

**§ 1223.46 Powers and duties.**

The Board shall have the following powers and duties:

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

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

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

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

(e) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**§ 1223.47 Prohibited activities.**

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

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

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

(c) No program, plan, or project including advertising shall be false or misleading or disparaging to another

agricultural commodity. Pecans of all origins shall be treated equally.

### **Expenses and Assessments**

#### **§ 1223.50 Budget and expenses.**

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

- (1) A statement of objectives and strategy for each program, plan, or project;
- (2) A summary of anticipated revenue, with comparative data for at least one preceding year (except for the initial budget);
- (3) A summary of proposed expenditures for each program, plan, or project; and
- (4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

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

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another.

Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

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

(e) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first year of operation of the Board.

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

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

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

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

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

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

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

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

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

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

(5) Other investments as authorized by the Secretary.

**§ 1223.51 Financial statements.**

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

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

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



**§ 1223.52 Assessments.**

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

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

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

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

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

(d) All assessment payments and reports will be submitted to the office of the Board. All assessment payments for a fiscal

period are to be received no later than the 10<sup>th</sup> of the month following the end of the previous month. A late payment charge shall be imposed on any producer and importer who fails to remit to the Board, the total amount for which any such producer and importer is liable on or before the due date established by the Board on forms approved by the Secretary. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the producer and importer is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

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

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

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

(3) In the event that any HTS number is subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of

pecans, assessment will continue to be collected based on the new numbers.

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

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

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

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

**§ 1223.53 Exemption procedures.**

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

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

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

(3) On receipt of an exemption application, the Board shall determine whether an exemption may be granted for that fiscal period. The Board will then issue, if deemed appropriate, a certificate of exemption to the producer or importer which is eligible to receive one covering that fiscal period. The Board

may request persons applying for the exemption to provide supporting documentation, such as past sales receipts or import data.

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

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

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

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

shall refund such assessments no later than 60 calendar days after receipt by the Board of information justifying the exemption from assessment.

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

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

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

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

(iv) Any producer so exempted shall continue to be obligated to pay assessments under this part that are associated

with any agricultural products that do not qualify for an exemption under this section.

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

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

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

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

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

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

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

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

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

(5) An importer who imports pecans that are eligible to be labeled as "organic" or "100 percent organic" under the NOP, or certified as "organic" or "100 percent organic" under a U.S. equivalency arrangement established under the NOP, may be exempt from the payment of assessments. Such importer may submit documentation to the Board and request an exemption from assessment on certified "organic" or "100 percent organic" pecans on an *Organic Exemption Request Form* (Form AMS-15) at any time initially, and annually thereafter on or before the beginning of the fiscal period, as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of a producer in paragraph (c)(3) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer within the applicable timeframe. Any importer so exempted shall



continue to be obligated to pay assessments under this part that are associated with any imported agricultural products that do not qualify for an exemption under this section.

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

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

**§ 1223.54 Refund escrow accounts.**

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

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

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

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

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

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

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

**Promotion, Research, and Information**

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

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

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

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing of pecans, and the creation of new products thereof, to the end that the marketing and use of pecans may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of pecans.

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

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

**§ 1223.56 Independent evaluation.**

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

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

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information,

publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, §1223.73 shall apply to determine disposition of all such property.

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

#### **§ 1223.60 Reports.**

(a) Each first handler, producer, or importer subject to this subpart shall be required to provide to the Board periodically such information as required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

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

(i) Number of pounds handled;

(ii) Number of pounds on which an assessment was collected;

(iii) Name, address and other contact information from whom the first handler has collected the assessments on each pound handled; and

(iv) Date collection was made on each pound handled.

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

(i) Number of pounds imported;

(ii) Number of pounds on which an assessment was paid;

(iii) Name, address, and other contact information of the importer; and

(iv) Date assessment was paid on each pound imported.

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

**§ 1223.61 Books and records.**

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

**§ 1223.62 Confidential treatment.**

All information obtained from books, records, or reports under the Act and this part shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, producers, importers, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such

information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

### **Miscellaneous**

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

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

#### **§ 1223.71 Referenda.**

(a) *Required referendum.* For the purpose of ascertaining whether the persons subject to this subpart favor the continuation, suspension, amendment, or termination of this

subpart, the Secretary shall conduct a referendum among persons subject to assessments under § 1223.52 who, during a representative period determined by the Secretary, have engaged in the production or importation of pecans:

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

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

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

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

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

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



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

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

**§ 1223.72 Suspension and termination.**

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof if the Secretary finds that this part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if the Secretary determines that this part or subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

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

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

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

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

**§ 1223.73 Proceedings after termination.**

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

(b) The said trustees shall:

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

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

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

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

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to the pecan producer organizations in the interest of continuing pecan promotion, research, and information programs.

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

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

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

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

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

**§ 1223.75 Personal liability.**

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

**§ 1223.76 Separability.**

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

**§ 1223.77 Amendments.**

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

**§ 1223.78 OMB control numbers.**

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

## **Subpart B—Referendum Procedures**

### **§ 1223.100 General.**

Referenda to determine whether eligible pecan producers and importers favor the issuance, amendment, suspension, or termination of the Pecan Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

### **§ 1223.101 Definitions.**

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

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

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

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

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

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

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

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

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

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

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

**§ 1223.102 Voting.**

(a) Each person who is an eligible producer or an eligible importer, as defined in this subpart, at the time of the referendum and during the representative period, shall be

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

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

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

**§ 1223.103 Instructions.**

The referendum agent shall conduct the referendum, in the manner provided in this section, under the supervision of the Administrator. The Administrator may prescribe additional

instructions, not inconsistent with the provisions in this section, to govern the procedure to be followed by the referendum agent. Such agent shall:

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

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

(c) Give reasonable public notice of the referendum:

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

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

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

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence



of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

**§ 1223.104 Subagents.**

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

**§ 1223.105 Ballots.**

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

**§ 1223.106 Referendum report.**

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the

extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

**§ 1223.107 Confidential information.**

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

**Subpart C—Administrative Provisions**

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

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

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

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Bruce Summers, Administrator,  
Agricultural Marketing Service.

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