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Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas; Recommended Decision and Opportunity To File Written Exceptions to Proposed Marketing Agreement and Order No. 986; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 986

[Docket No. AO–FV–15–0139; AMS–FV–15–0023; FV15–986–1]

Pecans Grown in the States of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas; Recommended Decision and Opportunity To File Written Exceptions To Proposed Marketing Agreement and Order No. 986

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This Recommended Decision proposes the issuance of a marketing agreement and order (order) under the Agricultural Marketing Agreement Act of 1937 to cover pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The proposed order would provide authority to collect industry data and to conduct research and promotion activities. In addition, the order would provide authority for the industry to recommend grade, quality and size regulation, as well as pack and container regulation, subject to approval by the Department of Agriculture (USDA). The program would be financed by assessments on pecan handlers and would be locally administered, under USDA oversight, by a Council of seventeen growers and shellers (handlers) nominated by the industry and appointed by USDA. This rule also announces the Agricultural Marketing Service's intention to request approval by the Office of Management and Budget of new information collection requirements to implement this program.

DATES: Written exceptions must be filed by November 27, 2015. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by December 28, 2015.

ADDRESSES: Four copies of all written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031–S, Washington, DC 20250–9200, Facsimile number (202) 720–9776. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order and Agreement Division, Rulemaking Branch, Specialty Crops Program, Agricultural Marketing Service (AMS), USDA, Post Office Box 1035, Moab, UT 84532, telephone: (202) 557–4783, fax: (435) 259–1502; or Michelle P. Sharrow, Marketing Order and Agreement Division, Rulemaking Branch, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938. Small businesses may request information on this proceeding by contacting Jeff Smutny, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on June 26, 2015, and published in the July 2, 2015, issue of the **Federal Register** (80 FR 38021).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this Recommended Decision with respect to the proposed marketing agreement and order regulating the handling of pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

This Recommended Decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900). The proposed marketing order is authorized under section 8(c) of the Act.

The proposed marketing agreement and order are based on the record of a public hearing held July 20 through July 21, 2015, in Las Cruces, New Mexico; July 23 through July 24, 2015, in Dallas, Texas; and, July 27 through July 29, 2015, in Tifton, Georgia.

The hearing was held to receive evidence on the proposed marketing order from growers, handlers, and other interested parties located throughout the proposed production area. Notice of this hearing was published in the **Federal Register** on July 2, 2015.

A request for public hearing on the proposed program was submitted to USDA on May 22, 2015, by the American Pecan Board (Board), a proponent group established in 2013 to represent the interests of growers and handlers throughout the proposed fifteen-state production area. A subsequent, modified draft of the proposed regulatory text was submitted on June 10, 2015.

Witnesses at the hearing explained that the provisions of this proposal aim to assist the industry in addressing a number of challenges, namely: a lack of organized representation of industry-wide interests in a single organization; a lack of accurate data to assist the industry in its analysis of production, demand and prices; a lack of coordinated domestic promotion or research; and a forecasted increase in production as a result of new plantings. Witnesses believed that these factors combined have resulted in the under-performance of the pecan industry compared to other nut industries.

At the conclusion of the hearing, the Administrative Law Judge fixed August 31, 2015, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. That date was subsequently extended to September 9, 2015, at the request of USDA and the Board. One brief was filed on behalf of the Board in support of the proposed program and its provisions. The brief also recommended certain changes in the regulatory text of the proposed order as a result of the public hearing sessions held in Las Cruces, New Mexico, from July 20 through July 22, 2015; Dallas, Texas, from July 23 to July 24, 2015; and Tifton, Georgia, from July 27 through July 29, 2015. These changes are discussed as appropriate later in this document.

Material Issues

The material issues presented on the record of hearing are as follows:

1. Whether the handling of pecans produced in the proposed production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce;

2. Whether the economic and marketing conditions are such that they justify a need for a Federal marketing agreement and order which would tend

to effectuate the declared policy of the Act;

3. What the definition of the production area and the commodity to be covered by the order should be;

4. What the identity of the persons and the marketing transactions to be regulated should be;

5. What the specific terms and provisions of the order should be, including:

(a) The definitions of terms used therein which are necessary and incidental to attain the declared objectives and policy of the Act and order;

(b) The establishment, composition, maintenance, procedures, powers and duties of an administrative Council for pecans that would be the local administrative agency for assisting USDA in the administration of the order;

(c) The authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses;

(d) The authority to conduct research and promotion activities;

(e) The authority to recommend grade, quality and size regulation, as well as pack and container regulation, for pecans grown and handled in the proposed production area;

(f) The establishment of requirements for handler reporting and recordkeeping;

(g) The requirement for compliance with all provisions of the order and with any regulation issued under it;

(h) An exemption for handlers of non-commercial quantities of pecans;

(i) The requirement for periodic continuance referenda; and

(j) Additional terms and conditions as set forth in § 986.88 through § 986.93, and § 986.97 through § 986.99 that are common to marketing agreements only.

Findings and Conclusions

The following findings and conclusions on the material issues are based on the record of the hearing.

Material Issue Number 1—Whether the Handling of Pecans Grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas is in the Current of Interstate or Foreign Commerce

The record indicates that the handling of pecans grown in the proposed production area is in the current of interstate or foreign commerce or directly burdens, obstructs or affects such commerce.

Witnesses testifying at the hearing stated that the proposed production area covers all known commercial production of pecans. The proposed production area would include the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

Domestic Utilization

The record shows that domestic utilization of pecans has remained relatively constant at an average of 136 million shelled pounds per year, or just below one half pound per person, over the past 10 years.

While the record indicates that U.S. utilization of pecans is predominant in the states where they are produced, pecans are shipped throughout the country. Witnesses stated that domestic prices of pecans are impacted by supply and demand within the pecan industry and that demand for pecans in one part of the U.S. influences the pecan market price throughout the market.

Witnesses explained that shipments of pecans between handlers within the production area are common. For example, pecans produced in the eastern part of the production area may be bought by a sheller who operates in the central or western parts of the production area. These pecans may be shelled to create whole meats or pieces, which may then be sold to pecan ingredient users in yet another part of the production area or outside thereof.

One witness gave the example of pecan pieces used by the confectionary industry. If demand increased for pecan pieces for candy makers located outside of the production area, the price for pieces to satisfy that demand will rise throughout the pecan industry, regardless of where the pecans are sourced from within the production area.

According to the record, because of the movement of pecans both within and outside of the production area, the pricing between regions is often correlated or interdependent.

Exports and Imports

The record states that the U.S. is the world leader in both production and export of pecans. The record also shows that export markets are increasingly important to pecan growers and handlers, with exports averaging 27 percent of total U.S. supply between 2009 and 2013 compared to averaging 12 percent of total supply between 1991 and 1995 (shelled basis).

The U.S. primarily exports to China with an annual average of 23.7 million inshell pounds per year between 2009 and 2013. The other main importers of U.S. inshell pecans are Vietnam and Mexico with 5.87 million pounds and 7.47 million pounds, respectively, during the same time period. China, Vietnam and Mexico together comprise roughly 95 percent of the total U.S. inshell pecan exports.

Main importers of U.S. shelled pecans are Canada, the Netherlands, the United Kingdom, Israel and Mexico, who have imported in aggregate 57.7 million inshell pounds on average over the same 2009 to 2013 time period.

While the U.S. is generally a net exporter of pecans, the trade balance in pecans is negative with Mexico. United States imports of pecans are sourced almost exclusively from Mexico (over 99 percent of the total imports), with an average of 50 million pounds per year in the period between 2010 and 2014. During this period, roughly half of the imports were inshell pecans with the balance being shelled.

Witnesses explained that demand for pecan exports directly impacts pecan prices in the domestic market. Chinese markets typically demand larger, inshell pecans, which are given as gifts during the Chinese New Year celebration or otherwise symbolize health and longevity. The increase in Chinese demand for pecans has resulted in a correlated increase in prices for larger, inshell pecans paid to U.S. pecan producers.

Moreover, the increasing export demand for pecans in general has impacted U.S. grower prices as more of total supply is directed out of the domestic market. Witnesses representing pecan sheller interests at the hearing explained that tighter supply of pecans in the domestic market can cause pecan prices to increase. However, these witnesses also explained that, due to a general lack of accurate production and cold storage data, price instability can be attributed to both increased export demand and the industry's inability to identify total supply. The lack of accurate industry data is further explored in Material Issue 2.

Evidence presented at the hearing confirmed that any handling of pecans in market channels, including intrastate shipments, exerts an influence on all other handling of such pecans. Several witnesses stated that a high price of pecans in the export market results in a higher price for pecans in the domestic market. Similarly, the market price for pecans shipped to states outside the production area impact market prices in producing states. Given the amount of shipments between handlers within the production area (for example, the movement of inshell pecans to shellers

between regions or from shellers to pecan ingredient users), the pricing between regions also has a market impact. Thus, it is concluded that the handling of pecans grown in the proposed production area is in the current of interstate and foreign commerce and directly affects such commerce.

Material Issue Number 2—The Need for a Pecan Marketing Order

The record evidence demonstrates that there is a need for a marketing order for pecans grown and handled in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

A summary of the challenges addressed by witnesses testifying in favor of the proposed program includes: A lack of organized representation of industry-wide interests in a single organization; a lack of accurate data to assist the industry in its analysis of production, demand and prices; a lack of coordinated domestic promotion or research; and a forecasted increase in production as a result of new plantings.

Proponents of the proposed program believe that these above-mentioned factors have resulted in the under-performance of the pecan industry compared to other nut industries. They further believe that the proposed program would increase demand, stabilize grower prices, create sustainable margins, and provide a consistent supply of quality pecans for consumers.

According to the record, the proposed order would provide authority to collect industry data and to conduct research and promotion activities. In addition, the order would provide authority for the industry to recommend grade, quality and size regulation, as well as pack and container regulation, subject to approval by USDA.

Need for Industry Organization

According to the record, there is currently no single organization that represents both pecan grower and handler interests industry-wide. There are two state pecan commissions (Georgia and Texas), ten state producer organizations, one national growers' association, and one national shellers' association. Witnesses from many of the state grower organizations explained that their activities primarily relate to grower education outreach within their respective areas. Witnesses from the two state commissions explained that assessments collected under those programs were used to support generic funding for pecans produced in the respective states, as well as to fund some research.

Witnesses from the national growers' association explained that the organization's primary focus is to promote U.S. pecan sales to foreign markets through USDA's Foreign Agricultural Service's Market Access Program. However, that organization also provides some support services to growers, such as information on Federal crop insurance and other government assistance programs. Lastly, the national growers' association also represents grower interests to government policymakers.

Witnesses from the national shellers' association described their organization's role as educating culinary and health professionals, food technologists and the general public about the nutritional benefits and uses of pecans. Additionally, the organization represents sheller interests in the handling and preparing of product for pecan ingredient users, improving handling and food safety technologies, and working with food product developers to identify new uses for pecans. Lastly, the national shellers' association also represents sheller interests to government policymakers.

Witnesses from the above-described organizations all stated that the proposed program would not duplicate or adversely affect their efforts and that an organization representing the industry as a whole would complement their efforts. These proponents explained that the proposed program would unify and represent industry interests through a coordinated selection of industry representatives to act and manage program activities on the industry's behalf. Moreover, these witnesses explained that the program's activities should include the hiring of a full-time professional staff to: Develop a comprehensive, professional marketing strategy; collect, assemble, and inform the industry with predictable supply numbers as a result of accurate data; and manage research and development projects focusing on disease and pest resistance, product development, and nutritional benefits of pecans.

Need for Data

According to the record, the only regularly published data on pecan production, supply, demand and market price is compiled by USDA's National Agricultural Statistical Service. Some additional data is compiled by USDA's Economic Research Service and the Foreign Agricultural Service. However, while helpful in a general analysis of the pecan industry as a whole, many witnesses explained that the USDA information is not readily available when market decisions need to be made. Moreover, USDA data is not offered at a level of detail that is sometimes needed when making sales decisions.

The U.S. pecan industry does not regularly compile its own data, and most data is reported on a voluntary basis. As a result, accurate market information is difficult for growers and handlers to obtain. Lack of timely information hampers both grower and handler decisions regarding pricing and available supply.

According to the record, under the proposed program handlers would be required to file reports on volume handled, carryover inventories, and other data deemed to be important to the proposed Council's ability to analyze the pecan industry and market. The proposed Council would also be required to make crop reports to the USDA at least yearly. These reports would provide all parties with more reliable product data. Increased confidence in the data on pecans would benefit growers, handlers and consumers, leading to more accurate product pricing and better information regarding product supply and demand.

Acreage of improved pecans throughout the proposed production area increased by 5 percent from just over 266,000 bearing acres in 2007 to approximately 279,300 bearing acres in 2012. During the same time period, the number of non-bearing acres of improved pecans (*i.e.,* acres less than 7 years old, not yet in full production) increased by 10 percent from 42,600 to approximately 46,860. Witnesses reported that new improved pecan plantings are being added each year, with significant production increases expected in the coming ten years. One witness estimated that the western region had added 15,000 to 20,000 acres of improved pecans in the previous five years. The number of native and seedling acres has declined, but the upcoming significant increase in improved pecan production is expected to have a major impact on future market conditions.

Witnesses stated that the additional production could potentially have a negative impact on price and be a challenge for the pecan industry in the coming years if no unified marketing efforts are made. They stated that future stability of market returns will likely be reliant on continually increasing consumer demand for pecans.

Witnesses further stated that strong consumer demand, which is ultimately related to consumer perceptions of product quality, is essential to the

continued economic well-being of the pecan industry. Moreover, witnesses discussed the importance of implementing a marketing order program that would provide a regulatory structure to monitor and ensure that minimum quality standards are not compromised as pecan production increases.

Need for Promotion

The record shows that generic promotion over a wide variety of agricultural products stimulates product demand and translates into higher prices for growers than would have been the case without promotion. Witnesses stated that the expected significant increase in production is one of the primary reasons for implementing a full-scale marketing program, with an emphasis on national generic promotion.

Promotional impact studies of other tree nuts (almonds and walnuts) and of Texas pecans showed that 0 to 3 percent was a representative range of price increases from promotion. Since the other tree nut promotion programs are well-established, the record shows that a middle (most likely) scenario would be a price increase from promotion of 1.5 percent for the early years of a new pecan promotion program. Based on a simulation of historical prices, and applying the 1.5 percent price impact, the projected increases in grower prices from promotion for improved and native/seedling pecans were 6.3 and 3.6 cents per pound, respectively, with a combined average of 5.7 cents. The weighted average was computed using a representative farm allocation of improved versus native/seedling pecans of 78 and 22 percent, respectively.

The record shows that the proposed initial range of assessments per pound is 2 to 3 cents for improved pecans and 1 to 2 cents for native pecans. The midpoints of these ranges (2.5 and 1.5 cents, respectively) are used to compute a cost-benefit ratio from promotion, with a weighted average of 2.3 cents.

Dividing the projected benefit of 5.7 cents per pound by the expected cost of 2.3 cents yields a cost-benefit ratio of approximately 2.5. For each dollar spent on pecan promotion through a Federal marketing order, the U.S. average grower price per pound is expected to increase by $2.50.

Need for Research

Research activities are currently conducted as funding is available by the independent organizations mentioned above with little coordination among projects. Witnesses cited a number of topics for research that would greatly benefit the pecan industry. One key issue was the need for more research on the nutritional and health benefits, such as impacts on cardiovascular disease and cancer. Pecan industry worker safety standards, including protection against dust particles, were also mentioned as topics for research that could be funded by the marketing order. Research topics cited by witnesses also included additional uses for pecans as ingredients, developing new pecan-containing products, understanding consumer trends, and determining the most effective methods to market pecan products. Additional topics cited included crop-related research on tree yields and preventing the spread of the pecan weevil.

Need for Handling Regulation

The relationship among product quality, consumer demand, and grower returns in the pecan industry was explained at the hearing.

Proponents of the proposed order assert that poor quality pecans impact demand and the potential growth of demand for pecans. Characteristics routinely deemed as ''poor quality'' by witnesses testifying at the hearing include dark coloration and rancidity. Witnesses stated that the authority to implement grade and quality regulation under the proposed order would lead to a higher level of consistent, quality product in the market, increased consumer demand, and stabilized grower returns.

Witnesses stated that when poor quality pecans reach certain consumers, they may cease buying pecan products. The way to minimize that outcome is to develop industry-wide minimum standards relating to size, color, rancidity and other characteristics. Improved quality standards and standardization of packaging can lead to higher quality products, with greater consistency, reaching store shelves and industrial (ingredient) users. The resulting increase in consumer confidence is the key to increasing demand as well as increasing and stabilizing grower returns, according to the record.

Stabilizing Grower Prices

Costs of Production

According to the record, farming pecans is a costly investment with a significant delay in benefits and, when mature trees are in production, an unreliable crop yield. To remain economically viable, growers must maintain a level of return per pound harvested that covers their cost of production.

Record evidence indicates that production costs can be divided into three categories: the orchard establishment costs, cultural costs, and administrative costs.

Establishment costs, or the overall cost to develop and maintain an acre of pecans until revenue exceeds growing expenses, are estimated at between $1,938 and $2,560 per acre per year, not including equipment or land costs, with an average tree maturation period of 7 years. The range of establishment costs reflects the differing needs and input costs in the different regions (See Table 1). Establishment costs include the purchase of trees, installation of irrigation systems, and input costs (labor, pest and disease control, etc.) prior to the trees being mature enough to yield a full crop.

Annual per acre cultural costs average between $1,479 and $2,478 per acre per year once the trees are productive. Again, the range in cost reflects differences in regional production environments. Cultural costs include water, labor, fertilizer, pest and disease control, and harvesting expenses incurred on an annual, per acre basis once the orchard has been established and is producing a commercial crop.

For the purpose of this Recommended Decision, administrative costs include equipment financing and insurance. Information gathered from witnesses indicates administrative costs are roughly $20,464 per year for a farm of 30 acres. Not included in this cost estimate is management labor or other related business expenses. Witnesses explained that this estimate would be applicable to orchards having between 30 and 80 acres operating as commercial producer businesses. Orchards of larger acreage would require greater investments in equipment and therefore have greater annual administrative costs.

Witnesses speaking to the varying production costs offered the following figures divided generally between the Carolinas to east Texas and west Texas to California.

TABLE 1—COSTS OF PRODUCTION

Orchard Establishment (not including land)			
Carolinas to East-Texas		West-Texas to California	
Well & Pump	$7,800–$34,000+.*	Well & Pump	$7,800–$34,000+.*
Drip Irrigation	$800/acre.	Irrigation	$75/acre.
Equipment	$513,000.*	Equipment	$513,000.*
Trees	$580/acre.	Trees	$580/acre.
Fertilizer, Pest, Disease, Weed Control.	$287/acre.	Fertilizer, Pest, Disease, Weed Control.	$605–$1055/acre.
Labor, Fuel, Repairs	$271/acre.	Labor, Fuel, Repairs	$336.58/acre.
Sample Total	$1,938/acre + $520,800–>$547,000 Equipment & Well.*	Sample Total	$2,110–$2,560/acre + $520,800–>$547,000 Equipment & Well.*
Cultural Costs (annual/acre)			
Fertilizer, Pest, Disease, Weed Control.	$555–$650/acre.	Fertilizer, Pest, Disease, Weed Control.	$605–$1,055/acre.
		Water	$325–375/acre.
Labor, Fuel, Repairs, Maint	$430/acre.	Labor, Fuel, Repairs	$337.
Hedging	$40–50.	Hedging	$140.
Harvest	$454.	Harvest	$580.
Sample Total	$1,479–$1,584.	Sample Total	$1,987–$2,487.
Administrative Costs ** (annual)			
Equip Interest	$17,955.	Equip Interest	$17,955.
Equip Insurance	$2,507.	Equip Insurance	$2,507.
Sample Total	$20,464.	Sample Total	$20,464.

* Not including interest.
** Not including management pay.

In order to recover these investment costs and annual expenditures, growers need to sell their crop at a price that covers production cost. To understand the extent to which growers have positive revenue, or conversely, are losing money on their pecan operations, Table 2 presents grower prices that can be used to compare grower revenue to grower costs. The table shows the six most recent years of U.S. season average grower price data, which covers both improved and native/seedling pecans for all of the U.S. from 2009 to 2014. The third row is a computation of weighted average price, combining both categories of pecan varieties. As mentioned in the previous section on the *Need for Promotion,* the weighted averages were computed using a representative farm allocation of improved versus native/seedling pecans of 78 and 22 percent, respectively.

TABLE 2—U.S. SEASON AVERAGE GROWER PRICES (2009–2014) AND COMPUTED WEIGHTED PRICES

	2009	2010	2011	2012	2013	2014
Improved *	$1.53	$2.49	$2.59	$1.73	$1.90	$2.12
Native/seedling *	0.93	1.58	1.61	0.88	0.92	0.88
Weighted average of improved and native/seedling prices **	1.40	2.29	2.38	1.54	1.68	1.85

* Price data NASS/USDA.
** Indicates the computed price using weights for improved and native/seedling pecans of 78% and 22%, respectively, which is the acreage allocation of a representative U.S. pecan farm, according to the record.

The weighted average prices also appear in Table 3 below. The purpose of the table is to compare grower revenues and grower costs using alternative scenarios of yields per acre. Witnesses reported that an average yield that represents all states, and both improved and native/seedling varieties, is 1,666.67 pounds per acre. That yield level appears in Table 3 as the middle (most likely) scenario figure of 1,667 pounds. The two alternative scenario yields (1,300 and 2,000 pounds) are approximately 20 percent above and below, respectively, the most likely scenario.

Gross revenue per acre in Table 3 is annual average price for each year multiplied by the three alternative yield levels.

In addition to the three yield levels, Table 3 also presents three alternative levels of grower costs. Analyses of variable costs per acre entered into the record ranged from approximately $1,500 to $2,500, so these levels were used as the low and high variable cost scenarios; the midpoint of that range is included as the middle scenario.

A fixed cost per acre estimate of $600 was also entered into the record. Adding $600 to the three alternative variable costs yields three total cost per acre scenarios: $2,100, $2,600 and $3,100.

With three levels each of yield and total cost of production, Table 3 shows

nine rows of net revenue estimates (gross revenue minus total cost). Positive values mean that growers with pecan farms with the corresponding level of yield and total costs are making money. Negative net revenue per acre means that grower costs exceed grower revenue from the sale of pecans.

The scenarios in Table 3 demonstrate that many pecan growers have faced difficult financial circumstances in four of the last six years. In two years of high prices (2010 and 2011), there was positive net revenue per acre in nearly every scenario, except in the highest cost and lowest yield. During the other four years, however, there are a number of cells with negative net revenue figures. Looking at the most likely yield scenario (1,667 pounds) and the alternative cost levels for the year 2013 provides a useful look at potential farm financial conditions. The 2013 weighted average grower price of $1.68 is close to the average of the most recent three years: $1.69 for 2012 to 2014. With the $2,100 cost scenario, net revenue per acre for 2013 is $707. When the cost rises to $2,600 per acre in the middle scenario, net revenue falls to $207. With costs at $3,100, net revenue per acre turns negative (-$293). Since this example is a ''middle scenario,'' many growers are better off than illustrated by this example, but many are also in worse financial condition.

TABLE 3—GROSS AND NET REVENUE PER ACRE OF PECANS AT ALTERNATIVE U.S. AVERAGE YIELDS, BASED ON WEIGHTED U.S. ANNUAL AVERAGE GROWER PRICES (2009–2014)

	2009	2010	2011	2012	2013	2014
	Dollars per pound					
Price *	$1.40	$2.29	$2.38	$1.54	$1.68	$1.85
Yield ** lbs/acre	Grower Gross Revenue *** at Alternative Yields, $ per Acre					
1,300	1,818	2,977	3,088	2,006	2,190	2,403
1,667	2,331	3,816	3,958	2,571	2,807	3,080
2,000	2,798	4,580	4,750	3,086	3,369	3,696
	(Variable plus fixed costs: $1,500 + $600 = $2,100 Total Cost)					
	2,100	2,100	2,100	2,100	2,100	2,100
	Grower Net Revenue at Alternative Yields, $ per Acre					
1,300	−282	877	988	−94	90	303
1,667	231	1,716	1,858	471	707	980
2,000	698	2,480	2,650	986	1,269	1,596
	(Variable plus fixed costs: $2,000 + $600 = $2,600 Total Cost)					
	2,600	2,600	2,600	2,600	2,600	2,600
	Grower Net Revenue at Alternative Yields, $ per Acre					
1,300	−782	377	488	−594	−410	−197
1,667	−269	1,216	1,358	−29	207	480
2,000	198	1,980	2,150	486	769	1,096
	(Variable plus fixed costs: $2,500 + $600 = $3,100 Total Cost)					
	3,100	3,100	3,100	3,100	3,100	3,100
	Grower Net Revenue at Alternative Yields, $ per Acre					
1,300	−1,282	−123	−12	−1,094	−910	−697
1,667	−769	716	858	−529	−293	−20
2,000	−302	1,480	1,650	−14	269	596

* Weighted averages, combining season average grower prices for improved and native/seedling.

** Based on record evidence, 1,666.67 pounds is a representative estimate of average yield per acre across all states and regions, including improved and native/seedling pecans. The range of alternative yields is approximately 20 percent above and below, rounded to the nearest hundred.

*** Gross Revenue per acre is annual average price multiplied by alternative yields per acre without subtracting costs. Net Revenue is Gross Revenue minus Total Cost. A negative net revenue value means that grower cost exceeds grower revenue from the sale of pecans.

Witnesses pointed out that without an improved, full-scale national marketing program in the face of increased future production, prices would remain volatile, and there could be a number of future years where grower prices will be as low as those experienced in 2012 ($1.54) and in 2009 ($1.40), with corresponding negative net revenue for many growers.

Qualified Grower

''Grower'' should be defined to identify those persons who are eligible to vote for, and serve as, grower members and alternate members of the council and those who are eligible to vote in any referendum. The term should mean any person engaged within the production area in a proprietary capacity in the commercial production of pecans.

Witnesses stated that the minimum size of a commercial grower is 30 acres and a representative average yield across the entire production area is

1,666.67 pounds per acre. This combination of acreage and yield results in a minimum threshold level of commercial production of approximately 50,000 pounds. Witnesses stated that expenditures for the minimum level of inputs required for commercial pecan production cannot be justified for any operation smaller than this. Any smaller operation is considered a ''hobby farmer.''

Given the record evidence outlined above, the term ''grower'' should mean any person engaged within the production area in a proprietary capacity in the production of pecans. ''Proprietary capacity'' would include scenarios in which the grower owns an orchard and harvests its pecans for sale (even if a custom harvester is used) or in which the grower is a lessee of a pecan orchard and has the right to sell the harvest (even if the lessee must remit a percentage of the crop or rent to a lessor). The definition of ''grower'' should also stipulate that, for the purpose of eligibility to participate in grower referenda, in nomination votes, and to serve as Council members, qualified growers should produce a minimum of 50,000 pounds of inshell pecans during a representative period (average of four years) or own a minimum of 30 pecan acres. In measuring acres of native pecan trees, the USDA's Farm Service Agency definition should be used (see Material Issue 5(a)). The proposed Council should also have the authority to recommend changes to this definition subject to the approval of the Secretary. In all cases, the term ''grower'' is synonymous with the term ''producer.''

As a conforming change to the addition of a new § 986.10, Cracks, discussed below, the proposed section number for the definition of ''grower'' has changed from § 986.16 to § 986.17 and is incorporated into the proposed regulatory text of this Recommended Decision.

The record further supports that each business unit (such as a corporation or partnership) should be considered a single grower and should have a single vote in nomination proceedings and referenda. The term ''grower'' should include any person who owns or shares in the ownership of pecans. For example, a person who rents land and produces pecans resulting in that person's ownership of all or part of the pecans produced on that land would be considered a grower.

Also, any person who owns land, which that person does not farm but, as rental for such land, obtains ownership of a portion of the pecans produced thereon, should be regarded as a grower for that portion of the pecans received as rent. The tenant on such land should be regarded as a grower for the remaining portion produced on such land.

A joint venture is one whereby several persons contribute resources to a single endeavor to produce and market a pecan crop. In such venture, one party may be the farmer who contributes one or more factors, such as labor, time, production facilities or cultural skills, and the other party may be a handler who contributes money and cultural, harvesting, and marketing supervision. Normally, a husband and wife operation would be considered a partnership. Any individual, partnership, family enterprise, organization, estate, or other business unit currently engaged in the production of pecans for market would be considered a grower under the proposed order and would be entitled to vote in referenda and council nominations. Each party would have to have title to at least part of the crop produced, electing its disposition, and receiving the proceeds there from. This control would come from owning and farming land producing pecans, payment for farming services performed, or a landlord's share of the crop for the use of the producing land. A landlord who only receives cash for the land would not be eligible to vote. A business unit would be able to cast only one vote regardless of the number and location of its orchards, but each legal entity would be entitled to one vote.

Evidence presented at the hearing supports a Federal marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. In view of the foregoing, and based on the record of the proceeding, it is concluded that current economic and marketing conditions justify a need for a marketing order for pecans. The order would meet many needs of the industry and would tend to effectuate the declared policy of the Act.

Material Issue Number 3—Definition of Pecan and Production Area

Definitions of the terms ''pecan'' and ''production area'' should be included in the order to delineate the commodity and the area that would be regulated under the provisions of the proposed program.

Pecans

According to the record, the term ''pecan'' should be defined to include any and all varieties or subvarieties of the tree Genus: *Carya,* Species: *Illinoensis,* also referred to as *Carya illinoinensis* (syn. *C. illinoenses*). The term ''varieties'' should mean and include all cultivars, classifications, or subdivisions of *Carya illinoinensis.* The record clarifies that trees classified as ''Hicans'' should not be included among the varieties of *Carya illinoinensis.* Instead, the term ''Hican'' refers to a tree resulting from a cross between a pecan and some other type of hickory (also members of the genus Carya) or the nut from such a hybrid tree and the product of that tree. Hican production would not be regulated under the proposed order. As a conforming change to the addition of a new § 986.10, Cracks, discussed below, the proposed section number for the definition of ''pecan'' has changed from § 986.28 to § 986.29 and is incorporated into the proposed regulatory text of this Recommended Decision.

The pecan (*Carya illinoinensis*) is a perennial tree native to North America and produced extensively throughout the southern region of the USA and the northern portion of Mexico. One witness reported that a pecan tree can produce for over 300 years.

Native and Improved Pecans

Record evidence explains that there are two broad categories of pecans: ''native or seedling'' and ''improved.'' Native pecans are pecan varieties that are harvested and sold from non-grafted or naturally propagated trees. Native groves are typically found along rivers and in alluvial bottomlands and are randomly spaced, depending upon soils and topography. Native pecans are grown primarily in the states of Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, and Texas. According to the record, a native tree can take ten to twelve years to produce.

Improved pecans are pecan varieties bred or selected for superior traits of nut size, ease of shelling, production characteristics, and resistance to certain insects and diseases. Improved orchards are intentionally planted trees grafted to rootstock in rows with uniform tree spacing. The NASS definition of improved varieties is ''budded, grafted, or top-worked.'' According to the record, the first grafted trees were sold in the 1880s, followed by growth in the commercial planting of improved varieties in the early 1900s. There are hundreds of pecan varieties around the world which can be classified as native or improved varieties; however, most of the horticulture advances have taken place in commercial orchards producing improved varieties. According to the record, the most common varieties of

improved pecans currently in production include but are not limited to: Desirable, Elliot, Forkert, Sumner, Creek, Excel, Gloria Grande, Kiowa, Moreland, Sioux, Mahan, Mandan, Moneymaker, Morrill, Cunard, Zinner, Byrd, McMillan, Stuart, Pawnee, Eastern and Western Schley, Wichita, Success, Cape Fear, Choctaw, Cheyenne, Lakota, Kanza, Caddo, and Oconee.

Witnesses explained that two additional varieties, the Gracross and the Gratex, should also be included in the list of commonly produced varieties even though they were not included in the proposed language published in the Notice of Hearing. The Board recommended adding both Gracross and Gratex to the list of varieties included in the renumbered § 986.29(a)(2), the proposed classification of improved varieties under the definition of ''pecan.'' This modification has been incorporated into the proposed regulatory text of this Recommended Decision.

While the list of improved varieties proposed to be included into the proposed definition of pecan is non-exhaustive, proponents stated that the introduction of future improved varieties would take considerable time to breed and develop into commercial production. Witnesses did state, however, that the authority to add new varieties to the improved list would be important in order for the definition of pecan to remain current with industry practices.

Witnesses evaluated the production of pecans in the U.S. separately for native and improved varieties. Record evidence indicates that over the past 10 years, production from improved varieties has increased, while the production from the native varieties has remained stagnant. Production from improved varieties was, on average, 225 million pounds per year from 2005 to 2014, representing 81 percent of total production. Native pecan production in the same period was 52 million pounds, which represents 19 percent of total production.

According to USDA data, total U.S.-utilized production of inshell pecans increased 10 percent on average each year from 2005 to 2014. Production of improved varieties increased more than 12 percent, while production of natives increased 8 percent on average over the same ten-year time period.

From 2005 to 2014, prices for improved variety pecans fell four percent on average each year, while prices for native pecans remained relatively stagnant, increasing by less than one percent each year.

On average, U.S. crop value for native and improved varieties of pecans was nearly $464 million per year from 2005 to 2014. Of that total, 88 percent was improved with more than $409 million in crop value, and 12 percent was native with a crop value of almost $55 million. Growth in production of both native and improved varieties from 2005 to 2014 increased total crop value 9 percent on average each year.

Substandard Pecans

A third classification of ''pecan'' is included in proposed § 986.29: Substandard pecans. Witnesses explained that this classification is intended to capture pecans that are identified as being of an inferior quality yet, with further handling, would have market value. Witnesses described some of the inferior traits of substandard pecans to include those that are lightweight or underdeveloped or those whose outer shuck has adhered to the shell.

According to the record, pecans that are underdeveloped and yield smaller nut meats should be defined as ''blowouts.'' This term describes the process of running inshell pecans through forced-air tubes to separate fully developed nuts from underdeveloped nuts. Fully developed nuts are heavier than the underdeveloped nuts. Therefore, the culled underdeveloped nuts ''blow out'' of the air tubes in the process of separation. The term ''blowout'' is defined in proposed § 986.4.

Witnesses further explained that pecans that are presented to the handler with the outer shuck adhered to the shell are also considered inferior due to the additional work required to remove the outer layer. These nuts are commonly referred to as ''stick-tights'' and fetch a lower value than pecans that are free of their outer hull. The proposed definition of ''stick-tight'' as published in the Notice of Hearing was identified as § 986.37. However, as a conforming change to the addition of a new § 986.10, Cracks, described below, the proposed section number for the definition of ''stick-tight'' has changed from § 986.37 to § 986.38 and is incorporated into the proposed regulatory text of this Recommended Decision.

Section 986.9 of the Notice of Hearing included a definition for ''crack or cracks'' that read as follows: ''*Crack* means to break, crack, or otherwise compromise the outer shell of a pecan so as to expose the kernel inside to air outside the shell. *Cracks* refer to an accumulated group or container of pecans that have been cracked in harvesting or handling.'' However, according to record evidence, the terms ''crack'' and ''cracks'' are not used interchangeably. The former is a verb that describes an action taken either accidentally during harvest or purposefully in the handling process. The latter term ''cracks'' refers to a group of pecans that have either been damaged during harvest or have intentionally had their shells opened in the handling process.

Witnesses further explained that cracks that occur naturally or during harvest are considered of lesser value as the outer shell has been compromised and may have resulted in exposure to dirt or insects. For this reason, ''cracks'' are also included in the list of substandard pecan attributes. However, these cracks are different from intentional ''cracks'' produced in a handling facility.

In order to clarify the difference between ''crack'' and ''cracks,'' the Board recommended separating the definition § 986.9 published in the Notice of Hearing into two definitions. This modification has been incorporated into the proposed regulatory text of this Recommended Decision at § 986.9.

Production Area

The term ''production area'' should be defined to mean the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The record shows that the production area defined in the proposed order is the major pecan producing area in the United States. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''production area'' has changed from § 986.30 to § 986.31 and is incorporated into the proposed regulatory text of this Recommended Decision.

Witnesses testifying at the hearing stated that 100 percent of the pecans produced in the United States are grown in the fifteen-state area. Witnesses explained that while pecan trees may be found growing outside of these fifteen states, commercial production from those trees would be highly unlikely. Climate factors would prohibit them from consistently yielding commercially viable crops. For example, pecan trees are found growing as far north as the state of Illinois, but the cooler temperatures in that state compared to the southern U.S. states prevent the trees' production cycle from producing nuts that are commercially viable. The nuts produced would be fewer in volume and yield a smaller meat,

thereby making commercial production less viable.

Regions

The record supports dividing the production area into three regions, where ''region'' would be defined to mean each geographic subdivision of the proposed production area described in the marketing order. The regional delineations would be important for the purposes of Council nominations of grower and sheller Council members who would represent the interests of their geographic peers.

According to the hearing record, the production area should be divided into three regions, each representing roughly one third of total domestic production. These regions are: The *Eastern Region,* consisting of Alabama, Florida, Georgia, North Carolina, South Carolina; the *Central Region,* consisting of Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Texas; and the *Western Region,* consisting of Arizona, California, New Mexico.

Witnesses testifying in support of the proposed regional boundaries and the authority of the Council to propose changes to those boundaries, if approved by the Secretary, noted that the proposed language published in the Notice of Hearing included a reference to ''district.'' As a clarifying change, the Board recommends replacing the word ''district'' with the word ''region'' in the first sentence of paragraph § 986.32(b) so that the terminology is consistent. In addition, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''region'' has changed from § 986.32 to § 986.33 and is incorporated into the proposed regulatory text of this Recommended Decision.

As the data given below indicates, overall production is concentrated in three states, one in each region: Georgia, New Mexico, and Texas, with 32 percent, 22 percent and 18 percent of the total U.S. production of pecans, respectively. A similar distribution of shares of production holds for improved variety pecans. Improved varieties are produced in all three regions.

As previously mentioned, total production is relatively evenly distributed across the three regions of the production area. The Eastern Region produces 36 percent of the nation's pecans, while the Central and Western Regions produce 32 and 31 percent, respectively. All three regions produce improved varieties of pecans, with 40 percent coming from the Eastern Region, 39 percent from the Western Region, and 21 percent from the Central Region. As already noted, three states—one from each region—produce the highest volume of improved pecans. They are Georgia, New Mexico, and Texas with 36 percent, 28 percent, and 17 percent, respectively, of the total improved variety production.

Native variety production only occurs in the Central and Eastern Regions, however. The Central Region produces 81 percent of total native variety volume in the U.S., while the East produces 19 percent. The states of Oklahoma, Texas, and Louisiana in the Central Region together make up 72 percent of total native production. In the Eastern Region, Georgia produces 14 percent of the U.S. native crop.

As stated earlier, improved varieties represent 88 percent of total crop value, and natives represent 12 percent. Crop value is divided fairly evenly among the three regions of the production area. The Eastern and Western Regions each represent 36 percent of total crop value, with the remaining 28 percent in the Central Region. Of improved variety crop value, the Western Region, Eastern Region, and Central Region represent 41, 38, and 21 percent, respectively. Together, Georgia, New Mexico, and Texas make up 81 percent of total crop value of improved varieties. Crop value of native varieties is concentrated in the Central Region, particularly in Texas, Oklahoma, and Louisiana with 26, 25, and 17 percent, respectively. Georgia, in the Eastern Region, represents 16 percent of native variety crop value as well.

According to the record, farm sizes also differ by region. Evidence entered into the record indicates that less than 30 percent of the reported farms in the proposed production area have less than 50 acres under production. In the Central and Western regions, almost half of the farms have between 50 and 499 acres under production, but less than 30 percent of the farms are this size in the East. The very large farms of 500 acres or more represent 23 percent, 28 percent and 44 percent of the acreage in the Central, Western, and Eastern regions, respectively, showing a higher concentration of large producers in the Eastern region.

Witnesses testifying to regional differences in farm operations across the proposed production area stated that generally, in the Eastern Region and the eastern part of the Central Region, trees are planted at a range of 20 to 40 per acre. This is less dense than the 30 to 50 trees per acre found in the western part of the Central Region and the Western Region.

Horticultural practices also differ from east to west. Generally, in the Eastern Region and eastern part of the Central Region, insect and fungicide management are required while irrigation water is supplemental. In the Western Region and western part of the Central Region, pest management is less of a factor. Instead of irrigation many Western orchards use ''flooding'' by diverting nearby rivers or streams.

The record shows that dividing the production area into the three above-described regions would provide for adequate grower representation on the Council.

Allocation of grower membership among the regions would be based, in large part, on the relative levels of acreage and production among the regions, as well as the number of growers in each of the regions. Furthermore, the regional allocation identifies three distinct areas having unique combinations of farm size and distribution, cultural practices, and production challenges. By allocating membership representation on the proposed Council by region, future grower and sheller members will be able to represent the individual concerns of their area and peers. Allocation of grower membership among the regions is discussed further under material issue 5(b).

Reapportionment and Redefining of Regions

Testimony indicated that authority should be provided to allow the Council to recommend to USDA the redefining of regional boundaries and reapportionment of grower and sheller membership among the regions. This would allow changes in grower and sheller representation on the Council to reflect any future shifts in pecan acreage and production within the production area.

For these reasons, witnesses testified in support of including the authority to reestablish regional boundaries as part of the proposed program. Any changes to the regions would require a recommendation of the Council, and approval by USDA through the rulemaking process. Authority for reallocation of grower and sheller membership among the regions is included in the proposal. This authority would allow the Council to recommend changes to regional representation in the number of members if production were no longer equally distributed among regions and regional boundaries were not changed. Both the authority for redefining of regions and reallocation were supported by witnesses explaining the need for the proposed order to have the flexibility to accommodate future changes in the industry.

Section 986.59 was entitled ''reapportionment and redistricting'' in the regulatory text of the Notice of Hearing. USDA recommends modifying the section heading for § 986.58 by removing the term ''redistricting'' and replacing it with ''redefining of regions.'' This modification reflects the usage of the term ''region'' throughout the proposed regulatory text, and the absence of the term ''district.'' This modification has been included in the proposed regulatory text of this Recommended Decision.

Smallest Practicable Area

The Act requires that marketing orders be limited in their application to the smallest regional production area found practicable. For the reasons given above, including the movement of pecans between growers and handlers of different regions and the interdependency of pecan prices among the states included in the proposed production area, it is concluded that the proposed production area meets the smallest practicable area requirement of the Act. A production area covering pecans grown in the states of Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas under the proposed order is consistent with carrying out the declared policy of the Act and, therefore, should be defined as hereinafter set forth.

Material Issue Number 4—Definition of Handler and Handle

The term ''handler'' should be defined to identify the persons who would be subject to regulation under the order. Such term should apply to any person who handles pecans within the production area or places pecans in the current of commerce within the production area or in the current of commerce between the production area and any point outside thereof. A handler could be an individual, a joint venture, partnership, corporation, or other business entity.

This term is further defined in the proposed order as the person who would be responsible for paying assessments and submitting reports and other information required for the administration of the proposed program. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''handler'' has changed from § 986.18 to § 986.19 and is incorporated into the proposed regulatory text of this Recommended Decision.

The term ''handle'' should be defined in the order to establish the specific functions that would place pecans in the current of commerce within the production area, or between the production area and any point outside thereof, and to provide a basis for determining which functions are subject to regulation under the authority of the proposed marketing order.

According to the record, ''handle'' should be defined to mean: To receive, shell, crack, accumulate, warehouse, roast, pack, sell, consign, transport, export, or ship (except as a common or contract carrier of pecans owned by another person), or in any other way to put inshell or shelled pecans into any and all markets in the stream of commerce either within the area of production or from such area to any point outside thereof. Again, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''handle'' has changed from § 986.19 to § 986.20 and is incorporated into the proposed regulatory text of this Recommended Decision.

Witness testimony generally describes the handling process as beginning with the receipt of inshell pecans that have been harvested either by the grower or by a custom harvester on the grower's behalf. Receipt of pecans can be at a handler's facility or at an accumulator's collection point. ''Accumulator,'' defined as a person who compiles inshell pecans from other persons for the purpose of resale or transfer, often operates as a collection point for smaller volumes of pecans being delivered on an ad hoc basis. These deliveries can be from smaller producers, individuals with producing pecan trees in their yard, or from individuals that collect pecans from untended orchards. Accumulators typically accrue these smaller deliveries to compile into larger lots for sale to larger handlers, including shelling facilities and exporters. The term ''accumulator'' is defined in proposed § 986.1 of this order.

According to the record, commercial growers generally sell their product directly to handlers, including shellers. In this scenario, pecans can either be cleaned by the grower prior to delivery or cleaned by the handler after receipt. If a grower operation is large enough to cover the cost of operating cleaning equipment, the harvest will be cleared of debris and substandard pecans to determine volumes of improved and native pecans prior to transfer to a handler for sale. The sale of pre-cleaned pecans is referred to as ''grower-cleaned production'' in the proposed order. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''grower-cleaned production'' has changed from § 986.17 to § 986.18 and is incorporated into the proposed regulatory text of this Recommended Decision.

Alternatively, ''handler-cleaned production'' is production that is received, purchased or consigned from a grower by a handler prior to processing through a cleaning plant. Once received by the handler, the pecans are processed through a cleaning plant so as to determine volumes of improved pecans, native and seedling pecans, and substandard pecans. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''handler-cleaned production'' has changed from § 986.21 to § 986.22 and is incorporated into the proposed regulatory text of this Recommended Decision.

According to the record, shelling is an important handling activity as it provides the consumer and the ingredient industry with a readily-useable pecan product. As such, the term ''sheller'' should be defined as a person or business that converts inshell pecans to shelled pecans for the purpose of placing shelled pecans, or ''pecan meats,'' into the stream of commerce.

As discussed in Material Issue 5b, ''sheller'' should also be defined as those persons who are eligible to vote for, and serve as, sheller members and alternate members on the Council. In order to fulfill the eligibility requirements of a sheller member, witnesses stated that the term ''sheller'' should only include those who shell more than 1 million pounds of inshell pecans in a fiscal year. Witnesses explained that the proposed 1 million pound threshold delineates a commercial shelling operation from smaller operations used for personal use or by a larger grower that also shells. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''sheller'' has changed from § 986.35 to § 986.36 and is incorporated into the proposed regulatory text of this Recommended Decision.

The proposed order also includes proposed definitions for inshell and shelled pecans. These definitions were identified as § 986.23 and § 986.36, respectively, in the Notice of Hearing. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section numbers for these definitions are changed to § 986.24 and § 986.37, respectively. These changes are incorporated into the proposed

regulatory text of this Recommended Decision.

As discussed in Material Issue 5(e) below, the proposed order would include the authority for the Council to recommend handling regulation. If the order were implemented and handling regulation effectuated, all pecans grown and handled within the proposed production area would be subject to mandatory compliance. According to the record, pecans subject to handling regulation would be referred to as ''merchantable pecans'' or pecans meeting the minimum grade requirements implemented under proposed § 983.69. Witnesses explained that minimum grade requirements could be implemented for both inshell and shelled pecans. The proposed definition for merchantable pecans was identified as § 986.26 in the Notice of Hearing. However, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''merchantable pecans'' has changed from § 986.26 to § 986.27 and is incorporated into the proposed regulatory text of this Recommended Decision.

In further discussing the need for the proposed definition of ''merchantable pecans,'' witnesses explained the need for accurate industry data. As further discussed in Material Issue 5(f), the proposed order includes handler reporting provisions for handler receipts, inventory, and merchantable pecans, among other information. This data would allow the Council to calculate production and supply of pecans in the market. However, in order to arrive at an accurate calculation of the above, witnesses explained the need to capture the loss of pecan volume between the volume of cleaned pecans and those meeting any regulation in effect. Witnesses referred to this loss of volume as ''disappearance'' and recommended that the term be defined.

As defined in § 986.12 of the Notice of Hearing, the term disappearance means ''the difference between the sum of grower-cleaned production and handler-cleaned production'' and the sum of ''merchantable pecans and merchantable equivalent of shelled pecans.'' Witnesses clarified that in the absence of handling regulation, disappearance would be zero.

Record evidence also indicates that the calculation of ''disappearance'' should be on an inshell basis. The phrase ''merchantable equivalent of shelled pecans'' at the end of this proposed definition is unclear given the proposed definition of ''merchantable'' does not factor in equivalency between inshell and shelled. USDA recommends further modifying the definition of ''disappearance'' by replacing the phrase ''the sum of available supply of merchantable pecans and merchantable equivalent of shelled pecans'' with ''the sum of inshell and shelled merchantable pecans reported on an inshell weight basis.'' This modification has been incorporated into the proposed regulatory text of this Recommended Decision. Also, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of disappearance has changed from § 986.12 to § 986.13 and is incorporated into the proposed regulatory text of this Recommended Decision.

According to the record, the term ''pack'' should be included as a handling activity and should be defined to mean clean, grade, or otherwise prepare pecans for market as inshell or shelled pecans. Witnesses explained that this term is often used as a general reference to handling activities. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of pack has changed from § 986.27 to § 986.28 and is incorporated into the proposed regulatory text of this Recommended Decision.

Record evidence indicates that pecans are customarily traded among handlers. As further discussed in Material Issue 5(c), trade among handlers predominantly occurs as a means for individual handlers to buy or sell pecans to meet the specific needs of their respective customers. Witnesses also explained that some handlers are better equipped than others to handle pecans that require additional work, such as substandard pecans or pecans that require shelling or roasting.

According to the record, ''inter-handler transfer'' should be defined to mean the movement of inshell pecans from one handler to another inside the proposed production area for the purpose of additional handling. Witnesses further clarified that if pecans are transferred from one handler to another, any assessments due or compliance with any handling requirement that may be in effect under the proposed order could be assumed by the receiving handler.

The proposed definition of ''inter-handler transfer'' was published as § 986.25 in the Notice of Hearing. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''inter-handler transfer'' has changed to § 986.26 and is incorporated into the proposed regulatory text of this Recommended Decision.

The record shows that all of these activities, from initial receipt of the pecans at the handling facility, to final packaging of the product, should be included in the definition of ''handle.'' These activities were identified as those necessary to prepare pecans for entering the stream of commerce and, as such, should be included in the definition of the process that makes a person a ''handler'' and, thus, subject to regulation under the proposed order.

In addition, the hearing record indicates that placing pecans into the current of commerce from within the production area to points outside thereof for the purpose of hulling and drying, further processing, or exporting would also constitute handling. In such cases, the individual responsible for placing pecans into the current of commerce, even if it is initially the grower, would be considered a handler and would be subject to the provisions of the proposed order.

Material Issue Number 5(a)—Other Definitions

Certain terms should be defined for the purpose of specifically designating their applicability and limitations whenever they are used in the order. According to the record, these include the following:

''Act'' should be defined as the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.. 601–674). This is the statute under which the proposed regulatory program would be operative, and this definition avoids the need to refer to the citation throughout the order.

According to record evidence, ''affiliation'' should be defined, as it is important within the context of proposed eligibility requirements for Council members and their alternates. Witnesses explained that ''affiliation'' should be defined to mean a person who is: A grower or handler that directly, or indirectly through one or more intermediaries, owns or controls, or is controlled by, or is under common control with the grower or handler specified; or a grower or handler that directly, or indirectly through one or more intermediaries, is connected in a proprietary capacity, or shares the ownership or control of the specified grower or handler with one or more other growers or handlers. According to the hearing record, the term ''control'' should be further defined to mean ''the possession, direct or indirect, of the power to direct or cause the direction of the management of policies of a handler or a grower whether through voting securities, membership in a cooperative, by contract or otherwise.''

Witnesses explained that this definition of ''affiliation'' is proposed to ensure that persons who are in business together as handlers or growers are limited in their representation on the administrative Council. The record evidence is that the membership of the Council should be representative of the industry as a whole. No one group of people who share common business interests should be able to gain control of Council decision making. To accomplish this goal, the order should limit the number of positions the members of any one affiliated group could hold.

The term ''affiliation'' should be defined broadly so that it encompasses the many different relationships through which people have common business interests.

Witnesses at the hearing gave several examples to illustrate their view of how this limitation on Council membership should work. In the case of a corporate handler, all of its shareholders should be considered an affiliated group because they would be connected in a proprietary capacity and share in the ownership and control of the corporate handler. In this scenario, the shareholders and employees of the corporation would be limited to one handler member on the Council; they could not hold both handler positions. If the corporation was also a pecan grower, a grower member could also represent the affiliated group. In no case could more than two Council members represent that affiliated group.

According to the record, the term ''to certify'' means the issuance of a certification of inspection of pecans by the inspection service. Witness testimony explained that this term would be relevant in the context of grade, size, or quality regulation that may become effective under the proposed order and the need for handlers to have their product inspected as to meeting those requirements. If regulation were implemented, inspection and certification would be required of handlers handling product grown within the production area. This term is revisited under the discussion of Material Issue 5(e).

''Confidential data or information'' should be defined to mean reports and records furnished or submitted by handlers to the Council which include data or information constituting trade secrets or disclosing the trade position, financial condition, or business operations of a particular handler or its customers. This term is relevant to proposed § 986.81 pertaining to disclosure of handler information. The confidentiality requirements in that provision of the order, discussed under Material Issue 5(f), are consistent with those contained in the Act.

According to the record, ''container'' should be defined to include a box, bag, crate, carton, package (including retail packaging), or any other type of receptacle used in the packaging or handling of pecans. Witness testimony explained that this term would become relevant in the context of pack and container regulation that may become effective under the proposed order. Witnesses discussed the potential need to standardize consumer packaging or bulk, wholesale containers for pecans. Standardized bulk or wholesale containers would provide for consistency and ease of wholesale price comparison between handlers. Consumer packaging could also become standardized to include improved packing material developed to prolong freshness or pecan quality.

''Council'' should be defined to mean the administrative Council, which would be established pursuant to the proposed provisions of § 986.45. The Act authorizes USDA to appoint an agency or agencies to assist in the administration of a marketing order program. This definition would identify the agency to locally administer the proposed pecan order. The Council would be comprised of nine pecan growers, six shellers, one at-large accumulator member, and one public member. The establishment of a Council would be important to ensure representation of the industry and consumers to USDA.

''Department'' or ''USDA'' should be defined to mean the United States Department of Agriculture, which is the governmental body responsible for oversight of Federal marketing orders and agreements. This definition allows the usage of the USDA acronym or reference to the USDA as the Department throughout the language of the proposed order. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''Department'' or ''USDA'' has changed from § 986.11 to § 986.12 and is incorporated into the proposed regulatory text of this Recommended Decision.

Farm Service Agency should be defined to mean that agency of the USDA. This definition also allows the usage of the FSA acronym throughout the language of the proposed order. The FSA is important in the context of the term ''pecan acres,'' as identified in newly numerated § 986.17, as it is the USDA agency responsible for defining appropriate definitions of pecan acres for native pecan orchards that do not organize their pecan trees in intentional rows. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''Farm Service Agency'' has changed from § 986.13 to § 986.14 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Fiscal year'' should be defined to mean the period beginning on October 1 and ending on September 30 of each year or such other period as may be recommended by the Council and approved by the Department. This period starts roughly one month prior to the beginning of the harvest season for pecans and would prescribe the period of conduct for the Council's administrative activities, such as preparing an annual budget of expenses and accounting for receipts and expenditures of funds. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''fiscal year'' has changed from § 986.14 to § 986.15 and is incorporated into the proposed regulatory text of this Recommended Decision.

According to the record, ''grade and size'' means the official grades of pecans and the official sizes of pecans as set forth in the United States Standards for Grades of Pecans in the Shell (1976) and United Stated Standards for Shelled Pecans (1969). Moreover, grade and size could refer to any future regulation recommended by the Council and approved by the Secretary. Witnesses explained that the authority to recommend such regulation under the proposed order would be important in updating the current U.S. grade standards. The U.S. grade standards were established in the late 1960s and early 1970s and are no longer reflective of grade and size terms currently used by the pecan industry. This authority to recommend grade and size regulation is further discussed in Material Issue 5(e). As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''grade and size'' has changed from § 986.15 to § 986.16 and is incorporated into the proposed regulatory text of this Recommended Decision.

The term ''handler inventory'' should mean all pecans, shelled or inshell, as of any date and wherever located within the production area, held and owned by a handler. Witnesses explained that collecting data regarding handler inventory, especially at the end of a fiscal year, is important to the industry's ability to assess the total amount of pecans available in the market. Handler

inventory, which was also referred to as ''carry-in inventory'' by some witnesses, refers to handler-warehoused pecans from one fiscal year into the next. Data on handler inventory is essential to the industry's ability to estimate prices for the upcoming crop. Witnesses stated that, out of all data, the lack of accurate handler inventory data is detrimental to understanding market trends within the pecan industry. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''handler inventory'' has changed from § 986.20 to § 986.21 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Inspection service'' should be defined to mean any inspection service authorized or approved by the USDA to inspect pecans. This term would be used in connection with any mandatory grade, size, or quality requirements that may be implemented under the proposed order. The inspection service would be responsible for inspecting and certifying that pecans meet the requirements of the order.

The record shows that the Federal or Federal-State Inspection Service would be designated as the agency responsible for conducting these activities. However, to provide maximum flexibility, the order should provide that any inspection service so authorized or approved by the Department may perform these functions. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''inspection service'' has changed from § 986.24 to § 986.25 and is incorporated into the proposed regulatory text of this Recommended Decision.

According to record evidence ''person'' should be defined to mean an individual, partnership, corporation, trust, association, or any other business unit. This definition is consistent with the definition contained in the Act. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''person'' has changed from § 986.29 to § 986.30 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Proprietary capacity'' should be defined to mean the capacity or interest of a grower or handler that, either directly or through an intermediary, is a property owner together with the rights of an owner, including the right to vote the interest in that capacity as an individual, shareholder, member of a cooperative, partner, trustee, or in any other capacity with respect to any other business unit. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''proprietary capacity'' has changed from § 986.31 to § 986.32 and is incorporated into the proposed regulatory text of this Recommended Decision.

Witnesses explained that this term is important to the proposed order and its provisions in that this language would make persons who are sharing ownership of a common business entity ''affiliated'' (see previous definition) for purposes of eligibility to serve on the Council. The term ''proprietary capacity'' is intended to imply ownership of a business as compared to an employee status only.

According to the record, the term ''representative period'' should mean the previous four fiscal years for which a grower's annual average production is calculated. This term is relevant in the context of determining a grower's eligibility to participate in a grower referendum or to qualify as eligible to sit as a member or alternate member on the Council. Because of the cyclical production and yield nature endemic to pecans, proponents of the order stated that the average of four years of production data would be necessary in order to appropriately determine a grower's production yield. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''representative period'' has changed from § 986.33 to § 986.34 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Secretary'' means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be, authorized to act in the Secretary's stead. The term includes any other officer or employee of the United States Department of Agriculture who has been delegated or who may be delegated the authority to act on behalf of the Secretary. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''Secretary'' has changed from § 986.34 to § 986.35 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Trade supply'' should mean the quantity of merchantable inshell or shelled pecans that growers will supply to handlers during a fiscal year for sale in the United States and abroad. Witnesses clarified that, in the absence of § 986.69, setting forth minimum grade regulation for merchantable pecans, trade supply should be the sum of handler-cleaned production and grower-cleaned production. A revision to the definition of ''trade supply'' as published in the Notice of Hearing to include the above language was proposed by the Board. This change is reflected in the proposed order language included in this Recommended Decision. Moreover, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''trade supply'' has changed from § 986.38 to § 986.39 and is also incorporated into the proposed regulatory text of this Recommended Decision.

''Unassessed inventory'' should mean inshell pecans held by growers or handlers for which no assessment has been paid to the Council. Witness testimony explained that this term is necessary in the context of both assessment collection and reporting requirements. As discussed under Material Issue 5(c), unassessed pecan inventory could be warehoused (defined below) by either a grower or a handler. If unassessed inventory is warehoused by a handler, on August 31 of any given fiscal year that inventory would be subject to assessment. This provision would allow for accurate recordkeeping and timely assessment collection for that fiscal year. If unassessed inventory is warehoused by a grower, that inventory would be assessed upon its receipt by a handler and would not be eligible to be transferred to a subsequent handler through an inter-handler transfer. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''unassessed inventory'' has changed from § 986.39 to § 986.40 and is incorporated into the proposed regulatory text of this Recommended Decision.

As discussed above, ''warehousing'' means to hold unassessed inventory. According to witness testimony, both growers and handlers may decide to hold inventory in storage rather than place product on the market. Witnesses explained that this practice is common when market prices are unstable immediately after harvest. By holding inventory until later in the season, a grower or handler may benefit from a more stable market or an increased market price due to perceived supply shortages.

Witnesses also explained that warehoused inventory could refer to either assessed or unassessed inventory. A revision to the definition of ''warehousing'' as published in the Notice of Hearing to include assessed inventory was proposed by the Board. This change is reflected in the proposed

order language included in this Recommended Decision. Moreover, as a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''warehousing'' has changed from § from 986.41 to § 986.42 and is incorporated into the proposed regulatory text of this Recommended Decision.

''Weight'' means pounds of inshell pecans, received by handler within each fiscal year. To convert the weight of shelled or kernel pecans into an equivalent inshell weight, the kernel weight would be multiplied by two. According to the record, the term weight would be used in the context of assessments, which would be calculated on the inshell weight handled by handlers. As a conforming change to the addition of a new § 986.10, Cracks, the proposed section number for the definition of ''weight'' has changed from § 986.42 to § 986.43 and is incorporated into the proposed regulatory text of this Recommended Decision.

Material Issue Number 5(b)—Administrative Council

Pursuant to the Act, it is necessary to establish an agency to locally administer the order and to provide for effective and efficient function of its operation. The establishment and membership of an administrative Council is addressed in §§ 986.45 and 986.46 of the proposed order.

The hearing record shows that the Council should consist of 17 members. Nine members should be growers, six members should be shellers, one member should be an at-large accumulator, and one member should be selected from the general public. Each member should have an alternate member who, possessing the same qualifications as the member, could serve in that member's place and stead in the event that the Council member could not fulfill his or her duties. Grower and sheller members and their alternates would be selected by the Secretary from nominees submitted by the Council. The two at-large seats would be nominated by the Council and appointed by the Secretary.

Allocation of Membership

For the purpose of grower and sheller representation, the proposed order provides that the production area be divided into three regions (see Material Issue 3). The record indicates that grower representation from each region should be based, in large part, on the relative volume of production in each region. As such, witnesses testifying to the establishment of the administrative Council stated that each region should be allocated three grower seats and two sheller seats to represent the interests and needs of their respective region. This allocation equally distributes grower and sheller representation among the three proposed regions.

Witnesses explained further that grower and sheller seats should be allocated such that small business entities are given the opportunity to represent their unique perspective within each region. To achieve this, witnesses explained that each region should have two grower seats allocated to growers whose acreage is equal to or exceeds 176 pecan acres. These seats should be referred to as Seat 1 and Seat 2. Each region should also have a grower Seat 3 allocated to a grower whose acreage does not exceed 176 pecan acres. Witnesses explained that the 175 acre threshold is intended to delineate grower operations that are comparatively small to those above the threshold.

It is important to note that the order language included in the Notice of Hearing defined grower Seat 3 as growers whose acreage does not exceed 175 pecan acres. Witnesses pointed out that this language left a gap in the seat definition for growers whose acreage fell between 175 and 176 acres. For example, would a grower who had 175.5 acres be eligible to serve in grower Seats 1 and 2, or would he or she be eligible for grower Seat 3? To correct this oversight, the Board recommended changing the definition of grower Seat 3 to include growers whose acreage is less than 176 acres. This revision has been incorporated into the proposed order language of this Recommended Decision.

To accommodate the smaller sheller operations, witnesses explained that each region should have one sheller seat (Seat 1) allocated to a sheller who handles more than 12.5 million pounds of inshell pecans and a second seat (Seat 2) allocated to a sheller who handles less than or equal to 12.5 million pounds of inshell pecans.

According to the record, grower and sheller nominees and their alternates must be growers and shellers at the time of their nomination and must remain so for the duration of their tenure. If a member ceases to satisfy this requirement, he or she would be subject to the proposed terms of the eligibility and vacancy requirements under sections 986.48 and 986.51, discussed below.

Council Nominations and Voting for Nominees

In order for the proposed Council to function, a mechanism is required by which members and alternate members would be nominated by their peers and selected and appointed by the Secretary. Nomination procedures are set forth in the proposed provisions of § 986.46.

Initial Council

The proposed order provides that USDA would conduct nominations for initial grower and sheller members of the Council. It also states that the first nominees must meet the same qualifications as required for their successors. USDA would conduct the initial nominations of grower and sheller members and alternates only. The initial public member and alternate would be nominated by the industry members of the Council, as described later in this document.

According to witness testimony, initial grower and sheller member nominations could be made either at industry meetings, by mail, or by email. Names of nominees would be submitted to USDA for inclusion on the nomination ballot on approved nomination forms. Witnesses explained that approved forms should include: The name of the nominated grower or sheller; the name and signature of the nominating grower or sheller; and two additional names and respective signatures of growers in support of the nomination or, in the case of a sheller nomination, one additional signature of a sheller. The names of additional supporters of the nominee are intended to ensure that any candidates put forward for consideration have a base of support prior to the nomination vote. In addition to this information, subject to the approval of the Secretary, the Council could require more information.

Sample nomination forms, along with all of the other requisite forms needed for nomination and selection of the first Council, were submitted as evidence into the record for USDA consideration. These forms are further discussed under the Paperwork Reduction Act section of this Recommended Decision.

While the Department would have discretion in determining a reasonable process to conduct initial Council nominations, witnesses stated that it would be preferable that the procedures provided in proposed § 986.46(b) for identifying member and alternate nominees, casting nomination ballots, and the accounting thereof, be followed. Paragraph (b) of § 986.46, which outlines the procedures for successor Councils, is discussed below.

Successor Councils

The record evidence indicates that the Council staff should conduct subsequent nominations for grower and

sheller members of the Council. At the end of the first four-year term of the initial Council and in the nomination and selection of the second Council only, roughly half of the Council seats would be eligible for terms of two years while the remaining would be eligible for four years. Proponents of the order recommended this provision so that Council membership terms would be staggered. These witnesses stated that staggered terms would prevent the Council from potentially having a membership full of individuals unfamiliar with the working of the program. To initiate the staggered terms, § 986.50(a) proposes that member and alternate seats assigned two-year terms for the seating of the second Council only shall be as follows:

(1) Grower member Seat 2 in all regions shall be assigned a two-year term;

(2) Grower member Seat 3 in all regions shall, by drawing, identify one member seat to be assigned a two-year term; and,

(3) Sheller Seat 2 in all regions shall be assigned a two-year term.

The record evidence shows that grower and sheller member nominations for the Council would entail several steps.

The first step would be a call for nominations. As mentioned above, names of nominees would be submitted to the Council for inclusion on the nomination ballot on approved nomination forms. If a grower or a sheller is engaged in business in more than one region, that grower or sheller would be nominated in the region in which they conduct the largest volume of their business. Witnesses explained that this requirement would ensure that peer growers and shellers are nominating individuals that represent the region in which the grower or sheller is most heavily vested. This would also prevent grower or sheller businesses from using their voting to influence Council representation in regions where they have relatively small portions of their business.

The next step in the Council establishment process would be the placement of nominees on the nomination ballot and the voting for nominees by peers.

Grower Nominees

Witnesses explained that individuals seeking candidacy for nomination to a grower seat would be required to designate the region in which they seek nomination and substantiate their qualification as a grower, or designated representative of a grower, in that region. However, testimony also clarified that the order would not require that the candidate be a resident of that region. Witnesses explained that it would not be reasonable to impose such a requirement since not all growers live in the same region in which they produce pecans. Such a residency requirement would, therefore, preclude a number of pecan growers from being able to serve on the Council.

Record evidence states that only growers would be qualified to serve as grower members and to participate in the nomination of grower members and their alternates. A grower can be a corporation, partnership, limited liability company, trust or other legal entity, as well as a sole proprietorship owned by an individual. Owners of pecan orchards could designate an officer or employee to seek membership and to cast the votes on their behalf. As proposed, officers and employees would not include professional farm managers who perform farm management services for a number of different growers without being an employee or an officer of the grower. The intent is to limit those eligible to serve as grower members to persons who are involved, either as a grower with a proprietary interest in the pecan industry or an employee working in the industry for a grower.

Once nominee candidates are identified as being eligible, the Council would mail nomination information to all growers who are on record with the Council. Nomination information would include official nomination ballots indicating the nominees for each of the three grower member seats in that region, along with voting instructions. Growers would then cast ballots at either meetings of growers, by mail, or by email, as designated by the Council.

On the ballot, growers would indicate their nomination for the grower seats and also indicate their average annual volume of inshell pecan production for the preceding four fiscal years.

Each grower would be entitled to cast one vote, either in person or through an authorized officer or employee, for each grower member position to be filled in his or her region. A grower would only be able to cast his or her vote in the region in which that grower produces pecans. If the grower were engaged in producing pecans in more than one region, then the grower would need to select a region in which to participate as a nominee and/or as a voter. As discussed above, record evidence shows that the grower would cast his or her ballot in the region in which that grower grows the largest volume of his or her production. A grower would not be allowed to vote for nominee candidates in more than one region.

Grower nominee voting instructions would direct voters to identify candidates to fill the designated grower Seats 1, 2 and 3. Ballots for grower Seat 1 would be counted based on the volume of production represented in the ballots cast. The nominee candidate for this seat in each region would be the grower receiving the highest volume of production votes. The grower receiving the second highest volume of production votes would be the alternate member nominee for this seat. In case of a tie vote, the nominee would be selected by a drawing.

Grower nominees for Seats 2 and 3 receiving the highest number of votes would be designated nominees for their respective region. Alternates for each nominee would be the candidates receiving the second highest number of votes in the same region. In the case of a tie, witnesses recommended that final nominees and their alternates be selected by a drawing.

The order language published in the Notice of Hearing did not specify whether or not the volume of production would be calculated on an inshell or shelled weight basis. Witnesses explained that a grower's volume of production should be reported and calculated on an inshell basis. The Board recommended adding the phrase in parenthesis ''(pounds of inshell pecans)'' to the first full sentence of § 986.46(b)(3)(iii) to clarify that volume should be calculated as such. This clarification has been incorporated into the proposed order language included in the Recommended Decision.

Witnesses explained that both grower Seats 1 and 2 are designated to growers with equal to or more than 176 acres of pecans. By assigning one seat (Seat 1) to be voted upon by volume and the other seat (Seat 2) to be voted upon by number of ballots cast, two different perspectives would be represented. According to the record, the volume weighted vote would likely represent the larger grower business of the two seats, and the ballot vote would likely represent a mid-to-large grower.

Sheller Nominees

The nomination procedure for sheller seats on the Council would be conducted similarly to the grower seat nominations. Individuals seeking candidacy for nomination to a sheller seat would be required to designate the region in which they seek election and substantiate their qualification as a sheller, or designated representative of a sheller, in that region. However, as

mentioned above, testimony also clarified that the order would not require that the candidate be a resident of that region.

Record evidence states that only shellers would be qualified to serve as sheller members and to participate in the nomination of sheller members and their alternates. Shellers can be corporations, partnerships, limited liability companies, trusts or other legal entities, as well as sole proprietorships owned by individuals. The owners of pecan shelling operations could designate an officer or employee to seek membership and to cast votes on their behalf.

Once nominee candidates are identified as being eligible to serve in either sheller Seat 1 or 2, the Council would mail nomination information to all shellers who are on record with the Council. Nomination information would include official nomination ballots indicating the nominees for each of the two sheller member seats in that region, along with voting instructions. Shellers would then cast ballots at either a meeting of shellers by mail, or by email, as designated by the Council.

Each sheller would be entitled to cast one vote, either in person or through an authorized officer or employee, for each sheller member position to be filled in his or her region. A sheller would only be able to cast his or her vote in the region in which that sheller conducts their business. If the sheller were engaged in shelling pecans in more than one region, then the sheller would need to cast their ballot in the region in which he or she shelled the largest volume of pecans in the preceding fiscal year. A sheller would not be allowed to vote for nominee candidates in more than one region.

Sheller nominee voting instructions would direct voters to identify candidates to fill the designated sheller Seats 1 and 2. The sheller nominees receiving the highest number of votes would be designated nominees for their respective region. Alternates for each nominee would be the candidates receiving the second highest number of votes in the same region. In the case of a tie, final nominees and their alternates would be selected by a drawing.

Members of the Council, at the time of their selection and during their term of office, must be pecan growers or shellers or officers or employees of a grower or handler. If that relationship should terminate during the member's or alternate's term on the Council, that person would become disqualified from further serving, and the position would be deemed vacant.

At-large Member Nominees

According to the record, once the grower and sheller members of the Council are selected and appointed by the Secretary, the Council would identify nominees for a public member and an accumulator member, plus respective alternates. These provisions are proposed under § 986.46(b)(6). The public member and alternate public member may not have any financial interest, individually or corporately, or be affiliated with persons vested in the pecan industry. The accumulator member and alternate accumulator member must meet the criteria set forth in § 986.1, Accumulator, and may reside or maintain a place of business in any region.

Witnesses explained that industry Council members would be in the best position to identify individuals who are qualified and willing to serve. Once the Council identified these candidates, the Council would make a recommendation to USDA for final approval and selection by the Secretary.

Selection by Secretary

Record evidence states that once the nomination process for grower and sheller members is completed, and the industry has voted on Council member and alternate candidates, a nomination report would be sent to the Secretary. The nomination report would include a certified summary of the nomination results and any other information deemed necessary by the Council for consideration by the Secretary. Other information could include, for example, the background and acceptance statements of the nominee candidates. According to the proposal, the report should be submitted on or before the 15th of July of the fiscal year in which the candidates would begin their term so that the Secretary has time to review, select and appoint Council members and their alternates prior to the beginning of the program's next fiscal year.

As previously mentioned, the Council would nominate the public member and accumulator member and their alternates. The proposal indicates that these nominations should be submitted to the Secretary by the 15th of September of the fiscal year in which their nomination is due. As with the other members of the Council, the Secretary would also be responsible for selecting and appointing those members.

Nominees would be required to indicate in advance of their selection that they are willing to accept the position for which they were nominated. Agreeing in advance to serve as a Council member or alternate would avoid possible delays in the appointment of the Council.

In the event that any of the above nominations are not made within the time and manner specified in the proposed order, the Secretary could appoint members and alternates without regard to nominations.

One witness suggested that the Secretary's authority to select and appoint members to the Council would be limited to only considering the nominees having received the highest votes for their respective seats. To the extent that record evidence supports that the nomination process is intended to present the Secretary with the industry's preferred candidates, this witness's explanation is consistent with the record. However, the results of the proposed process would not limit the Secretary's authority to select and appoint members of the Council.

According to the Act, the power to promulgate marketing orders, as well as to identify and appoint members to locally oversee the program's operation, rests with the Secretary. Moreover, all authorities, duties, and responsibilities assigned to a marketing order's administrative body are subject to review and approval by USDA.

As several witnesses explained, the nomination process is intended to present the Secretary with qualified candidates that have the support of their peers to represent their interests in the activities and management of the marketing order program. In the selection and appointment process, these results are strongly considered and, more often than not, accepted. However, the proposed Council's authority to oversee nominations does not include the authority to select and appoint members of the Council. Therefore, the testimony stating that the Secretary's power to appoint and select members of the Council is not consistent with the Act and the issuance of any marketing order Recommended Decision.

Included in the one brief that was filed on behalf of the Board, the issue of limiting the Secretary's power to select and appoint members of the Council was raised. This brief presents an interpretation of the Act that concludes the Council is delegated by the Secretary under the authorities of such Act to select members to administer the program. The brief continues to offer examples of the Federal marketing orders for pistachios, walnuts and dates, as current programs whose administrative bodies have authority to ''vote'' for their membership for

presentation to the Secretary. The brief infers that the said authority to ''vote'' results in a limiting of the Secretary's power in that those candidates must be selected and appointed. In these two assumptions, the brief is not entirely correct.

As stated above, the Secretary has complete authority and oversight of Federal marketing orders, including promulgation, amendment, selection and appointment of industry representatives (including program staff), budgets, assessment rates, implementation of regulation, and termination. This is further explained under proposed § 986.56. Therefore, to the extent that the proposed Council would act as a delegate of the Secretary with the appurtenant powers and duties described in proposed §§ 986.53 and 986.54, that delegation is subject to USDA oversight and Secretary approval.

Regarding the brief's interpretation of the administrative functioning of other orders, the brief's understanding of the context in which the term ''vote'' is used is misunderstood. As with all Federal marketing orders, the industry is called upon to identify its nominees to represent its interests as members of an administrative body. The process by which these nominees are identified is commonly referred to as a ''nomination vote.'' In this process, industry members cast nomination ballots and, in essence, ''vote.'' However, the results of those votes do not result in the election of members; the results identify nominee candidates that are forwarded for the Secretary's consideration prior to selection and appointment with the Secretary's approval.

The brief correctly states that, in the event that an industry nominee is not selected and appointed by the Secretary, the resulting action would be to hold a second nomination process. The brief also correctly raises a concern of timing. Currently, the proposed language in § 986.46(5) would require nominations to be reported to the Secretary on or before July 15 of nomination years. USDA recommends a modification to this language in order to accommodate an extension of this deadline if a second nomination process were needed. Accordingly, USDA recommends inserting the following sentence after the second sentence in paragraph § 986.46(5): ''In the event that a second nomination process is required to identify nominee candidates, the resulting nominee information may be reported to the Secretary after July 15 and before September 15.'' This language has been incorporated into the proposed regulatory text of this Recommended Decision.

The record also shows that the Council should have authority (with USDA approval) to establish additional rules and regulation governing the nomination process, if deemed necessary. This authority would apply to both grower and sheller member nominations.

One clarifying change to § 986.45 as published in the Notice of Hearing was recommended by the Board. The Board proposed removing the phrase ''nominated and selected in the same way and'' from the first sentence of the first paragraph. Witnesses stated that this language is incorrect as alternate member nominees are identified as those candidates receiving the second highest number of votes in the vote for nominee Council membership. The above-identified phrase could lead to confusion and the misunderstanding that a separate voting process for alternate member nominees would be held. The proposed modification is intended to remove this potential for misunderstanding. This change is reflected in the proposed regulatory text included in this Recommended Decision.

Two clarifying changes to § 986.46 as published in the Notice of Hearing were recommended by the Board. These changes include:

(1) In the second sentence of § 986.46(a), inserting the words ''votes on'' between ''cast'' and ''nomination.'' Witnesses explained that this modification would clarify the sentence's intended reference to the eligibility to vote as proposed in the order.

(2) In the first sentence of § 986.46(b)(3)(ii), the phrase ''vote for the grower nominee candidates'' should replace the word ''nomination'' between ''their'' and ''for.'' Witnesses stated that this modification would clarify that this paragraph relates to the casting of ballots for nominee candidates rather than the submittal of a nomination.

These changes are reflected in the proposed regulatory text included in this Recommended Decision.

Alternate Members

Proposed § 986.47 of the order provides for the nomination and selection of an alternate member for each Council member. Alternates would be subject to the same eligibility requirements as Council members. They would act in the place and stead of the Council members for whom they are alternates when the Council members cannot fulfill their obligations. Alternates would provide continuity and stability to Council operations by ensuring full representation of the industry, including their particular region and group.

Alternate members would be nominated in the same manner as Council members, except that the recommended alternate(s) would be the individual(s) receiving the next highest votes after the nominee(s) receiving the highest number of votes.

When serving in the place and stead of their Council members, alternate members would be able to exercise all of the rights, duties and powers of those members as though they were serving as full members of the Council.

Witnesses also explained that in the event any member of the Council and his or her alternate are both unable to attend a meeting of the Council, any alternate for any other member representing the same group as the absent member may serve in the place of the absent member. According to the hearing record, ''same group'' would mean that growers would be alternate alternates for growers, and shellers would be alternate alternates for shellers. To the extent practicable, the alternate alternates should also be from the same region. This provision would allow Council quorum and meeting requirements to be met in the event that business needed to be conducted and rescheduling of the Council meeting would cause an undue burden or delay.

Record evidence also shows that an alternate member should succeed his or her member in the event of that member's death, removal, resignation or disqualification. The alternate would then serve until a successor was selected and appointed by the Secretary.

Proposed § 986.48 of the order would clarify eligibility requirements for individuals wanting to serve as Council members or alternates.

As evidenced above, witnesses stipulated that grower and sheller members and alternates should be, at the time of selection and during their term of office, a grower or sheller (as identified by their appointed seat) or an officer or employee of a grower or sheller in the region and in the classification for which nominated. Witnesses explained that the term ''classification'' referred to the business size categories as identified by grower Seats 1, 2 or 3, and sheller Seats 1 and 2.

If a grower qualified to serve as both Seat 1 and 2, that grower would be required to select the seat for which he or she desires to be nominated, and the grower ballot shall reflect that selection. A grower could not be included on the ballot for two different member seats.

Record evidence also clarifies that any member or alternate member who, at the

time of selection and appointment by the Secretary, was serving as an employee or affiliate of a grower or sheller operation may no longer be eligible to fill their seat if their employment or affiliation is terminated. At the end of such relationship, the position would be deemed vacant.

Lastly, the proposed eligibility requirements also indicate that any person nominated to serve as a public member or alternate public member may not have a financial interest in any pecan grower or handling operation.

Term of Office

Record evidence suggests that the term of office lasts for four years and that the nomination process and beginning of the term should take place in late summer. The months of July and August represent a natural break in the pecan production cycle, with each new harvest beginning typically in October, or at the latest in December, depending on the region. Moreover, witnesses indicated that this time frame would allow adequate time for Council members and staff to prepare an annual budget, develop a marketing policy for the upcoming production year, and make any recommendations to the Department for any needed regulatory changes prior to harvest activities.

In addition, witnesses at the hearing indicated that terms should be staggered so that approximately half of the Council members' positions would be filled every two years. This provision would ensure that continuity in experience among Council members was maintained, yet provide for new members with new ideas and fresh perspectives to participate in the administration of the order. To initiate this process, witnesses recommended that the second Council members nominated be divided into two groups, by a drawing where necessary, to determine whether they would be seated for a term of two years or four years. According to the record, the staggering of terms should result in the following:

(1) Grower member Seat 2 in all regions would be assigned a two-year term;

(2) Grower member Seat 3 in all regions would, by drawing, identify one member seat to be assigned a two-year term; and,

(3) Sheller Seat 2 in all regions would be assigned a two-year term.

As a result, four of the grower member and alternate seats and three of the sheller member and alternate seats shall be seated for terms of two years. Remaining industry members and the public member (and their alternates) would serve an initial term of four years. This staggering of terms would cause approximately half of the members' and alternates' terms to expire every two years thereafter.

Term Limits

Record evidence supports term limits to increase the involvement of pecan growers and shellers and increase industry participation in administering the marketing order. Term limits should apply to all Council members and alternates, including those representing the public. The maximum number of terms that an individual would be allowed to serve would be two consecutive four-year terms of office or a maximum of eight consecutive years on the Council. The tenure requirements would apply to both Council members and alternate members. Once a person has served as a member and/or alternate for eight years, that person would not be eligible for re-nomination. In the case of the second Council seating in which half of the initial Council members would be given a two-year term, the two-year term would be counted as a full four-year term in the calculation of that member's tenure. Witnesses explained that this would be necessary in order to avoid allowing those members to potentially serve a total of ten years, as would be the case if the two-year term were not counted as tenure. Lastly, the shorter, two-year term is only applicable once as it is necessary to create staggered terms for subsequent Councils.

However, witnesses also explained that, if selected, an alternate having served up to two consecutive terms could immediately serve as a member for two consecutive terms without any interruption in service. The same is true for a member who, after serving for up to two consecutive terms, could serve as an alternate if nominated without any interruption in service. If a person were to serve in either one of the above scenarios, that person would not be able to serve again as a member or an alternate for at least twelve consecutive months. He or she would be eligible to serve again after 12 consecutive months out of office.

Witnesses clarified that in all cases, each member and alternate member would continue to serve until a qualified successor is selected.

Vacancies

According to the record, any vacancy on the Council would be filled by a majority vote of the Council members remaining for the remaining unexpired term of the vacant position. This authority appears in proposed § 986.51. The replacement must meet all of the qualifications set forth as required for any other nominee for the position, and that person's qualifications would have to be certified to USDA. The Secretary could then appoint the nominee to serve the balance of the term.

This procedure would eliminate the need to conduct a special nomination to fill a vacancy for the balance of a term. It would also serve to address situations in which a member's position is vacant and the alternate declines the position or is not available to fill the vacancy, as provided in proposed § 986.51. The authority could also be used to fill a vacancy for an alternate member.

Compensation

While testimony supported reimbursement of necessary expenses incurred by Council members attending meetings, witnesses testified that no compensation should be made to pecan growers and shellers for their service on the Council. There was also testimony that to the extent the Council requested the attendance of alternate members, those alternates would also be entitled to reimbursement of their expenses.

Record evidence considered compensation, in addition to the necessary expenses, of the public member. Witnesses explained that in order to get the level of experience and background required to serve as a qualified, effective public member, it might be necessary to compensate that person for his or her time. However, witnesses also stated that compensation would need to be set at a reasonable level and should be consistent with that person's experience and background.

In conclusion, the hearing record supports the reimbursement of expenses necessary and incidental to performing one's duties as a Council member, but not the compensation of time or service in that position.

Council Powers and Duties

The Council, under proposed § 986.53, should be given those specific powers that are set forth in section 608c(7)(C) of the Act. Such powers are necessary for an administrative agency, such as the proposed Council, to carry out its proper functions. According to record evidence, the Council would have four general powers under the proposed provisions of this order:

(1) To administer the provisions of the order;

(2) To adopt by-laws, rules, and regulation for the implementation of the order with the approval of the Department;

(3) To receive, investigate, and report to the Department complaints regarding violations of the order; and

(4) To recommend marketing order amendments to the Department.

These powers are necessary to carry out the Council's functions under both the proposed order and the Act. Witnesses indicated that these powers would enable the Council to make recommendations to the Department that reflect the conditions in the industry from their knowledge and experience.

The specific duties of the Council as set forth in § 986.54 of the proposed order are necessary for the discharge of its responsibilities. These duties are similar to those typically specified for administrative agencies under other marketing order programs. They pertain to specific activities authorized under the order, such as investigating and compiling information regarding pecan marketing conditions, and to the general administration of the program, including hiring employees, appointing officers, and keeping records of all Council transactions. The proposed order delineates the Council's duties as follows:

(a) To act as intermediary between the Secretary and any handler or grower;

(b) To keep minute books and records which will clearly reflect all of its acts and transactions, and such minute books and records shall at any time be subject to the examination of the Secretary;

(c) To furnish to the Secretary a complete report of all meetings and such other available information as he or she may request;

(d) To appoint such employees as it may deem necessary and to determine the salaries, define the duties, and fix the bonds of such employees;

(e) To cause the books of the Council to be audited by one or more competent public accountants at least once for each fiscal year and at such other times as the Council deems necessary or as the Secretary may request, and to file with the Secretary three copies of all audit reports made;

(f) To investigate the growing, shipping and marketing conditions with respect to pecans and to assemble data in connection therewith;

(g) To investigate compliance with the provisions of this part; and,

(h) To recommend by-laws, rules and regulation for the purpose of administering this part.

Witnesses explained that the above-outlined duties are important to the efficient and functional operation of the Council and that they reflect necessary and standard business practices.

Quorum and Voting Provisions

The record evidence is that once the Council is appointed, a quorum of the Council would consist of twelve Council members. This would include shellers, growers, the at-large accumulator, and the public member. Except as discussed below, any action of the Council would require the concurring vote of a majority of the Council members present. An alternate could serve as a member for purposes of constituting a quorum and voting if the member is absent.

Record evidence indicated, however, that certain issues are of sufficient significance to the industry that action should require a greater degree of consensus than a simple majority vote would demonstrate. Witnesses testified that there are ten areas that should require at least twelve concurring votes, prior to any recommendation being made to the USDA.

The first of these issues include the establishment of or changes to the Council's by-laws. Witnesses felt that the importance of by-laws to the operation of the order merited a robust discussion and more than majority consensus in either their establishment or future modification. Several witnesses testified to the importance of by-laws and their role in providing a foundation to the business functioning of the order. Similarly, witnesses felt that the appointment of the proposed program's manager or chief executive officer, as well as administrative issues relating to their responsibilities and employment, were equally important and merited the same level of super-majority consensus in decision-making thereto.

The third and fourth issues witnesses claimed should require twelve concurrent votes are the formulation and approval of the annual budget and the annual assessment rates. Because these issues directly impact regulated entities and represent funds collected from the industry for the benefit of the industry, witnesses explained that a high level of consensus on these issues was paramount. Witnesses stated that Council members will be tasked with the judicious management of assessment funds, and any plan to spend them should require thorough discussion and widespread support.

Similarly, witnesses stated that issues arising from non-compliance or audits would also require a super-majority determination. Because compliance and audit challenges have the potential to impact both the administration of the order as well as handler operations under regulation, decisions made with regard to these issues should measure and require widespread consensus.

With regard to the potential need to redefine regions, reapportion or reallocate Council membership, or modify the eligibility requirements of growers or shellers, the record indicates that recommendations related to changes in these factors should require a higher level of Council member agreement. Because of the important role that growers have in the promulgation and continuance of the program, approval of future amendments and changes to representation on the Council, the eligibility of a person to qualify as ''grower'' under the order is essential to the order's existence. Witnesses explained in great detail the method by which the current proposed eligibility requirements were identified. They emphasized that not only were they appropriate for the proposed program but that they were widely accepted. Proponents of the proposed order felt strongly that if grower eligibility were to be modified at a future date, that modification should require robust discussion and widespread support.

Witnesses expressed similar concerns for any future modification in the eligibility requirements for shellers. Because of the important role of shellers on the Council, future modification to the eligibility to serve as a sheller should be carefully reviewed prior to being modified. Again, proponents of the proposed order explained in great detail the method by which the current proposed eligibility requirements were identified. They moreover stressed that not only were they appropriate for the proposed program, but they were widely accepted by industry participants in discussion with the drafters of the initial proposal.

Lastly, witnesses indicated that the recommendation of any research and promotion activities, as well as the proposal of new regulation for grade, quality, size, pack or containers to USDA, should be thoroughly discussed and widely supported.

Because research and promotion activities are directly tied to the budget, which also requires a super-majority approval, spending of assessment monies on these activities should be judiciously reviewed. Witnesses stated that it would be important to identify research and promotion activities that would widely benefit industry participants. By requiring broad consensus, discussion of research needs across the industry would become necessary in order to develop an approved research strategy.

Similarly, witnesses explained that promotion activities should be geared primarily towards generic promotion of pecans to U.S. consumers and designed to benefit the industry as a whole. Proponents of the order explained that the super-majority voting requirement would result in the identification of such activities or projects.

According to the record, the proposal contains authority for the Council to recommend grade, size and quality regulation, as well as pack and container regulation. Such recommendations would be made by a super-majority of the Council for consideration and approval by USDA prior to implementation. Proponents of the proposed program explained that any recommended regulation should be based on a robust discussion, taking into consideration appropriate grade, size, and quality parameters in order to meet both customer demand and current industry tolerances. Regarding pack and container regulation, witnesses stated that consideration should be given to advances in packaging that could extend the shelf-life of pecans. Because pack and container requirements could result in increased costs for handlers, witnesses explained that any related regulation should be widely discussed and supported prior to becoming mandatory throughout the industry.

Proponents of the proposed order identified one issue that would require a unanimous vote of the full Council: Securing a bank loan. According to the record, if a bank loan is required for the purpose of financing start-up costs of the Council and its activities or for securing financial assistance in emergency situations, such action would require a unanimous vote of all members present at an in-person meeting. Witnesses further explained that in the event of an emergency that warrants immediate attention sooner than a face-to-face meeting is possible, a vote for financing may be taken by other means. In such event, the Council's first preference would be a videoconference and its second preference would be a telephone conference, both followed by written confirmation of the members attending the meeting. Other parameters relating to the securing of a bank loan are discussed in Material Issue 5(c).

In summary, § 986.55 of this proposal provides that any recommended change or modification to the ten issues outlined above would require at least twelve concurring votes. Regarding the decision to secure a bank loan, the proposal indicates that a unanimous vote of the Council would be required. Any other actions by the Council could be determined by a simple majority of those voting.

The record shows that at Council meetings, members could cast their votes by voice or in writing. Participation by telephone would be permitted as long as the equipment used would allow all meeting participants to hear and communicate with each other. Telephone or similar communication equipment could include conference call equipment and/or audio-visual equipment that would allow all members to participate in a meeting simultaneously.

If for some reason an action must be taken without a meeting, the votes would have to be in writing. Witnesses testifying at the hearing stated that the types of Council actions contemplated without a meeting would be limited to issues of routine business or those of relatively minor importance, such as approval of meeting minutes. Such matters would not merit the time and expense of holding an assembled meeting. This proposed provision is common to several existing marketing orders and would enhance the Council's decision-making abilities on simple administrative matters.

The Board recommended modifying the first sentence of § 986.55(c)(1) by deleting ''and must be approved at an in-person meeting.'' According to the record, in-person meetings are preferred by witnesses testifying to the importance of Council decision-making procedures and voting requirements. However, requiring in-person meetings may cause undue challenges in the future conducting of Council business. Section 986.55 proposes alternative methods for the proposed Council to meet and guidelines to follow in the event that decision-making votes are cast at non-in-person meetings. The proposed modification would relieve the proposed requirement that all decision-making votes made by the proposed Council be made at in-person meetings. This proposed language is incorporated into the proposed regulatory text of this Recommended Decision.

Proposed § 986.56, Right of the Secretary, clarifies the power of the Secretary in the oversight and administration of the marketing order. According to the proposal, the members and alternates as well as any agent or employee appointed by the Council shall be subject to removal or suspension by the Secretary at any time. Moreover, each and every regulation, decision, determination, or other act shall be subject to the continuing right of the Secretary to disapprove such actions. If disapproved of, the disapproved action would be deemed null and void. This proposed language is in compliance with the Act.

Record evidence indicates that § 986.57, Funds and other property, is necessary in order to clarify that any assessment funds, or otherwise contributed funds under the control of the Council, shall be used solely for the purposes of activities provided for under the proposed marketing order for pecans. To ensure that funds are properly administered, the Secretary may require the Council and its members to account for all receipts and disbursements.

Further, upon the death, resignation, removal, disqualification, or expiration of the term of office of any member or employee, all books, records, funds, and other property in their possession belonging to the Council must be delivered to their successor in office or to the Council. If necessary, actions may be taken to ensure that any successor or the Council regain full title to all the books, records, funds, and other property in the possession of the former member or employee.

Material Issue Number 5(c)—Expenses and Assessments

The Council should be required to prepare a budget showing estimates of income and expenditures necessary for the administration of the marketing order during each fiscal year. The budget, including an analysis of its component parts, should be submitted to USDA in advance of each fiscal period to provide for USDA's review and approval. The budget should also include a recommendation to USDA of rates of assessment designed to secure income required for such fiscal year.

The Council should be authorized under § 986.60 of the proposed order to incur such expenses as the Department finds are reasonable and likely to be incurred during each fiscal or production year. Such a provision is necessary to assure the maintenance and functioning of the Council and to enable the Council to perform its duties in accordance with the provisions of the order. USDA is recommending a clarifying change to the proposed order language that was published in the Notice of Hearing. USDA recommends adding a statement that specifies that any budget proposed by the Council would be subject to USDA approval. This clarifying change has been incorporated into the proposed regulatory text of this Recommended Decision.

The record states that funds to cover the Council's expenses would be obtained through the collection of

assessments from handlers who handle pecans in the proposed production area. These assessments are intended to reflect each handler's proportional share of the Council's expenses. As such, assessments would be based on the total amount of pecans processed by each handler relative to the total amount of pecans processed by the industry as a whole during a given production year.

Witnesses explained that it would be appropriate to apply assessment calculations to the handler who first handles a particular lot of pecans. By assessing the handler who initially receives a lot of pecans, the industry intends to prevent having assessments paid more than once for the same pecans. However, witnesses also explained that since pecans are often transferred between handlers for further preparation or packaging for market, an inter-handler transfer may apply.

If an inter-handler transfer were to occur, the receiving second handler may assume the responsibility of paying the assessment. In cases of inter-handler transfers, the transaction and the assumption of the assessment responsibility by the second handler would be documented with the Council.

For the purposes of separating each fiscal year's harvest, witnesses explained the importance of handler inventory reporting at the close of each season. According to the record, August 31 would be an appropriate day for such reporting to occur. This information would indicate how much of the crop was still being warehoused by handlers, thereby also giving an indication of how much of the previous year's crop was being carried into the new fiscal year.

In addition, witnesses explained that on August 31 of each year, every handler warehousing inshell pecans would be identified as the first handler of those pecans and would be required to pay the then effective assessment rate on the category of pecans in their possession on that date. According to the record, this would allow the Council to collect all assessments on assessable pecans within the same year in which they are grown and harvested.

With regard to pecan inventories warehoused by growers, witnesses explained that after August 31, those inventories would cease to be eligible for inter-handler transfer after initial receipt by a handler. Instead, such inventory would require that the first handler of the warehoused inventory pay the assessment thereon. The assessment rate that would be applied would be the prevailing assessment rates at the time of receipt of the warehoused inventory from the grower to the said handler.

The loss of inter-handler transfer transaction authority would only be applicable to pecans warehoused by growers after August 31 of the year in which they were harvested. Witnesses explained that this provision would again allow the Council to track crop flow from one year to the next, thereby providing more accurate data on carry-in volume in the market. According to the record, this information would be helpful in better understanding the flow of product in the market and the potential impact of carry-in inventory on the total available supply.

Proposed § 986.62 describes the provisions of inter-handler transfers. The first sentence of this section states the exception of transfers not being available to handlers receiving product from growers after August 31, as described in proposed § 986.61(i). Witnesses testifying to inter-handler transfers explained that the exception to inter-handler transfers should also include § 986.61(h), which states that the transfer of assessment responsibility for handler warehousing unassessed pecans could not be transferred. On August 31, the handler in possession of the unassessed inventory would be required to pay the assessment due. As such, the Board proposed, as a clarifying change, to include a reference to § 986.61(h) alongside the reference to § 986.61(i) in the first sentence of § 986.62. This change has been incorporated into the proposed regulatory text of this Recommended Decision.

Witnesses acknowledged that the proposals to report, assess, and limit inter-handler transfers of product warehoused by growers and handlers after August 31 would require additional recordkeeping on the part of both handlers and the Council. However, the recordkeeping requirement was not considered burdensome in light of the benefit of accurate carryover data and timely assessment collection. Witnesses also explained that the Council would have the authority to recommend guidelines to implement this provision and that such recommendations would be subject to USDA approval.

Testimony in support of proposed § 986.60 covering Council expenses indicates that prior to the beginning of each production year, and as may be necessary thereafter, the Council should prepare an estimated budget of expenses necessary for its effective administration of the order. Based upon this estimate, the Council would calculate and recommend to the Department rates of assessment that would provide adequate funds to cover the cost of projected expenditures. Preparing a budget for the Council prior to the beginning of each fiscal period is reasonable. A budget is necessary to provide the Council and the Department with a basis for determining the rates of assessment necessary to administer the order.

The Council would present its annual budget to USDA for review and approval. Accompanying the budget would be a report showing the basis for its calculations, an explanation of each line item, and any proposed year-over-year increases or decreases. Assessments would be levied at the rates established by USDA. Establishment of such assessment rates would be accomplished through the informal rulemaking process. Such rates would be established on the basis of the Council's recommendations or other available information.

Witnesses stated that any assessment rate recommended to the Department for native pecans should be limited to a maximum rate of two cents and a minimum of one cent per pound. Similarly, any assessment rate recommended to the Department for improved pecans should be limited to a maximum of three cents and a minimum of two cents per pound. The assessment rate recommended for substandard pecans should be between a maximum of two cents and a minimum of one cent per pound.

The intent of the maximum limit on the assessment rates is to assure pecan growers and handlers that program expenses would be kept within specified limits. The proposed limit appears reasonable for the administration of a program of this nature.

Witnesses also stated that the proposed limits may cease to be appropriate given the potential for future changes in the industry. For this reason, the proposed program also includes a provision that would allow the proposed Council to consider other assessment thresholds. Such a consideration could only be made after the current proposed assessment ranges are in effect for the initial four years of the order.

Moreover, witnesses explained that any subsequent assessment rates could not exceed two percent of the aggregate average of all grower prices in each classification across the production area based on Council or USDA data. According to the record, the aggregate grower price average would be calculated for each classification for the preceding fiscal year. The recommended assessment rate for each respective classification could not exceed two

percent and would be approved by the Secretary.

Witnesses reasoned that there could be times during a fiscal year when it would become necessary to revise the budget and/or increase an assessment rate. Such instances could include situations where actual harvest is lower than anticipated or the Council incurs unforeseen expenses. In this regard, witnesses stated that an assessment rate should not be increased without the Council first making a recommendation and securing approval of the Department to do so. Such recommendation would also need to be made prior to the issuance of that production year's final handler assessment bill. Any assessment increase would be applicable to all pecans received and processed by handlers within the proposed production area for that production year and within the limits specified in § 986.61.

In the event the order is promulgated, witnesses also discussed the potential need for administrative funds to cover expenses before sufficient operating income is available from assessments. In this case, witnesses stated that the Council should be able to accept the payment of assessments in advance. In addition, it was explained that the Council should also have the authority to borrow money for such purposes, provided that the recommendation to do so received a unanimous vote of the Council. Moreover, witnesses stated that financial prudence was important and that any loan secured by the Council could not exceed 50 percent of assessment revenue projected for the year in which the loan is secured and that the loan must be repaid within five years.

Record evidence in support of proposed § 986.61 indicates that if assessments are not paid within the time prescribed by the Council, the Council may apply a late payment fee and charge interest on the unpaid balance. Late payment charges and interest on unpaid balances are reasonable in encouraging timely payment of assessments and compensating the Council for expenses incurred in collecting unpaid assessments.

While supporters of this proposal indicated that any assessments imposed under the program would be quite modest, timely collection of those assessments would be important in order to efficiently and effectively administer the provisions of the proposed program. Moreover, they indicated that if one handler were to become delinquent in paying his or her assessments, this could serve as an incentive for others to also become delinquent. Witnesses felt that the proposed late payment and interest charges would help to ensure stability in the flow of Council funds collected through assessments.

Under the proposed § 986.63 of the order, the Council would be allowed to accept voluntary contributions. Such contributions could only be accepted if they are free from any encumbrances or restrictions on their use from the donor. Witnesses explained that the Council would retain control over the use of contributions and their allocation towards budgetary needs. Witnesses also explained that the Council should have the authority to receive contributions from both within and outside of the production area.

The Council may accept contributions, for example, to fund the operations of the order during the first part of a production year, before sufficient income is available from assessments on the current year's pecans. Another example offered by witnesses was the use of contributed funds to support research projects, either nutritional or production related.

Proposed § 986.64, Accounting, is necessary to assure handlers and the industry that funds would only be used for the purposes intended, that there would be a proper disposition of excess funds, and that a detailed accounting would be made of such disposition. Under the order, the Council would only be authorized to incur such expenses as USDA finds are reasonable and likely to be incurred by it during each production year for its maintenance and functioning and for such other purposes as the Department may determine to be appropriate.

Paragraph (a)(2) of proposed § 986.64 provides for situations where, at the end of the fiscal year, the assessments collected may be in excess of expenses incurred. According to record evidence, the provisions under this section would allow the Council, with the approval of the Department, to establish an operating monetary reserve. This would allow the Council to carry over to subsequent production years any excess funds in a reserve, provided that funds already in the reserve do not exceed approximately three fiscal years' expenses. If reserve funds do exceed that amount, the assessment rates should be reduced to bring the reserves within the maximum level authorized under the order. These reserve funds could be used to defray expenses during any production year before assessment income is sufficient to cover such expenses; to cover deficits incurred during any fiscal year when assessment income is less than expenses; to defray expenses incurred during any period when any or all provisions of the order were suspended or inoperative; and to cover necessary expenses of liquidation in the event of termination of the order.

If any excess funds were not retained in a reserve, each handler who paid assessments would be entitled to a proportionate refund of the excess assessments collected. If excess assessments remained at the end of a given production year, the Council could apply each handler's excess as a credit for handlers towards the next production year's operating costs, or the Council could refund such funds to the handlers.

Testimony states that all funds received by the Council pursuant to the provisions of the proposed order would be used solely for the purposes specified in the order. Moreover, § 986.64 would authorize the Department at any time to require the Council and its members to account for all receipts, disbursements, funds, property or records for which they are responsible. This authority is necessary to ensure that proper accounting procedures are followed at all times.

Whenever any person ceases to be a member of the Council, that individual should be required to account for all receipts and disbursements for which he or she was responsible. That person should also be required to deliver all property and funds in such person's possession to the Council. Finally, that person would execute such assignments and other instruments as might be necessary or appropriate to vest in the Council full title of all Council property and funds.

In the event the proposed order were to be terminated or become inoperative, the Council, with the approval of USDA, would appoint one or more trustees for holding records, funds or other property of the Council. Any funds not required to defray the necessary expenses of liquidation would be returned, to the extent practicable, pro rata to the handlers from whom such funds were collected. Distribution of those funds would be carried out in a way that the Department deems appropriate.

Marketing Policy

Proposed § 986.65 would require that the Council prepare and submit to USDA, prior to the end of each fiscal year, an annual marketing policy. The marketing policy would serve as the basis for proposed marketing and promotion activities, as well as any proposed or modified handling regulation for the coming year. It would

also serve as a tool to identify the level of assessment rates needed to fund those activities.

Record evidence explained that in developing its marketing policy, the Council should consider production, harvesting, processing and storage conditions, as well as current and prospective prices. Witnesses identified the following specific factors to be considered. Where applicable, these quantities would be calculated on an inshell basis.

(1) Estimate of the grower-cleaned production and handler-cleaned production in the area of production for the fiscal year;

(2) Estimate of disappearance;

(3) Estimate of the improved, native, and substandard pecans;

(4) Estimate of the handler inventory on August 31, of inshell and shelled pecans;

(5) Estimate of unassessed inventory;

(6) Estimate of the trade supply, taking into consideration trade inventory, imports, and other factors;

(7) Preferable handler inventory of inshell and shelled pecans on August 31 of the following year;

(8) Projected prices in the new fiscal year;

(9) Competing nut supplies; and

(10) Any other relevant factors.

Witnesses explained that the above-outlined factors were important in any analysis of both the current and anticipated state of production, supply and demand. Both the analysis and the correlating recommendations for regulation, as provided for under proposed § 986.67, would need to be approved by at least two-thirds of the Council prior to presenting them to USDA.

Witnesses also noted that the term ''trade inventory'' included in § 986.65(f) was unclear as the term is not otherwise defined or used in the language of the proposed order. As such, the Board recommended the removal of that term from § 986.65(f). This change has been incorporated into the proposed language of this Recommended Decision.

Material Issue Number 5(d)—The Authority To Conduct Research and Promotion Activities

Record evidence indicates that the proposed order should include authority for the Council to recommend research and promotion activities. The provision for this authority is provided in proposed § 986.68.

As discussed in Material Issue 2, the need for research and promotion funding is viewed as essential by witnesses to the future success of the pecan industry. Witnesses from across the proposed production area testified in support of this authority.

As mentioned previously, there are several grower and sheller organizations throughout the proposed production area. These organizations currently conduct or fund research and promotion activities related to pecans on a limited basis within their own geographic areas and with limited budget, according to record evidence.

Research activities are currently conducted as funding is available by the independent organizations mentioned above, with little coordination among projects. Certain states, such as Georgia, Texas and New Mexico, also benefit from research conducted by State agricultural extension staff that assist growers with agricultural practices.

Several witnesses speaking directly to the benefits of research stated that funding was needed to support disease and pest control studies. In the Eastern and Central Regions, where the growing climate is relatively more humid than in the West, Pecan scab, a fungal plant pathogen, regularly leads to loss of supply and quality if not aggressively treated.

Similarly, significant insect management is required to address damage caused by Phyllo era, Pecan Nut Case bearer, Aphids (black and yellow), Nut Curculio, Hickory Shuck worm, Scorch Mites and Pecan Weevils. The cost of disease and pest management can vary significantly depending on seasonal rainfall. One witness stated that, in a typical year with average rainfall, spraying for disease and pests can occur 10 times per orchard. In years of higher rainfall, spraying can increase up to 16 times per orchard. The additional spraying increases the cost of production by roughly $150 per acre.

Witnesses concluded that the development of scab-resistant varieties, or more effective pest control methods, could lead to both meaningful savings in the cost of production, as well as greater supply and quality of nuts from trees impacted by these challenges.

Another form of research important to witnesses was that of nutritional benefits of pecans. Several witnesses cited current studies linking health benefits to nut consumption. However, due to lack of consistent funding, nutritional research on pecans specifically has lagged behind other nuts, such as almonds and walnuts. Proponents of the order were confident that nutritional research of pecans would yield results that would greatly impact consumer demand for the product. Through the promulgation of the proposed order, both the financial resources to fund such research and publicize the results would be available. According to these witnesses, an economic impact study on the potential effects of nutritional research and promotion on consumer demand for pecans would also be realized from implementation of this authority as part of the proposed program.

Record evidence also indicates that, with coordinated market research and promotion activities, U.S. consumer demand for pecans could be positively impacted. As previously discussed in Material Issue 2, U.S. consumer demand for pecans has remained relatively flat for the past twenty years. Comparatively, demand for other nuts, such as almonds, walnuts and pistachios, have steadily increased. Witnesses also testified that consumer awareness of pecans in markets outside of the proposed production area was limited to the seasonal consumption of pecans during the winter holiday season. An active marketing campaign designed to educate U.S. consumers on the taste and uses of pecans could result in an increase in domestic demand for the nut. For these reasons, witnesses stated that the authority for research and promotion should include market research and development, and marketing promotion, including paid generic advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of pecans.

Witnesses also stated that research is needed to develop better packaging for pecans. According to the record, pecans need to be stored in air-tight packaging to prevent rancidity. Exposure to light and variations in temperature can also contribute to rancidity in pecans. The authority to develop packaging that could prolong the freshness and shelf-life of pecans would enhance the overall quality of the product received by consumers, thereby positively contributing to consumer perception and demand of the product. Witnesses also explained that, ideally, pecans should be displayed in grocery store coolers where lower temperatures stabilize the nut's oil and prolong freshness. These witnesses cited the importance of educating merchants and consumers on proper storage techniques for pecans in order to enhance the quality and consumer experience with the product. The proposed research and promotion authority would support packaging and product placement research as well as market education.

As with other provisions proposed under the order, witnesses explained that the proposed Council should have authority to make recommendations,

subject to the approval of USDA, for the establishment of the above-described programs and activities, including preparing a budget, hiring staff, and implementing procedures for their administration.

Record evidence shows that the proposed Council should have the authority to conduct production research, marketing research and development projects, and marketing promotion, including paid generic advertising, designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of pecans, including product development, nutritional research, and container development. Furthermore, the expenses of such projects should be paid from assessment funds collected pursuant to the proposed program or contributions.

Material Issue Number 5(e)—The Authority To Regulate Grade, Size, Pack and Container

According to record evidence, the proposed order should include the authority to regulate quality, including grade and size, as well as pack and container requirements. In addition, the proposed order should provide for the establishment of inspection and certification requirements. Provisions allowing for exemption from handling regulation under special circumstances should also be established, along with the authority to establish safeguards necessary to ensure compliance with handling regulation or exemption therefrom under specified circumstances. Lastly, the USDA and the proposed Council should be required to give prompt notice of any handling regulation in effect under the proposed order so that handlers may be in compliance. These provisions are captured under the proposed §§ 986.69 through 986.72.

According to the record, U.S. grade standards are currently the only official guidelines established for pecans. These include ''United States Standards for Grades of Pecans in the Shell'' (1976) and ''United States Standards for Grades of Shelled Pecans'' (1969). These regulations are voluntary in that they apply only to handlers who choose to request inspection and certification.

The proposed handling regulation authority would authorize the proposed Council to recommend grade, quality and size requirements, subject to USDA review and approval. If such regulation were put in effect, they would become mandatory. As such, this authority would also include the proposed Council's ability to recommend inspection and certification for pecans handled within the proposed production area. The inspection and certification requirements would also be subject to USDA review and approval prior to becoming effective.

According to the record, because of the differences in native and improved pecans, it may be necessary to develop quality requirements that are specific to each classification of pecan. Witnesses explained that, on average, pecans from native trees are smaller than those from improved trees. The nut yield between classifications often differs as well. For this reason, size regulation applicable to improved pecans may not be applicable to native pecans, and vice versa.

Given that the current proposal would only provide the proposed Council with authority to recommend grade, quality, size, pack and container regulation, flexibility in the applicability of those potential regulation should exist. According to the proposal, handling requirements or minimum tolerances for particular grades, sizes, or qualities, or any combination thereof, could be recommended for any or all varieties of pecans and for any duration of time or period. Furthermore, the proposed language states that different handling requirements or minimum tolerances for particular grades, sizes, or qualities could also be considered for different containers, for different portions of the production area, or any combination thereof could also be considered.

Witnesses stated that in the development of future handling regulation, the Council should be able to recommend regulation that is specific to either Native or Improved pecans. The proposed definition of pecans, § 986.28, delineates these pecans into two classifications. In order to maintain consistency in terminology and to clarify that regulation could be recommended for individual or groups of varieties as well as classifications, the Board proposed a clarifying change. The Board proposed inserting the words ''and classifications'' after the word ''varieties'' in both paragraphs (a)(1) and (2) of § 986.69. This change has been incorporated into the proposed regulatory text of this Recommended Decision.

While witnesses did not provide examples for all of the proposed scenarios in which the above-outlined regulatory needs might exist, they did explain that flexibility would be needed in order for future Councils to develop regulation that is applicable to the specific demands of the pecan industry and its customers. For this reason, the proposed authority encompasses a wide range of factors that could apply to future regulatory situations.

Along with the authority to recommend handling regulation, witnesses stated that the proposed Council should have the authority to recommend pack and container regulation. This type of authority could be used to establish size, capacity, weight, dimensions, or pack of the container or containers which may be used in the packaging, transportation, sale, preparation for market, shipment, or other handling of pecans. Witnesses explained that this authority would be important in the context of new packaging that may be developed as a result of product development authorized under the proposed research and promotion authority.

Other witnesses explained that pack and container regulation could help to standardize transactions between pecan handlers and customers. If a standard container size were used by all handlers, for example, customers would be better able to compare market prices between handlers than if each handler quoted prices based on different size containers. Standardization could lead to greater transparency in the market, thereby also resulting in less price volatility.

While record evidence is that handling regulation, including pack and container regulation, could benefit the pecan industry, witnesses also explained that authority to amend, modify, suspend, or terminate such regulation would be equally important. If handling regulation ceases to be applicable or produce their intended benefits, the proposed Council should have the authority to effectuate change. Such change would be recommended by the proposed Council and be subject to review and approval of USDA.

The proposed language for § 986.69(b)(1) does not include the stipulation that any such amendment, modification, suspension or termination recommended by the Council would be subject to approval by USDA. In order to maintain consistency within the proposed language and its conformity with § 986.56, Right of the Secretary, the Board recommended a clarifying change. The clarifying change inserts the phrase ''and approval by the Secretary'' after the word ''Council'' in § 986.56(b)(1). This change has been incorporated into the proposed language of this Recommended Decision.

According to the record, the proposed authority to regulate handling as outlined in this Material Issue should not in any way constitute authority for the proposed Council to recommend volume regulation, such as reserve pools, producer allotments, or handler withholding requirements which limit

the flow of product to market for the purpose of reducing market supply. Proponents of the proposed order explained that the subject of volume regulation had been thoroughly discussed with industry participants throughout the proposed production area, and there was near-unanimous opposition to its inclusion in the proposed order. In order to clarify that volume regulation would not be considered in the future operation of the proposed order, the proponents proposed specific language found in proposed § 986.69(c).

Witnesses further explained that authority should exist for exempting the handling of pecans for special purposes. One of these purposes includes facilitating the delivery of pecans for relief or charity causes. Witnesses explained that if the opportunity were to arise for the industry to provide pecans for charitable purposes, their handling should be free from handling regulation, including assessments.

Similarly, witnesses explained that pecans being used for product development or research should also be exempted from any handling regulation that may be in effect, including assessments.

In order to ensure that handling for special purpose exemptions are used for their intended purposes, the proposed Council should have the authority to recommend rules and requirements necessary to oversee such shipments or usages.

In all cases of handling regulation, record evidence is that the USDA and the proposed Council should be required to give prompt notice of any handling regulation in effect under the proposed order so that handlers may be in compliance.

Material Issue Number 5(f)—Reporting and Recordkeeping

The record evidence indicates that the Council should have the authority, with USDA approval, to require handlers to submit such reports and information as the Council may need to perform its functions and fulfill its responsibilities under the order. The Council would need to collect information for such purposes as collecting assessments, compiling statistical data for use in market evaluation, and determining whether handlers are complying with order requirements. The types of information that could be collected to fulfill these reporting needs include, but are not limited to: Production, sales and inventory data, and information pertaining to transfers of pecans between handlers.

Proposed §§ 986.75 through 986.77 outline the types of reports identified by witnesses as being important to the functioning of the Council. The first of these reports would provide handler inventory of inshell and shelled pecans. It is proposed that the Council could prescribe the date ranges and frequency of this report as may be necessary to conduct administrative operations. Similarly, the volume of merchantable pecans, or those pecans meeting any handling regulation in effect under the proposed order, should be reported for both inshell and shelled, on a frequency to be determined by the Council. Reports of handler receipts of inshell or shelled pecans from growers, handlers or others should also be collected per the proposed Council's need for that data. Lastly, the proposed Council should also have the authority to recommend any other type of handler report that may become necessary to carry out the administrative activities of the program. In all cases, the proposed Council should have the authority to recommend the forms and filing requirements needed for the above-outlined data collection.

Additionally, under proposed §§ 986.79 through 986.82, record evidence is that each handler should be required to maintain records with respect to pecans acquired and handled as would be necessary to verify the reports that the handler submits to the Council. All such records would be required to be maintained for at least three fiscal years after the end of the fiscal year in which the transaction occurred.

Witnesses also stated that the order should provide the authority for USDA and authorized employees of the Council to examine those records pertaining to matters within the purview of the order. This provision would enable verification of compliance with requirements of the proposed order. Such access should be available at any time during reasonable business hours. Furthermore, each handler should be required to furnish all labor necessary to facilitate such inspections at no expense to the Council or the Secretary. The proposed verification authority is necessary in order for the Council to be able to certify to USDA the completeness and correctness of the information obtained from handlers.

All reports and records submitted to the Council by handlers would be required to remain confidential and be disclosed only as authorized by USDA in accordance with the Act. However, the Council would be authorized to release composite information from any or all reports. Such composite information could not disclose the identity of the persons furnishing the information or any person's individual operation.

The record shows that industry handlers already collect and maintain some of the information contemplated to be reported and retained under the proposed order provisions. Thus, compliance with the provisions of the order with regard to reporting and recordkeeping would entail minimal handler costs.

Material Issue Number 5(g)—Compliance

No handler should be permitted to handle pecans except in conformity with the provisions of the order, as set forth in proposed § 986.87.

Witnesses stated that if the program is to be effective, compliance with its requirements is essential. Compliance with the mandatory provisions of the proposed order, if implemented, would provide assurance to industry participants that all handlers are subject to the same requirements. This requirement would, in effect, ''level-the-playing-field,'' witnesses explained. By mandating that all handlers contribute assessments on a per-pound basis, the assessment contribution is relative to the amount handled, meaning smaller handler businesses pay relatively smaller assessment amounts than larger handler businesses.

Similarly, if grade requirements were implemented, all pecans entering the market would have the same minimum quality. Witnesses explained that mandatory grade requirements, if implemented, would prevent the introduction of poorer quality product into the market, thereby lowering the consumer's expectations for quality pecans and depressing prices. Compliance would be necessary to ensure that mandatory requirements are being followed.

Proponents of the proposed order explained that, if promulgated, the Council would have the responsibility of identifying and hiring a staff to administer the day-to-day operations of the program. One of these activities would be program compliance and would require the hiring of a compliance officer or staff. The compliance activities of this staff would include receiving and reviewing handler reports submitted to the Council, conducting on-site reviews of handler records, and facilitating assessment collections. Witnesses also explained that while the day-to-day compliance operations were to be assumed by the proposed Council, elevated cases of non-compliance would be reported to

the USDA for further review and oversight.

Material Issue Number 5(h)—Exemption for Small Quantities

Proposed § 986.86, Exemption, states that any handler who handles 1,000 pounds of inshell pecans or less, or 500 pounds of shelled pecans or less, during any fiscal year may handle pecans free of the regulatory and assessment provisions of the proposed order. As discussed earlier in this Recommended Decision, costs associated with operating a commercial handling facility are significant. Record evidence indicates that an individual would need to handle a minimum of one million pounds of inshell pecans in order to be commercially viable. Growers who engage in handling activities may own some equipment necessary to prepare pecans for market, but also frequently use contract handlers. Again, for these entities to be commercially viable, the volume handled would need to be much larger in order for the revenue generated to exceed the costs. The record shows that the purpose of this provision is to provide an exemption from the proposed requirements of the order for small quantities of pecans, such as those that are grown for home or personal use.

An exception to the proposed exemption would be handlers engaged in mail order sales. Mail order sales would not be exempt. Mail order sales would be subject to any regulatory or assessment provisions in effect under the proposed order. Witnesses explained that the mail order business, also sometimes referred to as the ''fundraising business,'' should be regulated as these sales represent a significant portion of seasonal sales in parts of the Eastern and Central Regions. ''Fundraising'' refers to sales of pecans to organizations that then resell the nuts as part of a fundraising activity. Moreover, witnesses explained that mail order and fundraising sales entail a more sophisticated business engagement than a small handler selling pecans at a roadside stand. For these reasons, the proposed exemption should not be applied to mail order sales, including fundraising sales.

Additionally, implementing rules and regulation may be deemed necessary to ensure that handlers claiming this minimum exemption are not selling pecans in domestic human consumption outlets that are not in compliance with the minimum quality requirements of the order. Such rules and regulation could be implemented under the authority in proposed § 986.86 of the order.

Material Issue Number 5(i)—Continuance Referenda, Amendments and Termination

In accordance with proposed § 986.94(d), the order should provide that the Department conduct periodic continuance referenda every 5 years. The initial continuance referendum should be conducted within 5 years of the effective date of the marketing order.

Witnesses stated that the proposed continuance referendum requirement would be an important component of the proposed order. Many witnesses indicated that this provision would provide assurance that, if the industry determined that the program was not fulfilling its intended purpose, the program could be terminated.

The Act provides that in the promulgation of a marketing order, at least two-thirds of the growers voting in the referendum, or two-thirds of the volume represented by those grower, must favor the issuance of the order. It is also the position of the Department that periodic referenda ensure that marketing order programs continue to be accountable to growers, obligate growers to evaluate their programs periodically, and involve them more closely in their operation. The record supports these goals.

Witnesses explained that the same measure of support used in promulgation should also be used in the five-year periodic review of the order; at least two-thirds of growers voting would need to vote in favor of continuance. Witnesses also stated that prior to a continuance referendum, the Secretary would need to identify an appropriate period of time for which producers would report their production. Given that a continuance referendum measures votes cast in term of both number of eligible growers voting and the volume that each said grower produced, a production period needs to be identified.

Section 986.94 of the proposed language as published in the Notice of Hearing indicated that the period of production in question should be the ''representative period'' as defined in § 986.34 of the proposed language in this Recommended Decision. However, at the hearing, witnesses indicated that the four fiscal years identified in the definition may be too long of a time period. As such, the Board recommended modifying the proposed language in § 986.94(d) to state that the period of time used to determine grower production volume should be determined by the Secretary. Moreover, according to the brief filed on behalf of the Board, this modification would also recognize the power of the Secretary to determine the preferred period of time for grower eligibility in continuance and termination referenda. Therefore, the words ''representative period'' in second sentence in paragraph (d) of this section should be changed to ''an appropriate period of time.'' This change has been incorporated into the proposed regulatory text of this Recommended Decision. A similar conforming change has been made to proposed § 986.97, Counterparts.

Section 608(C)(16)(B) of the Act also requires the Department to terminate the order whenever the Department finds that the majority of all growers favor termination, and that such majority produced more than 50 percent of the commodity for market. This provision is provided for in proposed § 986.95.

According to the record, if the order were terminated, the then-serving Council members would continue serving as joint trustees for the purpose of liquidating all funds and property then in the possession or under the control of the Council, including claims for any funds unpaid or property not delivered at the time of such termination. The joint trustees would continue to serve in their capacity as such until discharged from their duties by the Secretary.

The process of liquidating the order would require that these trustees account for all receipts and disbursements of program funds, and deliver all funds, program property, and books and records to the Secretary. Program funds would be used to meet any outstanding obligations and expenses of the program. Any remaining funds would be returned to industry handlers in a pro rata proportion to their assessment contributions.

Lastly, the Secretary would have the authority to hold persons other than the Council members who may be holding program funds, property or claims, to the same obligations as the joint trustees.

Material Issue Number 5(j)—Common Terms

The provisions of proposed §§ 986.88 through 986.93 and §§ 986.97 through 986.99 are common to marketing agreements and orders now operating. All such provisions are necessary to effectuate the other provisions of the marketing order and marketing agreement and to effectuate the declared policy of the Act. The record evidence supports inclusion of each provision. These provisions, which are applicable to both the marketing agreement and the marketing order, are identified by section number and heading as follows:

§ 986.88 Duration of immunities; § 986.89 Separability; § 986.90 Derogation; § 986.91 Liability; § 986.92 Agents; and § 986.93 Effective time. Those provisions applicable to the marketing agreement only are: § 986.97 Counterparts; § 986.98 Additional parties; and, § 986.99 Order with marketing agreement.

Small Business Consideration

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, the AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers that would be regulated under the proposed pecan order, are defined as those with annual receipts of less than $7,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed pecan marketing order program on small businesses. The record evidence is that while the program would impose some costs on the regulated parties, those costs would be outweighed by the benefits expected to accrue to the U.S. pecan industry.

Specific evidence on the number of large and small pecan farms (above and below the SBA threshold figure of $750,000 in annual sales) was not presented at the hearing. However, percentages can be estimated based on record evidence.

The 2014 season average grower prices per pound for improved and native seedling pecans were $2.12 and $0.88, respectively. A weighted grower price of $1.85 is computed by applying as weights the percentage split between improved and native acreage on a representative U.S. pecan farm, which are 78 and 22 percent, respectively. The average yield on the representative farm is 1,666.67 pounds per acre. Multiplying the $1.85 price by the average yield gives total revenue per acre figure of $3,080. Dividing the $750,000 SBA annual sales threshold figure by the revenue per acre figure of $3,080 gives an estimate of 243 acres as the size of farm that would have annual sales about equal to $750,000, given the previous assumptions. Any farm of that size or larger would qualify as a large farm under the SBA definition.

Data presented in the record show that about 52 percent of commercial U.S. pecan farms have 250 or more acres of pecans. Since the 243 acre estimate above is close to 250 acres, it can be extrapolated that 52 percent is a reasonable approximation of the proportion of large farms and 48 percent is the proportion of small pecan farms. According to the record, this estimate does not include ''backyard'' production.

According to record evidence, there are an estimated 250 handlers in the U.S. Of these handlers, which include accumulators, there are an estimated 50 commercially viable shellers with production over 1 million pounds of inshell pecans operating within the proposed production area. Fourteen of these shellers meet the SBA definition for large business entity and the remaining 36 are small business entities.

Record evidence indicates that implementing the proposed order would not represent a disproportionate burden on small businesses. An economic impact study of the proposed authority for generic promotion presented at the hearing provided that the proposed program would likely benefit all industry participants.

Impact of Generic Promotion Through a Marketing Order

The record shows that generic promotion over a wide variety of agricultural products stimulates product demand and translates into higher prices for growers than would have been the case without promotion.

Promotional impact studies of other tree nuts (almonds and walnuts), and of Texas pecans, show price increases as high as 6 percent, but the record indicates that 0 to 3 percent is a more representative range. Since the other tree nut promotion programs are well-established, the record shows that a representative middle (most likely) scenario would be a price increase from promotion of 1.5 percent for the early years of a new pecan promotion program. Low and high scenarios were 0.5 and 3.0 percent, respectively.

The record indicates that an analytical method used historical yearly prices from 1997 to 2014 in a simulation covering that period to obtain an expected average price without promotion. In a subsequent step, the simulation applied a demand increase of 1.5 percent to the entire distribution of prices to represent the impact of promotion. The projected increases in grower prices from promotion for improved and native pecans were 6.3 and 3.6 cents per pound, respectively, as shown in Table 4. These two price increase projections represent a range of results. Based on a range of simulated price increases as high as 3 percent, the low and high price increase projections for improved pecans were 4.0 and 9.6 cents, respectively. For native varieties, the results ranged from 2.7 to 4.2 cents.

The record indicates that a key analytical step was developing an example farm with specific characteristics to explain market characteristics and marketing order impacts. An important characteristic of this ''representative farm'' is the acreage allocation between improved and native pecans of 78 and 22 percent, respectively. This is similar to the proportion of the U.S. pecan crop in recent years allocated to improved and native varieties. Average yield per acre of the representative farm (covering all states and varieties) is 1,666.67 pounds per acre.

The acreage split of 78 and 22 percent are used as weights to compute weighted average prices (combining improved and native pecans) of 5.7 and 2.3 cents, respectively, as shown in the fourth column of Table 4.

The record shows that the proposed initial ranges of marketing order assessments per pound are 2 to 3 cents for improved pecan and 1 to 2 cents for native pecans. The midpoints of these ranges (2.5 and 1.5 cents, respectively) are used to compute a benefit-cost ratio from promotion, with a weighted average assessment cost of 2.3 cents, as shown in Table 5. Assessments would be collected from handlers, not growers, but for purposes of this analysis, it is assumed that 100 percent of the assessment cost would be passed through to growers.

Table 4 shows that dividing the projected benefit of 5.7 cents per pound (weighted price increase from promotion) by the estimated assessment cost of 2.3 cents (weighted assessment rate per pound), yields a benefit-cost ratio of 2.5. For each dollar spent on pecan promotion through a Federal marketing order, U.S. average grower price per pound is expected to increase by $2.50.

TABLE 4—ESTIMATED BENEFIT-COST RATIO OF PECAN PROMOTION THROUGH A FEDERAL MARKETING ORDER

	Improved pecans	Native pecans	Weighted
Benefit: Projected price increase from pecan promotion (cents per pound)	6.3	3.6	5.7
Cost: FMO Assessment rate (cents per pound)	2.5	1.5	2.3
Benefit-cost ratio	2.52	2.40	2.50

*Weights for improved and native pecans are 78% and 22%, respectively, which is the acreage allocation of a representative U.S. pecan farm, according to the record.

Examining potential costs and benefits from promotion across different farm sizes is done in Table 5. Record evidence showed that the minimum size of a commercial pecan farm is 30 acres, and that a representative average yield across the entire production area is 1,666.67 pounds per acre. This combination of acreage and yield results in a minimum threshold level of commercial production of 50,000 pounds. Witnesses stated that expenditures for the minimum necessary level of inputs for commercial pecan production cannot be justified for any operation smaller than this.

In Table 5, a very small farm is defined as being at the minimum commercial threshold level of 30 acres and 50,000 pounds. Small and large farms are represented by farm size levels of 175 and 500 acres, respectively. Multiplying those acreage levels by the average yield for the entire production area gives total annual production level estimates of 291,667 and 833,335 pounds, respectively.

Multiplying the 2014 grower price per pound of $2.14 by the 291,677 pounds of production from the small farm (175 acres) yields an annual crop value estimate of about $618,000. This computation shows that the small farm definition from the record is consistent with the SBA definition of a small farm (annual sales value of up to $750,000).

Table 5 shows for the three representative pecan farm sizes the allocation of total production levels between improved and native varieties (78 and 22 percent, respectively).

Although marketing order assessments are paid by handlers, not growers, it is nevertheless useful to estimate the impact on growers, based on the assumption that handers may pass part or all of the assessment cost onto growers from whom they purchase pecans. To compute the marketing order burden for each farm size, the improved and native production quantities are multiplied by 2.5 and 1.5 cents per pound of improved and native pecans, respectively. For the representative small farm (175 acres), summing the improved and native assessments yields a total annual assessment cost of $6,650. For the large farm, the total assessment cost is $19,000.

A parallel computation is made to obtain the total dollar benefit for each farm size. The improved and native quantities for the representative farm sizes are multiplied by the corresponding projected price increases of 6.3 and 3.6 cents. Summing the improved and native benefits for the small and large farm size yields projected annual total benefits for the small and large representative farm sizes of $16,643 and $47,550, respectively. The results of dividing the benefits for each farm size by the corresponding costs is 2.5, which equals the benefit-cost ratio shown in Table 5.

TABLE 5—COSTS AND BENEFITS OF PROMOTION FOR THREE SIZES OF REPRESENTATIVE U.S. PECAN FARMS

	Very small farm	Small farm	Large farm
Representative Pecan Farms: Acres and Production:			
Acres per farm	30	175	500
Production on Representative Farms (Acres multiplied by estimated U.S. average yield of 1666.67 pounds per acre)	50,000	291,667	833,335
Improved pecan production (78% of farm acres)	39,000	227,500	650,001
Native pecan production (22% of farm acres)	11,000	64,167	183,334
Cost per farm: Grower burden of proposed program represented as cost per pound.			
Improved (2.5 cents)	$975	$5,688	$16,250
Native (1.5 cents)	$165	$963	$2,750
Total Estimated Cost per Farm	$1,140	$6,650	$19,000
Benefit per farm: Price increase per pound from pecan promotion multiplied by improved and native production			
Improved (6.3 cents)	$2,457	$14,333	$40,950
Native (3.6 cents)	$396	$2,310	$6,600
Total Estimated Benefit per Farm	$2,853	$16,643	$47,550

The computations in Table 5 provide an illustration, based on evidence from the record, that there would be no disproportionate impact on smaller size farms from establishing a marketing order and implementing a promotion program. Costs are assessed per pound and thus represent an equal burden regardless of size. The projected benefits from promotion are realized through increases in price per pound and are thus distributed proportionally among different sizes of farms.

All of the grower and handler witnesses, both large and small, testified that the projected price increases from promotion of pecans (6.3 and 3.6 cents per pound for improved and native pecans, respectively) were reasonable estimates of the benefits from generic promotion of pecans. A number of them expressed the view that the price increase estimates were conservative and that, over time, the price impact would be larger.

As mentioned above, marketing order assessments are paid by handlers, not growers. However, since handlers may pass some or all of the assessment cost

onto growers, it is useful to provide this illustration of potential impact on both growers and handlers.

Using the most recent three years of prices as examples of typical U.S. annual grower prices, Table 6 summarizes evidence from the record that shows the proposed marketing order assessment rates as percentages of grower and handler prices received. Based on record evidence that a representative handler margin is 57.5 cents per pound, handler prices are estimated by summing the grower price and handler margin.

TABLE 6—PROPOSED MARKETING ORDER ASSESSMENT RATES AS A PERCENTAGE OF PRICES FOR PECANS RECEIVED BY GROWERS AND HANDLERS

	Grower and handler prices			Assessment rates ***	Assessment rates as a percent of prices received		
	2012	2013	2014		2012	2013	2014
Grower price *							
Improved	$1.73	$1.90	$2.12	$0.025	1.4%	1.3%	1.2%
Native	0.88	0.92	0.88	0.015	1.7	1.6	1.7
Handler price **							
Improved	2.31	2.48	2.70	0.025	1.08	1.01	0.93
Native	1.46	1.50	1.46	0.015	1.03	1.00	1.03

* Season average grower price per pound from NASS/USDA.
** Grower price plus average handler margin of 57.5 cents per pound, based on hearing evidence.
*** Midpoints of proposed initial marketing order assessment rates: Improved (2 to 3 cents); Native (1 to 2 cents). For growers this represents the cost of the marketing order burden and for handlers this represents the cost of the assessment paid.

For both improved and native pecans, using 2012 to 2014 prices as examples, Table 6 shows that the potential burden of the proposed program can be calculated at between 1 and 2 percent of operating expenses for growers and are approximately 1 percent of operating expenses for handlers. Grower and handler witnesses, both large and small, covering both improved and native pecans, testified that the proposed initial marketing order assessment rates would not represent a significant burden to their businesses and that the benefits of the proposed generic promotion program substantially outweigh the cost. Sheller witnesses (large and small) that would likely become handlers under a Federal marketing order testified that the additional recordkeeping required to collect assessments to send to the marketing order board (American Pecan Council) would not be a significant additional burden and that the benefits would substantially outweigh the costs. Several witnesses stated that one reason that collecting the assessments would have only a minor impact is that they already perform similar functions for promotion and other pecan-related programs (or other commodity programs) organized under state law.

Additional Marketing Order Programs

Statements of support for additional benefits that could come from a Federal marketing order came from grower and handler witnesses, both large and small, covering both improved and native pecans. The additional benefits cited included: (1) Additional and more accurate market information, including data on production, inventory, and total supplies, (2) funding of research on health and nutrition aspects of pecans, improved technology relating to the pecan supply chain and crop health, consumer trends, and other topics, and (3) uniform, industry-wide quality standards for pecans, as well as packaging standards and shipping protocols. Witnesses testified that the burden of funding and participating in marketing order programs with these features would be minor, and that the benefits would substantially outweigh the costs.

The proposed order would impose some reporting and recordkeeping requirements on handlers. However, testimony indicated that the expected burden that would be imposed with respect to these requirements would be negligible. Most of the information that would be reported to the Council is already compiled by handlers for other uses and is readily available. Reporting and recordkeeping requirements issued under other tree nut programs impose an average annual burden on each regulated handler of about 8 hours. It is reasonable to expect that a similar burden may be imposed under this proposed marketing order on the estimated 250 handlers of pecans in the proposed production area.

The Act requires that, prior to the issuance of a marketing order, a referendum be conducted among the affected growers to determine if they favor issuance of the order. The ballot material that would be used in conducting the referendum would be submitted to and approved by OMB before it is used. It is estimated that it would take an average of 10 minutes for each grower to complete the ballot. Additionally, it has been estimated that it would take approximately 10 minutes for each handler to complete the marketing agreement.

Therefore, in compliance with OMB regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements that may be imposed by this order would be submitted to OMB for approval. Those requirements would not become effective prior to OMB review. Any recordkeeping and reporting requirements imposed would be evaluated against the potential benefits to be derived, and it is expected that any added burden resulting from increased reporting and recordkeeping would not be significant when compared to those anticipated benefits derived from administration of the proposed order.

The record evidence also indicates that the benefits to small as well as large handlers are likely to be greater than would accrue under the alternatives to the order proposed herein; namely, no marketing order.

In determining that the proposed order and its provisions would not have a disproportionate economic impact on a substantial number of small entities, all of the issues discussed above were considered. Based on hearing record evidence and USDA's analysis of the economic information provided, the proposed order provisions have been carefully reviewed to ensure that every effort has been made to eliminate any unnecessary costs or requirements.

Although the proposed order may impose some additional costs and requirements on handlers, it is

anticipated that the order will help to strengthen demand for pecans. Therefore, any additional costs would be offset by the benefits derived from expanded sales benefiting handlers and growers alike. Accordingly, it is determined that the proposed order would not have a disproportionate economic impact on a substantial number of small handlers or growers.

A 30-day comment period is provided to allow interested persons to respond to this proposed decision to effectuate a marketing order. Thirty days is deemed appropriate so that any marketing order resulting from this rulemaking process may be implemented as soon as possible at the beginning of the nearest fiscal year. A 60-day comment period on the information collection burden is deemed appropriate as any paperwork burden imposed by this action will not become effective until the process is finalized. All written exceptions and comments timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Civil Justice Reform

The marketing agreement and order proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed order would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted there from. A handler is afforded the opportunity for a hearing on the petition. After the hearing, the USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Department's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request an approval of a new information collection for the marketing order regulating pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

Title: Pecans Grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

OMB Number: 0581—NEW.

Expiration Date of Approval: To be assigned by OMB.

Type of Request: Intent to establish a new information collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the proposed pecan marketing order program.

The proposed pecan marketing order would authorize data collection, research and promotion authority, grade and size regulation, as well as pack and container regulation. AMS is the agency that would provide oversight of the order, and any administrative rules and regulations issued under the program.

The Department must determine if sufficient grower support exists within the industry to initially establish the proposed marketing order. If the order were established, the USDA could also, given recommendation by the Council and adequate support by the industry, implement formal rulemaking to amend the order. Further, a continuance referendum would be conducted every 5 years to determine ongoing industry support for the order. In all of these instances, ballot information would be collected from growers and compiled in aggregate for purposes of determining grower support for the order (or any amendment to the order).

Upon implementation of the order or during amendatory proceedings, handlers would be asked to sign a marketing agreement to indicate their willingness to comply with the provisions of the new or amended order. AMS would also provide a certificate of resolution for each handler organization to sign, documenting the handler's support of the marketing agreement and order.

If the proposed order is established, handler and grower nomination forms, ballots, and confidential qualification and acceptance statements will be used to nominate and appoint the Council members.

Pecan growers and handlers would be nominated by their peers to serve as representatives on the Council. Each grower and handler would have the opportunity to submit a nomination form with the names of individuals to be considered for nomination.

Individuals who are nominated and wish to stand for election would be required to complete a confidential qualification and acceptance statement before the election. If qualified, the nominees would be placed on a nomination ballot.

Growers and handlers would vote for the candidate(s) of their choice using the grower and handler nomination ballots. Names of candidates and their respective vote tallies would be submitted to AMS for selection and appointment as Council members and alternate members. The grower and handler members of the Council would nominate an at-large accumulator and an alternate accumulator member, as well as a public member and alternate public member. Each would complete qualification and acceptance statement before being recommended to AMS for appointment.

The forms covered under this information collection request submission of minimum information necessary to ascertain grower support for implementing the proposed order and to appoint initial Council members. Additional reporting and recordkeeping requirements may subsequently be recommended by the Council for its use in administering the order. The burden imposed by any additional requirements would be submitted for approval by the OMB.

The information collected would be used only by authorized representatives of USDA, including AMS, Specialty Crops Program regional and headquarters' staff, and authorized employees of the Council, if established. Section 608(d)(2) of the Act provides that all information would be kept confidential.

Total Annual Estimated Burden

The total burden for the proposed information collection under the order is as follows:

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 12.5 minutes per response.

Estimated Number of Respondents: 1,789.

Estimated Number of Responses per Respondent: .77.

Estimated Total Annual Burden on Respondents: 469 hours.

Estimated Annual Burden for Each Form

For each new form, the proposed request for approval of new information collections under the order are as follows:

FV–313 Grower's Referendum Ballot (promulgation and continuance). Growers would use this ballot to vote whether they favor establishment of the order and, once every 5 years, whether they want the order to continue in effect. For the purpose of this calculation, it is estimated that 1,875 pecan growers (75 percent of the total) would vote in the promulgation referendum and in the continuance referenda.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan growers.

Estimated Number of Respondents: 1,875.

Estimated Number of Responses per Respondent: Once every 5 years.

Estimated Total Annual Burden on Respondents: 125 hours.

FV–242 Marketing Agreement. Handlers would use this form to indicate their willingness to comply with the provisions of the order. The marketing agreement would be completed if the proposed order is implemented and in any future amendment of the order.

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

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan handlers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: Once every 5 years.

Estimated Total Annual Burden on Respondents: .83 minute.

FV–242A Certificate of Resolution. This would document corporate handlers' support for the order and marketing agreement. The marketing agreement would be completed if the proposed order is implemented and in any future amendment of the order.

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

Respondents: Incorporated pecan handlers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: Once every 5 years.

Estimated Total Annual Burden on Respondents: .83 minute.

FV–311 and 312 Administrative Council for Pecans Confidential Grower/Sheller and Public Member Qualification and Acceptance Statement. There are 17 members and 17 alternate members on the Council. Each year after the initial Council is seated, half of the 34 members would be replaced with new members. This form would be used by candidates for nomination to provide their qualifications to serve on the Council. For the purpose of this calculation, it is estimated that 60 individuals will agree to be candidates to serve on the Council.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response.

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan growers, handlers and public member nominees.

Estimated Number of Respondents: 60.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5.7 hours.

FV–308 Sheller Members and Alternate Sheller Members Ballot. Each sheller would use the ballot to vote on sheller member nominees to serve on the Council.

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

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan handlers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 4.2 hours.

FV–309 Grower Members and Alternate Grower Members Nomination Form. Pecan growers would use this form to nominate themselves or other growers to serve on the Council. For the purpose of this calculation, it is estimated that 50 growers will offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan growers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 16.7 hours.

FV–310 Sheller Members and Alternate Sheller Members Nomination Form. Pecan shellers would use this form to nominate themselves or other shellers to serve on the Council. For the purpose of this calculation, it is estimated that 10 shellers will offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 20 minutes per response.

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan handlers.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 3.3 hours.

FV–307 Grower Member and Alternate Grower Member Ballot. Pecan growers would use this ballot to vote on their choice of nominees to serve on the Council. For the purpose of this calculation, it is estimated that 1,250 growers (50 percent of all growers) will vote in nomination elections.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Respondents: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas pecan growers.

Estimated Number of Respondents: 1,250.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 313 hours.

If this marketing order program is approved by growers in referendum and established by USDA, the Council could recommend to the Department other forms (such as monthly handler reports of acquisitions or dispositions of substandard pecans) which would be

needed to administer the order. All such forms would be subject to USDA and OMB review and approval.

Comments: Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581—NEW and the pecan marketing order, and be sent to USDA in care of the Docket Clerk at the previously mentioned address. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval of the above-described forms. All comments will become a matter of public record.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

(1) The proposed marketing agreement and order and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The proposed marketing agreement and order regulate the handling of pecans in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The proposed marketing agreement and order are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act;

(4) The proposed marketing agreement and order prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pecans grown in the production area; and

(5) All handling of pecans grown in the production area (Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas) as defined in the proposed marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Provisions of the proposed marketing agreement and order follow. Those sections identified with an asterisk (*) apply only to the proposed marketing agreement.

List of Subjects in Proposed 7 CFR Part 986

Marketing agreements, Pecans, Reporting and recordkeeping requirements.

The Agricultural Marketing Service proposes to add 7 CFR part 986 to read as follows:

PART 986—PECANS GROWN IN THE STATES OF ALABAMA, ARKANAS, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MISSISSIPPI, NORTH CAROLINA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, AND TEXAS

Subpart A—Order Regulating Handling of Pecans

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Subpart B—Reserved

Authority: 7 U.S.C. 601–674.

Definitions

§ 986.1 Accumulator.

Accumulator means a person who compiles inshell pecans from other persons for the purpose of resale or transfer.

§ 986.2 Act.

Act means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*).

§ 986.3 Affiliation.

Affiliation. This term normally appears as ''affiliate of'' or ''affiliated with,'' and means a person such as a grower or sheller who is: A grower or handler that directly, or indirectly through one or more intermediaries, owns or controls, or is controlled by, or is under common control with the grower or handler specified; or a grower or handler that directly, or indirectly through one or more intermediaries, is connected in a proprietary capacity, or shares the ownership or control of the specified grower or handler with one or more other growers or handlers. As used in this part, the term ''control'' (including the terms ''controlling,'' ''controlled by,'' and ''under the common control with'') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a handler or a grower, whether through voting securities, membership in a cooperative, by contract or otherwise.

§ 986.4 Blowouts.

Blowouts mean lightweight or underdeveloped inshell pecan nuts that are considered of lesser quality and market value.

§ 986.5 To certify.

To certify means the issuance of a certification of inspection of pecans by the inspection service.

§ 986.6 Confidential data or information.

Confidential data or information submitted to the Council consists of data or information constituting a trade secret or disclosure of the trade position, financial condition, or business operations of a particular entity or its customers.

§ 986.7 Container.

Container means a box, bag, crate, carton, package (including retail packaging), or any other type of receptacle Used in the packaging or handling of pecans.

§ 986.8 Council.

Council means the American Pecan Council established pursuant to § 986.45, American Pecan Council.

§ 986.9 Crack.

Crack means to break, crack, or otherwise compromise the outer shell of a pecan so as to expose the kernel inside to air outside the shell.

§ 986.10 Cracks.

Cracks refer to an accumulated group or container of pecans that have been cracked in harvesting or handling.

§ 986.11 Custom harvester.

Custom harvester means a person who harvests inshell pecans for a fee.

§ 986.12 Department or USDA.

Department or *USDA* means the United States Department of Agriculture.

§ 986.13 Disappearance.

Disappearance means the difference between the sum of grower-cleaned production and handler-cleaned production (whether from improved orchards or native and seedling groves) and the sum of inshell and shelled merchantable pecans reported on an inshell weight basis.

§ 986.14 Farm Service Agency.

Farm Service Agency or FSA means that agency of the U.S. Department of Agriculture.

§ 986.15 Fiscal year.

Fiscal year means the twelve months from October 1 to September 30, both inclusive, or any other such period deemed appropriate by the Council and approved by the Secretary.

§ 986.16 Grade and size.

Grade and size means any of the officially established grades of pecans and any of the officially established sizes of pecans as set forth in the United States standards for inshell and shelled pecans or amendments thereto, or modifications thereof, or other variations of grade and size based thereon recommended by the Council and approved by the Secretary.

§ 986.17 Grower.

(a) *Grower* is synonymous with producer and means any person engaged within the production area in a proprietary capacity in the production of pecans if such person:

(1) Owns an orchard and harvests its pecans for sale (even if a custom harvester is used); or

(2) Is a lessee of a pecan orchard and has the right to sell the harvest (even if the lessee must remit a percentage of the crop or rent to a lessor).

(b) The term ''grower'' shall only include those who produce a minimum of 50,000 pounds of inshell pecans during a representative period (average of four years) or who own a minimum of 30 pecan acres according to the FSA, including acres calculated by the FSA based on pecan tree density. In the absence of any FSA delineation of pecan acreage, the regular definition of an acre will apply. The Council may recommend changes to this definition subject to the approval of the Secretary.

§ 986.18 Grower-cleaned production.

Grower-cleaned production means production harvested and processed through a cleaning plant to determine volumes of improved pecans, native and seedling pecans, and substandard pecans to transfer to a handler for sale.

§ 986.19 Handler.

Handler means any person who handles inshell or shelled pecans in any manner described in § 986.20.

§ 986.20 To handle.

To handle means to receive, shell, crack, accumulate, warehouse, roast, pack, sell, consign, transport, export, or ship (except as a common or contract carrier of pecans owned by another person), or in any other way to put inshell or shelled pecans into any and all markets in the stream of commerce either within the area of production or from such area to any point outside thereof. The term ''to handle'' shall not include: Sales and deliveries within the area of production by growers to handlers; grower warehousing; custom handling (except for selling, consigning or exporting) or other similar activities paid for on a fee-for-service basis by a grower who retains the ownership of the pecans; or transfers between handlers.

§ 986.21 Handler inventory.

Handler inventory means all pecans, shelled or inshell, as of any date and wherever located within the production area, then held by a handler for their account.

§ 986.22 Handler-cleaned production.

Handler-cleaned production is production that is received, purchased or consigned from the grower by a handler prior to processing through a cleaning plant, and then subsequently processed through a cleaning plant so as to determine volumes of improved pecans, native and seedling pecans, and substandard pecans.

§ 986.23 Hican.

Hican means a tree resulting from a cross between a pecan and some other type of hickory (members of the genus *Carya)* or the nut from such a hybrid tree.

§ 986.24 Inshell pecans.

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

§ 986.25 Inspection Service.

Inspection service means the Federal-State Inspection Service or any other inspection service authorized by the Secretary.

§ 986.26 Inter-handler transfer.

Inter-handler transfer means the movement of inshell pecans from one handler to another inside the production area for the purposes of additional handling. Any assessments or requirements under this part with respect to inshell pecans so transferred may be assumed by the receiving handler.

§ 986.27 Merchantable pecans.

(a) *Inshell. Merchantable inshell* pecans mean all inshell pecans meeting the minimum grade regulations that may be effective pursuant to § 986.69, Authorities regulating handling.

(b) *Shelled. Merchantable shelled* pecans means all shelled pecans meeting the minimum grade regulations that may be effective pursuant to § 986.69, Authorities regulating handling.

§ 986.28 Pack.

Pack means to clean, grade, or otherwise prepare pecans for market as inshell or shelled pecans.

§ 986.29 Pecans.

(a) *Pecans* means and includes any and all varieties or subvarieties of Genus: *Carya,* Species: *illinoensis,* expressed also as *Carya illinoinensis (syn. C. illinoenses)* including all varieties thereof, excluding hicans, that are produced in the production area and are classified as:

(1) *Native or seedling* pecans harvested from non-grafted or naturally propagated tree varieties;

(2) *Improved pecans* harvested from grafted tree varieties bred or selected for superior traits of nut size, ease of shelling, production characteristics, and resistance to certain insects and diseases, including but not limited to: Desirable, Elliot, Forkert, Sumner, Creek, Excel, Gracross, Gratex, Gloria Grande, Kiowa, Moreland, Sioux, Mahan, Mandan, Moneymaker, Morrill, Cunard, Zinner, Byrd, McMillan, Stuart, Pawnee, Eastern and Western Schley, Wichita, Success, Cape Fear, Choctaw, Cheyenne, Lakota, Kanza, Caddo, and Oconee; and

(3) *Substandard pecans* that are blowouts, cracks, stick-tights, and other inferior quality pecans, whether native or improved, that, with further handling, can be cleaned and eventually sold into the stream of commerce.

(b) The Council, with the approval of the Secretary, may recognize new or delete obsolete varieties or sub-varieties for each category.

§ 986.30 Person.

Person means an individual, partnership, corporation, association, or any other business unit.

§ 986.31 Production area.

Production area means the following fifteen pecan-producing states within the United States: Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas.

§ 986.32 Proprietary capacity.

Proprietary capacity means the capacity or interest of a grower or handler that, either directly or through one or more intermediaries or affiliates, is a property owner together with all the appurtenant rights of an owner, including the right to vote the interest in that capacity as an individual, a shareholder, member of a cooperative, partner, trustee or in any other capacity with respect to any other business unit.

§ 986.33 Regions.

(a) *Regions* within the production area shall consist of the following:

(1) *Eastern Region,* consisting of: Alabama, Florida, Georgia, North Carolina, South Carolina

(2) *Central Region,* consisting of: Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Texas

(3) *Western Region,* consisting of: Arizona, California, New Mexico

(b) With the approval of the Secretary, the boundaries of any region may be changed pursuant to § 986.58, Reapportionment and redefining of regions.

§ 986.34 Representative period.

Representative period is the previous four fiscal years for which a grower's annual average production is calculated, or any other period recommended by the Council and approved by the Secretary.

§ 986.35 Secretary.

Secretary means the Secretary of Agriculture of the United States, or any other officer or employee of the United States Department of Agriculture who is, or who may be, authorized to perform the duties of the Secretary of Agriculture of the United States.

§ 986.36 Sheller.

Sheller refers to any person who converts inshell pecans to shelled pecans and sells the output in any and all markets in the stream of commerce, both within and outside of the production area; *Provided,* That the term ''sheller'' shall only include those who shell more than 1 million pounds of inshell pecans in a fiscal year. The Council may recommend changes to this definition subject to the approval of the Secretary.

§ 986.37 Shelled pecans.

Shelled pecans are pecans whose shells have been removed leaving only edible kernels, kernel pieces or pecan meal. *Shelled pecans* are synonymous with *pecan meats.*

§ 986.38 Stick-tights.

Stick-tights means pecans whose outer shuck has adhered to the shell causing their value to decrease or be discounted.

§ 986.39 Trade supply.

Trade supply means the quantity of merchantable inshell or shelled pecans that growers will supply to handlers during a fiscal year for sale in the United States and abroad or, in the absence of handler regulations § 986.69 setting forth minimum grade regulations for merchantable pecans, the sum of handler-cleaned and grower-cleaned production.

§ 986.40 Unassessed inventory.

Unassessed inventory means inshell pecans held by growers or handlers for which no assessment has been paid to the Council.

§ 986.41 Varieties.

Varieties mean and include all cultivars, classifications, or subdivisions of pecans.

§ 986.42 Warehousing.

Warehousing means to hold assessed or unassessed inventory.

§ 986.43 Weight.

Weight means pounds of inshell pecans, received by handler within each fiscal year; *Provided,* That for shelled pecans the actual weight shall be multiplied by two to obtain an inshell weight.

Administrative Body

§ 986.45 American Pecan Council.

The American Pecan Council is hereby established consisting of 17 members selected by the Secretary, each of whom shall have an alternate member nominated with the same qualifications as the member. The 17 members shall include nine (9) grower seats, six (6) sheller seats, and two (2) at-large seats allocated to one accumulator and one public member. The grower and sheller nominees and their alternates shall be growers and shellers at the time of their nomination and for the duration of their tenure. Grower and sheller members and their alternates shall be selected by the Secretary from nominees submitted by the Council. The two at-large seats shall be nominated by the Council and appointed by the Secretary.

(a) Each region shall be allocated the following member seats:

(1) *Eastern Region:* Three (3) growers and two (2) shellers;

(2) *Central Region:* Three (3) growers and two (2) shellers;

(3) *Western Region:* Three (3) growers and two (2) shellers.

(b) Within each region, the grower and sheller seats shall be defined as follows:

(1) *Grower seats:* Each region shall have a grower Seat 1 and Seat 2 allocated to growers whose acreage is equal to or exceeds 176 pecan acres. Each region shall also have a grower Seat 3 allocated to a grower whose acreage is less than 176 pecan acres.

(2) *Sheller seats:* Each region shall have a sheller Seat 1 allocated to a sheller who handles more than 12.5 million pounds of inshell pecans in the fiscal year preceding nomination, and a sheller Seat 2 allocated to a sheller who handles less than or equal to 12.5 million pounds of inshell pecans in the fiscal year preceding nomination.

(c) The Council may recommend, subject to the approval of the Secretary, revisions to the above requirements for grower and sheller seats to accommodate changes within the industry.

§ 986.46 Council nominations and voting.

Nomination of Council members and alternate members shall follow the procedure set forth in this section, or as may be changed as recommended by the Council and approved by the Secretary. All nominees must meet the requirements set forth in §§ 986.45, American Pecan Council, and 986.48, Eligibility, or as otherwise identified by the Secretary, to serve on the Council.

(a) *Initial members.* Nominations for initial Council members and alternate members shall be conducted by the Secretary by either holding meetings of shellers and growers, by mail, or by email, and shall be submitted on approved nomination forms. Eligibility to cast votes on nomination ballots, accounting of nomination ballot results, and identification of member and alternate nominees shall follow the procedures set forth in this section, or by any other criteria deemed necessary by the Secretary. The Secretary shall select and appoint the initial members and alternate members of the Council.

(b) *Successor members.* Subsequent nominations of Council members and alternate members shall be conducted as follows:

(1) *Call for nominations.* (i) Nominations for the grower member seats for each region shall be received from growers in that region on approved forms containing the information stipulated in this section.

(ii) If a grower is engaged in producing pecans in more than one region, such grower shall nominate in the region in which they grow the largest volume of their production.

(iii) Nominations for the sheller member seats for each region shall be received from shellers in that region on approved forms containing the information stipulated in this section.

(iv) If a sheller is engaged in handling in more than one region, such sheller shall nominate in the region in which they shelled the largest volume in the preceding fiscal year.

(2) *Voting for nominees.* (i) Only growers, through duly authorized officers or employees of growers, if applicable, may participate in the nomination of grower member nominees and their alternates. Each grower shall be entitled to cast only one nomination ballot for each of the three grower seats in their region.

(ii) If a grower is engaged in producing pecans in more than one region, such grower shall cast their nomination ballot in the region in which they grow the largest volume of their production. Notwithstanding this stipulation, such grower may vote their volume produced in any or all of the three regions.

(iii) Only shellers, through duly authorized officers or employees of shellers, if applicable, may participate in the nomination of the sheller member nominees and their alternates. Each sheller shall be entitled to cast only one nomination ballot for each of the two sheller seats in their region.

(iv) If a sheller is engaged in handling in more than one region, such sheller shall cast their nomination ballot in the region in which they shelled the largest volume in the preceding fiscal year. Notwithstanding this stipulation, such sheller may vote their volume handled in all three regions.

(v) If a person is both a grower and a sheller of pecans, such person may not participate in both grower and sheller nominations. Such person must elect to participate either as a grower or a sheller.

(3) *Nomination procedure for grower seats.* (i) The Council shall mail to all growers who are on record with the Council within the respective regions a grower nomination ballot indicating the nominees for each of the three grower member seats, along with voting instructions. Growers may cast ballots on the proper ballot form either at meetings of growers, by mail, or by email as designated by the Council. For ballots to be considered, they must be submitted on the proper forms with all required information, including signatures.

(ii) On the ballot, growers shall indicate their vote for the grower nominee candidates for the grower seats and also indicate their average annual volume of inshell pecan production for the preceding four fiscal years.

(iii) *Seat 1* (growers with equal to or more than 176 acres of pecans). The nominee for this seat in each region shall be the grower receiving the highest volume of production (pounds of inshell pecans) votes from the respective region, and the grower receiving the second highest volume of production votes shall be the alternate member nominee for this seat. In case of a tie vote, the nominee shall be selected by a drawing.

(iv) *Seat 2* (growers with equal to or more than 176 acres of pecans). The nominee for this seat in each region shall be the grower receiving the highest number of votes from their respective region, and the grower receiving the second highest number of votes shall be the alternate member nominee for this seat. In case of a tie vote, the nominee shall be selected by a drawing.

(v) *Seat 3* (grower with less than 176 acres of pecans). The nominee for this seat in each region shall be the grower receiving the highest number of votes from the respective region, and the grower receiving the second highest number of votes shall be the alternate member nominee for this seat. In case of a tie vote, the nominee shall be selected by a drawing.

(4) *Nomination procedure for sheller seats.* (i) The Council shall mail to all shellers who are on record with the Council within the respective regions the sheller ballot indicating the nominees for each of the two sheller member seats in their respective regions, along with voting instructions. Shellers may cast ballots on approved ballot forms either at meetings of shellers, by mail, or by email as designated by the Council. For ballots to be considered, they must be submitted on the approved forms with all required information, including signatures.

(ii) *Seat 1* (shellers handling more than 12.5 million lbs. of inshell pecans in the preceding fiscal year). The nominee for this seat in each region shall be assigned to the sheller receiving the highest number of votes from the respective region, and the sheller receiving the second highest number of votes shall be the alternate member nominee for this seat. In case of a tie vote, the nominee shall be selected by a drawing.

(iii) *Seat 2* (shellers handling equal to or less than 12.5 million lbs. of inshell pecans in the preceding fiscal year). The nominee for this seat in each region shall be assigned to the sheller receiving the highest number of votes from the respective region, and the sheller receiving the second highest number of votes shall be the alternate member nominee for this seat. In case of a tie vote, the nominee shall be selected by a drawing.

(5) *Reports to the Secretary.* Nominations in the foregoing manner received by the Council shall be reported to the Secretary on or before 15 of each July of any year in which nominations are held, together with a certified summary of the results of the nominations and other information deemed by the Council to be pertinent or requested by the Secretary. From those nominations, the Secretary shall select the fifteen grower and sheller members of the Council and an alternate for each member, unless the Secretary rejects any nomination submitted. In the event the Secretary rejects a nomination, a second nomination process may be conducted to identify other nominee candidates, the resulting nominee information may be reported to the Secretary after July 15 and before September 15. If the Council fails to report nominations to the Secretary in the manner herein specified, the Secretary may select the members without nomination. If nominations for the public and accumulator at-large members are not submitted by September 15 of any year in which their nomination is due, the Secretary may select such members without nomination.

(6) *At-large members.* The grower and sheller members of the Council shall select one public member and one accumulator member and respective alternates for consideration, selection and appointment by the Secretary. The public member and alternate public member may not have any financial interest, individually or corporately, or affiliation with persons vested in the pecan industry. The accumulator member and alternate accumulator member must meet the criteria set forth in § 986.1, Accumulator, and may reside or maintain a place of business in any region.

(7) *Nomination forms.* The Council may distribute nomination forms at meetings, by mail, by email, or by any other form of distribution recommended by the Council and approved by the Secretary.

(i) *Grower nomination forms.* Each nomination form submitted by a grower shall include the following information:

(A) The name of the nominated grower;

(B) The name and signature of the nominating grower;

(C) Two additional names and respective signatures of growers in support of the nomination;

(D) Any other such information recommended by the Council and approved by the Secretary.

(ii) *Sheller nomination forms.* Each nomination form submitted by a sheller shall include the following:

(A) The name of the nominated sheller;

(B) The name and signature of the nominating sheller;

(C) One additional name and signature of a sheller in support of the nomination;

(D) Any other such information recommended by the Council and approved by the Secretary.

(8) *Changes to the nomination and voting procedures.* The Council may recommend, subject to the approval of the Secretary, a change to these procedures should the Council determine that a revision is necessary.

§ 986.47 Alternate members.

(a) Each member of the Council shall have an alternate member to be nominated in the same manner as the member.

(b) An alternate for a member of the Council shall act in the place and stead of such member in their absence or in the event of their death, removal, resignation, or disqualification, until the next nomination and elections take place for the Council or the vacancy has been filled pursuant to § 986.48, Eligibility.

(c) In the event any member of the Council and their alternate are both unable to attend a meeting of the Council, any alternate for any other member representing the same group as the absent member may serve in the place of the absent member.

§ 986.48 Eligibility.

(a) Each grower member and alternate shall be, at the time of selection and during the term of office, a grower or an officer, or employee, of a grower in the region and in the classification for which nominated.

(b) Each sheller member and alternate shall be, at the time of selection and during the term of office, a sheller or an officer or employee of a sheller in the region and in the classification for which nominated.

(c) A grower can be a nominee for only one grower member seat. If a grower is nominated for two grower member seats, he or she shall select the seat in which he or she desires to run, and the grower ballot shall reflect that selection.

(d) Any member or alternate member who at the time of selection was employed by or affiliated with the person who is nominated shall, upon termination of that relationship, become disqualified to serve further as a member and that position shall be deemed vacant.

(e) No person nominated to serve as a public member or alternate public member shall have a financial interest in any pecan grower or handling operation.

§ 986.49 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the Council shall, prior to such selection, qualify by advising the Secretary that if selected, such person agrees to serve in the position for which that nomination has been made.

§ 986.50 Term of office.

(a) Selected members and alternate members of the Council shall serve for terms of four years: *Provided,* That at the end of the first four (4) year term and in the nomination and selection of the second Council only, four of the grower

member and alternate seats and three of the sheller member and alternate seats shall be seated for terms of two years so that approximately half of the memberships' and alternates' terms expire every two years thereafter. Member and alternate seats assigned two-year terms for the seating of the second Council only shall be as follows:

(1) Grower member Seat 2 in all regions shall be assigned a two-year term;

(2) Grower member Seat 3 in all regions shall, by drawing, identify one member seat to be assigned a two-year term; and,

(3) Sheller Seat 2 in all regions shall be assigned a two-year term.

(b) Council members and alternates may serve up to two consecutive, four-year terms of office. Subject to section (c) below, in no event shall any member or alternate serve more than eight consecutive years on the Council as either a member or an alternate. However, if selected, an alternate having served up to two consecutive terms may immediately serve as a member for two consecutive terms without any interruption in service. The same is true for a member who, after serving for up to two consecutive terms, may serve as an alternate if nominated without any interruption in service. A person having served the maximum number of terms as set forth above may not serve again as a member or an alternate for at least twelve consecutive months. For purposes of determining when a member or alternate has served two consecutive terms, the accrual of terms shall begin following any period of at least twelve consecutive months out of office.

(c) Each member and alternate member shall continue to serve until a successor is selected and has qualified.

(d) A term of office shall begin as set forth in the by-laws or as directed by the Secretary each year for all members.

(e) The Council may recommend, subject to approval of the Secretary, revisions to the start day for the term of office, the number of years in a term, and the number of terms a member or an alternate can serve.

§ 986.51 Vacancy.

Any vacancy on the Council occurring by the failure of any person selected to the Council to qualify as a member or alternate member due to a change in status making the member ineligible to serve, or due to death, removal, or resignation, shall be filled, by a majority vote of the Council for the unexpired portion of the term. However, that person shall fulfill all the qualifications set forth in this part as required for the member whose office that person is to fill. The qualifications of any person to fill a vacancy on the Council shall be certified in writing to the Secretary. The Secretary shall notify the Council if the Secretary determines that any such person is not qualified.

§ 986.52 Council expenses.

The members and their alternates of the Council shall serve without compensation, but shall be reimbursed for the reasonable and necessary expenses incurred by them in the performance of their duties under this part.

§ 986.53 Powers.

The Council shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make bylaws, rules and regulations to effectuate the terms and provisions of this part;

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

(d) To recommend to the Secretary amendments to this part.

§ 986.54 Duties.

The duties of the Council shall be as follows:

(a) To act as intermediary between the Secretary and any handler or grower;

(b) To keep minute books and records which will clearly reflect all of its acts and transactions, and such minute books and records shall at any time be subject to the examination of the Secretary;

(c) To furnish to the Secretary a complete report of all meetings and such other available information as he or she may request;

(d) To appoint such employees as it may deem necessary and to determine the salaries, define the duties, and fix the bonds of such employees;

(e) To cause the books of the Council to be audited by one or more certified public accountants at least once for each fiscal year and at such other times as the Council deems necessary or as the Secretary may request, and to file with the Secretary three copies of all audit reports made;

(f) To investigate the growing, shipping and marketing conditions with respect to pecans and to assemble data in connection therewith;

(g) To investigate compliance with the provisions of this part; and,

(h) To recommend by-laws, rules and regulations for the purpose of administering this part.

§ 986.55 Procedure.

(a) The members of the Council shall select a chairman from their membership, and shall select such other officers and adopt such rules for the conduct of Council business as they deem advisable.

(b) The Council may provide for meetings by telephone, or other means of communication, and any vote cast at such a meeting shall be confirmed promptly in writing. The Council shall give the Secretary the same notice of its meetings as is given to members of the Council.

(c) *Quorum.* A quorum of the Council shall be any twelve voting Council members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the Council; *Provided,* That:

(1) Actions of the Council with respect to the following issues shall require a two-thirds (12 members) concurring vote of the Council:

(i) Establishment of or changes to by-laws;

(ii) Appointment or administrative issues relating to the program's manager or chief executive officer;

(iii) Budget;

(iv) Assessments;

(v) Compliance and audits;

(vi) Redefining of regions and reapportionment or reallocation of Council membership;

(vii) Modifying definitions of grower and sheller;

(viii) Research or promotion activities under § 986.68;

(ix) Grade, quality and size regulation under § 986.69(a)(1) and (2);

(x) Pack and container regulation under § 986.69(a)(3); and,

(2) Actions of the Council with respect to the securing of commercial bank loans for the purpose of financing start-up costs of the Council and its activities or securing financial assistance in emergency situations shall require a unanimous vote of all members present at an in-person meeting; *Provided,* That in the event of an emergency that warrants immediate attention sooner than a face-to-face meeting is possible, a vote for financing may be taken. In such event, the Council's first preference is a videoconference and second preference is phone conference, both followed by written confirmation of the members attending the meeting.

§ 986.56 Right of the Secretary.

The members and alternates for members and any agent or employee appointed or employed by the Council shall be subject to removal or suspension by the Secretary at any time.

Each and every regulation, decision, determination, or other act shall be subject to the continuing right of the Secretary to disapprove of the same at any time, and, upon such disapproval, shall be deemed null and void, except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

§ 986.57 Funds and other property.

(a) All funds received pursuant to any of the provisions of this part shall be used solely for the purposes specified in this part, and the Secretary may require the Council and its members to account for all receipts and disbursements.

(b) Upon the death, resignation, removal, disqualification, or expiration of the term of office of any member or employee, all books, records, funds, and other property in their possession belonging to the Council shall be delivered to their successor in office or to the Council, and such assignments and other instruments shall be executed as may be necessary to vest in such successor or in the Council full title to all the books, records, funds, and other property in the possession or under the control of such member or employee pursuant to this subpart.

§ 986.58 Reapportionment and reestablishment of regions.

The Council may recommend, subject to approval of the Secretary, reestablishment of regions, reapportionment of members among regions, and may revise the groups eligible for representation on the Council. In recommending any such changes, the following shall be considered:

(a) Shifts in acreage within regions and within the production area during recent years;

(b) The importance of new production in its relation to existing regions;

(c) The equitable relationship between Council apportionment and regions;

(d) Changes in industry structure and/or the percentage of crop represented by various industry entities; and

(e) Other relevant factors.

Expenses, Assessments and Marketing Policy

§ 986.60 Budget.

As soon as practicable before the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare a budget of income and expenditures necessary for the administration of this part. The Council may recommend a rate of assessment calculated to provide adequate funds to defray its proposed expenditures. The Council shall present such budget to the Secretary with an accompanying report showing the basis for its calculations, and all shall be subject to Secretary approval.

§ 986.61 Assessments.

(a) Each handler who first handles inshell pecans shall pay assessments to the Council. Assessments collected each fiscal year shall defray expenses which the Secretary finds reasonable and likely to be incurred by the Council during that fiscal year. Each handler's share of assessments paid to the Council shall be equal to the ratio between the total quantity of inshell pecans handled by them as the first handler thereof during the applicable fiscal year, and the total quantity of inshell pecans handled by all regulated handlers in the production area during the same fiscal year. The payment of assessments for the maintenance and functioning of the Council may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative. Handlers may avail themselves of an inter-handler transfer, as provided for in § 986.62, Inter-handler transfers.

(b) Based upon a recommendation of the Council or other available data, the Secretary shall fix three base rates of assessment for inshell pecans handled during each fiscal year. Such base rates shall include one rate of assessment for any or all varieties of pecans classified as native and seedling; one rate of assessment for any or all varieties of pecans classified as improved; and one rate of assessment for any pecans classified as substandard.

(c) Upon implementation of this part and subject to the approval of the Secretary, initial assessment rates per classification shall be set within the following prescribed ranges: Native and seedling classified pecans shall be assessed at one-cent to two-cents per pound; improved classified pecans shall be assessed at two-cents to three-cents per pound; and, substandard classified pecans shall be assessed at one-cent to two-cents per pound. These assessment ranges shall be in effect for the initial four years of the order.

(d) Subsequent assessment rates shall not exceed two percent of the aggregate of all prices in each classification across the production area based on Council data, or the average of USDA reported average price received by growers for each classification, in the preceding fiscal year as recommended by the Council and approved by the Secretary. After four years from the implementation of this part, the Council may recommend, subject to the approval of the Secretary, revisions to this calculation or assessment ranges.

(e) The Council, with the approval of the Secretary, may revise the assessment rates if it determines, based on information including crop size and value, that the action is necessary, and if the revision does not exceed the assessment limitation specified in this section and is made prior to the final billing of the assessment.

(f) In order to provide funds for the administration of the provisions of this part during the first part of a fiscal year, before sufficient operating income is available from assessments, the Council may accept the payment of assessments in advance and may also borrow money for such purposes; *Provided,* That no loan may amount to more than 50 percent of projected assessment revenue projected for the year in which the loan is secured, and the loan must be repaid within five years.

(g) If a handler does not pay assessments within the time prescribed by the Council, the assessment may be increased by a late payment charge and/or an interest rate charge at amounts prescribed by the Council with approval of the Secretary.

(h) On August 31 of each year, every handler warehousing inshell pecans shall be identified as the first handler of those pecans and shall be required to pay the assessed rate on the category of pecans in their possession on that date. The terms of this paragraph may be revised subject to the recommendation of the Council and approval by the Secretary.

(i) On August 31 of each year, all inventories warehoused by growers from the current fiscal year shall cease to be eligible for inter-handler transfer treatment. Instead, such inventory will require the first handler that handles such inventory to pay the assessment thereon in accordance with the prevailing assessment rates at the time of transfer from the grower to the said handler. The terms of this paragraph may be revised subject to the recommendation of the Council and approval by the Secretary.

§ 986.62 Inter-handler transfers.

Any handler inside the production area, except as provided for in § 986.61 (h) and (i), Assessments, may transfer inshell pecans to another handler inside the production area for additional handling, and any assessments or other marketing order requirements with respect to pecans so transferred may be assumed by the receiving handler. The Council, with the approval of the Secretary, may establish methods and procedures, including necessary reports,

to maintain accurate records for such transfers. All inter-handler transfers will be documented by forms or electronic transfer receipts approved by the Council, and all forms or electronic transfer receipts used for inter-handler transfers shall require that copies be sent to the selling party, the receiving party, and the Council. Such forms must state which handler has the assessment responsibilities.

§ 986.63 Contributions.

The Council may accept voluntary contributions. Such contributions may only be accepted if they are free from any encumbrances or restrictions on their use and the Council shall retain complete control of their use. The Council may receive contributions from both within and outside of the production area.

§ 986.64 Accounting.

(a) Assessments collected in excess of expenses incurred shall be accounted for in accordance with one of the following:

(1) Excess funds not retained in a reserve, as provided in paragraph (a)(2) of this section shall be refunded proportionately to the persons from whom they were collected; or

(2) The Council, with the approval of the Secretary, may carry over excess funds into subsequent fiscal periods as reserves: *Provided,* That funds already in reserves do not equal approximately three fiscal years' expenses. Such reserve funds may be used:

(i) To defray expenses during any fiscal period prior to the time assessment income is sufficient to cover such expenses;

(ii) To cover deficits incurred during any fiscal period when assessment income is less than expenses;

(iii) To defray expenses incurred during any period when any or all provisions of this part are suspended or are inoperative; and

(iv) To cover necessary expenses of liquidation in the event of termination of this part.

(b) Upon such termination, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate. To the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.

(c) All funds received by the Council pursuant to the provisions of this part shall be used solely for the purposes specified in this part and shall be accounted for in the manner provided for in this part. The Secretary may at any time require the Council and its members to account for all receipts and disbursements.

(d) Upon the removal or expiration of the term of office of any member of the Council, such member shall account for all receipts and disbursements and deliver all property and funds in their possession to the Council, and shall execute such assignments and other instruments as may be necessary or appropriate to vest in the Council full title to all of the property, funds, and claims vested in such member pursuant to this part.

(e) The Council may make recommendations to the Secretary for one or more of the members thereof, or any other person, to act as a trustee for holding records, funds, or any other Council property during periods of suspension of this subpart, or during any period or periods when regulations are not in effect and if the Secretary determines such action appropriate, he or she may direct that such person or persons shall act as trustee or trustees for the Council.

§ 986.65 Marketing policy.

By the end of each fiscal year, the Council shall make a report and recommendation to the Secretary on the Council's proposed marketing policy for the next fiscal year. Each year such report and recommendation shall be adopted by the affirmative vote of at least two-thirds (2/3) of the members of the Council and shall include the following and, where applicable, on an inshell basis:

(a) Estimate of the grower-cleaned production and handler-cleaned production in the area of production for the fiscal year;

(b) Estimate of disappearance;

(c) Estimate of the improved, native, and substandard pecans;

(d) Estimate of the handler inventory on August 31, of inshell and shelled pecans;

(e) Estimate of unassessed inventory;

(f) Estimate of the trade supply, taking into consideration imports, and other factors;

(g) Preferable handler inventory of inshell and shelled pecans on August 31 of the following year;

(h) Projected prices in the new fiscal year;

(i) Competing nut supplies; and

(j) Any other relevant factors.

Authorities Relating to Research, Promotion, Data Gathering, Packaging, Grading, Compliance and Reporting

§ 986.67 Recommendations for regulations.

Upon complying with § 986.65, Marketing policy, the Council may propose regulations to the Secretary whenever it finds that such proposed regulations may assist in effectuating the declared policy of the Act.

§ 986.68 Authority for research and promotion activities.

The Council, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects, and marketing promotion, including paid generic advertising, designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of pecans including product development, nutritional research, and container development. The expenses of such projects shall be paid from funds collected pursuant to this part.

§ 986.69 Authorities regulating handling.

(a) The Council may recommend, subject to the approval of the Secretary, regulations that:

(1) Establish handling requirements or minimum tolerances for particular grades, sizes, or qualities, or any combination thereof, of any or all varieties or classifications of pecans during any period;

(2) Establish different handling requirements or minimum tolerances for particular grades, sizes, or qualities, or any combination thereof for different varieties or classifications, for different containers, for different portions of the production area, or any combination of the foregoing, during any period;

(3) Fix the size, capacity, weight, dimensions, or pack of the container or containers, which may be used in the packaging, transportation, sale, preparation for market, shipment, or other handling of pecans; and

(4) Establish inspection and certification requirements for the purposes of (a)(1) through (3) of this section.

(b) Regulations issued hereunder may be amended, modified, suspended, or terminated whenever it is determined:

(1) That such action is warranted upon recommendation of the Council and approval by the Secretary, or other available information; or

(2) That regulations issued hereunder no longer tend to effectuate the declared policy of the Act.

(c) The authority to regulate as put forward in this subsection shall not in

any way constitute authority for the Council to recommend volume regulation, such as reserve pools, producer allotments, or handler withholding requirements which limit the flow of product to market for the purpose of reducing market supply.

(d) The Council may recommend, subject to the approval of the Secretary, rules and regulations to effectuate this sub-part.

§ 986.70 Handling for special purposes.

Regulations in effect pursuant to § 986.69, Authorities regulating handling, may be modified, suspended, or terminated to facilitate handling of pecans for:

(a) Relief or charity;

(b) Experimental purposes; and

(c) Other purposes which may be recommended by the Council and approved by the Secretary.

§ 986.71 Safeguards.

The Council, with the approval of the Secretary, may establish through rules such requirements as may be necessary to establish that shipments made pursuant to § 986.70, Handling for special purposes, were handled and used for the purpose stated.

§ 986.72 Notification of regulation.

The Secretary shall promptly notify the Council of regulations issued or of any modification, suspension, or termination thereof. The Council shall give reasonable notice thereof to industry participants.

Reports, Books and Other Records

§ 986.75 Reports of handler inventory.

Each handler shall submit to the Council in such form and on such dates as the Council may prescribe, reports showing their inventory of inshell and shelled pecans.

§ 986.76 Reports of merchantable pecans handled.

Each handler who handles merchantable pecans at any time during a fiscal year shall submit to the Council in such form and at such intervals as the Council may prescribe, reports showing the quantity so handled and such other information pertinent thereto as the Council may specify.

§ 986.77 Reports of pecans received by handlers.

Each handler shall file such reports of their pecan receipts from growers, handlers, or others in such form and at such times as may be required by the Council with the approval of the Secretary.

§ 986.78 Other handler reports.

Upon request of the Council made with the approval of the Secretary each handler shall furnish such other reports and information as are needed to enable the Council to perform its duties and exercise its powers under this part.

§ 986.79 Verification of reports.

For the purpose of verifying and checking reports filed by handlers on their operations, the Secretary and the Council, through their duly authorized representatives, shall have access to any premises where pecans and pecan records are held. Such access shall be available at any time during reasonable business hours. Authorized representatives of the Council or the Secretary shall be permitted to inspect any pecans held and any and all records of the handler with respect to matters within the purview of this part. Each handler shall maintain complete records on the receiving, holding, and disposition of all pecans. Each handler shall furnish all labor necessary to facilitate such inspections at no expense to the Council or the Secretary. Each handler shall store all pecans held by him in such manner as to facilitate inspection and shall maintain adequate storage records which will permit accurate identification with respect to inspection certificates of respective lots and of all such pecans held or disposed of theretofore. The Council, with the approval of the Secretary, may establish any methods and procedures needed to verify reports.

§ 986.80 Certification of reports.

All reports submitted to the Council as required in this part shall be certified to the Secretary and the Council as to the completeness and correctness of the information contained therein.

§ 986.81 Confidential information.

All reports and records submitted by handlers to the Council, which include data or information constituting a trade secret or disclosing the trade position, or financial condition or business operations of the handler shall be kept in the custody of one or more employees of the Council and shall be disclosed to no person except the Secretary.

§ 986.82 Books and other records.

Each handler shall maintain such records of pecans received, held and disposed of by them as may be prescribed by the Council for the purpose of performing its duties under this part. Such books and records shall be retained and be available for examination by authorized representatives of the Council and the Secretary for the current fiscal year and the preceding three (3) fiscal years.

Additional Provisions

§ 986.86 Exemptions.

(a) Any handler may handle inshell pecans within the production area free of the requirements of this part if such pecans are handled in quantities not exceeding 1,000 inshell pounds during any fiscal year.

(b) Any handler may handle shelled pecans within the production area free of the requirements of this part if such pecans are handled in quantities not exceeding 500 shelled pounds during any fiscal year.

(c) Mail order sales are not exempt sales under this part.

(d) The Council, with the approval of the Secretary, may establish such rules, regulations, and safeguards, and require such reports, certifications, and other conditions, as are necessary to ensure compliance with this part.

§ 986.87 Compliance.

Except as provided in this subpart, no handler shall handle pecans, the handling of which has been prohibited by the Secretary in accordance with provisions of this part, or the rules and regulations thereunder.

§ 986.88 Duration of immunities.

The benefits, privileges, and immunities conferred by virtue of this part shall cease upon termination hereof, except with respect to acts done under and during the existence of this part.

§ 986.89 Separability.

If any provision of this part is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remaining provisions and the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

§ 986.90 Derogation.

Nothing contained in this part is or shall be construed to be in derogation of, or in modification of, the rights of the Secretary or of the United States to exercise any powers granted by the Act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 986.91 Liability.

No member or alternate of the Council nor any employee or agent thereof, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any party under

this part or to any other person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, agent or employee, except for acts of dishonesty, willful misconduct, or gross negligence. The Council may purchase liability insurance for its members and officers.

§ 986.92 Agents.

The Secretary may name, by designation in writing, any person, including any officer or employee of the USDA or the United States to act as their agent or representative in connection with any of the provisions of this part.

§ 986.93 Effective time.

The provisions of this part and of any amendment thereto shall become effective at such time as the Secretary may declare, and shall continue in force until terminated in one of the ways specified in § 986.94.

§ 986.94 Termination.

(a) The Secretary may at any time terminate this part.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this part whenever he or she finds that such operation obstructs or does not tend to effectuate the declared policy of the Act.

(c) The Secretary shall terminate the provisions of this part applicable to pecans for market or pecans for handling at the end of any fiscal year whenever the Secretary finds, by referendum or otherwise, that such termination is favored by a majority of growers; *Provided,* That such majority of growers has produced more than 50 percent of the volume of pecans in the production area during such fiscal year. Such termination shall be effective only if announced on or before the last day of the then current fiscal year.

(d) The Secretary shall conduct a referendum within every five-year period beginning from the implementation of this part, to ascertain whether continuance of the provisions of this part applicable to pecans are favored by two-thirds by number or volume of growers voting in the referendum. The Secretary may terminate the provisions of this part at the end of any fiscal year in which the Secretary has found that continuance of this part is not favored by growers who, during an appropriate period of time determined by the Secretary, have been engaged in the production of pecans in the production area: *Provided,* That termination of this part shall be effective only if announced on or before the last day of the then current fiscal year.

(e) The provisions of this part shall, in any event, terminate whenever the provisions of the Act authorizing them cease to be in effect.

§ 986.95 Proceedings after termination.

(a) Upon the termination of this part, the Council members serving shall continue as joint trustees for the purpose of liquidating all funds and property then in the possession or under the control of the Council, including claims for any funds unpaid or property not delivered at the time of such termination.

(b) The joint trustees shall continue in such capacity until discharged by the Secretary; from time to time accounting for all receipts and disbursements; delivering all funds and property on hand, together with all books and records of the Council and of the joint trustees to such person as the Secretary shall direct; and, upon the request of the Secretary, executing such assignments or other instruments necessary and appropriate to vest in such person full title and right to all of the funds, property, or claims vested in the Council or in said joint trustees.

(c) Any funds collected pursuant to this part and held by such joint trustees or such person over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the joint trustees or such other person in the performance of their duties under this subpart, as soon as practicable after the termination hereof, shall be returned to the handlers pro rata in proportion to their contributions thereto.

(d) Any person to whom funds, property, or claims have been transferred or delivered by the Council, upon direction of the Secretary, as provided in this part, shall be subject to the same obligations and duties with respect to said funds, property, or claims as are imposed upon said joint trustees.

§ 986.96 Amendments.

Amendments to this part may be proposed from time to time by the Council or by the Secretary.

§ 986.97 Counterparts.

Handlers may sign an agreement with the Secretary indicating their support for this marketing order. This agreement may be executed in multiple counterparts by each handler. If more than fifty percent of the handlers, weighted by the volume of pecans handled during an appropriate period of time determined by the Secretary, enter into such an agreement, then a marketing agreement shall exist for the pecans marketing order. This marketing agreement shall not alter the terms of this part. Upon the termination of this part, the marketing agreement has no further force or effect.

§ 986.98 Additional parties.

After this part becomes effective, any handler may become a party to the marketing agreement if a counterpart is executed by the handler and delivered to the Secretary.

§ 986.99 Order with marketing agreement.

Each signatory handler hereby requests the Secretary to issue, pursuant to the Act, an order for regulating the handling of pecans in the same manner as is provided for in this agreement.

Dated: October 20, 2015.

Rex Barnes,

Associate Administrator, Agricultural Marketing Service.

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