

**PART XXXX – WHEAT FLOUR FOODS PROMOTION, RESEARCH, AND INFORMATION ORDER**

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## **Subpart A – Wheat Flour Foods Promotion, Research, and Information Order**

### **General**

#### **§ 1240.10 General.**

The terms defined/specified in this subpart shall apply to all research and promotion programs authorized under the Act.

### **Definitions**

#### **§ 1240.20 Definitions.**

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

*Baker* means a person who utilizes wheat flour to produce grain foods to market, or who purchases from or otherwise causes a sub-baker to produce grain foods for such person to market, and who is not exempt from assessment under the provisions of this Part.

*Board* or the Wheat Flour Foods Promotion, Research, and Information Board means the administrative body established pursuant to § 1240.40 or such other name as recommended by the Board and approved by the Secretary.

*Commerce* means interstate, foreign, or intrastate commerce.

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

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

*Fiscal period* means the 12-month period as shall be recommended by the Board and approved by the Secretary.

*Grain foods* means bread-basket products made from wheat flour, including but not limited to sliced bread, unsliced bread, rolls and buns (including croissants), bagels, naan, pitas, other flatbreads (but excluding tortillas), biscuits, and English muffins. Grain foods does not include products sold in frozen form to the consumer, or bars, crackers or sweet goods.

*Information* means information, program, and activities that are designed to increase efficiency in processing, enhance the development of new markets and marketing strategies, increase marketing efficiency, and enhance the image of grain foods produced in the United States and the United States' grain foods industry, both on a national and international basis.

*Market* means to sell or otherwise dispose of grain foods in interstate, foreign or intrastate commerce.

*Miller* means a person who mills grain into wheat flour to be baked to produce grain foods to be marketed in commerce, and who is not exempt from assessment under the provisions of this Part.

*Order* means an order issued by the Secretary under Section 514 of the Act that provides for a program of generic promotion, research, and information regarding agricultural commodities authorized under the Act.

*Part* means the Wheat Flour Foods Promotion, Research, and Information Order and all rules, regulations, and supplementary orders, issued pursuant to the Act and the Order. The Order shall be a "subpart" of such part.

*Person* means any individual, group of individuals, partnership, corporation, association, cooperative or other legal entity, including combinations of two or more legal entities that are under common control pursuant to such rules recommended by the Board pursuant to §1240.50(b) and approved by the Secretary.

*Promotion* means any action taken by the Board, including paid advertising, to present a favorable image for grain foods to the public to improve the competitive position of grain foods in the marketplace and to stimulate sales of grain foods.

*Research* means any type of systematic study, investigation, analysis and/or evaluation designed to advance the image, desirability, use, marketability,

quality or production of grain foods, including but not limited to research related to cost of production, testing the effectiveness of market development and promotional efforts, nutritional value, new types of grain foods, new uses for wheat flour, and environmental issues relating to the grain foods and wheat flour industry.

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

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

*Sub-baker* means a person who utilizes wheat flour to produce grain foods that will be sold to, or otherwise produced for, a baker.

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

*Sweet goods* means the broad variety of sweet and rich grain-based foods made with sweet dough, often but not always filled or topped with nuts, icing, glaze, jam, or jelly and may contain creamy fillings. Sweet goods includes, but is not limited to, cakes, cookies, snack cakes, brownies, breakfast pastries, doughnuts, muffins, filled bars, and the like.

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

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

*Wheat Flour* means the commodity prepared by grinding and bolting cleaned wheat, including, but not limited to, hard red winter, hard red spring, soft red winter, and white raw wheat, but excluding durum wheat and red durum wheat, which is used to make grain foods.

## **Wheat Flour Foods Promotion, Research, and Information Board**

### **§ 1240.40 Establishment and membership.**

(a) There is hereby established a Wheat Flour Foods Promotion, Research, and Information Board, hereinafter called the Board, to administer the terms and provisions of this Order. The Board shall be composed of bakers and millers and shall be composed of no more than ten (10) members appointed by the Secretary from nominations for each of the two (2) categories of members as provided in § 1240.40(b) below.

(b) The Board shall be composed of 10 members and shall be established as follows:

(1) Two (2) miller members.

(2) Eight (8) baker members.

(c) Adjustment of membership based on pro-rata contribution. At least once every five years upon implementation of the Order, but no more frequently than once every three years, the Board will review the dollar value of assessments, based on the Board's records, remitted under the Order from millers and bakers. If warranted, the Board will recommend to the Secretary that the membership on the Board be altered to reflect a more equitable representation between millers and bakers based on the pro-rata contribution of total assessments remitted under the Order from each of the two categories.

(d) For consideration of Board composition, to the extent practicable, the miller members should be from different states, and no more than two (2) baker members should be from the same state.

(e) Adjustments made pursuant to 1240.40(c) above shall not increase the total number (10) of Board members. The adjustments to the Board membership shall be submitted to the Secretary by Board recommendation and be implemented by the Secretary through rulemaking.

**§ 1240.41 Nominations.**

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

(a) All national organizations representing miller interests, as defined in § 1240.43(a) and (b), will have the opportunity to participate in a nomination caucus and will submit as a group a single slate of nominations to the Secretary for the available miller membership position(s) and at least one alternate position for each miller membership position(s) on the Board. If agreement is not reached among such national organizations with respect to a single slate of nominations, each such national organization may submit a single slate of nominations and alternates for any position(s) on which there is no agreement. Individual millers who have also paid assessments to the Board in the most recent fiscal period may submit nominations. For the initial Board, persons that meet the definition of millers as defined in § 1240.10 will certify their qualification through documentation requested by the Secretary, and upon approval of such qualification by the Secretary may submit nominations. The Secretary shall also appoint one alternate for each miller member.

(b) All national organizations representing baker interests, as defined in § 1240.43(c) and (d), will have the opportunity to participate in a nomination caucus and will submit as a group a single slate of nominations to the Secretary for the

available baker membership position(s) and at least one alternate position for each baker membership position(s) on the Board. If agreement is not reached among such national organizations with respect to a single slate of nominations, each such national organization may submit a single slate of nominations and alternates for any position on which there is no agreement. Individual bakers who have paid assessments to the Board in the most recent fiscal period may also submit nominations. For the initial Board, persons who meet the definition of bakers as defined in § 1240.10 will certify their qualification through documentation requested by the Secretary, and upon approval of such qualification by the Secretary, may submit nominations. The Secretary shall also appoint one alternate for each baker member.

**§ 1240.42 Nominee's Agreement to Serve.**

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

- (a) Serve on the Board if appointed;
- (b) Disclose any relationship with any grain foods promotion entity or with any organization that has or is being considered for a contractual relationship with the Board; and
- (c) Withdraw from participation in deliberations, decision-making, or voting on matters that concern the relationship disclosed under 1240.42(b) of this section.

**§ 1240.43 Certification of Nominating Organizations.**

(a) To be certified as a qualified national organization representing miller interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

- (1) The organization's voting membership must be comprised primarily of millers;
- (2) The organization must represent millers milling grain into wheat flour to be baked to produce grain foods in at least 15 states;
- (3) The organization must have a history of stability and permanency and have been in existence for more than one year;
- (4) The organization must have as a primary purpose promoting millers' economic welfare;
- (5) The organization must derive a significant portion of its operating funds from millers; and
- (6) The organization must demonstrate it is willing and able to further the Act's purposes.

(b) Any miller organization found eligible by the Secretary under this section shall

be certified by the Secretary, and the Secretary's determination as to eligibility shall be final.

(c) To be certified as a qualified national organization representing baker interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(1) The organization's voting membership must be comprised primarily of bakers;

(2) The organization must represent bakers producing grain foods in at least 15 states;

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

(4) The organization must have as a primary purpose promoting bakers' economic welfare;

(5) The organization must derive a significant portion of its operating funds from bakers; and

(6) The organization must demonstrate it is willing and able to further the Act's purposes.

(d) Any baker organization found eligible by the Secretary under this section shall be certified by the Secretary, and the Secretary's determination as to eligibility shall be final.

(e) All nominations must be submitted to the Secretary at least ninety (90) days before the new Board term begins. At least two (2) names must be submitted to the Secretary, including at least one (1) name as the preferred nominee and at least one (1) name as the preferred alternate for each position to be filled.

#### **§ 1240.44 Appointments**

From the nominations made pursuant to § 1240.41, the Secretary shall appoint the representatives of the Board on the basis of representation provided in § 1240.40.

#### **§ 1240.45 Term of office.**

(a) With the exception of the initial Board, each Board member shall serve for a term of three (3) years.

(b) Each term of office shall begin and end on dates determined by the Board.

(c) With the exception of the initial Board, no member may serve more than two consecutive three-year terms.

(d) Board members shall continue to serve until their successors have qualified, are appointed by the Secretary, and have accepted the position. For the initial Board, the terms of the Board members shall be staggered for two (2), three (3) and four (4) years. Members serving the initial terms of all durations will be eligible to serve a single term of three (3) years after their 2, 3, or 4 year term. Alternates who are appointed to serve the remainder of a term are eligible to serve two (2) additional three-year terms. A member or alternate may serve not more than two (2) consecutive terms.

#### **§ 1240.46 Removal.**

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

#### **§ 1240.47 Vacancies**

(a) If a member resigns, is removed from office, or in the event of death of any member or if any member of the Board ceases to qualify as a member of the category of members from which the member was appointed to the Board as defined under this Part, such position shall be filled by the alternate for such position for the remainder of the member's term, subject to § 1240.47(d).

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

(c) If an alternate position becomes vacant, nominations to fill the vacancy will be conducted using the nomination process set forth in this Order or the Board may recommend to the Secretary that he or she appoint a successor from the most recent list of nominations for the position.

(d) A vacancy will not be required to be filled if the unexpired term is less than six (6) months.

#### **§ 1240.48 Procedure.**

(a) At a Board meeting, it will be considered a quorum when a majority of the voting members are present. Each voting member of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by a simple majority of the total votes of the Board representatives present at the meeting.

(b) At the start of each fiscal period, the Board will select a chairperson and vice chairperson and other officers as appropriate who will conduct meetings throughout that fiscal period. The chairperson shall only vote in the event of ties.



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

(d) The Board may form committees and subcommittees as necessary. It will be considered a quorum at a committee meeting when a simple majority of those assigned to the committee are present. Committees may also consist of individuals other than Board members, and such individuals may participate and have such rights and responsibilities in committee meetings as the Board shall determine. These committee members shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

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

(f) There shall be no voting by proxy. If a Board member is unable to attend a meeting, the alternate for the position shall be informed and may attend in such Board member's stead.

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

(h) Meetings of the Board and committees may be conducted by electronic communications, provided that each member and committee member, if such committee member is not a member of the Board, is given prior notice of the meeting and has the opportunity to be present either physically or by electronic connection.

#### **§ 1240.49 Compensation and reimbursement.**

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

#### **§ 1240.50 Powers and duties.**

The Board shall have the following powers and duties:

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

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be

necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines to be appropriate. The committee and subcommittee may include individuals other than Board members as the Board deems necessary and appropriate.

(d) To employ and/or contract with persons, other than Board members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons;

(e) To develop and carry out generic promotion, research, and information activities relating to grain foods;

(f) To develop and administer programs, plans and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs, plans or projects of research, information, and promotion of grain foods. The payment of costs for such activities shall be from funds collected pursuant to this Order. Each contract or agreement shall provide that:

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

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

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

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

(g) To prepare and submit for approval of the Secretary before the beginning of each fiscal year, rates of assessments and an annual budget of the anticipated expenses to be incurred in the administration of the Order, including the probable costs of each promotion, research, and information activity proposed to be developed or carried out by the Board in accordance with §1240.52;

(h) To borrow funds necessary for startup expenses of the Order during the first year of operation by the Board;

- (i) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe and to make the records available to the Secretary for inspection and audit; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;
- (j) To cause its books to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at the end of each fiscal year and at such other times as the Secretary may request, and to submit a copy of such audit report directly to the Secretary;
- (k) To notify millers and bakers of all Board meetings through press releases or other means and to give the Secretary the same notice of meetings of the Board (including committees, subcommittees, and the like) as is given to members, including committee members if committee members are not members of the Board, in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting to the Secretary;
- (l) To act as intermediary between the Secretary and any miller, baker or sub-baker;
- (m) To furnish to the Secretary any information or records that the Secretary may request;
- (n) To investigate violations of the Act and the Order, conduct audits, and report the results of such investigations and audits to the Secretary for appropriate action to enforce the provisions of the Act and the Order.
- (o) To recommend to the Secretary such amendments to the Order as the Board considers appropriate;
- (p) To work to achieve an effective, continuous, and coordinated program of promotion, research, information, and evaluation designed to strengthen and protect the grain foods industry's position in the marketplace; maintain and expand existing markets and uses for grain foods; and to carry out programs, plans and projects designed to provide maximum benefits to the grain foods industry;
- (q) To invest assessments collected under this part in accordance with §1240.57 and use earnings from invested assessments to pay for activities carried out pursuant to the Order;
- (r) To pay the cost of activities with assessments collected under § 1240.54 and earnings from invested assessments and other funds;
- (s) To recommend changes to the assessments as provided in this part;
- (t) To appoint and convene, from time to time, working committees that may include millers and bakers or other members of the grain foods industry and the

public to assist in the development of research, promotion, advertising, and information programs for grain foods;

(u) To periodically prepare and make public and to make available to millers and bakers reports of program activities and, at least once each fiscal period, to make public an accounting of funds received and expended; and

**§ 1240.51 Prohibited activities.**

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

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

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

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

**Expenses and Assessments**

**§ 1240.52 Budget and expenses.**

(a) At least sixty (60) calendar days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Board shall prepare and submit to the Department for approval a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. The budget for research, promotion or information may not be implemented prior to approval by the Secretary. Each such budget shall include:

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

(2) A summary of anticipated revenue, with comparative data for at least one preceding year (except for the initial budget);

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

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

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

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan or project to another. Shifts of funds that do not cause an increase in the Board's approved budget and that are consistent with governing bylaws need not have prior approval by the Secretary.

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

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

(f) The Board may accept voluntary contributions and is encouraged to seek other appropriate funding sources to carry out activities authorized by the Order. Such funds must be identified on the Board's annual operating budget. Such contributions shall only be used to pay expenses incurred in the conduct of programs, plans, and projects approved by the Secretary and shall be free from any encumbrance by the donor and the Board shall retain complete control of their use. The Board may receive funds from outside sources (i.e. Federal or State grants) with approval of the Secretary, for specific authorized projects.

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

(h) For fiscal years beginning three (3) years after the date of establishment of the Board, the Board may not expend for administration, maintenance, and the functioning of the Board and amount that is greater than 15% percent of the assessment and other income received by and available of the Board for the fiscal year. For purposes of this limitation, reimbursements to the Secretary shall not be considered administrative costs.

(i) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, *provided* that the funds in the reserve do not exceed two (2) fiscal years' budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this subpart.

#### **§ 1240.53 Financial statements.**

(a) The Board shall prepare and submit financial statements to the Secretary on a quarterly basis or at any other time as requested by the Secretary. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, investments, and expense budget. The expense budget shall show

expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Department within forty-five (45) calendar days after the end of the time period to which it applies.

(c) The Board shall submit to the Department an annual financial statement within ninety (90) calendar days after the end of the fiscal year to which it applies.

**§ 1240.54 Assessments.**

(a) The Board's programs and expenses shall be paid from assessments on millers and bakers, other income of the Board, and other funds available to the Board including those collected pursuant to §1240.62.

(b) Each miller shall pay an assessment to the Board, either directly, upon receipt of an invoice from the Board for sales to sub-bakers, or through a baker for sales to such baker, at a rate of 2.4 cents per 100 pounds or "CWT" of wheat flour sold for the purpose of producing grain foods.

(c) Each baker shall pay an assessment directly to the Board at a rate of 13.6 cents per CWT of wheat flour purchased from a miller for the purpose of producing grain foods and 8.2 cents per CWT of grain foods purchased from a sub-baker by the baker for the baker to market.

(d) The assessment rate will be reviewed and may be modified with the approval of the Secretary, after the first referendum is conducted pursuant to this subpart. The assessment rate applicable to both categories may be raised or lowered no more than 10% per year. Prior to the change in assessment rate, the Department will provide notice by publishing in the Federal Register any proposed changes with interested parties allowed to comment. The assessment rate for bakers shall not exceed 18.0 cents per CWT of wheat flour purchased to produce grain foods which it markets and 10.0 cents per CWT of grain foods which it purchased from a sub-baker to market. The assessment rate for millers shall not exceed 4.0 cents per CWT of wheat flour sold to produce grain foods, unless both a majority of millers and bakers approve an increase above such levels of assessment through a referendum conducted pursuant to this subpart.

(e) Bakers shall be responsible for collecting from millers either directly or indirectly through sub-bakers the information described in § 1240.70. Millers will remit their assessments directly to the baker, unless the miller sells to a sub-baker, in which case the miller will pay directly to the Board upon receipt of an invoice from the Board. The Board will use the information collected by the baker to invoice millers directly for payment of the assessments they owe on wheat flour sold to sub-bakers. Sub-bakers are not assessed parties under this Order.

(f) Bakers shall remit to the Board their assessments and the reports due under § 1240.70 no later than sixty (60) calendar days of the month following the end of each fiscal quarter. Millers shall remit to the Board their assessments and the

reports due under § 1240.70 not later than sixty (60) calendar days following receipt of the invoice from the Board.

(g) A late payment charge and interest shall be imposed on any miller or baker who fails to pay the assessments. The late payment charge shall be a one-time fee of ten percent (10%) of the total assessment due.

(h) In addition to the late payment charge, a 1 ½ percent (1.5%) per month interest rate will be applied. Interest will continue to accrue monthly until the outstanding balance is paid in full.

(i) Persons failing to remit total assessments due in a timely manner may also be subject to actions under federal debt collection procedures or others means as recommended by the board to the Secretary.

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

**§ 1240.55 Exemptions and exemption procedures.**

(a) Any miller who sells less than 750,000 CWT of wheat flour annually to bakers or sub-bakers for the purpose of producing grain products shall be exempt from the payment of assessments. Such miller may apply to the Board, on a form provided by the Board, for a certificate of exemption. Such miller shall certify that it sold less than 750,000 CWT of wheat flour for the fiscal year in which the exemption is claimed for the purpose of producing grain foods.

(b) Any baker who buys wheat flour from millers for the purpose of producing grain foods in an amount less than 750,000 CWT of wheat flour annually shall be exempt from the payment of assessments. Any baker who purchases or otherwise acquires from sub-bakers grain foods for the baker to market in an amount less than 1.2 million CWT of grain foods annually shall be exempt from the payment of assessments. If a baker both buys wheat flour from millers for the purpose of producing grain foods to market and purchases or otherwise acquires from sub-bakers grain foods for the baker to market, the exemption amount shall be 750,000 CWT of wheat flour annually total, calculated by adding (i) the CWT of wheat flour purchased directly from millers and (ii) sixty percent (60%) of the CWT of grain foods purchased or otherwise acquired from sub-bakers for the bakers to market. Such baker may apply to the Board, on a form provided by the Board, for a certificate of exemption. Such baker shall certify that, for the fiscal year in which the exemption is claimed, such baker purchased, (x) less than 750,000 CWT of wheat flour directly from millers for the purpose of producing grain foods to market, (y) less than 1.2 million CWT of grain foods from sub-bakers for the baker to market, or (z) if such baker bought both wheat flour from millers for the purpose of producing grain foods to market and purchased or otherwise acquired from sub-bakers grain foods for the baker to market, less than 750,000 CWT of wheat flour total calculated by adding the CWT of wheat flour purchased directly from millers and sixty percent (60%) of the CWT of grain foods purchased or otherwise acquired from sub-bakers.

(c) Millers who sell wheat flour to a baker to be used to produce grain foods or to a sub-baker to produce grain foods to be marketed by a baker, and where such baker is exempt from assessment under the provisions of § 1240.55, shall be exempt from assessment on that portion of the wheat flour sold to the exempt baker or to the sub-baker producing grain foods for the exempt baker.

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

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

(f) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt grain foods.

(g) A miller or baker who operates under an approved National Organic Program (7 CFR part 205) (NOP) organic handling system plan may be exempt from the payment of assessments under this part, provided that:

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

(2) Only agricultural products certified as “organic” (as defined in the NOP) are eligible for exemption;

(3) The exemption shall apply to all certified “organic” (as defined in the NOP) grain foods whether the grain foods subject to the exemption is processed by a person that also processes conventional or nonorganic grain foods as that for which the exemption is claimed; and

(4) The miller or baker so exempted shall continue to be obligated to pay assessments under this part that are associated with any grain foods which do not qualify for an exemption under this section.

(h) To apply for organic exemption, an eligible miller or baker shall submit a request to the Board on an Organic Exemption Request Form (Form AMS–15) at any time during the year initially, and annually thereafter on or before the start of the Board’s fiscal year, for as long as the miller or baker continues to be eligible for the exemption.

(i) A miller or baker request for organic exemption shall include following information:

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



- (2) Certification that the applicant maintains a valid certificate of organic operation issued under the OFPA and the NOP;
- (3) Certification that the applicant processes organic products eligible to be labeled “organic” under the NOP;
- (4) An attached copy of the applicant’s certificate of organic operation issued by a USDA-accredited certifying agent under the OFPA and the NOP;
- (5) Certification, as evidenced by signature and date, that all information provided by the applicant is true; and
- (6) Such other information as may be required by the Board, with the approval of the Secretary.

(j) If a miller or baker complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the miller or baker within thirty (30) calendar days from the date of submission. If the application is not approved, the Board will notify the applicant of the reason(s) for disapproval within thirty (30) calendar days from the date of submission.

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

**§ 1240.56 Refund escrow accounts.**

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

(b) If the Order is not approved by the required referendum, the Board shall promptly pay refunds of assessments to all millers and bakers that have paid assessments during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in § 1240.56(c).

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

(d) Any miller or baker requesting a refund shall submit an application on the prescribed form to the Board within thirty (30) calendar days after the announcement of the referendum results of their request for a refund of the assessments that they paid. The millers and bakers requesting a refund shall also

submit documentation to substantiate that assessments were paid. Any such demand shall be made by such miller or baker in accordance with the provisions of this subpart and in a manner consistent with regulations recommended by the Board and prescribed by the Secretary.

(e) If the Order is approved by the required referendum set forth in §1240.81 then:

- (1) The escrow account shall be closed; and,
- (2) The funds shall be available to the Board for disbursement under §1240.60.

**§ 1240.57 Investment of funds.**

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

- (1) Obligations of the United States or any agency of the United States;
- (2) General obligations of any State or any political subdivision of a State;
- (3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System;
- (4) Obligations fully guaranteed as to principal interest by the United States;  
or
- (5) Other investments as authorized by the Secretary.

**Promotion, Research, and Information**

**§ 1240.60 Programs, plans, and projects.**

(a) The Board shall develop and submit to the Secretary for approval programs, plans, or projects authorized by this subpart. Such programs, plans, or projects shall provide for promotion, research, information, and other activities, including consumer and industry information designed to:

- (1) Establish, issue, effectuate, and conduct the administration of appropriate programs for promotion, research and information, including producer and consumer information, with respect to grain foods; and
- (2) Establish and conduct research with respect to the image, desirability, use, marketability, quality or production of grain foods, to the end that the marketing and use of grain foods may be encouraged, expanded, improved or made more acceptable and to advance the image, desirability or quality of grain foods.

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

(c) The Board shall evaluate each program, plan, and project authorized under this subpart to ensure that such program, plan or project contributes to an effective and coordinated program of promotion, research, and information. The Board must submit the evaluations to the Secretary. If the Board finds that a program, plan or project does not further the purposes of the Act, then the Board shall terminate such program, plan or project.

**§ 1240.61 Independent evaluation.**

The Board shall, at least once every five (5) years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and the programs conducted by the Board pursuant to the Act. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

**§ 1240.62 Patents, copyrights, trademarks, information, publications, and product formulations.**

(a) Any patents, copyrights, trademarks, information, publications and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U. S. Government as represented by the Board and shall, along with any rents, royalties, residual payments or other income from the rental, sales, leasing, franchising or other uses of such patents, copyrights, trademarks, information, publications or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary.

(b) Notwithstanding the provisions of paragraph (a), if patents, copyrights, trademarks, information, publications and product formulations are developed through the use of funds remitted to the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions, or publications shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, trademark, information, publication and product formulations, subject to approval by the Secretary.

(c) Upon termination of this subpart, §1240.83 shall apply to determine disposition of all such property.

**Reports, Books, and Records**

**§ 1240.70 Reports.**

(a) Each baker subject to this subpart will be required to provide to the Board, accompanying the assessment remittance, the following information covering the fiscal quarter for which assessments are being remitted, in addition to such other information as the Board, with the approval of the Secretary, may require:

- (1) For wheat flour purchased directly from millers:
    - (i) CWT of wheat flour purchased directly from millers used to produce grain foods on which assessments are being remitted;
    - (ii) CWT of wheat flour purchased directly from millers used to produce grain foods which is exempt from assessment under the organic exemption set forth in § 1240.55(g); and
    - (iii) The name(s) of the miller(s) from which the baker purchased wheat flour for the purchases enumerated in (i) and (ii) of this section above.
  
  - (2) For finished grain foods purchased from sub-bakers:
    - (i) CWT of grain foods purchased from sub-bakers on which assessments are being remitted;
    - (ii) CWT of grain foods purchased from sub-bakers which is certified organic and therefore exempt from assessment; and
    - (iii) The name(s) of the miller(s) and CWT of wheat flour purchased by the sub-baker from the miller for the sub-baker to produce the grain foods under (i) and (ii) above.
- (b) In addition to the information required above, the Board may request such other information from bakers and millers as it may periodically require to ensure compliance with the provisions of this subpart.

**§ 1240.71 Books and records.**

Each miller and baker, including millers and bakers exempt from the payment of assessments under the provisions of this subpart, shall:

- (a) maintain records sufficient to ensure compliance with the order and regulations;
  
- (b) submit to the board established under the order any information required by the board to carry out its responsibilities under the order; and
  
- (c) make the records described in (a) above available, during normal business hours, for inspection by employees or agents of the Board or the Department, including any records necessary to verify information required under (b) above. Such records shall be retained for at least three (3) years beyond the fiscal period of their applicability.

**§ 1240.72 Confidential treatment.**

All information obtained from books, records, or reports under the Act, this subpart, and the regulations issued thereunder shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, millers or bakers. Only those persons having a specific need for such information solely to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing

brought at the direction, or at the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

### **Miscellaneous**

#### **§ 1240.80 Right of the Secretary.**

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

#### **§ 1240.81 Referenda.**

(a) For the purpose of ascertaining whether the persons subject to this Order favor the continuation, suspension, or termination of this Order, the Secretary shall conduct a referendum among persons subject to assessments under §1240.54 who, during a representative period determined by the Secretary, have engaged in the production of grain food

(b) The initial referendum shall be conducted not later than three (3) years after assessments first begin under the Order.

(c) Subsequent referenda. The Secretary shall conduct subsequent referenda:

(1) Not later than every seven (7) years after the Order becomes effective, and every seven (7) years thereafter, the Secretary shall hold a referendum to determine whether millers and bakers favor the continuation of the Order. The Order shall continue if it is favored by as specified in 1240.81(d);

(2) At the request of the Board established by this Order;

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

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

(d) Approval in a referendum shall be established by a majority of millers and bakers voting in the referendum who also represent a majority of the volume of wheat flour voting in the referendum by millers and bakers during the representative period established by the Secretary

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

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

**§ 1240.82 Suspension and termination.**

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

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal year whenever the Secretary determines that its suspension or termination is favored by (i) a majority of bakers and millers and (ii) bakers representing at least a majority of the volume of grain foods, voting in the referendum who, during a representative period determined by the Secretary, have been engaged in the production of grain foods as a miller or a baker.

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

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

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

**§ 1240.83 Proceedings after termination.**

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

(b) The said trustees shall:

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

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

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

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

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

(d) Any residual funds or assets not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to one or more domestic grain foods organizations, should the Secretary identify such organizations, in the interest of continuing grain foods promotion, research and information programs.

**§ 1240.84 Effect of termination or amendment.**

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

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

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

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

**§ 1240.85 Personal liability.**

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

**§ 1240.86 Separability.**

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

**§ 1240.87 Amendments.**

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

**§ 1240.88 OMB control number.**

The control numbers assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505-0001 (Board nominee background statement) and OMB control number 0581-0281.

**Subpart B – Referendum Procedures**

**§ 1240.90 General.**

Referenda to determine whether bakers or millers of grain products favor the issuance, continuance, amendment, suspension or termination of the Wheat Flour Foods Promotion, Research and Information Order shall be conducted in accordance with this subpart.

**§ 1240.91 Definitions.**

*Administrator* means the Administrator of the Agricultural Marketing Service, or any officer or employee of USDA to whom there has been delegated or may be delegated the authority to act in the Administrator's stead.

*Eligible miller* means any person who sells at least 750,000 CWT of wheat flour to bakers, either directly or through sub-bakers, to produce grain foods during the representative period.

*Eligible baker* means any person who purchases at least (i) 750,000 CWT of wheat flour from millers to produce grain foods, (ii) 1.2 million CWT of grain foods from sub-bakers for the baker to market, or (iii) if such baker bought both wheat flour from millers for the purpose of producing grain foods to market and purchased or otherwise acquired from sub-bakers grain foods for the baker to market, less than 750,000 CWT of wheat flour total calculated by adding the CWT of wheat flour purchased directly from millers and sixty percent (60%) of the CWT of grain foods purchased or otherwise acquired from sub-bakers for the baker to market during the representative period.

*Referendum* means a referendum conducted by the Secretary pursuant to the Act whereby eligible millers and bakers are provided the opportunity to vote to determine whether the Wheat Flour Foods Promotion, Research and Information Order shall be suspended or terminated.

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

*Representative period* means the period designated by the Secretary pursuant to §518 of the Act.



**§ 1240.92 Voting.**

(a) Each eligible miller and eligible baker, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum.

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

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

(d) Eligible millers and bakers may be asked to provide proof of eligibility to vote in any referendum.

**§ 1240.93 Instructions.**

The referendum agent shall conduct the referendum, in the manner herein provided, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions hereof, to govern the procedure to be followed by the referendum agent. Such agent shall:

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

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

(c) Give reasonable public notice of the referendum:

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

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

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

(e) At the end of the voting period, collect, open, number and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

**§ 1240.94 Subagents.**

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

**§ 1240.95 Ballots.**

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

**§ 1240.96 Referendum report.**

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

**§ 1240.97 Confidential information.**

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

**§ 1240.98 OMB control number.**

The control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number [REDACTED].