

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1215

[FV-96-706FR]

Popcorn Promotion, Research, and Consumer Information Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This document establishes a Popcorn Promotion, Research, and Consumer Information Order (Order) under the Popcorn Promotion, Research, and Consumer Information Act of 1996. Under the Order, processors will pay an assessment rate of 5 cents per hundredweight of popcorn to the Popcorn Board (Board). Composed of popcorn processors, the Board will use the assessments collected to conduct a generic program of promotion, research, and consumer information to maintain and expand markets for popcorn. The U.S. Department (Department) of Agriculture conducted a referendum among eligible popcorn processors to determine whether they favor the implementation of the Order. The Order was approved by a majority of those voting in the referendum with such majority, processing more than 50 percent of the popcorn processed by all those voting in the referendum.

EFFECTIVE DATE: September 1, 1997.

ADDRESSES: Stacey L. Bryson, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456.

FOR FURTHER INFORMATION CONTACT: Stacey L. Bryson at the above address or telephone (888) 720-9917 (toll free) or (202) 720-6930.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Proposed Rule published in the September 30, 1996, issue of the **Federal Register** (61 FR 51046); Proposed Rule and Referendum Order published in the March 21, 1997, issue of the **Federal Register** (62 FR 13551).

This final rule is issued under the Popcorn Promotion, Research, and Consumer Information Act (7 U.S.C. 7481-7491), hereinafter referred to as the Act.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws,

regulations, or policies, unless they present an irreconcilable conflict with this rule. Further, § 580 of the Act states that nothing in the popcorn statute preempts or supersedes any other program relating to popcorn promotion organized and operated under the laws of the United States or any State.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under § 577 of the Act, after an Order is implemented, a person subject to the Order may file a petition with the Secretary stating that the Order or any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with law and requesting a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

Executive Order 12866 and Regulatory Flexibility Act

This 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.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agency has examined the impact of the proposed rule on small entities.

Legislation to create a generic program of promotion and research for popcorn became effective on April 4, 1996. Congress found that this program is vital to the welfare of popcorn processors and persons concerned with marketing, using, and producing popcorn for the market, as well as to the agricultural economy of the United States.

This program is intended to develop and finance an effective and coordinated program of promotion, research, and consumer information to maintain and expand the markets for popcorn. The program was initiated by the popcorn industry, which approved the program in a referendum in advance of its implementation, and industry members will serve on the Board that will administer the program under the Department's supervision. In addition, any person subject to the program may file with the Secretary a petition stating that the order or any provision is not in

accordance with law and requesting a modification of the order or an exemption from the order. Administrative proceedings were discussed earlier in this rule.

In this program, processors will submit assessments and reports to the Board. In addition, exempt processors will be required to file an exemption application. While the Order will impose certain recordkeeping requirements on processors, information required under the Order could be compiled from records currently maintained. The forms require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. The estimated cost in providing information to the Board by the estimated 67 respondents will be \$40.32 per respondent annually.

The Department will oversee program operations and, the Secretary may conduct referenda at the request of the Board or a representative group of processors to determine whether the popcorn industry supports continuation of the program.

There are approximately 35 processors who will pay the assessments, out of an industry of 67 processors in total.

Small agricultural service firms, which will include processors who will be covered under the Order, have been defined by the Small Business Administration [13 CFR 121.607] as those whose annual receipts are less than \$5 million.

Almost 50 percent of the industry will be exempt from the program. Those processors marketing 4 million pounds of popcorn or less annually will be exempt from the Order. It is also estimated that only 2 of the 35 eligible processors will be classified as small entities. Those processors marketing more than 4 million pounds of popcorn annually represent the majority of the tonnage processed each year.

The Department will seek ways to minimize the burden of complying with the program for the small businesses that will be affected by it. A compliance guide will be issued for the small businesses that will pay assessments as well as those that will be exempt. In addition, the Department will work with the Popcorn Board to ensure, to the extent practicable, that the procedures implemented represent the least burdensome alternatives while meeting the needs of the program.

It was estimated that there were 35 popcorn processors who were eligible to vote in the referendum. An average of 15 minutes was needed for each voter to

read the voting instructions and complete the referendum ballot. The total burden on the total number of voters was 2.9 hours.

The information collection requirements under the Order require the minimum information necessary to effectively carry out the requirement of the program, and their use is necessary to fulfill the intent of the Act. The monthly collection of information coincides with normal business practices and 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 estimated cost in providing information to the Board by the estimated 67 respondents will be \$19.28 per respondent annually. This total has been estimated by multiplying 129.15 (total burden hours requested) by \$10.00 per hour, a sum deemed to be reasonable if the respondents were compensated for their time.

According to the Popcorn Institute (Institute), a trade association consisting of popcorn processors representing the industry, annual sales of popcorn were 77.240 million pounds less in 1994 than they were in 1993, when sales totaled approximately 1.156 billion pounds.

The peak period for popcorn sales for home consumption is the fall. Sales remain constant throughout the winter months and taper off during the spring and summer.

Almost all of the popcorn consumed throughout the world is grown in the United States, and Americans consume more popcorn than the citizens of any other country. Popcorn is grown in 19 states. According to the latest Census on Agriculture, the top five major popcorn-producing states in 1992 were, in descending order, Indiana (23 percent), Illinois (19 percent), Nebraska (18 percent), Ohio (10 percent), and Missouri (7 percent). This is the most recent official information on popcorn production released by the U.S. government.

U.S. exports of popcorn totaled nearly 290 million pounds in 1995, with a value of \$64.7 million. According to the Snack Food Association, retail sales of popcorn in the United States totaled \$1.469 billion in 1994.

The popcorn Order authorizes an initial assessment on processors of 5 cents per hundredweight. The Order provides that the rate of assessment may be raised or lowered as recommended by the Board and approved by the Secretary, but shall not exceed 8 cents per hundredweight in any fiscal year. At the maximum rate of assessment, it is

estimated that \$800,000 will be collected under the program. The promotion Board will be composed of processors, who will be knowledgeable of the impact of any proposed assessment on processors, and other small entities prior to recommending any change of the assessment rate to the Secretary.

This Order is necessary to accomplish the statutory objectives, to strengthen the position of the popcorn industry in the marketplace, and to maintain and expand domestic and foreign markets and uses for popcorn.

Over the past several years, the popcorn industry pursued several limited efforts to promote the sales and consumption of popcorn. These were financed primarily through voluntary contributions of some, but not all, popcorn processors. Under the limited and voluntary program, the resources available were not adequate to address the issues facing the industry from a national perspective and did not allow the industry to work collectively in an industry-wide manner.

The Order provides the industry with the opportunity to collectively address issues in areas such as nutrition and quality, which individual processors could not effectively accomplish due to lack of resources.

The industry considered pursuing a marketing order; however, industry believes that popcorn is not a commodity covered under the existing marketing order statute. Furthermore, the marketing order system did not lend itself to addressing the issues that the promotion legislation clearly addresses, for example, establishing the definition of a processor.

In order to conduct the Regulatory Flexibility Analysis regarding the impact of this Order on small entities, the proposed rule that was published in the **Federal Register** on September 30, 1996 (61 FR 51046) invited comments concerning the potential effects of the proposed Order. No specific comments were received concerning the impact of the proposed order on small entities except that a comment from the Popcorn Institute did note that the order will be very beneficial to popcorn processors, especially small processors who will not otherwise be able to afford a nationwide comprehensive program.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that will be

imposed by this Order were approved by OMB on December 16, 1996.

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

OMB Number: 0581-0093.

Expiration Date of Approval: October 31, 1997.

Type of Request: Revision of a currently approved information collection for research and promotion programs.

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

While the Order will impose certain recordkeeping requirements on processors, information required under the Order could be compiled from records currently maintained. The Order's provisions have been carefully reviewed and every effort has been made to minimize any unnecessary recordkeeping costs or requirements.

Although the Order will impose some additional costs and requirements, it is anticipated that the program under the Order will help to increase the demand and expand markets for popcorn. Therefore, any additional costs should be offset by the benefits derived from expanded markets and sales benefiting all segments of the popcorn industry.

The forms require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the promotion Board. The forms will be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information less frequently will hinder the Board from effectively carrying out the provisions of its program. Collecting information monthly coincides with normal business practices. Requiring reports less frequently than monthly will impose additional recordkeeping requirements by requiring information from several months to be consolidated prior to filling out the form rather than just copying end-of-month figures already available on to the forms. The timing and frequency of collecting information is 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 processors who are subject to or exempted from the provisions of the Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

The estimated cost in providing information to the Board by the estimated 67 respondents will be \$19.28 per respondent annually. This total has been estimated by multiplying 129.15 (total burden hours requested) by \$10.00 per hour, a sum deemed to be reasonable if the respondents were compensated for their time.

A comment concerning the proposed Order's information collection requirements as published on September 30, 1996, in the **Federal Register** (61 FR 51046) was addressed in the proposed rule published in the **Federal Register** on March 21, 1997, (62 FR 13551).

Information collection requirements that are included in this rule include:

(1) *A periodic report by each person who processes popcorn.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .5 hours per each processor reporting on popcorn processed.

Respondents: Processors.

Estimated Number of Respondents: 35.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 70 hours.

(2) *An exemption application for processor of popcorn processing 4 million pounds or less a year.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response for each exempt processor.

Respondents: Exempt processors.

Estimated Number of Respondents: 32.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 8 hours.

(3) *A referendum ballot to be used to determine whether processors covered by the Order favor implementation or continuance of the Order.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response for each processor.

Respondents: Processors.

Estimated Number of Respondents: 35.

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

Estimated Total Annual Burden on Respondents: 2.9 hours.

(4) *Nominations.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .5 hours per response.

Respondents: Processors.

Estimated number of Respondents: 35.

Estimated Number of Responses per Respondent: 1 every 3 years (.33).

Estimated Total Annual Burden on Respondents: 5.75 hours.

(5) *Nominations background statement.*

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .5 hours per response.

Respondents: Processors.

Estimated number of Respondents: 18 for initial Board and 6 annually thereafter.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 9 hours for initial Board and 3 hours annually thereafter.

(6) *A requirement to maintain records sufficient to verify reports submitted under the Order.*

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average .5 hours per recordkeeper maintaining such records.

Recordkeepers: Processors.

Estimated number of Recordkeepers: 67.

Estimated Total Recordkeeping Hours: 33.5 hours.

Background

The Act authorizes the Secretary of Agriculture (Secretary) to establish a popcorn promotion, research, and consumer information program. The program will be funded by an assessment on processors not to exceed 8 cents per hundredweight of popcorn.

Assessments will be used to pay for: promotion, research, and consumer information; administration, maintenance, and functioning of the Board; and expenses incurred by the Secretary in implementing and administering the Order, including referendum costs.

Consistent with the Act, processors will be required to maintain records regarding the collection, payment, or remittance of the assessments. All information obtained through processor reports will be kept confidential.

Assessments will be collected in a manner prescribed by the Board. The collection of assessments will commence on all popcorn processed in the United States on or after the date established by the Secretary, and will continue until terminated by the Secretary.

The Act requires the Secretary to conduct a referendum during the 60-day period preceding the proposed Order's effective date. Popcorn processors of more than 4 million pounds annually are eligible to vote in the referendum to determine whether they favor the proposed Order's implementation. The proposed Order must be approved by a majority of eligible processors voting in the referendum, and processors favoring approval must process more than 50 percent of the total volume of popcorn processed by persons voting in the referendum. Subsequent referenda will be conducted not earlier than three years after the effective date of the proposed Order at the request of the Board or a representative group of processors covered by the proposed Order.

The Act provided for the submission of proposals for a popcorn promotion, research, and consumer information order by industry organizations or any other interested person affected by the Act. As stated earlier, the Act requires that the proposed Order provide for the establishment of the Board. The Board will be composed of nine members. Each member will serve a three-year term of office.

The Department issued a news release on May 22, 1996, requesting proposals for an initial Order or portions of an initial Order.

An entire proposed Order was submitted by the Institute. The Department slightly modified the Institute's proposed Order and published it on September 30, 1996, in the **Federal Register** (61 FR 51046). Comments were to be received by November 29, 1996. Six comments concerning the proposed rulemaking were received. These comments were addressed in the proposed rule which was published in the **Federal Register** (62 FR 13533) on March 21, 1997.

Also on March 21, the Department published a referendum order directing that the initial referendum be conducted from April 15 to 30, 1997.

The Order is summarized as follows: Sections 1215.1 through 1215.20 of the proposed Order define certain terms, such as popcorn, processor, and process, which are used in the proposed Order.

Sections 1215.21 through 1215.30 include provisions relating to the establishment and membership of the Board; nominations and appointment; terms of office; vacancies; removal; procedure; compensation and reimbursement; powers; and duties of the Board. The Board will be the body organized to administer the Order through the implementation of

programs, plans, projects, budgets, and contracts to promote and disseminate information about popcorn, under the supervision of the Secretary. Further, the Board will be authorized to incur expenses necessary for the performance of its duties and to set a reserve fund. Sections 1215.40 through 1215.41 and 1215.50 provide information on these activities.

Sections 1215.51 through 1215.53 will authorize the collection of assessments, specify who pays them and how, and specifies individuals who will be exempt from paying the assessment. In addition, it will prohibit use of funds to influence government policy or action.

Except as otherwise provided by the Board and approved by the Secretary, the rate of assessment will be 5 cents per hundredweight of popcorn.

The assessment section also outlines the procedures to be followed by processors for remitting assessments and authorize a interest charge for unpaid or late assessments.

Sections 1215.60 thorough 1215.62 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of information obtained from such books, records, or reports.

Sections 1215.60 through 1215.63 describe the rights of the Secretary, authorize the Secretary to suspend or terminate the Order when deemed appropriate, and prescribe proceedings after suspension or termination.

Sections 1215.64 through 1215.77 include the provisions involving personal liability of Board members and employees; handling of patents, copyrights, inventions, and others; amendments to the Order; and separability of Order provisions.

General Findings

The Department conducted a referendum among popcorn processors from April 15 through 30, 1997, to determine whether the Order will become effective. The representative period for establishing voter eligibility was from January 1, through December 31, 1996. Only processors who processed over 4 million pounds of popcorn during this period were eligible to vote.

It is determined that a majority of those who voted favored the implementation of the Order and that those voters favoring implementation represented a majority of processors voting in the referendum, which majority, annually processed more than 50 percent of the popcorn processed annually by all those voting in the referendum. After consideration of all relevant material presented, including

the initial proposal, comments received, and the referendum results, it is found that the Order effectuates the declared policy of the Act.

List of Subjects in 7 CFR Part 1215

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

For the reasons set forth in the preamble, Title 7, chapter XI of the Code of Federal Regulations is amended as follows:

1. Part 1215 is added to read as follows:

PART 1215—POPCORN PROMOTION, RESEARCH, AND CONSUMER INFORMATION

Subpart A—Popcorn Promotion, Research, and Consumer Information Order

Definitions

Sec.

- 1215.1 Act.
- 1215.2 Board.
- 1215.3 Board member.
- 1215.4 Commerce.
- 1215.5 Consumer information.
- 1215.6 Department.
- 1215.7 Fiscal year.
- 1215.8 Industry Information.
- 1215.9 Marketing.
- 1215.10 Part and subpart.
- 1215.11 Person.
- 1215.12 Popcorn.
- 1215.13 Process.
- 1215.14 Processor.
- 1215.15 Programs, plans, and projects.
- 1215.16 Promotion.
- 1215.17 Research.
- 1215.18 Secretary.
- 1215.19 State.
- 1215.20 United States.

Popcorn Board

- 1215.21 Establishment and membership.
- 1215.22 Nominations and appointment.
- 1215.23 Acceptance.
- 1215.24 Term of office.
- 1215.25 Vacancies.
- 1215.26 Removal.
- 1215.27 Procedure.
- 1215.28 Compensation and reimbursement.
- 1215.29 Powers.
- 1215.30 Duties.

Promotion, Research, Consumer Information, and Industry information

- 1215.40 Programs, plans, and projects.
- 1215.41 Contracts.

Expenses and Assessments

- 1215.50 Budget and expenses.
- 1215.51 Assessments.
- 1215.52 Exemption from assessment.
- 1215.53 Influencing governmental action.

Reports, Books, and Records

- 1215.60 Reports.
- 1215.61 Books and records.
- 1215.62 Confidential treatment.

Miscellaneous

- 1215.70 Right of the Secretary.
- 1215.71 Suspension or termination.
- 1215.72 Proceedings after termination.
- 1215.73 Effect of termination or amendment.
- 1215.74 Personal liability.
- 1215.75 Patents, copyrights, inventions, publications, and product formulations.
- 1215.76 Amendments.
- 1215.77 Separability.

Subpart B—Rules and Regulations Definitions

- 1215.100 Terms defined.

Exemption Procedures

- 1215.300 Exemption procedures.

Miscellaneous

- 1215.400 OMB control numbers.

Authority: 7 U.S.C. 7481–7491.

Subpart A—Popcorn Promotion, Research, and Consumer Information Order

Definitions

§ 1215.1 Act.

Act means the Popcorn Promotion, Research, and Consumer Information Act of 1995, Subtitle E of Title V of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. 104–127, 7 U.S.C. 7481–7491, and any amendments thereto.

§ 1215.2 Board.

Board means the Popcorn Board established under section 575(b) of the Act.

§ 1215.3 Board member.

Board member means an officer or employee of a processor appointed by the Secretary to serve on the Popcorn Board as a representative of that processor.

§ 1215.4 Commerce.

Commerce means interstate, foreign, or intrastate commerce.

§ 1215.5 Consumer information.

Consumer information means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of popcorn.

§ 1215.6 Department.

Department means the United States Department of Agriculture.

§ 1215.7 Fiscal year.

Fiscal year means the 12-month period from January 1 through December 31 each year, or such other period as recommended by the Board and approved by the Secretary.

§ 1215.8 Industry information.

Industry information means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the popcorn industry, or activities to enhance the image of the popcorn industry.

§ 1215.9 Marketing.

Marketing means the sale or other disposition of unpoped popcorn for human consumption in a channel of commerce but shall not include sales or disposition to or between processors.

§ 1215.10 Part and subpart.

Part means the Popcorn Promotion, Research, and Consumer Information Order and all rules and regulations and supplemental orders issued thereunder, and the term *subpart* means the Popcorn Promotion, Research, and Consumer Information Order.

§ 1215.11 Person.

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

§ 1215.12 Popcorn.

Popcorn means unpoped popcorn (Zea Mays L) that is commercially grown, processed in the United States by shelling, cleaning, or drying, and introduced into a channel of commerce.

§ 1215.13 Process.

Process means to shell, clean, dry, and prepare popcorn for the market, but does not include packaging popcorn for the market without also engaging in another activity described in this paragraph.

§ 1215.14 Processor.

Processor means a person engaged in the preparation of unpoped popcorn for the market who owns or who shares the ownership and risk of loss of such popcorn and who processes and distributes over 4 million pounds of popcorn in the market per year.

§ 1215.15 Programs, plans, and projects.

Programs, plans, and projects means promotion, research, consumer information, and industry information plans, studies, projects, or programs conducted pursuant to this part.

§ 1215.16 Promotion.

Promotion means any action, including paid advertising, to enhance the image or desirability of popcorn.

§ 1215.17 Research.

Research means any type of study to advance the image, desirability,

marketability, production, product development, quality, or nutritional value of popcorn.

§ 1215.18 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.

§ 1215.19 State.

State means each of the 50 States and the District of Columbia.

§ 1215.20 United States.

United States means all of the States.

Popcorn Board**§ 1215.21 Establishment and membership.**

(a) There is hereby established a Popcorn Board of nine members. The number of members on the Board may be changed by regulation: *Provided*, That the Board consist of not fewer than four members and not more than nine members. The Board shall be composed of popcorn processors appointed by the Secretary under § 1215.24.

(b) For purposes of nominating and appointing processors to the Board, the Secretary shall, to the extent practicable, take into account the geographic distribution of popcorn production.

(c) No more than one officer or employee of a processor may serve as a Board member at the same time.

§ 1215.22 Nominations and appointment.

(a) All nominations for appointments to the Board established under § 1215.21 shall be made as follows:

(1) As soon as practicable after the effective date of this subpart, nominations for appointment to the initial Board shall be obtained from processors by the Secretary. In any subsequent year in which an appointment to the Board is to be made, nominations for positions for which the term will expire at the end of that year shall be obtained from processors at least six months prior to the expiration of terms.

(2) Except for initial Board members, whose nomination process will be initiated by the Secretary, the Board shall issue a call for nominations in each year for which an appointment to the Board is to be made. The call shall include, at a minimum, the following information:

(i) A list of the vacancies for which nominees may be submitted and qualifications for nomination; and

(ii) The date by which the names of nominees shall be submitted to the

Secretary for consideration to be in compliance with paragraph (a) of this section.

(3)(i) Nominations for each position shall be made by processors. Notice shall be publicized to all processors.

(ii) All processors may participate in submitting nominations.

(4) Two nominees must be submitted for each vacancy. If processors fail to nominate a sufficient number of nominees, additional nominees shall be obtained in a manner prescribed by the Secretary.

(b) The Secretary shall appoint the members of the Board from nominations made in accordance with paragraph (a).

(1) The Secretary may reject any nominee submitted. If there is an insufficient number of nominees from whom to appoint members to the Board as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary in a manner prescribed by the Secretary.

(2) Whenever processors cannot agree on nominees for a position on the Board under the preceding provisions of this section, or whenever they fail to nominate individuals for appointment to the Board, the Secretary may appoint members in such a manner as the Secretary determines appropriate.

(3) If a processor nominates more than one officer or employee, only one may be appointed to the Board by the Secretary.

§ 1215.23 Acceptance.

Each individual nominated for membership of the Board shall qualify by filing a written acceptance with the Secretary at the time of nomination.

§ 1215.24 Term of office.

(a) The members of the Board shall serve for terms of three years, except that members appointed to the initial Board shall serve, to the extent practicable, proportionately for terms of two, three, and four years.

(b)(1) Except with respect to terms of office of the initial Board, the term of office for each Board member shall begin on the date the member is seated at the Board's annual meeting or such other date that may be approved by the Secretary.

(2) The term of office for the initial Board member shall begin immediately following the appointment by the Secretary.

(c) Board members shall serve during the term of office for which they are appointed and have qualified, and until their successors are appointed and have qualified.

(d) No Board member may serve more than two consecutive three-year terms,

except as provided in § 1215.25(d). Initial members serving two- or four-year terms may serve one successive three-year term.

§ 1215.25 Vacancies.

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary may appoint a successor from the most recent nominations submitted for positions on the Board or the Secretary may obtain nominees to fill such vacancy in such a manner as the Secretary deems appropriate.

(b) Each such successor appointment shall be for the remainder of the term vacated.

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

(d) If an unexpired term is less than 1.5 years, serving the term shall not prevent the appointee from serving two successive three-year terms.

(e) A Board member shall be disqualified from serving on the Board if such individual ceases to be affiliated with the processor the member represents.

§ 1215.26 Removal.

If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board is known to be engaged in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. Further, without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service will be detrimental to the achievement of the purposes of the Act.

§ 1215.27 Procedure.

(a) At a properly convened meeting of the Board, a majority of the members shall constitute a quorum.

(b) Each member of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by a simple majority of those voting. At assembled meetings of the Board, all votes will be cast in person.

(c) 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 upon the concurring votes by a majority of its

members by mail, telephone, facsimile, or any other means of communication. If appropriate, any such action shall be confirmed promptly in writing. In that event, all members must be given prior notice 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 votes shall be recorded in Board minutes.

(d) Meetings of the Board may be conducted by electronic communications, provided that each member is given prior notice of the meeting and has the opportunity to be present either physically or by electronic connection.

(e) 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.

§ 1215.28 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses incurred by such members in the performance of their responsibilities under this subpart.

§ 1215.29 Powers.

The Board shall have the following powers:

(a) To administer the Order in accordance with its terms and provisions;

(b) To make rules and regulations to effectuate the terms and provisions of the Order;

(c) To select committees and subcommittees of Board members, including an executive committee, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(d) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals;

(e) To disseminate information to processors or industry organizations through programs or by direct contact using the public postal system or other systems;

(f) To propose, receive, evaluate and approve budgets, plans and projects of popcorn promotion, research, consumer information and industry information, as well as to contract with the approval of the Secretary with appropriate persons to implement plans and projects.

(g) To receive, investigate, and report to the Secretary for action any complaints of violations of the Order;

(h) To recommend to the Secretary amendments to the order;

(i) To accept or receive voluntary contributions;

(j) To invest, pending disbursement pursuant to a program, plan or project, funds collected through assessments authorized under this Act provided for in § 1215.51, and any other funds received by the Board in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest bearing account or certificate of deposit or a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(k) With the approval of the Secretary, to enter into contracts or agreements with national, regional, or State popcorn processor organizations, or other organizations or entities, for the development and conduct of programs, plans or projects authorized under § 1215.40 and for the payment of the cost of such programs with assessments received pursuant to this subpart; and

(1) Such other powers as may be approved by the Secretary.

§ 1215.30 Duties.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, consumer information, and industry information programs, plans or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart, as provided in § 1215.50;

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles and to be audited by an independent certified public accountant

in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books and records that clearly reflect all the acts and transactions of the Board. Minutes of each Board meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any processor;

(k) To investigate violations of the Act, order, and regulations issued under the order, conduct audits, and report the results of such investigations and audits to the Secretary for appropriate action to enforce the provisions of the Act, order, and regulations; and

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

Promotion, Research, Consumer Information, and Industry Information

§ 1215.40 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, consumer information, and industry information with respect to popcorn; and

(2) The establishment and conduct of research with respect to the sale, distribution, marketing, and use of popcorn, and the creation of new uses thereof, to the end that the marketing and use of popcorn may be encouraged, expanded, improved, or made more acceptable.

(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 may 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, consumer information, or industry 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, consumer information, or industry information, then the Board shall terminate such program, plan, or project.

(d) In carrying out any program, plan, or project, no reference to a brand name, trade name, or State or regional identification of any popcorn will be made. In addition, no program, plan, or project shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

§ 1215.41 Contracts.

The Board shall not contract with any processor for the purpose of promotion or research. The Board may lease physical facilities from a processor for such promotion or research, if such an arrangement is determined to be cost effective by the Board and approved by the Secretary. Any contract or agreement shall provide that:

(a) 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;

(b) Any such program, plan, or project shall become effective upon approval by the Secretary;

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

(d) 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.

Expenses and Assessments

§ 1215.50 Budget and expenses.

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

(b) Each budget shall include:

(1) A rate of assessment for such fiscal year calculated, subject to § 1215.51(b), to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (g) of this section;

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

(3) A summary of anticipated revenue, with comparative data for at least one preceding year;

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

(5) Staff and administrative expense breakdowns, with comparative data for at least one preceding year.

(c) In budgeting plans and projects of promotion, research, consumer information, and industry information, the Board shall expend assessment and contribution funds on:

(1) Plans and projects for popcorn marketed in the United States or Canada in proportion to the amount of assessments projected to be collected on domestically marketed popcorn (including Canada); and

(2) Plans and projects for exported popcorn in proportion to the amount of assessments projected to be collected on exported popcorn (excluding Canada).

(d) The Board is authorized to incur such reasonable 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) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects approved by the Secretary. Such contributions shall be free from any encumbrances by the donor and the Board shall retain complete control of their use. The Board may also receive funds provided through the Foreign Agricultural Service of the United States Department of Agriculture for foreign marketing activities.

(f) As stated in section 75(f)(4)(A)(ii) of the Act, the Board shall reimburse the Secretary, from funds received by the Board, for costs incurred by the Secretary in implementing and administering this subpart: *Provided*, That the costs incurred by the Secretary to be reimbursed by the Board, excluding legal costs to defend and enforce the order, shall not exceed 15

percent of the projected annual revenues of the Board.

(g) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, except that the funds in this reserve shall not exceed approximately one fiscal year's expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

(h) With the 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 during its first year of operation only.

§ 1215.51 Assessments.

(a) Any processor marketing popcorn in the United States or for export shall pay an assessment on such popcorn at the time of introduction to market at a rate as established in § 1215.51(c) and shall remit such assessment to the Board in such form and manner as prescribed by the Board.

(b) Any person marketing popcorn of that person's own production to consumers in the United States either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such popcorn at the rate set forth in paragraph § 1215.51(c), and in such form and manner as prescribed by the Board.

(c) Except as otherwise provided, the rate of assessment shall be 5 cents per hundredweight of popcorn. The rate of assessment may be raised or lowered as recommended by the Board and approved by the Secretary, but shall not exceed 8 cents per hundredweight in any fiscal year.

(d) The collection of assessments under this section shall commence on all popcorn processed in the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Board is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Board and may hold such assessments until the Board is constituted, then remit such assessments to the Board.

(e) Each person responsible for remitting assessments under paragraphs (a) and (b) of this section shall remit the amounts due from assessments to the Board on a quarterly basis no later than the last day of the month following the last month in the previous quarter in which the popcorn was marketed, in such manner as prescribed by the Board.

(f) The Board shall impose a late payment charge on any person who fails

to remit to the Board the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(g) The Board shall impose an additional charge 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 in rules and regulations as approved by the Secretary.

(h) In addition, persons failing to remit total assessments due in a timely manner may also be subject to penalties and actions under federal debt collection procedures as set forth in 7 CFR 3.1 through 3.36.

(i) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Board by the payment due date, shall be considered to have been payable on the payment due date. Under such a situation, paragraphs (f), (g), and (h) of this section shall be applicable.

(j) The Board, with the approval of the Secretary, may enter into agreements authorizing other organizations or entities to collect assessments on its behalf. Any such organization or entity shall be required to maintain the confidentiality of such information as is required by the Board for collection purposes. Any reimbursement by the Board for such services shall be based on reasonable charges for services rendered.

(k) The Board is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Board shall not be obligated to pay interest on any advance payment.

§ 1215.52 Exemption from assessment.

(a) Persons that process and distribute 4 million pounds or less of popcorn annually, based on the previous year, shall be exempted from assessment.

(b) To claim such exemption, such persons shall apply to the Board, in the form and manner prescribed in the rules and regulations.

§ 1215.53 Influencing governmental action.

No funds received by the Board under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart.

Reports, Books, and Records

§ 1215.60 Reports.

(a) Each processor marketing popcorn directly to consumers, and each processor responsible for the remittance of assessments under § 1215.51, shall be required to report quarterly to the Board, on a form provided by the Board, such information as may be required under this subpart or any rule and regulations issued thereunder. Such information shall be subject to § 1215.62 and include, but not be limited to, the following:

(1) The processor's name, address, telephone number, and Social Security Number or Employer Identification Number;

(2) The date of report, which is also the date of payment to the Board;

(3) The period covered by the report;

(4) The number of pounds of popcorn marketed or in any other manner are subject to the collection of assessments;

(5) The amount of assessments remitted;

(6) The basis, if necessary, to show why the remittance is less than the number of pounds of popcorn divided by 100 and multiplied by the applicable assessment rate; and

(7) The amount of assessments remitted on exports (not including Canada).

(b) The words "final report" shall be shown on the last report at the end of each fiscal year.

§ 1215.61 Books and records.

Each person who is subject to this subpart shall maintain and make available for inspection by the Board or the Secretary such books and records as are deemed necessary by the Board, with the approval of the Secretary, to carry out the provisions of this subpart and any rules and regulations issued hereunder, including such books and records as are necessary to verify any reports required. Such books and records shall be retained for at least two years beyond the fiscal year of their applicability.

§ 1215.62 Confidential treatment.

(a) All information obtained from books, records, or reports under the Act, this subpart, and the rule and regulations issued thereunder shall be kept confidential by all persons, including all employees, agents, and former employees and agents of the Board; all officers, employees, agents, and former officers, employees, and agents of the Department; and all officers, employees, agents, and former officers, employees, and agents of contracting and subcontracting agencies

or agreeing parties having access to such information. Such information shall not be available to Board members or processors. Only those persons having a specific need for such information to administer effectively the provisions of this part 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 suit 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 part.

(b) No information obtained under the authority of this part may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of the Act and any investigatory or enforcement action necessary for the implementation of the Act.

(c) Nothing in paragraph (a) of this section may be deemed to prohibit:

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

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

(d) Any person who knowingly violated the provisions of this section, on conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for not more than 1 year, or both, or if the person is an officer, employee, or agent of the Board or the Department, that person shall be removed from office or terminated from employment as applicable.

Miscellaneous

§ 1215.70 Right of the Secretary.

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

§ 1215.71 Suspension or termination.

(a) Whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(b) The Secretary may conduct additional referenda to determine whether processors favor termination or suspension of this subpart three years

after the effective date, on the request of a representative group comprising 30 percent or more of the number of processors who have been engaged in processing during a representative period as determined by the Secretary.

(c) Whenever the Secretary determines that suspension or termination of this subpart is favored by two-thirds or more of the popcorn processors voting in a referendum under paragraph (b) of this section who, during a representative period determined by the Secretary, have been engaged in the processing, the Secretary shall:

(1) Suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

(2) Suspend or terminate, as appropriate, all activities under this subpart in an orderly manner as soon as practicable.

(d) Referenda conducted under this subsection shall be conducted in such manner as the Secretary may prescribe.

§ 1215.72 Proceedings after termination.

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

(b) The trustees shall:

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

(2) Carry out the obligations of the Board under any contract or agreement entered into by it under this subpart;

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

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

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

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

liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information or industry information programs, plans, or projects authorized under this subpart.

§ 1215.73 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any rule and regulation issued under this subpart, or the issuance of any amendment to such provisions, shall not:

(a) Affect or waive any right, duty, obligation, or liability that shall have arisen or may hereafter arise in connection with any provision of this subpart or any such rules or regulations;

(b) Release or extinguish any violation of this subpart or any such rules or regulations; or

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

§ 1215.74 Personal liability.

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

§ 1215.75 Patents, copyrights, inventions, publications, and product formulations.

Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Board under this subpart shall be the property of the United States Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, publications, or product formulations inure to the benefit of the Board and be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this subpart, § 1215.72 shall apply to determine disposition of all such property.

§ 1215.76 Amendments.

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

§ 1215.77 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.

Subpart B—Rules and Regulations**§ 1215.100 Terms defined.**

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions in Subpart A—Popcorn Promotion, Research, and Consumer Information Order of this part.

Exemption Procedures**§ 1215.300 Exemption procedures.**

(a) Any processor who markets 4 million pounds or less of popcorn

annually and who desires to claim an exemption from assessments during a fiscal year as provided in § 1214.52 of this part shall apply to the Board, on a form provided by the Board, for a certificate of exemption. Such processor shall certify that the processor's marketing of popcorn during the previous fiscal year was 4 million pounds or less.

(b) 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 that is eligible to receive one.

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

(d) The Board may require persons receiving an exemption from assessments to provide to the Board

reports on the disposition of exempt popcorn.

Miscellaneous**§ 1215.400 OMB control numbers.**

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581-0093, except for the Promotion Board nominee background statement form which is assigned OMB control number 0505-0001.

Dated: July 16, 1997.

Lon Hatamiya,

Administrator, Agricultural Marketing Service.

[FR Doc. 97-19150 Filed 7-21-97; 8:45 am]

BILLING CODE 3410-02-P