

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1221****[Docket No. AMS-LS-07-0056, LS-07-02]****Sorghum Promotion, Research, and Information Order****AGENCY:** Agricultural Marketing Service (AMS), USDA.**ACTION:** Final rule.

**SUMMARY:** This rule establishes an industry-funded promotion, research, and information program for sorghum, which includes but is not limited to, grain sorghum, sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage. For the purpose of clarity, the term sorghum means all the above mentioned types of sorghum unless specifically identified otherwise. The Sorghum Promotion, Research, and Information Order (Order) is implemented under the authority of the Commodity Promotion, Research, and Information Act of 1996 (Act). The Order will establish a national Sorghum Promotion, Research, and Information Board (Board) comprised initially of 13 sorghum producers. Producers and importers will pay assessments based on the value of the sorghum they produce or import. A referendum will be conducted 3 years after assessments begin to determine if sorghum producers and importers favor the program.

**DATES:** Effective May 7, 2008. Collection of assessments and appropriate reporting will begin on July 1, 2008.

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**SUPPLEMENTARY INFORMATION:** This Order is issued pursuant to the Act of 1996 (7 U.S.C. 7411-7425) enacted April 4, 1996, hereafter referred to as the Act. A proposed Order was published November 23, 2007 [72 FR 65842].

**Executive Order 12988**

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

Under Section 519 of the Act, a person subject to the Order may file a petition with the Secretary of

Agriculture (Secretary) stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not established in accordance with the law, and may request a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order, or any obligation imposed in connection with the Order, shall be filed within 2 years after the effective date of the Order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Secretary will issue a ruling on the petition. The Act provides that the district court of the U.S. 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 the Secretary's final ruling.

**Executive Order 13132**

This final rule has been reviewed under Executive Order 13132, Federalism. This Order directs agencies to construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision. Section 524 of the Act provides that the Act shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Six States currently have State-legislated sorghum research and promotion programs. In accordance with the Act, this final rule will not preempt any of these State-legislated programs. Further, section 1221.112(j) of the final Order provides for an annual allocation to State programs based on the State's proportional contribution of total assessments collected by the national sorghum checkoff program.

In 2005 and 2006, representatives of the six State-legislated sorghum promotion programs were among other sorghum industry representatives who met with AMS representatives to discuss the possibility of implementing a national sorghum checkoff program. State program representatives participated in the development of the provisions of the proposed Order during these meetings and through direct communication with the National Sorghum Producers (NSP) during the drafting of its proposal.

Not only were the States informed throughout the development of the national sorghum checkoff program, they were instrumental in the sorghum

industry's decision to institute a national sorghum checkoff program. In addition to receiving support from NSP and the U.S. Grains Council, an organization that is dedicated to expanding export opportunities and markets for sorghum and sorghum products, industry and producer organizations from four of the largest grain sorghum production States: Kansas, Nebraska, Texas, and Oklahoma expressed their support for the proposed Order. New Mexico, a producer of grain sorghum and sorghum silage, also expressed support. Within these States, the following organizations indicated their interest in establishing the program: The Texas Grain Sorghum Board; the Texas Grain Sorghum Association; the Kansas Grain Sorghum Producers Association; the Kansas Grain Sorghum Commission; the Nebraska Grain Sorghum Producers Association; the Oklahoma Grain Sorghum Association; and the New Mexico Grain Sorghum Association.

**Executive Order 12866**

This final rule has been determined not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), USDA is required to examine the impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

The Act authorizes generic programs of promotion, research, and information for agricultural commodities. Congress found that it is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, commodity promotion programs.

The Order is intended to develop and finance, through assessments, an effective and coordinated program of promotion, research, and information to maintain and expand the markets for sorghum. While the Order will impose certain reporting and recordkeeping requirements on persons subject to the Order, the information required under the Order can generally be compiled from records currently maintained.

Under the Order, first handlers will remit assessments collected from

producers to the Board. First handlers will also be required to keep records and provide information to the Board that it deems necessary. Currently, first handlers already complete and maintain the same or similar information for existing State sorghum and soybean programs, as well as for the Soybean Checkoff Program (7 CFR part 1220). Reporting forms will require the minimum information necessary to fulfill the intent of the Act. Such records and reports will be retained for 2 years beyond the fiscal year of their applicability. First handlers will also be required to make available, to the Secretary, their books and records in order to determine compliance with the Order.

In addition to paying assessments, producers and importers will have a reporting and recordkeeping burden. This burden relates to producers and importers who will seek nomination to serve on the Board, request an organic exemption, request a refund of assessments paid, or vote in a nationwide referendum. The Order requires producers and importers to keep records and to provide information to the Board or the Secretary when requested and to keep records to qualify for a refund. However, it is not anticipated that producers will be required to regularly submit assessment and other related information to the Board. Information may be obtained through an audit of producers' records to confirm information provided by first handlers or as part of the Board's compliance program.

When seeking nominations to serve on the Board, producers will be required to complete two forms that would be submitted to the Secretary.

Any producer paying assessments may request a refund of assessments paid by submitting an application to the Board. Refunds will be made only if the program is not approved in referendum.

With regard to imports of sorghum, U.S. Customs and Border Protection (Customs) will collect and remit assessments from importers to the Board. Customs will also provide information to the Board regarding the value and volume of imported sorghum, and therefore it is not anticipated that importers will have any regular reporting burden. The Order requires importers to keep records and to provide information to the Board or the Secretary, when requested, and to keep records to qualify for a refund. Information may be obtained through an audit of importers' records to confirm information provided by Customs or as part of the Board's compliance program.

Importers will have similar reporting and recordkeeping requirements as producers concerning nominations to serve on the Board, organic exemptions, refunds of assessments paid, or referendums.

The Small Business Administration (SBA) [13 CFR 121.201] defines small agricultural service businesses as those whose annual receipts are less than \$6.5 million. According to the National Agricultural Statistics Service (NASS) 2002 Census of Agriculture, there are 22 grain sorghum producing States and approximately 3,000 wholesale grain merchants who will be considered first handlers under the Order, in these 22 States. By calculating the average values of product sold by grain merchants in each of the 22 grain sorghum producing States, one can determine that 16 States have wholesale grain industries where, on average, the wholesalers each sold in excess of \$6.5 million per year. This gives a rough approximation that as many as 73 percent of wholesale grain elevators in grain sorghum producing States may have annual sales in excess of \$6.5 million and therefore are determined not to be small businesses.

Based upon data collected from State sorghum boards, NSP estimates that approximately 1,150 first handlers of grain sorghum will be affected. This number represents the number of wholesale grain merchants who buy grain sorghum of the 3,000 wholesale grain merchants approximated. Although State promotion, research, and information programs do not currently exist for sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage, NSP estimates that approximately 700 first handlers of these products will be affected. This was determined through discussions with State sorghum promotions program representatives and State organizations representing sorghum producers. We assume that some of these 700 first handlers will be small businesses.

Under SBA criteria, importers of sorghum are considered agricultural service businesses. The Order defines an importer as a person who imports more than 1,000 bushels of grain sorghum, or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage during a calendar year.

At present, a relatively small amount of grain sorghum is imported into the United States, and the exact number of sorghum importers who will be affected by the proposed Order is not known. It is believed that most grain sorghum imports are related to sorghum seed breeding activities at the present time. For the purpose of this RFA, we

therefore will assume that some importers are small businesses.

For 2005, United States International Trade Commission (USITC) database reports indicate that there were 24,549 bushels of grain sorghum imported, valued at \$96,800. Based upon 2005 NASS data, this total would equal approximately 0.01 percent of the value of the domestic grain sorghum crop. In 2006, USITC database reports indicate that there were 2,547 bushels of grain sorghum imported, valued at \$46,000. Using 2006 NASS data, this would again equal approximately 0.01 percent of the value of the domestic grain sorghum crop. Using data from USITC reports for January–August 2007, the amount of grain sorghum imported is currently 75,497 bushels, valued at \$374,000. Based upon NASS projections for the upcoming marketing year, grain sorghum imports would equal approximately 0.02 percent of the value of the 2007 domestic grain sorghum crop.

The SBA defines small agricultural producers as those having annual receipts of not more than \$750,000 annually. According to the NASS 2002 Census of Agriculture, the average grain sorghum farm size is 204 acres. The USDA Economic Research Service's (ERS) *Feed Grains Data Base Yearbook Tables* indicate that for 2002 the weighted average farm price for grain sorghum was \$2.32 per bushel and that, on average, 50.6 bushels per acre were produced. Based on these figures, the average value of grain sorghum produced would be \$23,948. Accordingly, most grain sorghum producers subject to this Order are determined to be small businesses.

Sufficient data are not available to make similar calculations for the burden of assessments on sorghum forage, sorghum hay, sorghum haylage, sorghum billets, sorghum silage and sorghum seed producers. For the purpose of this RFA, we will assume that these producers are small businesses.

ERS' report *Feed Outlook*, August 14, 2007, forecasted grain sorghum production of 475 million bushels in 2007, making it the largest production year since 2001. If this level of production were realized, the proposed Board would collect \$9.4 million in assessments on grain sorghum. While ERS does not provide a production forecast for sorghum silage, NASS reports that 4,642,000 tons of sorghum silage was produced in 2006. NASS does not estimate the value of sorghum silage, but at \$18 per ton, an estimate provided by NSP, the Board would collect approximately \$2.9 million from

sorghum silage. Were production and prices to remain at these record levels, the Board could collect approximately \$12.3 million from domestic production of grain and silage sorghum and \$2,244 from imported grain sorghum.

An estimate of the grain sorghum assessments that would have been paid by producers in 2002 can be calculated by multiplying the average farm size (204 acres) by the average production (50.6 bushels per acre) by the price received (\$2.32 per bushel) by the proposed grain sorghum assessment rate of 6 tenths of one percent of the value of the grain sorghum (0.006). The burden to each farm can be estimated to be approximately \$144 for 2002. In this example, the year 2002 was selected because it is the most recent NASS Census of Agriculture reporting farm size.

Sufficient data are not available to make a more accurate forecast of assessment collections on sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage production. In addition to sorghum first handlers, importers, and producers, there are other entities affected by the Order. State, regional and national organizations representing sorghum producers and importers will have a role in the Order. There will be some burden on producer organizations that want to participate in the program by becoming certified to make nominations to the Board. USDA estimates that two organizations within each State will request certification.

Shortly after the effective date of this Order, USDA will publish a notice in the **Federal Register** announcing that it will accept applications for certification of organizations to participate in the nomination of Board members pursuant to criteria in section 1221.107. Certified organizations will be required to re-submit applications for certification periodically. It is anticipated that this will occur every 5 years.

Additionally, there will be a burden on State sorghum producer organizations requesting qualification by the Secretary to receive funding from the Board pursuant to section 1221.112(j). Only one organization within each State will be qualified by the Secretary to receive funding from the Board, and preference will be given to existing State legislated sorghum promotion organizations. Organizations will be required to submit an application for qualification to the Secretary pursuant to section 1221.128. It is estimated that one organization will be qualified per State although it is not required that each State have a qualified organization. Qualified organizations

receiving funding through the Order will be required to re-submit applications for qualification periodically. It is anticipated that this will occur every 5 years.

While the exact number of certified and qualified organizations is not known, nonetheless their membership, to a great extent, are producers who are largely small entities, and, when applicable, importers who we assume some of which are small entities.

The Act provides authority to tailor a program according to the individual needs of an industry. Section 514 of the Act provides for orders applicable to producers, first handlers, and other persons in the marketing chain as appropriate. Provision is made for permissive terms in an order in Section 516 of the Act and authorizes an order to provide for 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; and provision for credits for generic and branded activities. In addition, Section 518 of the Act provides for a referendum to ascertain approval of an order to be conducted either prior to its going into effect or within 3 years after assessments first begin under the order. An order also may provide for its approval in a referendum to be based upon (1) a majority of those persons voting; (2) persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. Section 515 of the Act provides for establishment of a board from among producers, first handlers, and others in the marketing chain as appropriate.

This Order includes provisions for a delayed referendum. Approval will be based upon the majority of those persons voting for approval who were engaged in the production or importation of sorghum during the representative period established by the Secretary.

We have not identified any relevant Federal rules that are currently in effect that duplicate, overlap, or conflict with this rule.

#### **Paperwork Reduction Act**

In accordance with OMB regulation (5 CFR part 1320) that implements the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) (PRA), AMS has submitted to OMB a new information

collection that has been assigned OMB control number 0581-0246.

*Abstract:* The information collection requirements in the request are essential to carry out the intent of the Act.

Under the Order, first handlers will be required to collect assessments from producers, file reports with, and submit assessments to the Board. While the Order will impose certain recordkeeping requirements on first handlers, information required under the Order can be compiled from records currently maintained. Such records must be retained for at least 2 years beyond the marketing year of their applicability. Each first handler will be responsible for the collection of assessments and remittance of the assessments to the Board. It is anticipated that the bulk of assessments will be submitted to the Board by first handlers who purchase sorghum. A producer will be considered a first handler when that person markets sorghum of their own production directly to a consumer.

The Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements.

The forms on which information is to be collected require the minimum information necessary to effectively carry out the requirements of the Order. 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 are designed to be simple and easy to understand and place as small a burden as possible on the person required to file the information.

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. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and first handlers who are subject to the provisions of the Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

For the purpose of estimating the cost of reporting and recordkeeping, \$18.55 is used, which is the mean hourly earnings of first line supervisors and managers of farming, fishing, and forestry workers as obtained from the U.S. Department of Labor Bureau of Labor Statistics National Compensation Survey of Occupational Wages.

Information collection requirements include:

(1) *Background Information Form* (OMB Form No. 0505-0001).

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 0.5 hours per response for each producer or importer nominated to serve on the Board.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* (26 for initial nominations to the Board, 8 in the second year, 10 in the third year, and 8 in the fourth year, sequencing 8, 10 and 8 annually, thereafter).

*Estimated Number of Responses per Respondent:* 0.33.

*Estimated Total Annual Burden on Respondents:* 4.29 hours for the initial nominations to the Sorghum Board and sequencing 1.3, 1.6, and 1.3 annually thereafter.

*Total Cost:* (Number of respondents  $\times$  responses per respondent  $\times$  \$18.55) \$79.58 initial, and sequencing \$24.12, \$29.68, and \$24.12 annually thereafter.

(2) *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 0.1 hour per record keeper maintaining such records.

*Recordkeepers:* Producers, importers, and first handlers.

*Estimated Number of Recordkeepers:* 35,050.

*Estimated Total Recordkeeping Hours:* (Number of recordkeepers  $\times$  0.1 hours) 3,502 hours.

*Total Cost:* (Number of record keepers  $\times$  0.1 hour per record keeper  $\times$  \$18.55) \$64,962.

(3) *Remittance Form by Each First Handler.*

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

*Respondents:* First handlers.

*Estimated Number of Respondents:* (1,150 first handlers of grain plus 700 first handlers of silage and hay) 1,850.

*Estimated Number of Responses per Respondent:* 12.

*Estimated Total Annual Burden on Respondents:* (Number of first handlers  $\times$  total number of reports  $\times$  0.25 hour per report) 5,550 hours.

*Total Cost:* (5,550 hours  $\times$  \$18.55) \$102,952.50.

(4) *Application for Refund Form.*

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.167 hour per response.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* (25 percent of 33,200 total producers) 8,300.

*Estimated Number of Responses per Respondent:* 6.

*Estimated Total Annual Burden:* (8,300 producers  $\times$  6 reports per year  $\times$  0.167 hour per report) 8,317 hours.

*Total Cost:* (8,317 hours  $\times$  \$18.55) \$154,280.

(5) *Application for Certification of Organizations.*

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

*Respondents:* National, State, or regional sorghum associations or organizations.

*Estimated Number of Respondents:* (Two organizations certified in each of 22 sorghum producing States) 44.

*Estimated Number of Responses per Respondent:* (Estimating recertification every 5 years) 0.2.

*Estimated Total Annual Burden:* (44 organizations  $\times$  0.2 responses  $\times$  0.5 hour per response) 4.4 hours.

*Total Cost:* (4.4 hours  $\times$  \$18.55) \$81.62.

(6) *Application for Qualification of Organizations.*

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

*Respondents:* State associations or organizations.

*Estimated Number of Respondents:* (1 organization certified in each of 22 sorghum producing States) 22.

*Estimated Number of Responses per Respondent:* (Estimating requalification every 5 years) 0.2.

*Estimated Total Annual Burden:* (22 organizations  $\times$  0.2 responses  $\times$  0.5 hour per response) 2.2 hours.

*Total Cost:* \$40.81.

(7) *Nominations for Appointments to the Sorghum Board Form.*

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

*Respondents:* National, State, or regional sorghum associations and organizations.

*Estimated Number of Respondents:* (Certified organizations) 22.

*Estimated Number of Responses per Respondent:* one per year.

*Estimated Total Annual Burden:* (22 organizations  $\times$  1 response  $\times$  0.5 hour per response) 11 hours.

*Total Cost:* (11 hours  $\times$  \$18.55) \$204.

(8) *Organic Exemption Form.*

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

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 10.

*Estimated Number of Responses per Respondent:* (Annual exemption application required) 1.0.

*Estimated Total Annual Burden on Respondents:* 5.0 hour.

*Total Cost:* (5 hours  $\times$  \$18.55) \$92.75.

(9) *Referendum Ballot.*

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.1 hour per referendum ballot.

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 8,300.

*Estimated Number of Responses per Respondent:* (Estimating referendums every 5 years) 0.2.

*Estimated Total Annual Burden on Respondents:* 166 hours.

*Total Cost:* (166 hours  $\times$  \$18.55) \$3,079.30.

In the proposed rule published November 23, 2007, [72 FR 65842] comments were invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and the USDA's oversight of the program, including whether the information will 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 assumption used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

No separate comments were received regarding the information collection section. However, one comment was received concerning recordkeeping and is discussed in the comment section.

## Background

NSP submitted a draft Order to USDA on December 28, 2006, along with letters of support from nine industry organizations. These letters represented producer organizations from five sorghum producing States, NSP, and the U.S. Grains Council.

According to NSP, a national promotion, sorghum checkoff program will allow the industry to address a number of production and marketing problems it currently faces. Three main

problems currently affecting sorghum producers are as follows: Lack of yield improvement and technology; aggressive market competition; and lagging ethanol research. The sorghum industry has declined in recent years in both production and acreage.

State grain sorghum promotion, research, and information programs currently exist in Kansas, Texas, Nebraska, Oklahoma, Louisiana, and Arkansas. These promotion, research, and information programs are based on volumetric assessments, so as volumes of grain sorghum change, so do the promotion, research, and information assessments. This variability leads to sporadic research funding. Also, State programs cannot generate a sufficient scale of funding to effectuate large coordinated research programs.

The national sorghum checkoff program addresses both of these concerns.

The assessment provisions of the Order are based on value, so variability of funding will lessen. Also, the revenue generated by a national sorghum checkoff program is anticipated to reach levels that can adequately fund large coordinated research programs in sorghum.

The proponent requested that the implementation referendum be conducted within 3 years after assessments begin, which is consistent with the provisions of the Act. Approval will be based upon a majority of eligible persons voting for approval who have engaged in the production or importation of sorghum during the representative period established by the Secretary.

The program will be administered by a 13-member Board appointed by the Secretary from industry nominations. The Board will recommend to the Secretary the assessment rate, programs and projects, budgets, and any rules and regulations that might be necessary for the administration of the program. The Board will consist of five producers nominated from the State with the largest production, three from the State with the second largest production, one from the State with the third largest production, and four producers to serve as at-large representatives, among which two representatives are appointed from States other than the top three sorghum producing States.

Importers will be entitled to one seat if the value of assessments collected on imported sorghum reaches or exceeds the production of the State with the third largest sorghum production. Currently, imports of grain sorghum are very limited and not at a value that would trigger the provision of

appointing an importer representative to serve on the Board. For example, Nebraska was the third largest producer of grain sorghum in 2006 at approximately 19,200,000 bushels. Imports of grain sorghum in 2006, according to USITC data, were 2,547 bushels.

For the purpose of establishing the initial Board, USDA grain sorghum production data will be used to determine the top three grain sorghum producing States. Section 515(3) of the Act provides for periodic reapportionment of the Board. The Act provides that at least once every 5 years, but not more frequently than once every 3 years the Board shall review the geographical distribution of the production of the agricultural commodity covered by the Order including the quantity or value. If warranted, the Board will recommend reapportionment of the Board membership.

The key to understanding reapportionment in the Order is the definition of production. For the purpose of reapportionment under Section 1221.100 of the Order, production means the total assessments collected by the Board during the last 5 crop years, excluding the high and low years.

Section 1221.100(f) of the Order specifically uses the term production and does not refer to a quantity such as "bushels" harvested per acre. The intent of this is to use assessment collections as the basis for reapportionment.

The Order uses this definition since it best accounts for the difference in geographic regions found in the sorghum belt where sorghum prices vary widely. Furthermore, NASS does not report pricing for sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage, so the Board assessment records will provide a method to track the value of all types of sorghum. Using the assessment collections will permit the Board to analyze sorghum production in a consistent manner and base reapportionment decisions on a value as provided for in the Act.

The Order establishes an assessment in section 1221.116 that will be paid by sorghum producers and importers. The assessment will be collected and remitted to the Board by first handlers. The term producer is defined in the proposal as any person who is engaged in the production and sale of sorghum in the United States and who owns or shares the ownership and risk of loss of the sorghum.

Importer is defined as any person importing more than 1,000 bushels of

grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or purchases sorghum outside of the United States for sale in the United States, and who is listed as the importer of record for such sorghum. First handler is defined as the first person who buys or takes possession (excluding a common or contract carrier of sorghum owned by another) of more than 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage from producers in a calendar year for marketing. The term first handler includes a producer who markets sorghum of the producer's own production directly to consumers. It may also mean the Commodity Credit Corporation (CCC) in any case in which sorghum is pledged as collateral for a loan issued under any CCC price support loan program and the sorghum is forfeited by the producer in lieu of loan repayment.

The definition of first handler is constructed so that any commercial grain elevator will meet the requirement of the definition by buying more than the minimum amount of grain sorghum in a calendar year and therefore will assess all grain sorghum purchased. The definition of first handler is designed to exclude small cattle feeding operations and dairies that would buy less than 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage. The Order does not have a *de minimis* clause applicable to producers, but it does define first handler and importer in a way as to exclude very small entities.

As mentioned above, the approximately 1,850 first handlers of sorghum will collect and remit assessments to the Board. First handlers will remit assessments to the Board on a monthly basis along with a report detailing the volume of sorghum on which assessments were collected as well as identifying the State in which the sorghum was produced. Information regarding the origin of the sorghum's production is necessary so that the Board can make recommendations to USDA regarding reapportionment of its membership.

Section 1221.119 of the Order provides for refunds. Any producer or importer from whom an assessment is collected and remitted to the Board, or who pays an assessment directly to the Board, through the announcement of the results of the implementing referendum,

upon failure of the referendum will then have the right to receive from the Board a refund of assessments paid. Any producer or importer requesting a refund will be required to submit an application on the prescribed form to the Board within 60 days from the date the assessments were paid by such producer or importer, but no later than the date the results of the required referendum are announced by the Secretary. Section 1221.112(j) provides for an allocation of a portion of all assessments collected to be made available to qualified State sorghum producer organizations. Each year the Board will establish an allocation amount of no less than 15 percent but no more than 25 percent of the total assessments collected on all sorghum available for any fiscal period, less the expenses incurred by the Secretary for administration and supervision of the Order. The funds can be made available for use by qualified sorghum producer organizations pursuant to section 1221.128 for State programs of generic promotion, research, and information. Amounts allocated by the Board for State generic promotion, research, and information programs will be based on requests submitted to the Board by qualified sorghum producer organizations. An important aspect of the availability of an allocation to a qualified State organization is that the organization will not automatically receive a 15–25 percent allocation. Each year the qualified organizations will have to submit requests for the funds, which can be for no more than their allocated amount. A detailed plan describing projects with budgets would be a part of this request to demonstrate that the allocation will be used in a way consistent with the Act and Order.

An example of how an allocation amount could be determined is as follows:

A particular qualified State organization contributes 40 percent of the total assessments collected by the Board for the previous annual fiscal period. Total assessments collected less the USDA expenses for the previous fiscal period were \$12,300,000. The Board has set the allocation amount at 25 percent. The qualified organization representing that State may submit requests up to \$1,230,000 ( $\$12,300,000 \times 40 \text{ percent} \times 25 \text{ percent}$ ).

The Order provides for exemptions from assessments under specific conditions. Any importer of less than and including 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage per calendar year may claim an exemption from the assessment required under

section 1221.116. An importer desiring an exemption must apply to the Board for a certificate of exemption and certify that the importer will import less than the above stated quantities of sorghum. The Board will then issue a certificate of exemption and the importers who receive a certificate of exemption will be eligible for reimbursement of assessments collected by Customs. The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt sorghum and, in the case of importers, proof of payment of assessments.

A producer or importer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP may be exempt from the payment of assessments. The producer or importer must submit a request to the Board annually as long as the producer continues to be eligible for the exemption.

The Order is summarized as follows: Sections 1221.1 through 1221.32 of the Order define certain terms such as producer, handler, and importer which are used in the Order.

Sections 1221.100 through 1221.111 include provisions relating to the Board. These provisions cover establishment and membership, nominations nominee's agreement to serve, appointment, term of office, vacancies, removal, certification of organizations, procedure, compensation and reimbursement, powers and duties, and prohibited activities.

Section 1221.112 through 1221.120 covers expenses and assessments. Sections 1221.112 through 1221.115 include provisions relating to budget and expenses, financial statements, operating reserve, and investment of funds. Section 1221.116 through 1221.120 include provisions related to assessments and specify assessment rates, and the imposition of late payment charges. Also included are provisions for exemptions, refund, escrow accounts, refunds, and procedures for obtaining a refund. Section 1221.116 was changed by AMS in the proposed rule to specify that if Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment to the Board.

Section 1221.221 through 1221.223 covers programs, plans, and projects detailing the types of activities to be engaged by the Board. Also covered are provisions for an independent evaluation and the protection of patents, copyrights, inventions, trademarks,

information, publications, and product formulations derived from assessment funded activities.

Section 1221.124 through 1221.127 includes provisions for reporting requirements on first handlers and importers; books and records; use of information; and the confidential treatment of all personally identifiable information obtained from books and records of persons subject to the Order.

Section 1221.128 covers the qualification by the Secretary of State organizations that would be eligible to receive funding from the Board. Section 1221.128 was changed by AMS in the proposed rule by adding paragraph (e) to express the primary considerations in determining the qualification of an organization to receive funding.

Sections 1221.129 through 1221.138 discusses the rights of the Secretary; referenda; suspension or termination; proceeding after termination; effects of termination or amendment; personal liability; separability; amendments; rules and regulations; and OMB numbers.

The changes suggested by the commenters are discussed below, along with changes made by USDA upon further review. Also, USDA has made other miscellaneous changes for the purpose of clarity and accuracy. For the readers' convenience, the discussion of comments is organized by topic headings.

## Comments

USDA published a proposed Order on November 23, 2007 [72 FR 65849] with a request for comments on the proposal to be received by January 22, 2008. USDA received 215 timely comments on the proposed Order. Five comments were received after the close of the comment period. No new issues were raised by these comments. Twenty-three of the comments were from State and national organizations representing producers or providing agricultural related services from the States of Arkansas, Nebraska, Kansas, Texas, Oklahoma, and Colorado. One of these organizations represents itself as the largest importer of sorghum into the United States. Five of these organizations submitted comments in opposition to the proposed Order. One hundred sixty-seven comments were submitted by producers in support of the proposed Order from the States of Arkansas, Colorado, Kansas, Texas, New Mexico, South Dakota, Nebraska, and Missouri. Twenty-two producers submitted comments opposing the proposal in part or in whole.

### *Supporting Comments*

One hundred thirty-seven comments identified the pooling of resources as a significant benefit of a national mandatory sorghum checkoff program. Several of these comments cited the Soybean and Cotton Checkoff programs as successful farmer funded self-help programs that have contributed substantially to the benefit of their respective industries. These comments stressed that for sorghum to remain a viable rotation crop, a national sorghum checkoff program must be implemented.

Some comments addressed funded research as a resulting benefit of establishing a national mandatory sorghum checkoff program.

Eight comments, in support of the proposal, specifically identified the proposed funding allocation to States as an appropriate way to help support State level research and promotion initiatives while emphasizing the financial strength of a national sorghum checkoff program.

One hundred twelve comments, in support of the proposal, identified weed control as an area where a national sorghum checkoff program could fund major research. Comments from producers and large and small production States specifically mentioned shatter cane and other grasses as important areas of weed control research that could be performed by the national sorghum checkoff program.

Sixty-four comments addressed the need for national level research relating to the development of cellulosic ethanol production. These comments were submitted by producers of both grain and forage type sorghums.

Sixty-eight comments suggested that research into improving sorghum yields has been historically underfunded, especially when compared to the tremendous amount of resources devoted by private companies into corn and soybean yield research. These comments were submitted by producers from large and small production States.

Twenty comments specifically mentioned that a national sorghum checkoff program could more effectively fund sorghum breeding and genetics programs. Some of these comments suggested that improved varieties would encourage greater planted acreage and production, which would expand and stabilize sorghum markets.

Twenty-six comments, in favor of the proposal, specifically mentioned that a national sorghum checkoff program could address the issues of developing new markets, domestic and foreign, for grain sorghum.

### *Assessment Rate Cap*

Seventy-two supporting comments recommended changing text in section 1221.116, Assessments, to clarify that the assessment rates on grain and silage may not be raised above a cap of 1 percent. These comments suggest changing the text in section 1221.116 so that the maximum modification of the assessment rate would be 0.4 percent of net market value in 1221.116(c)(1) and 0.65 percent of net market value in 1221.116(c)(2). This would cap the assessment rates for all sorghum at 1 percent of net market value. We agree that a clarification is appropriate. However, USDA has changed section 1221.116(c)(1), section 1221.116(c)(2), and section 1221.116(e) so that the Order reflects the intent of the original submission by the proponent. The cap for the assessment rates at 1 percent of the net market value will appear only in section 1221.116(e). Further, any change in the assessment rates must be promulgated through regulations approved by the Secretary.

### *Other Changes for Consistency With NSP Submission*

Several supportive commenters recommended five changes to the regulatory text in the Order to make the text consistent with the intent of the original submission of the proponent and to correct miscellaneous grammatical errors.

The comments recommended changing 1221.104(c)(5) by adding “at large national representatives shall also have their staggered terms assigned by the Secretary”; removing an unnecessary semicolon from 1221.117; correcting a section reference in 1221.123 from 1221.131 to 1221.132; changing an “or” to “and” in 1221.130(b)(3) so that a petition for a referendum would require 10 percent of eligible producers and importers (A similar change was also supported by an organization that opposes the proposal); adding “and Importers” to 1221.130(c) to reflect that both producers and importers, who are eligible, may vote in referendums. These changes have merit and have been made in the final rule.

### *Opposing Comments*

Twenty-two comments from producers and five comments from organizations were submitted opposing the implementation of the proposal or portions thereof. A number of topics were discussed.

### *Board Membership*

Five organizations, opposing the proposal, submitted comments regarding Board membership and

asserted that the proposed Board structure favors the largest production States. Further, that the largest production State would control 40 percent of the Board’s membership. They believe that this would allow the largest production States to influence the spending of resources for promotion and research to the exclusion of small production States.

One commenter suggested that as an alternative to creating a national sorghum checkoff program, the sorghum industry should continue under the current system of State legislated and voluntary State level sorghum checkoff programs and be encouraged to establish a coordinating checkoff board comprised of State programs.

One commenter recommended adoption of a method of apportionment that would prevent any State from having more than 25 percent of Board seats. One commenter noted that the Board would have broad powers under 1221.112 and 1221.116 and that the interest of small production States would not be represented under the proposed Board structure.

To address this issue, the apportionment method suggested by the commenter distributes Board seats using a combination of representation assigned to the top five production States and dividing the remainder of sorghum production areas into four regions. States and regions would then be allotted representation based on the value production. States or regions with production valued at less than \$75 million would get one member. States of regions with production valued between \$75 million and \$225 million would receive two members, and States or regions with production valued above \$225 million would receive three members. Importers would receive membership using the same criteria based on the value of imported product. Under this system the size of the Board would expand and contract as acreage and crop prices change, and a five year average of crop value would be calculated annually to determine Board membership.

Other commenters reviewed this alternative representation mechanism and offered comments regarding its merits. These comments noted that under the alternative representation mechanism, the number of Board members would continue to increase as sorghum production increases thus potentially leading to an overly large board and increased administrative costs associated with travel and Board meetings. These commenters also suggested that the alternative representation plan does not



substantially contribute to minimizing majority membership for the largest production States.

The alternative apportionment method suggested by the commenter is significantly different from the proposal and has not been subject to public comment. Nonetheless, USDA believes that a board comprised of 13 members is an appropriate and reasonable size for the anticipated revenue of the national sorghum checkoff program. Further, based on review of the comments, grain sorghum production is heavily concentrated in three States. Based on 2007 NASS production data, three States account for 79 percent of the total United States production. Therefore, USDA believes it reasonable to have Board representation reflect this production. Additionally, under the representation mechanism proposed in the Order, certified organizations are responsible for the submission of qualified nominees from all geographic areas to fill at-large positions for nomination and appointment to the Board by the Secretary. Also, representation on the Board will be reviewed at least once every five years and the Board may recommend to the Secretary that representation be altered to reflect any change in geographical distribution of domestic sorghum production. Sorghum imported into the United States will also be reviewed. Board members are appointed by the Secretary and are expected to make decisions that would benefit the entire sorghum industry. Therefore, USDA is finalizing this section as proposed.

#### *Allocation of Assessments to States*

Several opposing commenters stated that the "pass-back" allocation (section 1221.112(j)) is too small and recommended an increase to 50 percent citing the Beef Promotion and Research Order and the Soybean Promotion, Research, and Consumer Information Order as examples. Other commenters suggested that the funding allocation should be automatically provided to States at 50 percent. Several commenters asserted that the proposal's funding allocation provision will not provide adequate funding to maintain State checkoff programs given different research needs in small production States. Several of these opposing commenters suggested that research needs are different in small production States because grain sorghum utilization varies among small States. They asserted that small production States are interested in weed control research and verification and not interested in breeding programs or ethanol research. Further, they stated that without proper

representation on the Board, combined with loss of individual assessment funding, they believed research vital to their interest will go unfunded. They contended, their assessments would go to fund research that would not benefit small production States, and university researchers in small production States would lose funding. They noted that other national programs, such as the Soybean Promotion, Research, and Consumer Information Order in particular, have implemented programs that left State programs at least as well off after implementation of the national program.

As previously noted, eight comments, in support of the proposal, specifically identified the proposed funding allocation to States as an appropriate way to help support State level research and promotion initiatives while emphasizing the financial strength of a national sorghum checkoff program.

Seven supportive commenters rebutted these comments opposed to the proposed State funding allocation. Several of the supporting commenters noted that the State funding allocation was not intended to be a funding mechanism for State checkoff boards but, rather a method to fund promotion and research initiatives specific to States that are not currently addressed by national promotion and research initiatives. Some commenters noted that, currently, State checkoffs are responsible for costs associated with collecting assessments while under the proposal they would have no such costs because the national Board would collect assessments. These commenters suggested that, in addition to the State funding allocation, these qualified State programs could apply for and receive additional funding from the Board on a project-by-project basis.

One supportive commenter responding to the opposing comments on State funding allocation stated that the commenter had visited personally with a number of university researchers regarding the State funding allocation. This commenter stated that these researchers had no reservation competing on a national level for research funding and that in doing so felt that the research proposals with the most merit would rise to priority and receive funding. Other supportive commenters noted that while the Beef Promotion and Research Order and the Soybean Promotion, Research, and Consumer Information Order retain 50 percent of assessments, other checkoffs do not.

The Lamb Promotion, Research, and Information Order and Blueberry Promotion, Research, and Information

Order provide no funding allocation back to States. The Cotton Research and Promotion Order, the oldest program, passes back 5 percent to States and the Peanut Promotion, Research, and Information Order currently returns 20 percent to States. The National Pork Promotion, Research, and Consumer Information Order, on average, returns about 16 percent to States.

While several existing national checkoff programs provide varying degrees of funding to State research, promotion, and information efforts, some of these programs have percentages established by statute while other programs have percentages established in their order's provisions. The proposed Order provided for an annual allocation to State programs based on a State's proportional contribution of total assessments collected by the national sorghum checkoff program. The allocation amount would be no less than 15 percent but no more than 25 percent of total assessments collected. We believe that the provision provides for a reasonable allocation for State generic programs while maintaining an appropriate level of funding for the national program. Also, a 50 percent funding allocation should be subject to public comment. Further, the national program does not preempt existing State checkoff programs. Thus, States are not precluded from establishing or continuing a State checkoff program in addition to a national sorghum checkoff Program. Accordingly, these suggestions are not adopted.

#### *Referendum*

A number of opposing commenters stated they were against a delayed referendum. Some commenters cited their organization's policies that state that commodity checkoff programs should be approved by producer referendum prior to implementation or change of a program. Other commenters suggested that no one should be subject to assessment without the opportunity to vote in a referendum beforehand.

A number of supporting commenters reviewed the opposing comments regarding the delayed referendum and submitted additional comments. These commenters stated that accurately identifying all sorghum producers who would be eligible to vote in the referendum is not possible prior to the collection of assessments, thereby making it impractical to conduct an up-front referendum. Other commenters cited that it would be problematic and impractical to conduct an up-front referendum due to the significant expense of a referendum when there are



no funds available to reimburse USDA for the expense.

Section 518 of the Act provides for both required referenda and optional referenda for determining whether persons covered by an order favor the order. The Act provides for an optional referendum procedure that authorizes an up-front referendum for which, USDA has historically required the proponent industry to post a bond well in advance of an order's effective date to cover all costs associated with development of an order as well as referendum expenses.

The Act allows for a referendum to be conducted up to three years after the effective date of the Order. This allows all persons subject to the Order a sufficient amount of time to observe the management and functioning of the new program before making a decision regarding its continuation. Further, the Order provides an opportunity to request and receive a refund of assessments if the initial referendum fails. Accordingly, USDA is finalizing the Order with the delayed referendum requirement. Prior to the referendum, USDA will issue regulations for public comment regarding the process in which the referendum will be conducted.

#### *First Handlers*

A number of comments and requests for clarification were made regarding first handlers and their role in the sorghum promotion, research, and information program. Among the topics raised were: Reimbursement payments to first handlers for cost associated with collections; economic impact analysis; redefining first handlers; recording the State of origin of sorghum; first handler representation on the Board; clarifying the time of assessment collection; and clarification of the date of sale.

#### *Payments to First Handlers*

A commenter stated the commenter's belief that first handlers would bear the burden of implementing the checkoff and, therefore requested that USDA consider reimbursing first handlers up to 10 percent of sorghum checkoff assessments collected to offset the direct costs incurred in collecting, submitting, and maintaining records for the national sorghum promotion, research, and information program. While first handlers are subject to the Order, the Act does not provide for such reimbursement of administrative expenses to first handlers or anyone else in the marketing chain. Accordingly, USDA does not accept this proposed change.

#### *Definition of First Handler*

A commenter suggested that the definition of first handler be changed because 1,000 bushels is too low of a limit to exclude a handler from their obligation to pay the assessment. This commenter also suggested that grain buyers may not know at the beginning of the year how much sorghum they will buy, thus placing them in the position of either refunding assessments if they don't reach the 1,000 bushel limit or assessing after-the-fact once they reach the trigger. Either way, the commenter suggested, that this would cause an undue burden on the handler.

We disagree. The definition of first handler is constructed so that every commercial grain elevator, under current industry practices, would exceed the threshold since they typically buy more than the minimum threshold amount of sorghum in a calendar year. Therefore, all sorghum purchased by first handlers would be assessed.

The definition of first handler is designed to exclude small cattle feeding operations and dairies that would buy less than 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage. According to NASS data, the average U.S. sorghum production in 2007 was 74.2 bushels per acre. Any commercial grain elevator that purchases 13.5 acres of sorghum will have met the definition. According to the NASS' 2002 Census of Agriculture, the average grain sorghum farm size was 204 acres. If a commercial grain elevator has even one grain sorghum producing customer, they would likely meet the limit more than 15 times over. Accordingly, USDA believes that the 1,000 bushel limit is appropriate and will not burden commercial grain buyers. Accordingly, this suggestion to change the definition of first handler is not adopted.

#### *State of Origin of Sorghum*

A commenter suggested that the requirement for first handlers to keep records of the State of Origin of their sorghum purchases is a burden that is not part of their regular course of business. This requirement is essential to the Board's determination of representation, which is based on assessment collections for each State. The information is also needed in identifying the appropriate State to receive funding allocations. A similar requirement is part of the Soybean Promotion, Research, and Consumer Information Order's recordkeeping requirements as well as other State

programs and has not proven to be a substantial burden. The burden estimated under this program is minimal and necessary for carrying out the provisions of the Order. Accordingly, this comment is not adopted.

#### *First Handler Representation on Board*

A commenter criticized the lack of representation of first handlers on the Board stating that first handlers deserved representation because of the disproportionate economic impact they will incur as a result of implementing the checkoff. We disagree. The program's effect on first handlers is not unreasonable. Further, the representation provisions of the Order are appropriate as they afford representation to those persons who pay the assessments. Accordingly, this comment is not adopted.

#### *Time of Assessment Collection*

A commenter asked for clarification of the term handled as it relates to the timing of the assessment collection. While the collection of assessments is on handled sorghum the assessment occurs at the time the producer sells the sorghum and the net market value is established. Also, the commenter suggested that the wording of section 1221.124(1) be changed to clarify that records would only be required for sorghum bushels on which assessments have been collected. We disagree. The information required in subparagraph (a)(1) is needed by the Board to carry out its responsibilities under the Order. Accordingly, no change is made as a result of this comment.

#### *Date of Sale*

A commenter asked for clarification of the date of sale. The commenter suggested that in the context of the grain trade, a better term might be date of settlement which would reflect the date when the assessment is deducted from the producer's payment in fulfillment of a contract. USDA believes that this comment has merit, but also believes that a more appropriate term would be date on which assessments were paid. *Therefore, USDA is changing 1221.125(b)(5) to read as follows:* "(5) date on which assessments were paid; and". Further, this change makes the term consistent with 1221.124(4). The commenter also suggested making a similar change in section 1221.116. However, USDA does not believe any change is necessary in this section.

*Miscellaneous Comments**Nomination and Appointment*

Two commenters, one in support and one in opposition to the Order, expressed concern that USDA removed a paragraph of text from the original submission that would have allowed the Board to make adjustments in procedures for the nomination to, appointment to, or representation on the Board without amending the Order. This sentence would have been included in 1221.100(f) at the end of the paragraph. The Order provides for a review every five years of sorghum production and importation to determine whether there is equitable representation on the Board. However, given the organization and structure of the Board, rulemaking is appropriate and necessary to make such adjustments. Accordingly, no changes are made as a result of these comments.

*Assessment Remittance*

Several commenters requested that USDA consider changing the assessment remittance requirement from monthly to quarterly. An appropriate remittance schedule is critical to the Board's functioning. While no change is made to the final rule, USDA, in consultation with the Board, will review this issue after the program has been fully implemented. Consequently, unless otherwise prescribed in future regulations, assessments are due by the 15th of the following month in which assessments are collected.

*Freezing of Assessment Rate*

A commenter suggested that the assessment rate be frozen for a period of three years until after the referendum is conducted. We disagree. Section 1221.116(e) provides that the Board may make recommendations to the Secretary to raise or lower the assessment rate by no more than 0.2 percent of net market value received by the producer in any given year. We believe that the Board needs such discretion to recommend changes to assessments in order to fully exercise its authority to develop promotion, research, and information programs, plans, and projects. Accordingly, no change to the Order's provisions is made as a result of this comment.

*Non-Preemption of State Checkoffs*

A commenter asked for clarification regarding the non-preemption of State checkoffs due to concern that recordkeeping for a State and national checkoff would be burdensome. While the national sorghum program imposes certain reporting and recordkeeping

requirements, information required under the Order can be completed from records already maintained. Such information is the same or similar to existing State sorghum and soybean programs, as well as the Soybean Checkoff program (7 CFR part 1220). Six States currently have State-legislated sorghum research and promotion programs. Further, the Order's provisions have been carefully reviewed and every effort has been made to minimize any unnecessary reporting or recordkeeping requirements. Accordingly, no change is made as a result of this comment.

*Economic Impact Analysis*

A commenter requested that USDA conduct a comprehensive economic impact analysis prior to implementing the Order. We believe that comprehensive analysis of the Order has been conducted under applicable Executive Orders, the Regulatory Flexibility Act and the Paperwork Reduction Act. In addition, in 2005 and 2006, representatives of the six State-legislated sorghum promotion programs were among other sorghum industry representatives who met with AMS representatives to discuss the possibility of implementing a national sorghum checkoff program. State program representatives participated in the development of the provisions of the proposed Order during these meetings and through direct communication with the NSP during the drafting of its proposal.

*Books and Records*

AMS is changing section 1221.125(a) to make clear that producers as well as first handlers and importers are required to maintain and make available during normal business hours for inspection by employees or agents of the Board or the Secretary, such books and records as are necessary to carry out the provisions of the Order and regulations. Such changes better conform Order language to the provisions of the Act.

*Budget and Expenses*

AMS is changing section 1221.112(l) to make clear that remaining funds available to the Board after calculating State allocations should be applied, to the extent practicable, to promotion, research, and information programs, plans, or projects provided for in section 1221.121. Also, the term "generic" and a more detailed description of the request made by qualified sorghum producer organizations is added to section 1221.112 for clarity.

After consideration of all relevant materials presented, including the

proposal and comments received, the Department has determined that this Order is consistent with and will effectuate the purposes of the 1996 Act.

It is found that good cause exist for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because given that the collection and remittance of assessments begin on July 1, 2008, the initial Board should be appointed as soon as possible in order to carry out the purposes of the program.

**List of Subjects in 7 CFR Part 1221**

Administrative practice and procedure, Advertising, Sorghum and sorghum product, Consumer information, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, Title 7 of Chapter XI of the Code of Federal Regulations is amended to add part 1221 to read as follows:

**PART 1221—SORGHUM PROMOTION, RESEARCH, AND INFORMATION ORDER****Subpart A—Sorghum Promotion, Research, and Information Order****Definitions**

Sec.	
1221.1	Act.
1221.2	Board.
1221.3	Calendar year.
1221.4	Certified organization.
1221.5	Conflict of interest.
1221.6	Crop year.
1221.7	Customs.
1221.8	Department.
1221.9	First handler.
1221.10	Fiscal period.
1221.11	Handle.
1221.12	Harvest.
1221.13	Importer.
1221.14	Information.
1221.15	Market.
1221.16	Net market price.
1221.17	Net market value.
1221.18	Order.
1221.19	Part and subpart.
1221.20	Person.
1221.21	Producer.
1221.22	Production.
1221.23	Promotion.
1221.24	Qualified sorghum producer organization.
1221.25	Referendum.
1221.26	Research.
1221.27	Secretary.
1221.28	Sorghum.
1221.29	State.
1221.30	Suspend.
1221.31	Terminate.
1221.32	United States.

**Sorghum Promotion, Research, and Information Board**

1221.100 Establishment and representation.

- 1221.101 Nominations.
- 1221.102 Nominee's agreement to serve.
- 1221.103 Appointment.
- 1221.104 Term of office.
- 1221.105 Vacancies.
- 1221.106 Removal.
- 1221.107 Certification of organizations.
- 1221.108 Procedure.
- 1221.109 Compensation and reimbursement.
- 1221.110 Powers and duties.
- 1221.111 Prohibited activities.

#### Expenses and Assessments

- 1221.112 Budget and expenses.
- 1221.113 Financial statements.
- 1221.114 Operating reserve.
- 1221.115 Investment of funds.
- 1221.116 Assessments.
- 1221.117 Exemptions.
- 1221.118 Refund escrow accounts.
- 1221.119 Refunds.
- 1221.120 Procedure for obtaining a refund.

#### Promotion, Research, and Information

- 1221.121 Programs, plans, and projects.
- 1221.122 Independent evaluation.
- 1221.123 Patents, copyrights, inventions, trademarks, information, publications, and product formulations.

#### Reports, Books, and Records

- 1221.124 Reports.
- 1221.125 Books and records.
- 1221.126 Use of information.
- 1221.127 Confidential treatment.

#### Qualification of Sorghum Producer Organizations

- 1221.128 Qualification.

#### Miscellaneous

- 1221.129 Right of the Secretary.
- 1221.130 Referenda.
- 1221.131 Suspension or termination.
- 1221.132 Proceedings after termination.
- 1221.133 Effect of termination or amendment.
- 1221.134 Personal liability.
- 1221.135 Separability.
- 1221.136 Amendments.
- 1221.137 Rules and regulations.
- 1221.138 OMB control numbers.

#### Subparts B through E—[Reserved]

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

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

##### Definitions

##### § 1221.1 Act.

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

##### § 1221.2 Board.

*Board* or *Sorghum Promotion, Research, and Information Board* means the administrative body established pursuant to § 1221.100, or such other name as recommended by the Board and approved by the Secretary.

##### § 1221.3 Calendar year.

*Calendar year* means the 12-month period from January 1 through December 31.

##### § 1221.4 Certified organization.

*Certified organization* means any organization that has been certified by the Secretary pursuant to this part as eligible to submit nominations for membership on the Board.

##### § 1221.5 Conflict of interest.

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

##### § 1221.6 Crop year.

*Crop year* means the time period by which the USDA reports crop production for sorghum and is indicated by the calendar year in which sorghum is normally harvested.

##### § 1221.7 Customs.

*Customs* means the U.S. Customs and Border Protection of the U.S. Department of Homeland Security.

##### § 1221.8 Department.

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

##### § 1221.9 First handler.

*First handler* means the first person who buys or takes possession (excluding a common or contract carrier of sorghum owned by another) of more than 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage from producers in a calendar year for marketing. The term first handler includes a producer who markets sorghum of the producer's own production directly to consumers. In any case in which sorghum is pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program and the sorghum is forfeited by the producer in lieu of loan repayment, the Commodity Credit Corporation will be considered a first handler.

##### § 1221.10 Fiscal period.

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

##### § 1221.11 Handle.

*Handle* means to engage in the receiving or acquiring of sorghum and in the shipment (except as a common or contract carrier of sorghum owned by another) or sale of sorghum, or other activity causing sorghum to enter the current of commerce.

##### § 1221.12 Harvest.

*Harvest* means combining or threshing sorghum for grain and/or severing the stalks from the land with mechanized equipment.

##### § 1221.13 Importer.

*Importer* means any person importing more than 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or purchases sorghum outside of the United States for sale in the United States, and who is listed as the importer of record for such sorghum.

##### § 1221.14 Information.

*Information* means information and programs that are designed to develop new markets and marketing strategies; increase market efficiency; enhance the image of sorghum on a national or international basis; and assist producers in meeting their conservation objectives. These include, but are not exclusive to:

- (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 sorghum;
- (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 sorghum industry, and activities to enhance the image of the sorghum industry.

##### § 1221.15 Market.

*Market* means to sell or otherwise dispose of sorghum into intrastate, interstate, or foreign commerce by buying, distributing, or otherwise placing sorghum into commerce.

##### § 1221.16 Net market price.

*Net market price* means the sales price, or other value, per volumetric unit, received by a producer for sorghum after adjustments for any premium or discount.

##### § 1221.17 Net market value.

*Net market value* means:

(a) Except as provided in paragraph (b) and (c) of this section, the value found by multiplying the net market price by the appropriate quantity of the volumetric units or the minimum value in a production contract received by a producer for sorghum after adjustments for any premium or discount.

(b) For imported sorghum, the total value paid by the importer for the sorghum as reported on the appropriate Customs form; or

(c) For sorghum pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program, the principal amount of the loan.

#### **§ 1221.18 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.

#### **§ 1221.19 Part and subpart.**

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

#### **§ 1221.20 Person.**

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

#### **§ 1221.21 Producer.**

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

#### **§ 1221.22 Production.**

*Production*, as used in § 1221.100, means:

(a) for the purpose of establishing the initial Board in paragraphs (a), (b), (c), (d), and (e) of § 1221.100, the volume of grain sorghum produced during the last 5 crop years, excluding the high and low years, and

(b) For the purpose of reapportionment in paragraphs (e) and (f) of § 1221.100, the total assessments collected by the Board during the last 5 crop years, excluding the high and low years.

#### **§ 1221.23 Promotion.**

*Promotion* means any action taken to present a favorable image of sorghum to the public and the end-user industry for the purpose of improving the competitive position of sorghum and stimulating the sale of sorghum. This

includes paid advertising and public relations.

#### **§ 1221.24 Qualified sorghum producer organization.**

*Qualified sorghum producer organization* means a qualified State-legislated sorghum promotion, research, and education commission or organization, approved by the Secretary. For States without a qualified State-legislated sorghum promotion, research, and education commission or organization, qualified sorghum producer organization means any qualified organization that has the primary purpose of representing sorghum producers, has sorghum producers as members, and that is approved by the Secretary.

#### **§ 1221.25 Referendum.**

*Referendum* means a referendum conducted by the Secretary pursuant to the Act whereby producers and importers are provided the opportunity to vote to determine whether the continuance of this subpart is favored by a majority of eligible persons voting.

#### **§ 1221.26 Research.**

*Research* means any type of test, study, or analysis designed to advance the knowledge, image, desirability, use, marketability, production, product development, or quality of sorghum, including, but not limited to, research relating to yield, nutritional value, cost of production, new product development, inbred and hybrid development, nutritional value, health research, and marketing of sorghum.

#### **§ 1221.27 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.

#### **§ 1221.28 Sorghum.**

*Sorghum* means any harvested portion of *Sorghum bicolor* (L.) Moench or any related species of the genus *Sorghum* of the family Poaceae. This includes, but is not limited to, grain sorghum (including hybrid sorghum seeds, inbred sorghum line seed, and sorghum cultivar seed), sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage.

#### **§ 1221.29 State.**

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

#### **§ 1221.30 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.

#### **§ 1221.31 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 certain date specified in the rule.

#### **§ 1221.32 United States.**

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

### **Sorghum Promotion, Research, and Information Board**

#### **§ 1221.100 Establishment and representation.**

There is hereby established a Sorghum Promotion, Research, and Information Board, hereinafter called the Board. Representation includes, but is not limited to, fixed State seats determined by total production with at-large seats to allow representation from a broad geographical area. The Board shall initially be composed of 13 representatives, with the maximum number of producers from one State limited to 6, appointed by the Secretary from nominations as follows:

(a) The largest production State based on total production shall have 5 sorghum producers to serve as representatives.

(b) The second largest production State based on total production shall have 3 sorghum producers to serve as representatives.

(c) The third largest production State based on total production shall have one sorghum producer to serve as a representative.

(d) There shall be 4 sorghum producers to serve as at-large national representatives with at least two representatives appointed from States not described in paragraphs (a), (b), and (c) of this section.

(e) If the value of assessments on imported sorghum reaches or exceeds the production of the third largest sorghum production State, there shall be one importer to serve as a representative plus an additional at-large national representative, with the maximum number of producers from one State being increased from six to seven.

(f) At least once every 5 years, the Board will review the geographical distribution of production of sorghum in the United States, the production of

sorghum in the United States, and the value of assessments on sorghum imported into the United States. The review will be based on Board assessment records and statistics from the USDA. If warranted, the Board may recommend to the Secretary that representation on the Board be altered to reflect any changes in geographical distribution of domestic sorghum production. If, in the review, the Board determines that the value of assessments on sorghum imported into the United States exceeds 15 percent of the production of sorghum, the Board shall recommend to the Secretary that the nomination procedures and appointments to the Board be altered as necessary or appropriate to facilitate the equitable representation of importers on the Board.

#### **§ 1221.101 Nominations.**

All nominations authorized under this section shall be made in the following manner:

(a) Nominations for State-specific and at-large national seats shall be obtained by the Secretary from eligible organizations certified under § 1221.107. Certified eligible organizations representing producers in a State, or when making nominations for at-large seats, shall submit to the Secretary at least two nominees for each vacant seat. If the Secretary determines that a State is not represented by a certified eligible organization, then the Secretary may solicit nominations from other organizations or other persons residing in the State.

(b) If so required pursuant to § 1221.100(f), at least two nominations for the importer representative shall be submitted by the Board to the Secretary.

(c) After the establishment of the initial Board, the Secretary shall announce when a vacancy does or will exist. Nominations for subsequent Board representatives shall be submitted to the Secretary not less than 90 days prior to the expiration of the terms of the representatives whose terms are expiring, in the manner as described in this section. In the case of vacancies due to reasons other than the expiration of a term of office, successor Board members shall be appointed pursuant to section 1221.105.

(d) When there is more than one certified eligible organization representing a State or when the Secretary solicits nominations from organizations and persons residing in that State, or when eligible certified organizations are nominating persons for at-large positions, eligible certified organizations may caucus and jointly nominate two qualified producers for

each position on the Board for which a representative is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary two nominees for each appointment to be made to represent that State, or to fill an at-large position.

#### **§ 1221.102 Nominee's agreement to serve.**

Any producer or person nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

- (a) Serve on the Board if appointed;
- (b) Disclose any relationship with any sorghum promotion entity or with any organization that has or is being considered for a contractual relationship with the Board; and
- (c) Withdraw from participation in deliberations, decision-making, or voting on matters that concern the relationship disclosed under paragraph (b) of this section.

#### **§ 1221.103 Appointment.**

From the nominations made pursuant to § 1221.101, the Secretary shall appoint the representatives of the Board on the basis of representation provided in § 1221.100.

#### **§ 1221.104 Term of office.**

(a) The term of office for the representatives of the Board shall be three years, except for the initial term, pursuant to paragraph (c) of this section.

(b) Representatives may serve a maximum of 2 consecutive 3-year terms.

(c) When the Board is first established, the Secretary shall establish staggered terms as follows:

(1) Largest Production State—2 representatives shall serve a 2-year term, 1 representative shall serve a 3-year term, and 2 representatives shall serve a 4-year term.

(2) Second Largest Production State—1 representative shall serve a 2-year term, 1 representative shall serve a 3-year term, and 1 representative shall serve a 4-year term.

(3) Third Largest Production State—The representative shall serve a 3-year term.

(4) At-large national—1 representative shall serve a 2-year term, 2 representatives shall serve a 3-year term, and 1 representative shall serve a 4-year term.

(5) States with multiple representatives shall have their staggered terms assigned by the Secretary. At-large national representatives shall also have their staggered terms assigned by the Secretary.

(6) Representatives serving initial terms of 2 or 4 years shall be eligible to serve a single term of 3 years after their initial 2- or 4-year term.

(d) Each representative shall continue to serve until a successor is appointed by the Secretary and has accepted the position.

(e) Any successor appointed pursuant to § 1221.105 serving 1 year or less may serve two consecutive 3-year terms.

#### **§ 1221.105 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, a successor for the unexpired term of such representative shall be appointed by the Secretary pursuant to § 1221.103 from the most recent list of nominations for the position pursuant to § 1221.101 or the Secretary shall request nominations for a successor pursuant to § 1221.101, except that said nomination and replacement shall not be required if an unexpired term is less than 6 months.

#### **§ 1221.106 Removal.**

If the Secretary determines that any person appointed under this part fails or refuses to perform his or her duties properly or engages in an act of dishonesty or willful misconduct, the Secretary shall remove the person from office. A person appointed under this part or any employee of the Board may be removed by the Secretary if the Secretary determines that the person's continued service would be a detriment to the purposes of the Act.

#### **§ 1221.107 Certification of organizations.**

(a) The eligibility of State, regional, or national organizations to participate in making nominations for membership on the Board shall be certified by the Secretary. Those organizations that may seek certification include:

(1) State-legislated sorghum promotion, research, and information organizations;

(2) Organizations whose primary purpose is to represent sorghum producers within a State, region, or at the national level; or,

(3) Organizations that have sorghum producers as members.

(b) Such eligibility shall be based, in addition to other information, upon a report submitted by the organization that shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) The geographic territory covered by the organization's active membership;

(2) The nature and size of the organization's active membership,

proportion of active membership accounted for by producers, a map showing the sorghum producing counties in which the organization has active members, the volume of sorghum produced in each such county, the number of sorghum producers in each such county, and the size of the organization's active sorghum producer membership in each such county;

(3) The extent to which the sorghum producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organization's operating funds are derived;

(6) The functions of the organization; and

(7) The ability and willingness of the organization to further the purpose and objectives of the Act.

(c) The primary consideration in determining the eligibility of an organization shall be whether its sorghum producer membership consists of a sufficiently large number of sorghum producers who produce a relatively significant volume of sorghum to reasonably warrant its participation in the nomination of State specific and national at-large members to the Board. Any sorghum producer organization found eligible by the Secretary under this section shall be certified by the Secretary, and the Secretary's determination as to eligibility shall be final.

#### **§ 1221.108 Procedure.**

(a) At a Board meeting, it will be considered a quorum when a simple majority of the voting representatives are present.

(b) At the start of each fiscal period, the Board will approve a chairperson, vice chairperson, and secretary/treasurer who will conduct meetings throughout that period.

(c) All Board representatives and the Secretary or the Secretary's designee will be notified at least 30 days in advance of all Board and committee meetings, unless an emergency meeting is declared.

(d) Each voting representative of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by a simple majority of the total votes of the Board representatives present at the meeting.

(e) It will be considered a quorum at a committee meeting when a simple majority of those assigned to the committee are present at the meeting. Committees may consist of individuals

other than Board representatives, and such individuals may vote in committee meetings. Committee members 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 a simple majority of the Board representatives by mail, telephone, electronic mail, facsimile, or any other means of communication. In that event, all representatives must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All telephone votes shall be confirmed promptly in writing. All votes shall be recorded in Board minutes.

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting representative.

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

#### **§ 1221.109 Compensation and reimbursement.**

The representatives of the Board 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 representatives.

#### **§ 1221.110 Powers and duties.**

The Board shall have the following powers and duties:

(a) To administer the Order 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 the Order, including activities authorized to be carried out under the Order;

(c) To meet not less than annually, and organize, and select from among the representatives of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines appropriate;

(d) To employ persons, other than the representatives, 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;

(e) To develop programs, plans, 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, plans, 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. Furthermore, 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 § 1221.112;

(g) 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;

(h) 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;

(i) To give the Secretary the same notice of Board and committee meetings as is given to representatives in order that the Secretary's representative(s) may attend such meetings;

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

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

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

(m) To recommend to the Secretary such amendments to the Order as the Board considers appropriate; and with the approval of the Secretary, to make rules and regulations to effectuate the terms and provisions of this subpart;

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

(o) To provide not less than annually a report to producers and importers accounting for the funds expended by the Board, and describing programs implemented under the Act; and to make such report available to the public upon request; and

(p) To invest funds in accordance with § 1221.115.

#### **§ 1221.111 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 is a conflict of interest;

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

(c) Any advertising, including promotion, research, and information activities authorized to be carried out under the Order that is false or misleading or disparaging to another agricultural commodity.

#### **Expenses and Assessments**

##### **§ 1221.112 Budget and expenses.**

(a) 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 that increases the budget must be approved by the Secretary. Shifts of funds that do not result in an increase in the Board's approved budget and that are consistent with this subpart and the Board's 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 fiscal period 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 in accordance with the Order. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

(g) In accordance with § 1221.118(a), the Board shall deposit funds in a refund escrow account and refrain from allocating this amount for expenditure until the Order is approved by the required referendum except as provided for in § 1221.118.

(h) The Board shall allocate an appropriate amount each year to allow for payment of future referendums.

(i) The Board shall reimburse the Secretary for all expenses incurred by

the Secretary in the implementation, administration, and supervision of the Order, including all referendum costs in connection with the Order.

(j) The Board shall determine annually an allocation amount no less than 15 percent but no more than 25 percent of the total assessments collected on all sorghum available for any fiscal period, less the expenses pursuant to paragraph (i), for use by qualified sorghum producer organizations pursuant to § 1221.128 for State programs of generic promotion, research, and information. Amounts allocated by the Board for State generic promotion, research, and information programs will be based on requests submitted to the Board by qualified sorghum producer organizations when it is determined that these requests meet the goals and objectives stated in the Act and Order. The request shall include detailed programs, plans, or projects with budgets. Qualified sorghum producer organizations shall not submit requests for State generic promotion, research, and information programs that exceed the annual allocation amount determined by the Board which shall be the product of:

(1) The State's proportional contribution based on reports submitted by first handlers pursuant to § 1221.124(a) to total assessments remitted on all sorghum for the previous fiscal period; multiplied by

(2) The total assessments collected on all sorghum for the previous fiscal period less expenses pursuant to paragraph (i) of this section.

(k) The Board may not expend for administration, maintenance, and functioning of the Board in any fiscal period an amount that exceeds 10 percent of the assessments and other income received by the Board for that fiscal period except for the initial fiscal period. Reimbursements to the Secretary required under paragraph (i) of this section are excluded from this limitation on spending.

(l) The Board shall allocate all other funds available for any fiscal period, to the extent practicable, subject to paragraphs (g), (h), (i), (j), and (k) of this section on programs, plans, or projects, as provided for in § 1221.121.

(m) The Board shall determine annually the allocation of total funds pursuant to this section, with the approval of the Secretary.

##### **§ 1221.113 Financial statements.**

(a) As requested by the Secretary, the Board shall prepare and submit financial statements to the Secretary on a monthly basis. 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, fiscal period-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.

#### **§ 1221.114 Operating reserve.**

The Board may establish an operating monetary reserve and may carry over to subsequent fiscal period excess funds in a reserve so established, *provided* that funds in the reserve shall not exceed one fiscal period's anticipated expenses.

#### **§ 1221.115 Investment of funds.**

The Board may invest, pending disbursement, funds it receives under this subpart, only in obligations of the United States or any agency of the United States; general obligations of any State or any political subdivision of a State; interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve system; or obligations that are fully guaranteed as to principal and interest by the United States.

#### **§ 1221.116 Assessments.**

(a) The funds to cover the Board's expenses shall be paid from assessments on producers and importers, donations from any person not subject to assessments under this Order, and other funds available to the Board and subject to the limitations contained therein.

(b) First handlers of domestic sorghum shall be responsible for collecting assessments from producers on all domestically handled sorghum. This includes sorghum of the first handler's own production. Grain pledged as collateral for a Commodity Credit Corporation price support loan program shall be considered handled sorghum. A first handler shall not collect an assessment on sorghum from a producer when said producer presents documentation demonstrating that an assessment has previously been collected on said sorghum.

(c) The following assessment rates for sorghum shall apply:

(1) Grain sorghum shall be initially assessed at a rate of 0.6 percent of net market value received by the producer pursuant to paragraph (e) of this section; and

(2) Sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and

sorghum silage shall be initially assessed at a rate of 0.35 percent of net market value received by the producer pursuant to paragraph (e) of this section.

(d) Importers of sorghum shall pay an assessment to the Board through Customs on sorghum imported into the United States. The following apply to imported sorghum:

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

(2) The import assessment shall be uniformly applied to imported sorghum that is identified by the numbers 1007.00.0020 and 1007.00.0040 in the Harmonized Tariff Schedule of the United States.

(3) The assessments due on imported sorghum shall be paid when the sorghum enters the United States.

(4) If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment to the Board.

(e) The Board will review the assessment rates and may make recommendations to modify the assessment rates to the Secretary. Assessment rates may be raised or lowered no more than 0.2 percent of net market value received by producers and importers in any one calendar year. The maximum assessment rate cannot exceed 1 percent of the net market value received by producers and importers.

(f) Each person responsible for collecting assessments under paragraph (b) of this section shall remit the amount due to the Board in such a manner as required by regulations recommended by the Board and prescribed by the Secretary.

(g) Any unpaid assessment due to the Board pursuant to this section shall be increased 2 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this paragraph, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this paragraph, any assessment determined at a later date than the date prescribed by this subpart because of a person's failure to timely submit a report to the Board shall be considered to have been payable by the date it would have been due if the report had been filed timely. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board.

(h) An additional charge shall be imposed on any person subject to a late payment charge in the form of interest

on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed by the Secretary.

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

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

(k) The collection of assessments pursuant to this section shall begin with respect to sorghum handled on or after the effective date established by the Secretary and shall continue until terminated or suspended by the Secretary.

(l) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments and invest them on behalf of the Board, and shall pay such assessments and any interest earned to the Board when it is formed. The Secretary shall have the authority to promulgate rules and regulations concerning assessments and the collection of assessments, if the Board is not in place or is otherwise unable to develop such rules and regulations.

(m) Payment remitted pursuant to this subpart shall be in the form of a negotiable instrument made payable to the Board. Such remittances and the reports specified in §§ 1221.124 and 1221.125 shall be mailed to the location designated by the Board.

#### **§ 1221.117 Exemptions.**

(a) Any importer of less than and including 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage per calendar year may claim an exemption from the assessment required under § 1221.116.

(b) An importer desiring an exemption shall apply to the Board, on a form provided by the Board, for a certificate of exemption. An importer shall certify that the importer will import less than and including 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage.

(c) Upon receipt of an application, the Board shall determine whether an exemption may be granted. The Board then will issue, if deemed appropriate, a certificate of exemption to each person who is eligible to receive one. It is the responsibility of these persons to retain a copy of the certificate of exemption.

(d) Importers who receive a certificate of exemption shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessments paid. No interest will be paid on the assessments collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the sorghum was actually imported.

(e) Any person who desires an exemption from assessments for a subsequent calendar year shall reapply to the Board, on a form provided by the Board, for a certificate of exemption.

(f) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt sorghum and, in the case of importers, proof of payment of assessments.

(g) A producer or importer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces or imports only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (m) of this section; and is not, or does not import products from, a split operation shall be exempt from the payment of assessments.

(h) To apply for an exemption under this section, the applicant shall submit the request to the Board or other party as designated by the Board, on a form provided by the Board, at any time initially and annually thereafter on or before January 1 as long as the applicant continues to be eligible for the exemption.

(i) The request shall include the following: The applicant's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(j) If the applicant complies with the requirements of this section, the Board or designee will grant the exemption and issue a Certificate of Exemption to the applicant. The Board will have 30 days from the date of receiving the request to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(k) The producer or importer shall provide a copy of the Certificate of Exemption to each first handler. The first handler shall maintain records showing the name and address of the exempt producer or importer and the exemption number assigned by the Board.

(l) The exemption will apply at the first reporting period following the issuance of the exemption.

(m) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer or importer from exemption under this section, except that producers or importers who produce or import both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR Part 205, provided all other criteria are met.

#### **§ 1221.118 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 the product obtained by multiplying the total amount of assessments collected by the Board 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 by ten percent (10 percent).

(b) Upon failure of the required referendum, the Board shall pay refunds of assessments to eligible persons requesting refunds 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 refunds requested, the Board shall prorate the amount deposited in such account among all eligible persons who request a refund of assessments paid no later than 90 days after the required referendum results are announced by the Secretary.

(d) If the Order is approved by the required referendum conducted under § 1221.130 then:

(1) The escrow account shall be closed; and

(2) The funds shall be available to the Board for disbursement under § 1221.112.

#### **§ 1221.119 Refunds.**

Any producer or importer from whom an assessment is collected and remitted to the Board, or who pays an assessment directly to the Board, under authority of the Act and this subpart through the announcement of the results of the required referendum, upon failure of the required referendum shall have the right to receive from the Board a refund of such assessment, or a prorated share thereof, upon submission of proof satisfactory to the Board that the producer or importer paid the assessment for which refund is sought. 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 regulations recommended by the Board and prescribed by the Secretary.

#### **§ 1221.120 Procedure for obtaining a refund.**

Upon failure of the required referendum, each producer or importer who paid an assessment pursuant to this subpart during the period beginning on the effective date of the Order and ending on the date the required referendum results are announced may obtain a refund of such assessment only by following the procedures prescribed in this section and any regulations recommended by the Board and prescribed by the Secretary:

(a) A producer or importer shall obtain a Board-approved refund application form from the Board. Such forms may be obtained by written request to the Board and the request shall bear the producer's or importer's signature or properly witnessed mark.

(b) 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 assessments were paid by such producer or importer but no later than the date the results of the required referendum are announced by the Secretary. The refund application shall show:

(1) Producer's or importer's name and address;

(2) Name and address of the person who collected applicant's assessment;

(3) Number of bushels or tons of sorghum on which a refund is requested;

(4) Total amount of refund requested;

(5) Date or inclusive dates on which assessments were paid; and

(6) The producer's or importer's signature or properly witnessed mark.

(c) The documentation provided pursuant to § 1221.125(b) to the producer by the first handler responsible for collecting an assessment pursuant to this subpart, or a copy thereof, or such other evidence deemed satisfactory to the Board, shall accompany the producer's refund application. An importer must submit documentation showing that the assessment was paid along with a copy of the appropriate Customs form stating the net market value of the sorghum.

(d) The Board shall initiate payment of refund requests, or pay a prorated share thereof, within 90 days of the date the results of the required referendum are released by the Secretary. Refunds shall be paid in a manner consistent with § 1221.119.

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

##### **§ 1221.121 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 consumer and industry information, with respect to sorghum; and

(2) The establishment and conduct of research with respect, but not limited to: The yield, use, nutritional value and benefits, sale, distribution, and marketing of sorghum, and the creation of new products thereof, to the end that the marketing and use of sorghum may be encouraged, expanded, improved, or made more acceptable; and to advance the image, desirability, or quality of sorghum.

(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.

(d) No program, plan, or project including advertising shall be false or

misleading or disparaging to another agricultural commodity. Sorghum of all origins shall be treated equally.

##### **§ 1221.122 Independent evaluation.**

Pursuant to the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), 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 paragraph.

##### **§ 1221.123 Patents, copyrights, inventions, trademarks, information, publications, and product formulations.**

(a) Any patents, copyrights, inventions, trademarks, information, publications, or product formulations developed through the use of funds collected by the Board under the provisions of 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, inventions, 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, § 1221.132 shall apply to determine disposition of all such property.

(b) Should patents, copyrights, inventions, trademarks, information, publications, or product formulations be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions, trademarks, information, publications, or product formulations shall be determined by agreement between the Board and the party contributing funds towards the development of such patents, copyrights, inventions, trademarks, information, publications, or product formulations in a manner consistent with paragraph (a) of this section.

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

##### **§ 1221.124 Reports.**

(a) Each first handler, on a State-by-State basis, will be required to provide

to the Board periodically such information as may be required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of bushels or tons of domestic sorghum within the State that were marketed to the first handler;

(2) Number of bushels or tons of domestic sorghum within the State on which an assessment was paid;

(3) The amount of assessments remitted on sorghum within the State;

(4) Date that any assessments were paid within the State;

(5) The explanation, if necessary, to show why the remittance is less than the applicable assessment rate multiplied by the net market price multiplied by the number of bushels or tons within the State that were marketed to the first handler; and

(6) The first handler's tax identification number.

(b) Each importer will be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of bushels or tons of sorghum imported;

(2) Number of bushels or tons of imported sorghum on which an assessment was paid;

(3) The amount of assessments remitted;

(4) Date that any assessments were paid;

(5) The explanation, if necessary, to show why the remittance is less than the applicable assessment rate multiplied by the net market value; and

(6) The importer's tax identification number.

##### **§ 1221.125 Books and records.**

(a) Each first handler, producer, or importer subject to this subpart shall maintain and make available during normal business hours for inspection by employees or agents of the Board or the Secretary such books and records as are necessary to carry out the provisions of this part, including records necessary to verify any required reports. Such records shall be maintained for at least 2 years beyond the fiscal period of their applicability.

(b) Each first handler responsible for collecting assessments pursuant to this subpart is required to give the producer from whom the assessment was collected, written evidence of payment of the assessment paid pursuant to this subpart. Such written evidence serving as a receipt shall include, but not be limited to, the following information:

(1) Name and address of the first handler,

(2) Name of producer who paid the assessment,

(3) Total number of bushels or tons of sorghum on which the assessment was paid,

(4) Total assessment paid by the producer,

(5) Date on which assessments were paid, and

(6) Such other information as the Board, with the approval of the Secretary, may require.

#### **§ 1221.126 Use of information.**

Information from records or reports required pursuant to this subpart shall be made available to the Secretary as is appropriate to the administration or enforcement of the Act, subpart, or any regulation issued under the Act. In addition, the Secretary may authorize the use, under this part, of information regarding producers, first handlers, or importers, that is accumulated under laws or regulations other than the Act or regulations issued under the Act.

#### **§ 1221.127 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 representatives, first handlers, producers, or importers. 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 there from, which statements do not identify the information furnished by any person; and

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

### **Qualification of Sorghum Producer Organizations**

#### **§ 1221.128 Qualification.**

(a) Organizations receiving qualification from the Secretary will be entitled to submit requests for funding to the Board pursuant to § 1221.112(j). Only one sorghum producer organization per State may be qualified.

(b) State-legislated sorghum promotion, research, and information organizations may request qualification and will be considered first for qualification by the Secretary.

(c) If a State-legislated sorghum promotion, research, and information organization does not elect to seek qualification from the Secretary within a specified time period as determined by the Secretary, or does not meet eligibility requirements as specified by the Secretary, then any State sorghum producer organization whose primary purpose is to represent sorghum producers within a State, or any other State organization that has sorghum producers as part of its membership, may request qualification.

(d) Qualification shall be based, in addition to other available information, upon a factual report submitted by the organization that shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) The geographic territory covered by the organization's active membership;

(2) The nature and size of the organization's active membership, proportion of active membership accounted for by producers, a map showing the sorghum-producing counties in which the organization has active members, the volume of sorghum produced in each such county, the number of sorghum producers in each such county, and the size of the organization's active sorghum producer membership in each such county;

(3) The extent to which the sorghum producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organizations operating funds are derived;

(6) The functions of the organization; and

(7) The ability and willingness of the organization to further the purpose and objectives of the Act.

(e) The primary consideration in determining the eligibility of an organization shall be whether its

sorghum producer membership consists of a sufficiently large number of sorghum producers who produce a relatively significant volume of sorghum to reasonably warrant its qualification to submit requests for funding to the Board. Any sorghum producer organization found eligible by the Secretary under this section will be qualified by the Secretary, and the Secretary's determination as to eligibility shall be final.

### **Miscellaneous**

#### **§ 1221.129 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.

#### **§ 1221.130 Referenda.**

(a) For the purpose of ascertaining whether the persons subject to this part favor the continuation, suspension, or termination of this part, the Secretary shall conduct a referendum among persons subject to assessments under § 1221.116 who, during a representative period determined by the Secretary, have engaged in the production or importation of sorghum.

(1) The referendum shall be conducted not later than 3 years after assessments first begin under this part.

(2) This part will be approved in a referendum if a majority of those persons voting vote for approval.

(b) The Secretary shall conduct a subsequent referendum:

(1) Not later than 7 years after assessments first begin under this part;

(2) At the request of the Board; or

(3) At the request of 10 percent or more of the sorghum producers and importers eligible to vote to determine if the persons favor the continuation, suspension, or termination of this part.

(c) The Secretary may conduct a referendum at any time to determine whether the continuation, suspension or termination of this part or a provision of this part is favored by sorghum producers and importers eligible to vote.

(d) The Board shall reimburse the Secretary for any expenses incurred by the Secretary to conduct referenda.

(e) A referendum conducted under this section with respect to this part shall be conducted in the manner determined by the Secretary to be appropriate.

#### **§ 1221.131 Suspension or termination.**

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

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

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

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

(1) No 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.

#### **§ 1221.132 Proceedings after termination.**

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its representatives 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 the Order;

(3) From time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and 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 persons, title and right to all funds, property and claims vested in the Board or the trustees pursuant to the Order.

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, by qualified organizations pursuant to § 1221.128 in the interest of continuing sorghum promotion, research, and information programs.

#### **§ 1221.133 Effect of termination or amendment.**

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

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

#### **§ 1221.134 Personal liability.**

No representative 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 representative or employee, except for acts of dishonesty or willful misconduct.

#### **§ 1221.135 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.

#### **§ 1221.136 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.

#### **§ 1221.137 Rules and regulations.**

The Secretary may prescribe such rules and regulations as may be necessary to effectively carry out the provisions of this subpart.

#### **§ 1221.138 OMB control number.**

The control number assigned to the information collection requirements of this part 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 0581-0246.

#### **Subparts B Through E—[Reserved]**

Dated: April 24, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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