

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1219

[FV-01-705-PR#2]

RIN 0581-AB92

#### Proposed Hass Avocado Promotion, Research, and Information Order

**AGENCY:** Agricultural Marketing Service, Agriculture.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish an industry-funded promotion, research, and information program for the Hass avocados. This program is authorized under the Hass Avocado Research, Promotion, and Information Act (Act). USDA published four proposals (Proposals 1-4) for comment reflecting all or portions of an Order. This proposed rule adopts Proposal 1 with changes, including appropriate provisions from Proposals 2, 3, and 4. Under the proposed Order, producers and importers would pay an initial assessment of 2.5 cents per pound of Hass domestic and imported avocados to the Hass Avocado Board (Board). The Board would be appointed by USDA to conduct research, promotion, industry information, and consumer information needed for the maintenance, expansion, and development of domestic markets for Hass avocados.

**DATES:** Agricultural Marketing Service will publish a referendum order and the dates for the referendum in the **Federal Register** at a future date.

**FOR FURTHER INFORMATION CONTACT:** Julie Morin, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, S.W., Room 2535-S, Washington, D.C. 20250-0244, telephone (202) 720-6930 or (888) 720-9917, fax (202) 205-2800, e-mail [julie.morin@usda.gov](mailto:julie.morin@usda.gov).

**SUPPLEMENTARY INFORMATION:** This proposed Order is issued under the Hass Avocado Research, Promotion, and

Information Act of 2000 (Act) [7 U.S.C. 7801-7813], enacted on October 23, 2000.

*Prior documents:* A proposed rule was published in the **Federal Register** on July 13, 2001 [66 FR 36870], with a 45-day comment period. Subsequently, the USDA published a notice in the **Federal Register** on August 28, 2001, extending the comment period by 15 days, to September 12, 2001. In addition, USDA published a proposed rule on the referendum procedures in the **Federal Register** on July 13, 2001 [66 FR 36886], with a 45-day comment period. The comment period on this rule was also extended 15 days. These comment periods were extended one day due to mail service being shut down on September 11-12, 2001.

#### Question and Answer Overview

##### *Why Is USDA Proposing a Program for Hass Avocados?*

The U.S. Department of Agriculture (USDA or the Department) received a proposal from the California Avocado Commission and partial proposals from Hass avocado interests in Chile, Mexico, and New Zealand to implement a program under the Act. The USDA issued the proposed rule to obtain comments on the proposals and to obtain information on the potential impact of the proposed program on the Hass avocado industry before developing a final proposed program and conducting a referendum on it.

##### *What Is the Purpose of the Hass Avocado Program?*

The purpose of the program is to increase consumption of Hass avocados in the United States.

##### *How Will the Hass Avocado Program Be Implemented?*

A referendum will be conducted on the proposed Order. The Order will be implemented if it is approved by a simple majority of the eligible voters in the referendum.

##### *When Will the Referendum Be Held?*

A final rule providing referendum procedures will be published in this issue of the **Federal Register**. A referendum order will be published in the **Federal Register** after a bond or irrevocable letter of credit has been posted by the California Avocado Commission. The representative period

for eligibility for voting in the referendum and the dates for registration and for voting will be announced in the referendum order.

##### *Who Will Be Covered by the Program?*

Producers and importers of Hass avocados will pay assessments under the program, and first handlers will be involved in the assessment collection process.

##### *Who Will Sit on the Board?*

The Act provides that there will be a 12-member Board consisting of seven domestic Hass avocado producers, two importers, and three additional members who can either be importers or domestic producers. The three "swing" seats will be allocated to producers and importers so as to assure as nearly as possible that the composition of the Board reflects the proportion of domestic production and imports supplying the United States market. The proportion shall be based on the average volume of domestic production and imports in the United States over the previous three years. Each member will have an alternate.

##### *How Will Members of the Board Be Selected?*

The Order will provide for a nomination and election process to identify industry members who are interested and willing to serve on the Board. In the initial nomination process, the California Avocado Commission (Commission) will conduct an election to determine who will be nominated for each domestic producer seat. USDA will conduct an election among importers to determine who will be nominated to fill the importer seats. Two names must be submitted for each member and alternate position. From the names submitted, USDA will appoint the members and alternates of the Board.

##### *If the Hass Avocado Program is Implemented and There Are Concerns About How It Is Operating, What Can the Department of Agriculture Do?*

Three years after the program is implemented, USDA could conduct a referendum to determine whether the Hass avocado industry supports continuation of the program: (1) At any time; (2) at the request of 30 percent or more of the producers and importers required to pay assessments; or (3) at the request of the Board.

### Executive Orders 12866 and 12988

This proposed rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This proposed rule has been reviewed under E.O.12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 1212 of the Act states that the Act may not be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a state.

Under Section 1207 of the Act, a person subject to the Order may file a petition with USDA stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not established in accordance with law, and requesting 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 two 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, USDA will issue a ruling on the petition. The Act provides that the district court of the United States in any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

### Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agency has examined the impact of the proposed 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 California avocado industry initiated this program by asking the U.S. Congress (Congress) to pass legislation to authorize USDA to create a generic program of promotion and research for Hass avocados. Congress found that this program is vital to the welfare of Hass avocado producers and other persons concerned with producing, marketing, and processing Hass avocados.

This program is intended to: Develop and finance an effective and coordinated program of research,

promotion, industry information, and consumer information regarding Hass avocados; strengthen the position of the Hass avocado industry in U.S. markets; maintain, develop, and expand domestic markets for Hass avocados; and treat persons producing, handling, and importing avocados fairly.

Hass avocado producers and importers must approve the program in a referendum in advance of its implementation and would serve on the Board that would administer the program under the Department of Agriculture's supervision. In addition, any person subject to the program may file with USDA a petition stating that the Order or any provision of the Order 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 proposed rule.

In this program, first handlers would be required to collect assessments from producers, file reports, and submit assessments to the Board. Importers would be required to remit to the Board assessments not collected by the U.S. Customs Service (Customs) and to file reports with the Board. Exports of U.S. Hass avocados would be exempt from assessment. While the proposed Order would impose certain recordkeeping requirements on producers, handlers, and importers, information required under the proposed Order could be compiled from records currently maintained and would involve clerical or accounting skills. 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. There would be an estimated 6,315 respondents providing information to the Board or to USDA: 6,000 producers, 100 first handlers, 200 importers, 10 exempt handlers, and five importer associations. The burden associated with the information collections would be \$40,020 for all producers or \$6.67 per producer, \$6,500 for all first handlers or \$65 per first handler, \$50 for all importers or \$0.25 per importer, \$25 for exempt handlers or \$2.50 per exempt handler, and \$25 for all importer associations or \$2.50 per importer association. These totals have been estimated by multiplying total burden hours requested by \$10.00 per hour, a sum deemed to be reasonable should the respondents be compensated for their time.

The Department would oversee the operation of the program. Three years after the program is implemented, USDA could conduct a referendum to determine whether the Hass avocado

industry supports continuation of the program at any time, at the request of 30 percent or more of the producers and importers required to pay assessments, or at the request of the Board.

There are approximately 6,000 producers, 200 importers, and 100 first handlers of Hass avocados that would be covered by the program. The program would also affect 10 exempt handlers, a state association of avocado producers, and several importer associations.

The Small Business Administration [13 CFR 121.201] defines small agricultural producers as those having annual receipts of \$750,000 or less annually and small agricultural service firms as those having annual receipts of \$5 million or less. Importers, first handlers, and exempt handlers would be considered agricultural service firms. Using these criteria, most producers and importers to be covered by the proposed program would be considered small businesses, and most handlers would not. The associations affected by this proposed rule consist of producers or importers and would reflect the size of these entities.

According to the USDA's National Agricultural Statistics Service (NASS), total U.S. production of all varieties of avocados during the 2000–2001 season was 234,320 tons, all of which was utilized fresh (except for a small processed quantity that NASS included in fresh utilization to protect the confidentiality of individual operations). The value of the 2000–2001 crop was \$321 million. Production in 2000–2001 was up 28 percent from the previous year's total of 183,300 tons, which had a value of \$379 million.

In 2000–2001, California accounted for more than 89 percent of U.S. production, followed by Florida (nearly 11 percent) and Hawaii (about 0.1 percent). Hass avocados account for about 85 percent of the total California avocado crop.

Avocados are imported in both fresh and processed forms. In 2000, fresh avocado imports accounted for about 75 percent of the total tonnage of fresh and processed avocados imported. Imported fresh avocados totaled 86,667 tons, up about 42 percent from 1999. Processed avocados accounted for 25,214 tons, up 21 percent from 1999.

The total import value for fresh and processed avocados was \$149 million in 2000, up from \$105 million in 1999. The total tonnage imported was up 37 percent in 2000, to 111,880 tons. The trend in imports is up, and imports have more than doubled since 1997. Almost all prepared or preserved avocado imports come from Mexico. In recent years, Chile has accounted for more

than 50 percent of fresh imports, followed by Mexico, the Dominican Republic, and New Zealand.

The United States is a net importer of avocados, and exports of avocados are much smaller than imports. In 2000, total exports were 2,756 tons, down 60 percent from the year before, and only about 2 percent as large as imports. The value of exports in 2000 was \$3.6 million, down from \$7.6 million in 1999. There are just a few major destinations of U.S. exports. Canada, Japan, Spain, and the United Kingdom purchased about 87 percent of the U.S. avocado exports in 2000.

The proposed Hass avocado Order would authorize assessments on producers (to be collected by first handlers) and on importers (collected by Customs) of Hass avocados at an initial rate of 2.5 cents a pound. Exports of domestic Hass avocados are exempt from assessment. At the initial rate of assessment, about \$10 million will be collected to administer the program: about 65 percent from domestic production and 35 percent from imports. The Act authorizes assessments on fresh, frozen, and processed Hass avocados. However, initially only fresh Hass avocados will be assessed.

An exempt handler is a person who would otherwise be considered a first handler, except that all Hass avocados purchased by the person have already been subject to assessments under the Order. Others affected by the program would be a state association (currently, the Commission), which would receive 85 percent of the assessments paid by domestic producers, and importer associations which would receive 85 percent of the assessments paid by their members. The state association could use the assessment funds to promote California Hass avocados in the United States, and the importer associations could use the assessments to promote Hass avocados on a country-of-origin basis in the United States. The funds remaining with the Board would be used to promote Hass avocados in the United States. The Board would also enter into contracts with the state association as provided for in the Act.

Associations and related industry media would receive news releases and other information regarding the implementation and referendum process. Furthermore, all the information would be available electronically.

If the program is implemented, the Hass avocado industry would nominate individuals to serve as members and alternates of the Board. USDA would ensure that the nominees represent the

Hass avocado industry as specified in the Act.

The Board would develop guidelines for compliance with the program. The Board would recommend changes in the assessment rate; programs, plans, and projects; a budget; and any rules and regulations that might be necessary for the administration of the program. Rules and regulations that might be necessary for the administration of the program would be provisions to assess other types of avocados that are so similar to the Hass variety that they are indistinguishable to consumers in fresh form. The Board could also recommend the assessment of imported frozen and processed Hass avocados. The Board also has the authority to recommend the exemption of certain processed avocado products for sale to a retailer if the avocado portion of the product does not constitute a substantial value of the product. The administrative expenses of the Board are limited by the Act to no more than 10 percent of its assessment income.

There is a federal marketing order program for avocados grown in south Florida [7 CFR Part 915]. According to NASS, in Florida, there is little or no production of Hass avocados. Under the program, Hass avocados are covered by the grade regulations, but not by the maturity regulations. Since California is the source for more than 95 percent of avocados produced in the United States and Florida does not produce Hass avocados, there is little duplication between this Order and the federal marketing order.

There is also a state avocado program in California, which is administered by the Commission. The chief objective of the program is to increase consumer awareness of and demand for avocados on behalf of the state's 6,000 growers. Under the program, growers pay a percentage-of-revenue fee to fund a variety of market development programs. In 1998–1999, California producers paid \$13,165,544 in assessments at a rate of 4 cents of the gross dollar value. In 1999–2000, the assessment rate was 3.5 percent of the gross dollar value. The state assessment may not exceed 6.5 percent of the gross dollar value of the year's sales of avocados by all producers to handlers, or which are sold by handlers on behalf of growers. Expenditures for administrative purposes under the program may not exceed 2.5 percent of the gross dollar value of sales. The assessments are collected from the growers by handlers, who remit the money to the Commission.

Paragraph (b)(1) of section 1212 of the Act states that nothing in the Act may

be construed to provide for the control of production or otherwise limit the right of any Hass avocado grower, handler, and importer to produce, handle, or import Hass avocados. Paragraph (b)(2) of section 1212 of the Act states that the Order must treat all persons producing, handling, and importing Hass avocados fairly and that the Order must be implemented in an equitable manner. Further, paragraph (c) of section 1212 states that nothing in the Act may be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a state.

Alternatives to the proposed Hass avocado program are limited by the Act. The Act requires USDA to publish proposals received for a Hass avocado program under the Act. USDA published four proposals for comment reflecting all or portions of an Order. The Act is very specific on many provisions which must be included in the programs. However, the Act does include a few alternatives which USDA has included as permissive terms—rather than required—in this proposed rule. These alternatives include the identification and assessment of avocado varieties that are so similar to Hass avocados that they are indistinguishable to consumers in fresh form, the exemption of certain processed Hass avocado products for sale to a retailer if the Hass avocado portion of the product does not constitute a substantial value of the product, and the identification and assessment of imported frozen and processed Hass avocado products.

#### **Paperwork Reduction Act**

In accordance with OMB regulations [5 CFR Part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that may be imposed by this Order have been submitted to OMB for approval. These requirements will not become effective prior to OMB approval.

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

*OMB Number:* 0581–0197.

*Expiration Date of Approval:* October 31, 2004.

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

*Abstract:* The information collection requirements in this request are

essential to carry out the intent of the Act.

In addition, there will be the additional burden on producers and importers voting in referenda. The information collection requirements relating to referenda are registration for the referendum and the ballot. These burdens are addressed in the final rule on referendum procedures that is published separately in this issue of **Federal Register**.

Under the proposed program, first handlers would be required to collect assessments from producers and file reports with and submit assessments to the Board. While the proposed Order would impose certain recordkeeping requirements on producers, handlers, and importers, information required under the proposed Order could be compiled from records currently maintained.

There are an estimated 6,315 respondents: 6,000 producers, 100 first handlers, 200 importers, 10 exempt handlers, and five importer associations. The burden would be \$40,020 for all producers or \$6.67 per producer; \$6,500 for all first handlers or \$65 per first handler; \$50 for all importers or \$0.25 per importer; \$25 for all exempt handlers or \$2.50 per exempt handler; and \$25 for all importer associations or \$2.50 per importer association. These totals have been estimated by multiplying total burden hours requested by \$10.00 per hour, a sum deemed to be reasonable should the respondents be compensated for their time. (There are currently no importer associations, but some are expected to be created if the Order is implemented.)

The proposed Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already maintained by handlers for the Commission.

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

Collecting information less frequently would hinder the Board from effectively

carrying out the provisions of the program. Requiring reports less frequently than monthly would 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 onto the forms. 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.

Therefore, there is no practical method for collecting the required information without the use of these forms.

Information collection requirements in this proposal are:

(1) A monthly report by each first handler who handles Hass avocados.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.50 hours per each respondent reporting on Hass avocados handled.

*Respondents:* First handlers.

*Estimated Number of Respondents:* 100.

*Estimated Number of Responses per Respondent:* 12.

*Estimated Total Annual Burden on Respondents:* 600 hours.

(2) A periodic report by each importer who imports Hass avocados.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hours per each importer respondent reporting on Hass avocados imported.

*Respondents:* Importers.

*Estimated Number of Respondents:* 200.

*Estimated Number of Responses per Respondent:* 1 every ten years (0.10).

*Estimated Total Annual Burden on Respondents:* 5 hours.

(3) An exemption application for handlers who will be exempt from assessments.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hours per response for each exempt producer and importer.

*Respondents:* Exempt handlers.

*Estimated Number of Respondents:* 10.

*Estimated Number of Responses per Respondent:* 1.

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

(4) Voting in the nomination process.

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

*Respondents:* Producers and importers.

*Estimated number of Respondents:* 6,200.

*Estimated Number of Responses per Respondent:* 1 every 3 years (0.33).

*Estimated Total Annual Burden on Respondents:* 1,023 hours.

(5) A background questionnaire for nominees.

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

*Respondents:* Producers and importers.

*Estimated Number of Respondents:* 24 for the initial nominations to the Board and approximately 12 respondents annually thereafter.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12 hours for the initial nominations to the Board and 6 hours annually thereafter.

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

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

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

*Estimated number of Recordkeepers:* 6,300.

*Estimated Total Recordkeeping Hours:* 3,150 hours.

(7) A requirement for importer associations to submit information in order to be certified by the Department.

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

*Respondents:* Importer associations.

*Estimated Number of Respondents:* 5.

*Estimated Number of Responses per Respondent:* 1.

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

## Background

The Hass Avocado Research, Promotion, and Information Act (Act) authorizes the Department to establish a Hass avocado research, promotion, and information program. The program would be funded by an assessment of 2.5 cents per pound of Hass avocados levied on producers and importers of Hass avocados. The rate could be raised up to a maximum rate of 5 cents per pound. Exports of U.S. Hass avocados would be exempt from assessment. The Act authorizes assessments on domestic Hass avocados and on imports of fresh, frozen, and processed Hass avocados.

Initially, only fresh domestic and imported Hass avocados will be assessed.

The Hass Avocado Board (Board) would use the funds to pay for research, promotion, industry information, and consumer information; administration, maintenance, and functioning of the Board; and expenses incurred by USDA in implementing and administering the Order, including referendum costs.

The Board would be composed of 12 voting members: 7 producers, 2 importers, and 3 producers and importers (swing seats). The three "swing" seats will be allocated to producers and importers so as to assure as nearly possible that the composition of the Board reflects the proportion of domestic production and imports supplying the United States market, based on the three-year average of domestic production and imports.

First handlers would be responsible for the collection of assessments from the producer and payment to the Board. First handlers would be required to maintain records for each producer for whom Hass avocados is handled, including Hass avocados produced by the handler. In addition, first handlers would be required to file reports regarding the collection, payment, or remittance of the assessments and the disposition of exported Hass avocados, which are exempt from assessment. All information obtained through handler reports would be kept confidential.

An exempt handler is a person who would otherwise be considered a first handler, except that all Hass avocados purchased by the person have already been subject to assessments under the Order. Others affected by the program would be a state association of avocado producers (currently, the Commission), which would receive 85 percent of the assessments paid by domestic producers, and importer associations which would receive 85 percent of the assessments paid by their members. The state association could use the assessment funds to promote California Hass avocados in the United States, and the importer associations could use the assessments to promote Hass avocados on a country-of-origin basis in the United States. The funds remaining with the Board would be used to promote Hass avocados generically in the United States. The Board would also enter into contracts with the state association as provided for in the Act.

Customs would collect assessments on imported Hass avocados and would remit those assessments to the Board for a fee.

The Act requires the USDA to conduct a referendum during the 60-day

period preceding the proposed Order's effective date. Hass avocado producers and importers would vote in the referendum to determine whether they favor the Order's implementation. The proposed Order must be approved by a majority of the eligible producers and importers voting in the referendum. After the program has been in operation for three years, referenda could be conducted at any time, when requested by 30 percent of the Hass avocado producers and importers covered by the Order, or when requested by the Board.

The Act provides for the submission of proposals for a Hass avocado research, promotion, and information program by industry organizations or any other interested person affected by the Act.

The USDA issued a news release on January 8, 2001, requesting proposals for an initial Order or portions of an initial Order by February 7, 2001. A second news release, extending the deadline for submission of proposals to March 9, 2001, was issued on February 2, 2001.

An entire proposed Order and proposed referendum procedures were submitted by the Commission (Proposal 1). In addition, proposals containing portions of an Order were submitted by the Asociacion de Productores y Empacadores Exportadores de Aguacate de Michoacan (APEAM) (Proposal 2); the Chilean Exporters Association (ASOEX), Chilean Fruit Growers Federation (FEDEFRUTA), and Comite de Paltas de Chile (Proposal 3); and the New Zealand Avocado Growers Association (NZAGA) and the New Zealand Avocado Industry Council (NZAI) (Proposal 4). The Chilean and New Zealand proposals were considered jointly because they are identical in every respect except for the provision on the importer definition, which is included in the Chilean proposal, but not in the New Zealand proposal. Proposals 2, 3, and 4 contained alternatives to provisions in Proposal 1 as well as provisions not included in Proposal 1.

Upon receipt of the proposals, USDA, the proponents of the four proposals, as well as representatives of the governments of Chile, Mexico, and New Zealand, engaged in an extensive dialogue with multiple opportunities to present views concerning the provisions contained in the submitted proposals. Upon completion of this review process, USDA published a proposed rule on July 13, 2001, for comment.

In the supplementary information section of the proposed rule, USDA summarized the four proposals received, identifying and separating out

those provisions that were duplicative of other proposals, as well as those provisions that were not authorized by the Act. That discussion follows.

#### Proposal 1

The proposed Order submitted by the Commission was summarized as follows: Sections 1219.1 through 1219.26 of the proposed Order define certain terms, such as Hass avocado, handler, producer, and importer, which are used in the proposed Order.

Sections 1219.30 through 1219.42 include provisions relating to the establishment, adjustment, and membership; nominations; appointment; terms of office; vacancies; reimbursement; powers; and duties of the Board.

The Board would be the body organized to administer the Order through the implementation of programs, plans, projects, budgets, and contracts to promote and disseminate information about Hass avocados, under the supervision of USDA. Further, the Board would be authorized to incur expenses necessary for the performance of its duties and to set a reserve fund.

Sections 1219.50 through 1219.57 authorize the collection of assessments, specify who pays them and how, and specifies persons who would be exempt from paying the assessment. The assessment rate may not exceed 5 cents per pound of Hass avocados. The assessment sections also outline the procedures to be followed by first handlers and importers for remitting assessments; and establish interest charges for unpaid or late assessments.

Sections 1219.60 through 1219.64 concern reporting and recordkeeping requirements for persons subject to the Order and protect the confidentiality of information obtained from such books, records, or reports and the maintenance of a list of handlers required by the Act.

Sections 1219.70 through 1214.77 describe the rights of the Secretary of Agriculture (Secretary), the authority for the Department to suspend or terminate the Order, proceedings after termination, the effect of termination or amendment, personal liability of Board members and staff, separability, amendments, and OMB control number.

The Department modified the Commission's proposal to make it consistent with the Act, as necessary as well as provide clarity, consistency, and correctness with respect to word usage and terminology. For example, the Department alphabetized definitions in §§ 1219.1 through 1219.26; organized sections of the Order to be more consistent with current programs and renumbered them accordingly; deleted

redundant provisions; deleted referendum procedures and drafted a separate rule on referendum procedures; and changed the proposal to make it consistent with the Act and USDA policy.

In the definitions section, the definitions of “crop year” and “Association” were added to provide clarity, and the definition of “retailer” was removed because a specific definition was not warranted.

In the apportionment of three swing positions in § 1219.30(b)(3), USDA specified that Customs or USDA may provide import data in order to ensure accuracy. Section 1219.31(a)(3) was changed to indicate that two nominees must be submitted for each producer vacancy and two nominees must be submitted for each alternate vacancy because this is the standard practice for similar national programs. In § 1219.36(d), USDA specified that nominations and replacement shall not be required if the unexpired term is less than six months, and, in § 1219.35, a term of office for alternates was added to enhance administration of the program. In § 1219.36, authority for the Board to select alternates to fill vacant alternate positions by majority vote was revised to state that the Board may select, by majority vote, nominees to submit to the Department for appointment. The Commission’s proposal provided for the Board to appoint the replacement members, but only the Department may appoint persons to serve on the Board as members or alternates. A paragraph on bylaws was added to § 1219.38 as paragraph (b) to ensure that the activities of the Board are consistent with the Order. In § 1219.38(k), the citation for the Act which requires periodic evaluations was corrected so that it complies with provisions of the Federal Agricultural Improvement and Reform Act of 1996 [7 U.S.C. 7401 *et seq.*]

Under § 1219.52, the Department revised the Commission’s proposed limitation on administrative expenses of the Board to 10 percent of the funds available for generic promotion and research to reflect the fact that as much as 85 percent of the assessments collected under the program could be remitted to the Association and importer associations. The Act limits the administrative expenses of the Board in carrying out its generic programs, plans, and projects. In addition, the provision for the Board to make payments of assessments to the Association and importer associations within 30 days following the month in which the assessments were received

because this language was inconsistent with other provisions which require payments to the Association and importer associations within 30 days of receipt of the assessments by the Board. USDA modified § 1219.56 to specify that the Board will apply overpayments of assessments against the amount due in succeeding months unless the person requests a refund.

A requirement for producers and exempt handlers to maintain records and file reports with the Board or the Department was added to § 1219.60(a) in order to facilitate enforcement of the Order and to make the Order consistent with current practice for similar national programs. In § 1219.61, authority for the Board to use agents to conduct audits—not just Board and USDA employees—was added to increase flexibility. Since agents were added in § 1219.61 for audits, they were also added to § 1219.63(a) on confidentiality to ensure that information obtained in audits is protected.

Lastly, a section on the rights of the Secretary was added so that the program would be consistent with other national programs and specify the rights of the Secretary.

#### Proposal 2

A partial proposal was submitted by APEAM. APEAM is an association of persons who export avocados produced in Mexico to the United States.

USDA published several of the provisions submitted by APEAM. Other provisions were not published either because they were covered by Proposal 1 or because they were not authorized by the Act.

The provisions that were published for comment were as follows: (1) A definition of first handler; (2) a definition of fiscal period; (3) a provision requiring the Department to use data from import associations, Customs, and the Bureau of the Census for determining the level of imports in making its determination of the composition of the initial Board; (4) a provision defining “substantial activity” as it pertains to eligibility requirements for importer members; (5) a provision authorizing importer associations in general or by country of origin; (6) a provision authorizing the Department to certify only one importer association per country of origin; (7) authority for importer associations to include representatives of foreign avocado exporting industries; (8) a provision authorizing importer associations to invest funds received from the Board and conduct promotion and research on a country of origin basis; (9) a provision

requiring final payments for a crop year to be received no later than May 31; and (10) a provision requiring the administrative staff of the Board to periodically review the list of Hass avocado producers and requiring the Association to provide a list of producers to the Department or to the administrative staff of the Board.

The following provisions were not published because they were covered by Proposal 1: (1) A provision requiring the Board to remit funds to importer associations no later than 30 days after such funds are received by the Board; (2) a requirement to allocate producer and importer members in the three swing positions in such a manner that, to the extent possible, importers will have proportional representation on the Board as a whole; (3) a requirement to reallocate the three swing positions to producers and importers in such a manner that, to the extent possible, there will be proportional representation on the Board as a whole.

The following provisions were not published because they were not authorized by the Act: (1) Authority for the Department to appoint a board to govern importer associations; (2) authority for Customs to send import assessments directly to importer associations; (3) a requirement for the Board to remit 85 percent of all import assessments to importer associations; (4) authority for importers to pay assessments 30 days after the end of the month in which the imported Hass avocados are sold in the United States; and (5) authority for the Board to enter into a contract or agreement with an importer association.

#### Proposals 3 and 4

Proposal 3 was submitted by ASOEX and FEDEFRUTA and the Chilean Avocado Committee. ASOEX and FEDEFRUTA are the principal trade associations representing fruit exporters and producers in Chile. Proposal 4 was submitted by NZAGA and NZAIC. NZAGA is a voluntary association of avocado growers representing avocado production in New Zealand. USDA published several of the provisions submitted by ASOEX, FEDEFRUTA, NZAGA, and NZAIC. Other provisions were not published either because they were covered by Proposals 1 and 2 or because they were not authorized by the Act.

The provisions that were published were: (1) An eligibility requirement for importer members on the Board; (2) a requirement for the Board’s generic programs to be conducted throughout the year; (3) a requirement for the Board to consult with the Commission and

country-of-origin importer associations when developing generic programs; (4) a provision limiting the Board's administrative expenses for generic programs to 1.5 percent of total assessments; (5) a requirement for importer associations to be formed as soon as possible after the effective date of the Order; (6) a requirement for importer associations to establish bylaws; (7) authority for importer associations to use existing organizations for establishing their associations and their promotional and research programs; and (8) certification requirements for importer associations.

Provisions that were not published because they were covered by Proposals 1 or 2 were: (1) A requirement for overall representation of importers on the Board to be based on the proportion of domestic and import assessments; (2) a requirement for the Department to notify all importer associations on nominations for the initial Board within 30 days of the effective date of the Order; (3) a requirement for the Department to develop nomination procedures for importer members; and (4) a requirement for the Department to prepare a ballot containing the names of all persons nominated by all importer associations.

The provisions that were not published because they were not authorized by the Act were: (1) A requirement for USDA to serve as an advisor to importer associations; (2) a requirement for all importers and foreign producers and exporters to participate in importer associations; (3) authorization for the assessment of all varieties of avocados; (4) a requirement for the Board to contract with importer associations; (5) authority for importers to pay import assessments 60 days after the sale of avocados in the United States; (6) a requirement for importer associations to receive 85 percent of all import assessments, prorated by each country of origin; (7) authority for producers and importers to receive credit toward their assessments under the proposed program for contributions to generic state or country-of-origin promotion programs at a regional, state, or local level; (8) authority for importer associations to use import assessments for reasonable administrative expenses; and (9) a requirement to include a vote by volume in referenda.

#### Comments

Nine comments were timely received on the proposed rule. The comments contained several recommendations, a number of which have been adopted. There was one late comment.

Two of the comments received were submitted on behalf of the proponent of Proposal 1, the Commission. USDA also received a letter concerning the proponent's opposition to the 15-day extension for comments to be received and its view with regard to the impact of the extension on the rulemaking process. We disagree and continue to believe that the extension was appropriate and to the benefit of all interested parties, including the proponent.

The proponents of Proposals 2, 3, and 4 each commented on the proposed rule published on July 13, 2001, as did representatives of the governments of Chile and New Zealand. Two importers of avocados also submitted comments on the proposed rule. In general, the comments submitted by or on behalf of the Commission were in favor of a Hass Avocado Promotion, Research, and Information Order. The comments from New Zealand representatives were also generally in favor of such a program. Both groups, however, offered their own concerns or changes.

The comments received from the Chilean representatives, APEAM, and the two importers opposed implementation of the Hass avocado program while offering their recommendations for changes if the program was to be implemented. The late comment (from an association of Mexican avocado packers and exporters) generally reflected the issues and concerns raised by the proponents of Proposal 2 and did not contain any issues or comments that were not already raised in the comments that were received by the deadline.

Many of the comments reflected a continuing dialogue in connection with the variety of proposals previously received by USDA. In this regard, the comments compare and contrast the provisions of the proposals as well as the views of and comments submitted by others. Following is a discussion of the comments received that reflects our views with regard to them.

Several of the comments raised constitutional and World Trade Organization (WTO) issues. The constitutional issue is framed in terms of a recent United States Supreme Court (Court) decision *United States v. United Foods, Inc.* [121 S. Ct. 2334 (2001)] (*United Foods*). The WTO issues also were discussed in the preliminary phases of this rulemaking process.

In the July 13, 2001, proposed rule, we noted that on June 25, 2001, the Court issued the *United Foods* decision that held that the use of mandatory assessments to fund promotional speech in the mushroom research and

promotion program violated the First Amendment of the U.S. Constitution. In general, comments in opposition to the proposed Hass avocado promotion program raised a constitutional argument and objected to the mandatory nature of the program. Such comments recommended that assessments for promotional activities under the proposed Hass avocado program be voluntary. The comment filed on behalf of the Commission, which supported Proposal 1, disagreed with that analysis. USDA believes and continues to be of the view that the Hass avocado program, as previously proposed and with the changes included in this action, is constitutionally sound.

In addition, the New Zealand comment (Proposal 4) suggested that the requirement that all Board members and alternates be domiciled in the United States was probably unconstitutional. We disagree. Further discussion of this requirement will occur later in our subsequent responses to comments.

With regard to the WTO issues raised as to the consistency with international trade obligations, some comments argued that the proposed Hass avocado program was not consistent with these trade obligations. These comments identified a number of provisions as discriminatory. In that regard, comments focused on the timing of payments of assessments on domestic and imported avocados. One comment noted the failure to assess all varieties of avocados. Other examples were also offered. The comment filed on behalf of the Commission argued the contrary. We continue to view this program as consistent with applicable international trade obligations.

Comments discussed individual sections of the four proposals and in a number of instances offered views of provisions that appeared in the alternative, comparing and contrasting such sections. A summary of these comments appears in the following discussion.

A comment was received comparing the definition of first handler in § 1219.9 of Proposal 1 with the definition of that term in Proposal 2. The comment deferred to USDA with regard to this definition. The alternative definition is not substantially different from the definition in Proposal 1. Accordingly, we are adopting the definition from Proposal 1.

Section 1219.10 of Proposal 1 establishes the fiscal period or marketing year as the period beginning on November 1 of any year and extending through the last day of October of the following year. Proposal 2 provides for a period beginning on



April 1 of any year and extending through the last day of March of the following year. A comment pointed out that the period beginning on November 1 corresponded to the domestic marketing season while the period beginning on April 1 corresponded to the growing season in Mexico. The comment argued that the definition in Proposal 1 should be adopted, noting that the Commission has a substantial database on historical U.S. production organized on a November 1 fiscal year basis and that each exporting country may have a different growing season. We agree that the fiscal period or marketing year should begin on November 1. It should also be noted that § 1219.10 provides for changing to another consecutive 12-month period, as recommended by the Board and approved by the Department. Therefore, we are adopting § 1219.10 of Proposal 1. We are also adopting without change the definition of crop year in § 1219.5 of Proposal 1. That section provides for the crop year also to begin on November 1.

The definition of importer appears in § 1219.14. A comment raised concern regarding this section of Proposal 1 as modified by USDA. The comment stated that the language is overly broad and would include non-U.S. residents and non-U.S. citizens. We disagree. There are two definitions of importer in the Act. The one in § 1203(8) of the Act is a general definition, and the other appears in § 1205(c) of the Act as a special definition concerning eligibility for membership on the Board. The provision in the Order at issue implements the general definition of the Act. It is intended to be broad so as to cover all importers subject to assessments. This provision is not applicable to § 1219.30 of the Order, where a special and separate definition for importer appears in connection with an importer's eligibility for membership on the Board.

A number of proposals were published concerning § 1219.30 *Establishment and membership* with language and provisions appearing in Proposals 1, 2, 3, and 4. One comment related to the requirement in § 1219.30(a) that all Board members and alternates be domiciled in the United States. The comment expressed the view that this requirement was undemocratic, probably unconstitutional, and not consistent with the Act. We disagree. We believe that it is more practical and reasonable for effective program administration, management, and participation in this program to include domicile as an eligibility requirement.

One comment compared the language of Proposal 2 with that of Proposal 1

with regard to the apportionment of Board members as specified in § 1219.30(b)(3). The comment noted that the source of data to be used by the Department in determining proportional representation on the initial Board was broad based for both the level of domestic production and the level of imports. The comment further noted that Proposal 2 had provided for different sources of information for domestic production and for imports. The comment stated that all sources of information should be referred to for both. We agree, but we have eliminated references to individual sources of information, as proposed, in favor of a more general statement referring to all sources of information available to the Secretary. An appropriate change to § 1219.30(b)(3) has been made.

In Proposal 1, § 1219.30(d) provides that an importer means a person who is involved in, as a substantial activity, the importation of Hass avocados. The term substantial activity is not further defined. However, in Proposals 2 and 3, a person would be considered to be involved in the importation of Hass avocados as a substantial activity if the person has imported 75 percent or more of the total annual volume of all Hass avocados produced, handled, or imported by such person. Two comments objected to the 75 percent provision in Proposals 2 and 3.

One comment indicated that the purpose of the term substantial activity in the statute was to insure that importers who serve on the Board were not merely people who might import a few boxes of Hass avocados occasionally and that the term was meant to guarantee that importer members on the Board were truly involved in the importation and marketing of Hass avocados. The comment went on to note that: The statute does not provide for a 75 percent or other threshold; a dictionary definition of the word substantial speaks in terms of volume and not proportion; a 75 percent provision was beyond the scope of and contrary to the statute; the provision could have the effect of disqualifying some of the largest importers and most knowledgeable marketers; and the provision would be burdensome on the Department in connection with the auditing the books of importers to determine eligibility.

The other comment that opposed the 75 percent provision in Proposals 2 and 3 noted that the 75 percent provision for imports as a proportion of total Hass avocados handled would prevent almost all of the importers of New Zealand Hass avocados from qualifying now and in the future without changes to

commercial relationships with U.S. handlers. The comment went on to recommend the use of Proposal 1 language which does not define substantial activity or more preferably the definition of importer in § 1219.14 of Proposal 1 instead of § 1219.30(d) of Proposals 2 and 3.

We disagree with both comments. Under the statute, the Board is divided between producer and importer members. The Secretary appoints such members to the Board. In determining who is eligible to serve as an importer member on the Board, the statute provides for a substantial activity test. In order to implement such a provision, the Order needs to provide specific detail to enable the Department to measure substantial activity. One comment suggested a quantity basis to compare one potential importer with another that would be indicative of size and knowledge. We believe that a more reasonable application of the substantial activity test would be to base a person's eligibility on the person's individual business activity and which industry function (producing or importing) predominates. This is a reasonable measure and regulatory approach. This also would provide a clear and understandable benchmark for the Department to use to measure substantial activity. Therefore, we are adding to § 1219.30(d) a provision that states "a substantial activity means that the volume of a person's Hass avocado imports must exceed the volume of the person's production or handling of domestic Hass avocados."

One comment was received regarding the initial nomination and appointment of producer members and alternates as provided in § 1219.31 of Proposal 1. The comment proposed that the Department be allowed to choose an alternate member from either the nominee for the Board member who is not appointed to the Board or from the two nominees for the alternate member position. This suggested change has merit. Therefore, we have revised § 1219.31 of Proposal 1 accordingly with some modification of the language recommended in the comment. We further believe that similar change to § 1219.32 concerning the initial nomination and appointment of importer members and alternates is appropriate and have accordingly made this change.

Two comments were received on the provisions in § 1219.32 of Proposal 1 that deal with the initial nomination and appointment of importer members and alternates. The comment requested clarification as to whether importers or importer associations would vote in the initial nomination process. The



comment pointed out that there are currently no importer associations representing the interests of Hass avocado importers. As published in the July 13, 2001, proposed rule, the language in § 1219.32 of Proposal 1 included references to both importers and importer associations. The inclusion of importer associations in this provision was incorrect and the applicable reference has been deleted. Individual importers will vote in the nomination process.

One comment also requested that country-of-origin exporter associations be notified by USDA of the nomination process for initial importer members and their alternates. Prior to the nomination process, the Department will use all available resources to help assure that the maximum number of importers are identified, but this does not merit a change in the proposed language for the Order. The comment went on to suggest alternative language for § 1219.32 including changes to the text concerning subsequent nominations. Section 1219.33 addresses subsequent nominations which will be subject to further rulemaking as appropriate. Accordingly, no further changes were made to § 1219.32.

Regarding § 1219.33 of Proposal 1, a comment expressed concern that the Board itself may put procedures in place for subsequent nominations of importer members and alternates of the Board. However, this section provides that any procedures recommended by the Board require the approval of the Department. Prior to implementing any procedures, the Department would engage in rulemaking and publish recommended procedures for public comment before they are approved by the Department.

The comment also requested that § 1219.38(s) of Proposal 1 be revised to require the Board to report annually to importer associations. This section requires the Board to make public reports of its activities at least once each fiscal period. This means that the information would be available to all interested persons, including importer associations. Accordingly, no change is needed in § 1219.38(s).

A comment was submitted on § 1219.40(e) of Proposal 1. The comment requested the deletion of the requirement for the Department to receive advance notice of committee meetings. The comment offered that this requirement is an example of micromanagement and will result in excessive costs for the Department, presumably because the Department would have the opportunity to attend committee meetings which would, in turn, increase the administrative costs

billed by the Department to the Board. We disagree. This provision is necessary for proper program administration and will ensure that the Department is appropriately informed of program activities. Therefore, § 1219.40(e) of Proposal 1 is adopted without change.

Two comments were received on § 1219.50(e) of Proposals 3 and 4 that requires the Board's programs be conducted throughout the year to reflect periods when imported and domestic Hass avocados are in the U.S. marketplace. One comment opposed this provision, raising a variety of concerns. These concerns included statutory authority, vagueness, and the diminishment of Board authority by imposing a requirement that substitutes scheduling for strategy. We disagree. In the prior discussion of the definition of fiscal period or marketing year in Proposal 2, this same comment noted that there are different growing seasons in different exporting countries. The provision in § 1219.50(e) reflects this. We believe that it is reasonable to provide in the Order language that programs shall be conducted throughout the year and that the Board will be fully able to accomplish such a result consistent with this provision.

The second comment supported this provision but recommended modifying it to provide that the Board's generic programs may not be conducted predominately during the time that domestic Hass avocados are in the marketplace. We believe that this change is unnecessary. Therefore, we have adopted § 1219.50(e) of Proposals 3 and 4 without change.

Three comments related to § 1219.50(f) of Proposals 3 and 4 which would require the Board to consult with both the state association and importer associations on programs, plans, and projects for generic promotion and research. Two comments supported the requirement, and one comment stated that the consultation should be discretionary rather than mandatory. The Board's generic programs will be carried out by the state association with funds paid by both domestic producers and importers. Therefore, it would be beneficial to provide for and require such consultation. Accordingly, we adopt § 1219.50(f) of Proposals 3 and 4 by adding a new paragraph (f) to § 1219.50 of Proposal 1.

Under the Act, the Board is required to remit 85 percent of domestic assessments to the Commission and may remit up to 85 percent of import assessments to one or more importer associations. If the entire 85 percent of domestic assessments are remitted to the Commission, and the entire 85

percent of import assessments are remitted to importer associations, the Board would retain 15 percent of total assessments to conduct its generic programs. The Act also limits the Board's administrative expenses to 10 percent of its income. The intent of the cap on administrative expenses is to ensure that a majority of the Board's expenditures are program-related. After assessments have been distributed to the Commission and to importer associations, the remaining funds will be used by the Board for generic promotion and research. In order to implement the statutory cap on administrative expenses, § 1219.52(a)(1) of Proposal 1 states that the Board's administrative expenses shall not exceed 10 percent of the funds received by the Board for generic programs. A different approach was taken in Proposals 3 and 4. In § 1219.52(a)(1) of Proposals 3 and 4, the Board's administrative expenses are limited to 1.5 percent of total assessment income. This assumes that only 15 percent of the Board's income would remain with the Board and be available to be used for generic promotion and research.

Comments were received from two parties on the 1.5 percent cap specified in § 1219.52(a)(1) of Proposals 3 and 4. One comment supported this limitation as long as importer associations actually receive 85 percent of the import assessments paid to the Board. In addition, the comment expressed the view that the 1.5 percent limitation should be lowered if importer associations receive less than 85 percent of the import assessments. We are not adopting this recommendation or the provisions of § 1219.52(a)(1) in Proposals 3 and 4 because they would be difficult to administer. The second comment on § 1219.52(a)(1) of Proposals 3 and 4 stated that efforts to control administrative expenses in the program were desirable but the 1.5 percent seemed unreasonably low. The comment suggested a change in the language of the Order to clarify that there would be a 10 percent limitation on funds actually retained by the Board. We agree with the substance of the second comment, but no change is needed to § 1219.52(a)(1) of Proposal 1. As noted above, this section already limits administrative expenses to 10 percent of the funds available to or retained by the Board for generic promotion and research.

Comments were received concerning importer association provisions in § 1219.54 of Proposals 1, 3, and 4 and the unnumbered section of Proposal 2. These comments reflected a variety of issues that have been raised in

connection with the establishment and function of importer associations under the Act and the Order. With regard to the unnumbered section in Proposal 2, statutory concerns were raised as to compelled membership and limiting certification to only one importer association per country of origin. The statutory authority for § 1219.54(u) of Proposals 3 and 4 was questioned while the list of information required for certification was not opposed as long as it was considered discretionary and as long as the import association contemplated in § 1219.54(l) of Proposal 1 was applicable rather than that referred to in paragraph (u). In addition, a comment offered support for § 1219.54 (u) and (v) of Proposals 3 and 4 with modifications that included establishing importer associations before the effective date of the Order; limiting one importer association per exporting country; and requiring participation of all importers of Hass avocados in one or more importer associations based on the country of origin of imports. The same comment offered an addition to § 1219.54 in the form of new paragraphs (w) and (x) concerning Board transfers, to importer associations, of 85 percent of all assessments paid on imports, prorating each country of origin, and concerning information required for the Department to certify associations. Paragraph (w) is not authorized by the Act. Paragraph (x) is discussed in relationship to a new § 1219.58 on importer associations.

We have reviewed all relevant provisions of Proposals 1, 2, 3, and 4 concerning importer associations, taking into account the comments received, including modifications and additions to proposed language. We have considered these proposals and comments and created a new § 1219.58 relating to importer associations. Paragraph (a) of the new section adopts the language from paragraph (m) of § 1219.54 from Proposal 1. As a result, paragraph (l) of § 1219.54 of Proposal 1 has been revised to provide a reference to the new § 1219.58, and paragraphs (n) and (o) will be redesignated as paragraphs (m) and (n), respectively.

Further, we are deleting the second sentence of proposed § 1219.54 concerning first handlers and producers who are also handlers. The definition of first handler in § 1219.9 is applicable and, therefore, such a sentence is unnecessary.

Proposal 2 includes an unnumbered section that provides for the establishment of importer associations. One comment supported the adoption of this section, including the sentence in paragraph (a) of the unnumbered section

that states that one importer association could represent all importers of Hass avocados or importers from a particular country. We agree with this comment and have adopted this sentence as part of paragraph (b) of § 1219.58, with modifications for clarity.

The unnumbered section also provides that the Department would not certify more than one importer association per country of origin. One comment supported this provision. Another comment opposed the adoption of this requirement. We inadvertently indicated in the July 13, 2001, proposal that an Order could prohibit the Department from certifying more than one importer association per country of origin. The text of this appeared in Proposal 2. Such a provision is not authorized by the statute. Therefore, the sentence in paragraph (a) of the unnumbered section of Proposal 2 that would limit the number of importer associations that could be certified is not adopted.

One comment supported the adoption of paragraph (b) of the unnumbered section in Proposal 2 that provides that an importer association may be composed of importers as well as representatives of the foreign avocado exporting industries. Another comment supported the adoption of a paragraph (u) of § 1219.54 in Proposals 3 and 4. In addition to authorizing importer associations to be composed of importers, foreign producers, and exporters, paragraph (u) provides that importer associations establish their own bylaws and utilize existing organizations for establishment of their associations and coordination of their promotional and research efforts.

We agree that importer associations may be composed of importers as well as representatives of the foreign avocado exporting industries. Therefore, we have adopted paragraph (b) of the unnumbered section of Proposal 2 as part of paragraph (b) of the new § 1219.58. We believe the language in this paragraph is more appropriate than the similar language in paragraph (u). We also agree that importer associations should establish their own bylaws and may utilize existing organization for establishment of their associations and coordination of their promotional and research efforts. Therefore, we have adopted these provisions of paragraph (u) from § 1219.54 of Proposals 3 and 4 as part of paragraph (b) of the new § 1219.58.

Paragraph (u) also provides that importer associations be established within a reasonable amount of time after the effective date of this subpart. This provision was supported by one

comment and opposed by another. The comment in opposition of this provision stated that the Act gives no authority to require the establishment of importer associations within a reasonable time. We agree. The timing of the establishment of an importer association is at the discretion of importers. It should not be a requirement of the Order. Therefore, we are not adopting this provision of paragraph (u) of § 1219.54 of Proposals 3 and 4.

Another comment opposed the unpublished provision of Proposal 2 that would require all importers to join an importer association. The comment stated that this provision is not authorized by the Act and goes far beyond the intent of Congress in authorizing the establishment of importer associations. We agree. In identifying in the July 13, 2001, proposed rule the provisions in Proposals 3 and 4 that were not published because they were not authorized by the Act, we included the requirement that all importers join an importer association.

One comment recommended that the proposed Order allow importer associations to be certified by the Department before the effective date of the proposed Order. This would be impractical because importer associations cannot be certified by the Department prior to the effective date of the proposed Order. Therefore, this recommendation is not adopted.

Paragraph (v) of § 1219.54 in Proposals 3 and 4 includes criteria to be used by the Department in determining whether to certify importer associations. One comment included revised language for this section as a new paragraph (x). Paragraph (x)(2) of the comment generally parallels paragraph (v)(2) of § 1219.54 of Proposals 3 and 4. However, the new paragraph (x)(2) would add to the criteria for certification evidence that an importer association is composed not only of importers but of foreign exporters. We disagree with this change. The inclusion of foreign exporters is not a requirement for importer associations under the Order. Therefore, it would not be appropriate to include this criteria, and we have adopted paragraph (v)(2) of § 1219.54 of Proposals 3 and 4 as published on July 13, 2001.

In addition, paragraph (x) does not include paragraph (v)(3) of § 1219.54 of Proposals 3 and 4. We disagree with the removal of this paragraph. The paragraph states that one of the criteria for certification is certification of the importer association's ability and willingness to further the aims and objectives of the Order. We believe this

criteria is of particular importance because importer associations that are certified to receive funds from the Board must agree to utilize the funds in conformance with the provisions of the Order. Therefore, we are adopting paragraph (v) of § 1219.54 in its entirety as paragraph (c) of the new § 1219.58.

Finally, in regard to § 1219.54(l) of Proposal 1, an importer association would receive an amount of assessment funds equal to 85 percent of the assessments paid on the Hass avocados imported by its members. Section 1219.54(1) of Proposal 2 states that an importer association shall receive an amount of assessments equal to the product obtained by multiplying the aggregate amount of assessments attributable to the pounds of Hass avocados imported by its member importers by 85 percent. The language in Proposal 2 and the language in Proposal 1 create the same requirement. Unlike Proposal 1, however, Proposal 2 expresses the requirement in terms of a mathematical calculation. We are adopting the language from § 1219.54(l) of Proposal 1 because it is not necessary to include the mathematical calculation in the Order.

There was one comment on § 1219.61 of Proposal 1 which covers books and records. Citing established research and promotion programs administered by the Department, the comment recommended that producers who are not also first handlers, and who are not responsible for remitting assessments to the Board, should not be subject to the recordkeeping requirement. We disagree. The Act itself provides that, not only first handlers and importers, but also producers are required to maintain books and records and make them available to the Department or the administrative staff of the Board. It may be necessary on occasion for the staff of the Board to audit the records of producers to verify the information provided in handler reports. Therefore, the comment is not adopted.

A comment supported, with modifications, the requirement for a list of importers as provided for in § 1219.64 of Proposal 1. We are not adopting the recommended modification that would require Customs to provide the list to importer associations and for such associations to review the list. Such a requirement is not consistent with section 1205(m)(3) of the Act. However, we are deleting the second sentence of § 1219.65 of Proposal 1 concerning the list of importers and Customs because they are not necessary in view of language in the Act. The Act requires Customs to provide this information to the Department and the staff of the

Board on request. Another comment noted that the requirement in § 1219.65 of Proposal 2 was redundant and unnecessary, adding that the Secretary would have the authority to obtain such a list in any event. Section 1219.65 provides that on request of the Secretary or the Board, the Association would provide to the Secretary or the administrative staff of the Board, a list of producers of Hass avocados. We disagree and believe that such a provision is appropriate for inclusion in the Order.

Section 1219.70 *Right of the Secretary* provides that all fiscal matters, plans, projects, contracts, rule or regulations, reports, or other substantive actions proposed and prepared by the Board are required to be submitted to the Secretary for approval. A comment stated that this section should be eliminated. The comment believed the provision was redundant because all necessary provisions requiring submission of materials for the Secretary's approval were already in the Order. The comment particularly objected to inclusion of a requirement that the Secretary approve other substantive actions proposed and prepared by the Board indicating that the requirement was vague and ambiguous, would invite abuse of authority by USDA officials, and invite the subversion of the function of lawfully appointed Board members. We disagree. Research and promotion programs represent a federal and industry partnership that has been affirmed by Congress time and time again. The Department recognizes the expertise of the industry. At the same time, the Department has long-standing experience in administering and enforcing the provisions of these programs. The Department has and will continue to maintain the integrity of such programs. While industries may take advantage of the benefits of research and promotion programs, certain responsibilities attach, including those referenced in § 1219.70. Therefore, no change is made.

In addition, commenters made a number of recommendations which cannot be adopted because they are inconsistent with or not authorized by the Act. These comments appeared in a variety of contexts with some being raised in overall or general concerns and with others in terms of alternatives or modifications and others spanning provisions or a provision of the proposals. These recommendations include amending the proposed Order to provide for the following: a requirement for proportional representation of producers and

importers on the Board as a whole; a requirement for all importers and country-of-origin producers and exporters to participate in importer associations; authority for the Board to assess all varieties of avocados; a requirement for the Board to contract with country-of-origin importer associations in the same manner and with the same effect as with the State association; authority for importers to pay import assessment 30 days after the end of the month in which imported Hass avocados are sold in the United States; a requirement for importer associations to receive 85 percent of all import assessments, prorated by each country of origin; and authority for producers and importers to receive credit towards their assessments under the proposed program for contributions to generic state or country-of-origin promotion programs at a regional, state, or local level.

Comments were also received relating to the procedures used in connection with notice and comment rulemaking. For example, one requested that its comments be published in their entirety in the **Federal Register**. All comments were posted in their entirety on the USDA-AMS website at the time they were received by the Department. In addition, comments are discussed and responded to in this rule, as appropriate, in the context of the discussions that appear herein. Another comment raised concerns regarding what is in effect an opportunity for rebuttal of the other comments. In this rulemaking, we have provided opportunity for comment that is consistent with applicable law and made every attempt to include the views of all interested persons as part of this proceeding.

In summary, Proposal 1 is adopted with the following changes: Revising § 1219.30(b)(3), § 1219.30(d), § 1219.31(b), § 1219.32(a)(1) and (2), and § 1219.32(b); correcting a citation in § 1219.42(d); adding new paragraphs (e) and (f) from Proposals 3 and 4 to § 1219.50; revising § 1219.54(b)(3) and (l); deleting paragraph (m) from § 1219.54 and redesignating paragraphs (n) and (o) in that section; adding a new § 1219.58 from Proposals 1, 3, and 4 with modifications; revising § 1219.64; and adding a new § 1219.65 from Proposal 2. Other provisions of Proposals 2, 3, and 4 are not adopted. Miscellaneous changes were also made to the following provisions for the purpose of clarity and consistency: § 1219.12; § 1219.39(c); § 1219.52(a)(1); § 1219.54(m)(3); § 1219.58(b); § 1219.63(a); § 1219.71(a); and § 1219.77.

A referendum will be conducted among eligible Hass avocado producers and importers to determine whether they favor implementation of the Hass Avocado Promotion, Research, and Information Order. The referendum order will be published in the **Federal Register** at a later date following the publication of this proposed order and the final rule providing for referendum procedures. The representative period for eligibility for voting in the referendum and the dates for registration and for voting will be announced in the referendum order.

#### List of Subjects in 7 CFR Part 1219

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

For the reasons set forth in the preamble, AMS proposes to amend 7 CFR chapter XI as follows:

#### PART 1219—HASS AVOCADO PROMOTION, RESEARCH, AND INFORMATION

1. The authority citation for part 1219 continues to read as follows:

**Authority:** 7 U.S.C. 7801–7813.

2. Subpart A is added to part 1219 to read as follows:

#### Subpart A—Hass Avocado Promotion, Research, and Information Order

##### Definitions

Sec.

- 1219.1 Act.
- 1219.2 Association.
- 1219.3 Conflict of interest.
- 1219.4 Consumer information.
- 1219.5 Crop year.
- 1219.6 Customs.
- 1219.7 Department.
- 1219.8 Exempt handler.
- 1219.9 First handler.
- 1219.10 Fiscal period or marketing year.
- 1219.11 Handle.
- 1219.12 Hass avocado.
- 1219.13 Hass Avocado Board.
- 1219.14 Importer.
- 1219.15 Industry information.
- 1219.16 Marketing.
- 1219.17 Order.
- 1219.18 Part and subpart.
- 1219.19 Person.
- 1219.20 Producer.
- 1219.21 Programs, plans, and projects.
- 1219.22 Promotion.
- 1219.23 Research.
- 1219.24 Secretary.
- 1219.25 State.
- 1219.26 United States.

##### The Hass Avocado Board

- 1219.30 Establishment and membership.

- 1219.31 Initial nomination and appointment of producer members and alternates.
- 1219.32 Initial nomination and appointment of importer members and alternates.
- 1219.33 Subsequent nomination and appointment of Board members and alternates.
- 1219.34 Failure to nominate.
- 1219.35 Term of office.
- 1219.36 Vacancies.
- 1219.37 Alternate members.
- 1219.38 Powers and duties.
- 1219.39 Board procedure.
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##### Budgets, Expenses, and Assessments

- 1219.50 Budgets, programs, plans, and projects.
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- 1219.56 Adjustments of accounts.
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- 1219.60 Reports.
- 1219.61 Books and records.
- 1219.62 Books and records of the Board.
- 1219.63 Confidential treatment.
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##### Miscellaneous

- 1219.70 Right of the Secretary.
- 1219.71 Suspension or termination.
- 1219.72 Proceedings after termination.
- 1219.73 Effect of termination or amendment.
- 1219.74 Personal liability.
- 1219.75 Separability.
- 1219.76 Amendments.
- 1219.77 OMB control numbers.

#### Subpart A—Hass Avocado Promotion, Research, and Information Order

##### Definitions

###### § 1219.1 Act.

*Act* means the Hass Avocado Promotion, Research, and Information Act of 2000, Pub. L. 106–387, 7 U.S.C. 7801–7813, and any amendments thereto.

###### § 1219.2 Association.

*Association* means an avocado organization established by State statute in a State with the majority of Hass avocado production in the United States.

###### § 1219.3 Conflict of interest.

*Conflict of interest* means a situation in which a Board member or employee has a direct or indirect financial interest in a person who performs a service for,

or enters into a contract with, the Board for anything of economic value.

###### § 1219.4 Consumer information.

*Consumer information* means any action or program that disseminates or otherwise provides information to consumers and other persons, on the use, nutritional attributes, and other information that will assist consumers and other persons in the United States in making evaluations and decisions regarding the purchase, preparation, and use of Hass avocados.

###### § 1219.5 Crop year.

*Crop year* means the period from November 1 of one year through October 31 of the following year, or such other one-year period recommended by the Board and approved by the Secretary.

###### § 1219.6 Customs.

*Customs* means the United States Customs Service.

###### § 1219.7 Department.

*Department* means the United States Department of Agriculture.

###### § 1219.8 Exempt handler.

*Exempt handler* means a person who would otherwise be considered a first handler, except that all Hass avocados purchased by the person have already been subject to assessments under the Order. A person who handles both Hass avocados that have already been subject to assessments under the Order and Hass avocados that have not been subject to assessments under the Order is a first handler.

###### § 1219.9 First handler.

*First handler* means a person operating in the Hass avocado marketing system that sells domestic or imported Hass avocados for consumption in the United States and who is responsible for remitting assessments to the Board. For the purposes of the Order, the term means the first person who handles Hass avocados for sale (except a common or contract carrier of Hass avocados owned by another person), including a producer who handles Hass avocados for sale of the producer's own production.

###### § 1219.10 Fiscal period or marketing year.

*Fiscal period or marketing year* means the period beginning on November 1 of any year and extending through the last day of October of the following year, or such other consecutive 12-month period as shall be recommended by the Board and approved by the Secretary.

###### § 1219.11 Handle.

*Handle* means to pack, process, transport, purchase, or in any other way

to place or cause Hass avocados to which one has title or possession to be placed in the current of commerce. Such term shall not include the transportation or delivery of Hass avocados by the producer thereof to a handler.

**§ 1219.12 Hass avocado.**

*Hass avocado* means the fruit grown in or imported into the United States of the species *Persea americana* Mill., or other type of avocados that, in the determination of the Board, with approval of the Secretary, is so similar to the Hass variety avocado as to be indistinguishable to consumers in fresh form. The term shall include all fruit in fresh, frozen, or any other processed form.

**§ 1219.13 Hass Avocado Board.**

*Hass Avocado Board* or the *Board* means the administrative body established pursuant to § 1219.40.

**§ 1219.14 Importer.**

*Importer* means any person who imports Hass avocados into the United States. The term includes a person who holds title to Hass avocados produced outside of the United States immediately upon release by Customs, as well as any person who acts on behalf of others, as an agent, broker, or consignee, to secure the release of Hass avocados from Customs and the introduction of the released Hass avocados into the current of commerce and who is listed in the import records of Customs as the importer of record for such Hass avocados.

**§ 1219.15 Industry information.**

*Industry information* means information, programs, and activities that are designed to increase efficiency in processing, enhance the development of new markets and marketing strategies, increase marketing efficiency, and enhance the image of Hass avocados and the Hass avocado industry in the United States.

**§ 1219.16 Marketing.**

*Marketing* means any activity related to the sale or other disposition of Hass avocados in any channel of commerce.

**§ 1219.17 Order.**

*Order* means this subpart.

**§ 1219.18 Part and subpart.**

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

**§ 1219.19 Person.**

*Person* means any individual, group of individuals, firm, partnership,

corporation, joint stock company, association, cooperative, or any other legal entity.

**§ 1219.20 Producer.**

*Producer* means any person who is engaged in the business of producing Hass avocados in the United States for commercial use, who owns, or shares the ownership and risk of loss, of such Hass avocados.

**§ 1219.21 Programs, plans, and projects.**

*Programs, plans, and projects* means those research, promotion, and information programs, plans, studies, or projects established pursuant to § 1219.50.

**§ 1219.22 Promotion.**

*Promotion* means any action to advance the image, desirability, or marketability of Hass avocados in the United States, including paid advertising, sales promotion, and publicity. Promotion activities are designed to improve the competitive position and stimulate sales of Hass avocados in the domestic marketplace.

**§ 1219.23 Research.**

*Research* means any type of test, study, or analysis relating to market research, market development, and market efforts, or relating to the use, quality, or nutritional value of Hass avocados, other related food science research, or research designed to advance the knowledge, image, desirability, usage, or marketability of Hass avocados in the United States.

**§ 1219.24 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States or any other 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.

**§ 1219.25 State.**

*State* means any of the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the Republic of the Marshall Islands, and the Federated States of Micronesia.

**§ 1219.26 United States.**

*United States* means collectively the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the

Republic of the Marshall Islands, and the Federated States of Micronesia.

**Hass Avocado Board**

**§ 1219.30 Establishment and membership.**

(a) A Hass Avocado Board, hereinafter called the Board, is hereby established to administer the terms and provisions of this subpart. The Board shall consist of 12 members nominated by the Hass avocado industry and appointed by the Secretary as provided in this subpart, each of whom shall have an alternate nominated and appointed in the same manner as members of the Board are nominated and appointed. Board members and alternates shall be domiciled in the United States.

(b) The membership of the Board shall be divided as follows:

(1) Seven members and their alternates shall be producers of Hass avocados that are subject to assessments under this subpart;

(2) Two members and their alternates shall be importers of Hass avocados that are subject to assessments under this subpart; and

(3) Three members shall be producers of Hass avocados that are subject to assessments under this subpart or importers of Hass avocados that are subject to assessments under this subpart. Producers and importers shall be allocated to these positions so as to assure as nearly as possible that the composition of the 12-member Board reflects the proportion of domestic production and imports supplying the United States market. Such proportion shall be based on the Secretary's determination of the average volume of domestic production and the average volume of imports into the United States market over the previous three years, based on all information available to the Secretary.

(c) Three years after the assessment of funds commences pursuant to this subpart, and at the end of each three-year period thereafter, the Board shall review the production of domestic Hass avocados in the United States and the volume of imported Hass avocados on the basis of the amount of assessments collected from producers and importers over the immediately preceding three-year period and, if warranted, recommend to the Secretary the reapportionment of the positions authorized in paragraph (b)(3) of this section to reflect changes in the proportion of domestic Hass avocado production to the volume of imported Hass avocados, to the extent possible in the Act. Any adjustment under this paragraph shall be subject to the review and approval of the Secretary.

(d) For purposes of this section, *importer* means a person who is involved in, as a substantial activity, the importation of Hass avocados for sale or marketing in the United States (either directly or as an agent, broker, or consignee of any person that produces Hass avocados outside of the United States for sale in the United States), who is subject to assessments under the Order, and who is listed by Customs as the importer of record for such Hass avocados. A substantial activity means that the volume of a person's Hass avocado imports must exceed the volume of the person's production or handling of domestic Hass avocados.

**§ 1219.31 Initial nomination and appointment of producer members and alternates.**

(a) The Association will nominate producer members and alternates to serve on the Board in accordance with the following procedures.

(1) Within 30 days of implementation of this subpart, the Association shall establish a list of producers in the United States who are eligible to serve on the Board and notify all producers that they may nominate persons to serve as members and alternates on the Board.

(2) After names are received from the producers, the Association shall prepare a ballot with the names of all persons nominated and mail it to all producers to allow them the opportunity to vote for the persons who will represent their interests on the Board.

(3) After tabulating the vote, the Association shall announce the results and submit two names for each producer member and two names for each alternate producer member to the Secretary from the persons receiving the highest number of votes.

(b) The Secretary shall select the producer members and alternates of the Board from the names submitted by the Association. Following the selection of the producer members, the Secretary shall select the alternate producer members. In selecting the alternate members, the Secretary shall consider the names submitted by the Association for each alternate member position along with the individuals whose names were submitted by the Association for each Board member position but were not selected for that position.

**§ 1219.32 Initial nomination and appointment of importer members and alternates.**

(a) The Department will conduct the nomination process for the initial importer members and alternates on the Board in accordance with the following procedures.

(1) Within 30 days of implementation of this subpart, the Department shall notify all known importers and importer organizations that they may nominate persons to serve as importer members and alternates on the Board.

(2) After names are received from the importers and importer organizations, the Department shall prepare a ballot with the names of all persons nominated and mail it to all known importers to allow them the opportunity to vote for the persons who will represent their interests on the Board.

(3) After tabulating the vote, the Department shall announce the results and submit two names for each importer member and two names for each alternate importer member to the Secretary from the persons receiving the highest number of votes.

(b) The Secretary shall select the importer members and alternates of the Board from the nominees elected by importers. Following the selection of the importer members, the Secretary shall select the alternate importer members. In selecting the alternate members, the Secretary shall consider the names for each alternate member position along with the individuals who were elected by importers for each Board member position but were not selected for that position.

**§ 1219.33 Subsequent nomination and appointment of Board members and alternates.**

The Board's staff shall announce at least 150 days in advance of the expiration of members' and alternates' terms that such terms are expiring and shall solicit nominations in accordance with procedures recommended by the Board and approved by the Secretary. Nominations for such positions should be submitted to the Secretary no less than 90 days prior to the expiration of the terms.

**§ 1219.34 Failure to nominate.**

In any case in which producers or importers fail to nominate individuals for appointment to the Board, the Secretary may appoint individuals to fill vacancies from the appropriate segments of the industry.

**§ 1219.35 Term of office.**

The members and alternate members of the Board shall serve for terms of three years, except the members of the initial Board shall serve terms as follows: Four members and four alternates shall serve for two-year terms; four members and four alternates shall serve for three-year terms; and four members and four alternates shall serve for four-year terms. No member shall

serve more than two consecutive three-year terms. Members and alternates serving initial two-year or four-year terms may serve for one additional three-year term. A Board member may serve as an alternate during the years the member is ineligible for a member position. Each term of office will end on October 31, with new terms of office beginning on November 1.

**§ 1219.36 Vacancies.**

(a) In the event any member or alternate of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such member or alternate shall be disqualified from serving on the Board and the position shall automatically become vacant.

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

(c) Should any Board member position become vacant in the event of the death, removal, resignation, or disqualification, the alternate of that member shall automatically assume the position of said member. The alternate shall serve until the end of the member's normal term. If there is no alternate member to assume the position of member, the successor member and alternate shall be nominated and selected in the manner specified in §§ 1219.31, 1219.32, or 1219.33.

(d) Should any alternate member become vacant in the event of death, removal, resignation, or disqualification, the Board may nominate persons to serve for the unexpired term of such alternate member. The nomination shall be conducted at a regularly scheduled Board meeting as soon as practicable after the vacancy occurs. The Board may solicit the names of nominees from producers and importers prior to the meeting and from the floor of the meeting. All nominees must meet the qualifications for nomination. The Board shall submit two nominees for each vacancy to the Secretary. A vacancy will not be required to be filled if the unexpired term is less than six months.

**§ 1219.37 Alternate members.**

An alternate member of the Board, during the absence of the member for whom the person is the alternate, shall act in the place and stead of such

member and perform such duties as assigned. In the event of the death, removal, resignation, or disqualification of any member, the alternate for that member shall automatically assume the position of said member. In the event that both a member of the Board and the alternate are unable to attend a meeting, the Board may not designate any other alternate to serve in such member's or alternate's place and stead for the meeting.

**§ 1219.38 Powers and duties.**

The Board shall have the following powers and duties in addition to the responsibilities and authorities specified in other sections of this subpart:

- (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, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, at the start of each fiscal period, and at such other times as the Board determines to be appropriate;
- (d) To recommend to the Secretary rules and regulations to effectuate the terms and conditions of this subpart;
- (e) To employ such persons, other than the members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons;
- (f) To appoint from its members an executive committee and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board and approved by the Secretary;
- (g) To develop budgets for the implementation of this subpart and submit the budgets to the Secretary for approval and to propose and develop (or receive and evaluate), approve, and submit to the Secretary for approval programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research;
- (h) To develop and implement after the approval by the Secretary programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research, to contract or enter into agreements with appropriate persons to implement the programs, plans, and

projects, and to pay the costs of the implementation of contracts and agreements with funds collected under this subpart;

(i) 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;

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

(k) To evaluate on-going and completed programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research and to comply with the independent evaluation provisions of the Federal Agricultural Improvement and Reform Act of 1996 [7 U.S.C. 7401 *et seq.*];

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

(m) To recommend to the Secretary amendments to this Order;

(n) To invest, pending disbursement under a program, plan, or project, funds collected through assessments authorized under this Act only in:

- (1) Obligations of the United States or any agency of the United States;
- (2) General obligations of any State or any political subdivision of a State;
- (3) Any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

(4) Obligations fully guaranteed as to principal and interest by the United States, except that income from any such invested funds may be used only for a purpose for which the invested funds may be used;

(o) To borrow funds necessary for the startup expenses of the Order;

(p) To cause the books of the Board to be audited by a qualified independent auditor at the end of each fiscal period and to submit a report of the audit directly to the Secretary;

(q) To give the Secretary the same notice of meetings and teleconferences of the Board and its committees as is

given to members in order that the Secretary's representative(s) may attend or participate in the meetings;

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

(s) To periodically prepare and make public reports of its activities carried out, and at least once each fiscal period, to make public an accounting of funds received and expended; and

(t) To notify Hass avocado producers, first handlers, and importers of all Board meetings through news releases or other means.

**§ 1219.39 Board procedure.**

(a) At a properly convened meeting of the Board, seven (7) members, including alternates acting in place of members of the Board, shall constitute a quorum: *Provided*, that such alternates shall serve only when the member is absent from a meeting. Any action of the Board shall require the concurring votes of a majority of those present and voting. At assembled meetings, all votes shall be cast in person.

(b) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or other means of communication. Such alternative means for the Board taking action may be undertaken for various reasons. These reasons include the need to address matters of an emergency nature when there is not enough time to call an assembled meeting of the Board. All telephone votes shall be confirmed promptly in writing. In that event, all members must be notified and provided an 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 the Board minutes.

(c) All Board members and alternates and the Secretary will be notified at least 10 days in advance of all Board meetings, except the chairperson of the Board can waive the 10-day requirement in matters of an emergency nature.

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

(e) There shall be no voting by proxy.

(f) The chairperson shall be a voting member of the Board.



**§ 1219.40 Committee procedure.**

(a) The Board may establish committees as deemed necessary to carry out the purposes and objectives of the Order.

(b) The chairperson of the Board shall appoint all committee chairpersons and shall appoint all members of each committee after consultation with the committee chairperson affected. Appointments are subject to approval by the Board and may be changed from time to time as determined by the chairperson of the Board with the concurrence of the Board.

(c) The chairperson of the Board may appoint committee members from among the Board members and alternates and from the industry in general.

(d) The rules and procedures under which committees conduct their activities shall be prescribed in the Board's bylaws.

(e) Committee members and the Secretary will be notified at least 10 days in advance of all committee meetings.

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

(g) There shall be no voting by proxy on committees.

(h) The chairperson of the Board shall be an ex-officio member of all committees.

**§ 1219.41 Compensation and expenses.**

(a) The members and alternates of the Board and committee members shall serve without compensation but shall be reimbursed for reasonable out-of-pocket expenses, as approved by the Board, incurred by them in the performance of their duties.

(b) The Board shall have in place sufficient internal controls to prevent reimbursements or expenditures for unreasonable or otherwise controversial travel and meeting expenses.

**§ 1219.42 Prohibited activities.**

The Board may not engage in and shall prohibit its employees and agents from engaging in:

(a) Any action that would be a conflict of interest. For the purposes of this subpart, Board members and employees thereof must disclose any relationship with any organization or company that has a contract with the Board or operates a State promotion program. No member may vote on any matter in which the member or member's business entity has a financial interest.

(b) Using funds collected under this subpart for the purpose of influencing legislation or governmental action or

policy, by local, national, and foreign governments, except to develop and make recommendations to the Secretary as provided for in this subpart.

(c) In a program, plan, or project conducted under this subpart:

(1) Making any reference to private brand names or making false, misleading, disparaging, or unwarranted claims on behalf of Hass avocados or

(2) Making any false, misleading, or disparaging statements with respect to the attributes or use of any agricultural product. This section shall not preclude the Board from offering its programs, plans, and projects for use by commercial parties under such terms and conditions as the Board may prescribe as approved by the Secretary.

(d) For the purposes of this section, a reference to State of origin or country of origin does not constitute a reference to a private brand name with regard to any funds credited to or disbursed by the Board to the Association or to any importer association established in accordance with § 1219.54.

**Budgets, Expenses, and Assessments****§ 1219.50 Budgets, programs, plans, and projects.**

(a) The Board shall submit to the Secretary, on a fiscal period basis, annual budgets of its anticipated expenses and disbursements of the Board in the administration of this subpart, including the projected costs of Hass avocado promotion, industry information, consumer information, and related research programs, plans, and projects. The first budget, which shall be submitted promptly after the effective date of this subpart, shall cover such period as may remain before the beginning of the next fiscal period. If such fiscal period is 90 days or less, the first budget shall cover such period, as well as the next fiscal period. Thereafter, the Board shall submit budgets for each succeeding fiscal period not less than 60 days before the beginning of such fiscal period.

(b) The Board shall receive and evaluate, or on its own initiative develop programs, plans and projects for Hass avocado promotion, industry information, consumer information as well as related research. The Board shall submit to the Secretary for approval any program, plan, or project authorized in this subpart. Such programs, plans or projects shall provide for:

(1) The establishment, implementation, issuance, effectuation, administration, and evaluation of appropriate programs, plans, or projects for advertising, sales promotion, other promotion, and consumer information

with respect to Hass avocados directed toward increasing the general demand for Hass avocados in the United States. Funds shall be available as necessary to carry out this section;

(2) The establishment, implementation, issuance, effectuation, administration, and evaluation of appropriate programs, plans, and projects designed to strengthen the position of the Hass avocado industry in the domestic marketplace; to maintain, develop, and expand markets for Hass avocados in the United States; to lead to the development of new marketing strategies; to advance the image and desirability of, increase the efficiency of, and encourage further development of the Hass avocado industry; and to provide for the disbursement of necessary funds for the purposes described in this section;

(3) The establishment, implementation, issuance, effectuation, administration, and evaluation of programs, plans, and projects for marketing development research; research on the sale, distribution, marketing, use, quality, and nutritional value of Hass avocados; and other research with respect to Hass avocado marketing, promotion, industry information, or consumer information, including the creation of new products thereof. Information acquired from such plans and projects shall be disseminated as appropriate. Funds shall be available as necessary to carry out this section; and

(4) The Board to enter into contracts or make agreements for the development and carrying out of research, promotion, and information, and pay for the costs of such contracts or agreements with funds collected pursuant to § 1219.54.

(c) A budget, program, plan, or project for Hass avocados promotion, industry information, consumer information, or related research may not be implemented prior to approval of the budget, program, plan, or project by the Secretary. If the Secretary fails to provide notice to the Board or approval or disapproval of a budget, program, plan, or project within 45 days after receipt, such budget, program, plan, or project shall be deemed approved by the Secretary and may be implemented by the Board.

(d) The Board, from time to time, may seek advice and consult with experts from the production, import, wholesale, and retail segments of the Hass avocado industry to assist in the development of promotion, industry information, consumer information, and related research programs, plans, and projects. For these purposes, the Board may appoint special committees composed

of persons other than Board members. A committee so appointed shall consult directly with the Board.

(e) Programs must be conducted throughout the year to reflect the periods when imported and domestic Hass avocados are in the U.S. marketplace.

(f) The Board shall consult with both the Association and importer associations on programs, plans, and projects for generic promotions.

**§ 1219.51 Contracts and agreements.**

(a) The Board shall enter into a contract or an agreement with the Association for the implementation of programs, plans, or projects for promotion, industry information, consumer information, or related research with respect to Hass avocados and for the payment of the cost of the contract or agreement with funds received by the Board under this subpart. The Board may disburse such funds as necessary for these purposes after such programs, plans, or projects have been submitted to and approved by the Secretary.

(b) Any contract or agreement entered into shall provide that the contracting or agreeing party shall develop and submit to the Board a program, plan or project, together with a budget that includes the estimated costs to be incurred for the program, plan or project, and such program, plan or project shall become effective on the approval of the Secretary. For such contract or agreement, the contracting or agreeing party shall:

- (1) Keep accurate records of all transactions of the party;
- (2) Account for funds received and expended;
- (3) Make periodic reports to the Board of activities conducted; and
- (4) Make such other reports as the Board or the Secretary shall require.

(c) The Secretary may audit the records of the contracting or agreeing party periodically.

(d) Contractors and subcontractors are subject to the provisions of § 1219.42.

(e) The Board may enter into contracts or agreements for administrative services, including contracts for employment, as may be required to conduct its business. To the extent appropriate to the contract involved, contracts or agreements entered into by the Board under the authority of this section shall conform to the provisions described in § 1219.51(b).

**§ 1219.52 Control of administrative costs.**

(a) As soon as practicable after this subpart becomes effective and after consultation with the Secretary and

other appropriate persons, the Board shall implement a system of cost controls based on normally accepted business practices to:

(1) Ensure that the costs incurred by the Board in administering this part in any fiscal period shall not exceed 10 percent of the projected level of assessments and other income received by the Board for generic promotion and research programs for that fiscal period; and

(2) Cover the minimum administrative activities and personnel needed to properly administer and enforce this subpart, and conduct, supervise, and evaluate programs, plans, and projects under this subpart.

(b) Reimbursements to the Secretary required under § 1219.53(b) are excluded from the limitation on spending.

(c) To the extent possible, the Board shall use the resources, staffs, and facilities of existing avocado organizations as provided in § 1219.54(a).

**§ 1219.53 Budget and expenses.**

(a) The Board is authorized to incur such expenses, including provision for a reasonable reserve for operating contingencies, 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, including assessments, contributions from any person not subject to assessments under this subpart, and other funds available to the Board.

(b) The Board shall reimburse the Department:

(1) For expenses not to exceed \$25,000 incurred by the Secretary in connection with any referendum conducted under the Act;

(2) For administrative costs incurred by the Secretary for supervisory work of up to two employee years annually after the Order or amendment to the Order has been issued and made effective; and

(3) For costs incurred by the Secretary in implementation of the Order, for enforcement of the Act and the order, for subsequent referenda conducted under the Act, and in defending the Board in litigation arising out of action taken by the Board or otherwise in defense of the Order.

(c) The Board shall establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs authorized by the Act. The Board shall include its annual

administrative expenses as a separate item in its annual report. The Board shall adhere to its fiduciary responsibilities and ensure that all monies are spent in accordance with the Act and the Order.

(d) 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. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first period of operation of 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. The contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

**§ 1219.54 Assessments.**

(a) Except as provided in § 1219.55, the initial rate of assessment shall be 2.5 cents per pound on fresh Hass avocados produced and handled in the United States and on fresh Hass avocados imported into the United States. An equivalent rate shall be assessed on processed and frozen Hass avocados on which an assessment has not been paid. Such equivalent rate will be assessed on processed or frozen Hass avocados upon the recommendation of the Board with the approval of the Secretary. The rate of assessment may be increased or decreased as recommended by the Board and approved by the Secretary. Such an increase or decrease may occur not more than once annually. Any change in the assessment rate shall be announced by the Board at least 30 days prior to going into effect and shall not be subject to a vote in a referendum. The maximum assessment rate authorized is 5 cents per pound. No more than one assessment shall be made on any Hass avocados.

(b) *Domestic assessments.* The collection of assessments on domestic Hass avocados will be the responsibility of the first handler.

(1) In the case of a producer acting as the producer's own first handler, the producer will be required to collect and remit the assessments due to the Board.

(2) Each first handler shall collect from the producer and pay to the Board an assessment of 2.5 cents per pound in accordance with this subpart.

Assessments shall be remitted by each first handler to the Board or its agent within 30 days after the end of the month in which the sale or non-sale

transfer subject to assessment under this subpart took place.

(3) The first handler shall maintain a separate record of the domestic Hass avocados of each producer whose domestic Hass avocados are handled, including the domestic Hass avocados owned by the handler and domestic Hass avocados that are exported.

(4) Assessment of other types of fresh avocados may be added at the recommendation of the Board with the approval of the Secretary.

(c) *Import assessments.* Each importer of fresh Hass avocados shall pay an assessment to the Board through Customs on fresh Hass avocados imported for marketing in the United States.

(1) The assessment rate for imported fresh Hass avocados shall be the same or equivalent to the rate for fresh Hass avocados produced and handled in the United States.

(2) The import assessment shall be uniformly applied to imported fresh Hass avocados that are identified by the number 08-04.00.00.10 in the Harmonized Tariff Schedule of the United States or any other numbers to identify fresh Hass avocados.

Assessments on other types of imported fresh avocados or on processed Hass avocados, such as prepared, preserved, or frozen Hass avocados or Hass avocado paste, puree, and oil will be added at the recommendation of the Board with the approval of the Secretary.

(3) The assessments due on imported Hass avocados shall be paid when they are released from custody by Customs and introduced into the stream of commerce in the United States.

(d) All assessment payments and reports will be submitted to the Board's office. All final payments for a crop year are to be received no later than November 30 of that year, unless the Board determines that assessments due from the first handler shall be paid to the Board at a different time and manner, with approval of the Secretary.

(e) A late payment charge prescribed by the Secretary shall be imposed on any first handler who fails to remit to the Board the total amount for which any such handler is liable on or before the due date. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the handler is liable. The rate of interest shall be prescribed by the Secretary. The timeliness of a payment to the Board shall be based on the date the payment is actually received by the Board.

(f) Regulations issued by the Secretary may provide for different first handler

payment schedules of assessments on domestic Hass avocados, so as to recognize differences in marketing or purchasing practices and procedures.

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

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

(i) The collection of assessments shall commence on or after a 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 remitted, the Secretary shall have the authority to receive assessments on behalf of the Board and may hold such assessments in an interest-bearing account until the Board is constituted and the funds are transferred to the Board.

(j) To facilitate the payment of assessments under this section, the Board shall publish lists of first handlers required to remit assessments under this subpart and exempt handlers.

(k) The Association shall receive an amount of assessment funds equal to 85 percent of the assessments paid on Hass avocados produced in such State. Such funds shall be remitted to such State organization no later than 30 days after such funds are received by the Board. In addition, such funds and any proceeds from the investment of such funds shall be used by the Association to finance promotion, research, consumer information, and industry information programs, plans, and projects in the United States. However, no such funds shall be used for any administrative expenses incurred by the Association.

(l) An association of Hass avocado importers established pursuant to § 1219.58 shall receive an amount of assessment funds equal to 85 percent of the assessments paid on Hass avocados imported by its members. Such funds shall be remitted to such importer association no later than 30 days after such funds are received by the Board. In addition, such funds and any proceeds from the investment of such funds shall be used by the importer association to finance promotion, research, consumer information, and industry information programs, plans, and projects in the United States. However, no such funds shall be used for any administrative expenses incurred by the importer association.

(m) In general, assessment funds received by the Board shall be used:

(1) For payment of costs incurred in implementing and administering this subpart;

(2) To provide for a reasonable reserve to be maintained from assessments to be available for contingencies; and

(3) To cover the administrative costs incurred by the Secretary in implementing and administering this Act, as set forth in § 1219.53(b).

(n) The Board may establish an operating monetary reserve which may carry over to subsequent fiscal periods: *Provided that*, the funds in the reserve do not exceed one fiscal period's budget. Subject to approval by the Secretary, reserve funds may be used to defray any expenses authorized under this part.

#### **§ 1219.55 Exemption from assessment.**

(a) Any sale of Hass avocados for export from the United States is exempt from assessment.

(b) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt Hass avocados.

#### **§ 1219.56 Adjustments of accounts.**

Whenever the Board or the Secretary determines through an audit of a person's reports, records, books, or accounts or by some other means that additional money is due to the Board, the person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against any amounts due in succeeding months unless the person requests a refund of the overpayment.

#### **§ 1219.57 Patents, copyrights, trademarks, publications, and product formulations.**

(a) Any patents, copyrights, trademarks, inventions, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, trademarks, inventions, 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 of the Secretary. Section 1219.72 describes the procedures for termination.

(b) Should patents, copyrights, trademarks, inventions, 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, trademarks, inventions, publications, or product formulations shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, trademark, invention, publication, or product formulation in a manner consistent with paragraph (a) of this section.

**§ 1219.58 Importer associations.**

(a) An association of avocado importers is eligible to receive assessment funds and any proceeds from the investment of such funds only if such importer association is:

(1) Established pursuant to State law that requires detailed State regulation comparable to that applicable to the State organization of domestic avocado producers, as determined by the Secretary; or

(2) Certified by the Secretary as meeting the requirements applicable to the Board as to its operations and obligations, including budgets, programs, plans, projects, audits, conflicts of interest, and reimbursements for administrative costs incurred by the Secretary.

(b) An importer association may represent any importers of Hass avocados including importers of Hass avocados from a particular foreign country. An importer association may be composed of importers as well as representatives of foreign avocado exporting industries. An importer association should establish its own bylaws and may use existing organizations for the establishment of the association and coordination of the association's promotion and research efforts.

(c) For the purposes of the Order, the information required for certification of the importer associations by the Secretary may include, but is not limited to, the following:

(1) Evidence of incorporation under any state law with all appropriate legal requirements;

(2) Evidence that the association is composed of importers that are located in any state and subject to assessments under the Order, no matter where the association has been incorporated or in which state the importers reside;

(3) Certification of the association's ability and willingness to further the aims and objectives of the Order;

(4) Evidence of stability and permanency; and

(5) A description of the functions of the association.

**Books, Records and Reports**

**§ 1219.60 Reports.**

(a) Each first handler of domestic Hass avocados, producer, and importer subject to this subpart shall report to the administrative staff of the Board, at such times and in such manner as the Board may prescribe, such information as may be necessary for the Board to perform its duties.

(b) First handler reports shall include, but shall not be limited to, the following:

(1) Number of pounds of domestic Hass avocados received during the reporting period;

(2) Number of pounds on which assessments were collected;

(3) Assessments collected during the reporting period;

(4) Name and address of person(s) from whom the first handler collected the assessments on each pound handled;

(5) Date collection was made on each pound handled;

(6) Record of assessments paid, including a statement from the handler that assessments have been paid on all domestic Hass avocados handled during the reporting period; and

(7) Number of pounds exported.

(c) Each importer subject to this subpart may be required to report the following:

(1) Number of pounds of Hass avocados imported during the reporting period;

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

(3) Name and address of the importer;

(4) Date collection was made on each pound imported and to whom payment was made; and

(5) Record of each importation of Hass avocados during such period, giving quantity, variety, date, and port of entry.

**§ 1219.61 Books and records.**

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

**§ 1219.62 Books and records of the Board.**

(a) The Board shall maintain such books and records as the Secretary may

require. Such books and records shall be made available upon request by the Secretary for inspection and audit.

(b) The Board shall prepare and submit to the Secretary, from time to time, such reports as the Secretary may require.

(c) The Board shall account for the receipt and disbursement of all the funds entrusted to the Board.

(d) The Board shall cause the books and records of the Board to be audited by an independent auditor at the end of each fiscal period. A report of each audit shall be submitted to the Secretary.

**§ 1219.63 Confidential treatment.**

(a) All information obtained from the books, records, or reports under this Act, this subpart, and the regulations issued thereunder shall be kept confidential and shall not be disclosed to the public by any person, including all current and former officers, employees, staff and agents of the Department, the Board, and contracting and subcontracting agencies or agreeing parties having access to such information. 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, and then only in a judicial proceeding or administrative hearing brought at the direction, or upon 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 subpart shall be deemed to prohibit:

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

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

(b) Any disclosure of any confidential information by any employee or agent of the Board shall be considered willful misconduct.

(c) No information on how a person voted in a referendum conducted under the Act shall be made public.

**§ 1219.64 List of importers.**

The administrative staff of the Board shall periodically review the list of importers of Hass avocados to determine

whether persons on the list are subject to this subpart.

**§ 1219.65 List of producers.**

The administrative staff of the Board shall periodically review the list of producers of Hass avocados to determine whether the persons on the list of subject to this subpart. On the request of the Secretary or the Board, the Association shall provide to the Secretary or the administrative staff of the Board the list of producers of Hass avocados.

**Miscellaneous**

**§ 1219.70 Right of the Secretary.**

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

**§ 1219.71 Suspension or termination.**

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

(b) The Secretary shall suspend or terminate this subpart at the end of the marketing year 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 Hass avocados.

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

(1) Suspend or terminate, as appropriate, the collection of assessments not later than 180 days after making such determination; and

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

**§ 1219.72 Proceedings after termination.**

(a) Upon the termination of this subpart, the Board shall recommend to the Secretary not more than five of its members 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 owned, in possession of 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 by it 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 of the trustees, to such person or persons as the Secretary may direct; and

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

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be returned to the persons who contributed such funds, or paid assessments, or, if not practicable, shall be turned over to the Secretary to be distributed to authorized Hass avocado producer and importer organizations in the interest of continuing Hass avocado promotion, research, and information programs.

**§ 1219.73 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or any regulation issued thereunder, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this subpart or any such rule or regulation issued thereunder; or

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

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

**§ 1219.74 Personal liability.**

No member, alternate member, employee, or agent 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 Association or omission, as such member, alternate, employee, or agent, except for acts of dishonesty or willful misconduct.

**§ 1219.75 Separability.**

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstance 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.

**§ 1219.76 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. Except for changes in the assessment rate, the provisions of the Act applicable to the Order are applicable to any amendment of the Order.

**§ 1219.77 OMB control number.**

The control number assigned to the information collection requirements in 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 0581-0197.

Dated: February 12, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**DEPARTMENT OF JUSTICE**

**8 CFR Parts 3 and 280**

[AG Order No. 2559-2002]

RIN 1125-AA36; EOIR 131P

**Board of Immigration Appeals:  
Procedural Reforms To Improve Case  
Management**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule will revise the structure and procedures of the Board of Immigration Appeals, provide for an enhanced case management procedure, and expand the number of cases referred to a single Board member for disposition. These procedures are intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those