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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS-00-01]

Guidelines for AMS Oversight of Commodity Research and Promotion Programs

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: The Department of Agriculture (USDA) is seeking comments on the "Guidelines for AMS Oversight of Commodity Research and Promotion Programs" (Guidelines). USDA's Agricultural Marketing Service (AMS) developed the guidelines to facilitate uniform oversight of national research and promotion programs which have been implemented under numerous Federal statutes. The guidelines are part of the findings and recommendations of the Research and Promotion Task Force (task force) that was created by Secretary Glickman in November 1998. The task force held a public meeting in March 1999 and held several working meetings to review the oversight responsibilities of AMS and board operations.

DATES: Comments must be received on or before March 17, 2000.

FOR FURTHER INFORMATION CONTACT: Interested persons are invited to submit written comments concerning this notice to: Barbara C. Robinson, Deputy Associate Administrator, Room 3069 South Bldg., U.S. Department of Agriculture, AMS, OA, Washington, DC 20250; telephone (202) 720-4276; fax (202) 690-3967. Comments should be submitted in triplicate and will be made available for public inspection at the above address during regular business hours. Comments may also be submitted electronically to: public.comments@usda.gov. All comments should indicate the docket

number and the date and page number of this issue of the **Federal Register**. A copy of this notice may be found at: www.AMS.USDA.Gov/R&P/.

SUPPLEMENTARY INFORMATION: This notice is authorized under the following Federal statutes: the Beef Promotion and Research [7 U.S.C. 2901-2911]; the Canola and Rapeseed Research, Promotion, and Consumer Information Act [7 U.S.C. 7441-7452]; the Commodity Promotion, Research, and Information Act of 1996 [7 U.S.C. 7411-7425]; the Cotton Research and Promotion Act [7 U.S.C. 2101-2118]; the Dairy Production Stabilization Act of 1983 [7 U.S.C. 4501-4513]; the Egg Research and Consumer Information Act [7 U.S.C. 2701-2718]; the Floral Research and Consumer Information Act [7 U.S.C. 4301-4319]; the Fluid Milk Promotion Act of 1990 [7 U.S.C. 6401-6417]; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act [7 U.S.C. 6801-6814]; the Honey Research, Promotion, and Consumer Information Act, as amended [7 U.S.C. 4601-4612]; the Lime Research, Promotion, and Consumer Information Act, as amended [7 U.S.C. 6201-6212]; the Mushroom Promotion, Research, and Consumer Information Act of 1990 [7 U.S.C. 6101-6112]; the National Kiwifruit Research, Promotion, and Consumer Information Act [7 U.S.C. 7461-7473]; the Pecan Promotion and Research Act of 1990 [7 U.S.C. 6001-6013]; the Popcorn Promotion, Research, and Consumer Information Act [7 U.S.C. 7481-7491]; the Pork Promotion, Research, and Consumer Information Act [7 U.S.C. 4801-4819]; the Potato Research and Promotion Act, as amended [7 U.S.C. 2611-2627]; the Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7101-7111]; the Soybean Promotion, Research, and Consumer Information Act [7 U.S.C. 6301-6311]; the Watermelon Research and Promotion Act, as amended [7 U.S.C. 4901-4916]; and the Wheat and Wheat Foods Research and Nutrition Education Act [7 U.S.C. 3401-3417].

There are currently 13 active programs under these statutes: beef, cotton, dairy, eggs, fluid milk, honey, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.

AMS is seeking public comment on the Guidelines which have been developed to promote uniformity in the

oversight of these and any future programs.

Guidelines for AMS Oversight of Commodity Research and Promotion Programs

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Introduction

National research and promotion programs are designed to strengthen the position of a commodity in the marketplace, maintain and expand existing domestic and foreign markets, and develop new uses and markets for specified agricultural commodities. They are administered by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) and funded by assessments collected from designated segments of industry.

Until 1996, industry-specific legislation had to be passed by Congress before a national program could be established. (See Appendix I.) However, under the Commodity Promotion, Research, and Information Act of 1996 (generic statute), industry groups may

submit a proposal directly to AMS requesting that a program be implemented. All programs require rulemaking and a referendum to determine if those who pay assessments approve the programs.

The programs are run by industry boards and councils (boards) appointed by the Secretary of Agriculture (Secretary) from industry nominations.

Purpose of Guidelines

These Guidelines are designed to facilitate the application of the legislative and regulatory provisions of the acts and orders or plans (orders), subject to the unique language of individual legislation as determined by AMS. They are designed to promote uniformity in the oversight of all commodity research and promotion programs. The Guidelines shall be reviewed annually and amended as necessary.

Administration

Administrative Reviews

To the extent practicable, AMS will conduct periodic administrative reviews of board operations to ensure adherence to AMS policy. Selected areas for examination will include, but not be limited to, travel expenses of board members and staff, contract compliance, and investment of funds. In general, boards should operate through an appropriate set of oversight committees that deal with each board's major budget items (see Budgets section of these Guidelines); board members should be given adequate information on all significant projects, proposals, issues, etc., and an outline of options for their consideration in decision making; and the board and its committees should document their decisions in an official set of minutes. Board members must be given adequate information on ongoing operations to allow the board to exercise appropriate management control. This can be accomplished through a series of progress reports on ongoing activities and accomplishment reports on completed activities.

Audits

Each board shall engage a certified public accountant (CPA) to perform a comprehensive financial statement audit each year.

These audits must be conducted in accordance with the Generally Accepted Government Auditing Standards (GAGAS) prescribed by the Comptroller General of the United States. Such an audit must cover the financial statements specified in the Financial Accountability section of these

Guidelines and must include such procedures as are necessary for the auditor to express an opinion on the financial statements and such additional procedures as may be necessary for the auditor to express an opinion on the board's internal control system and its compliance with all applicable laws and regulations including the program's enabling statute, the order which established the program, and AMS policies and guidelines.

AMS shall: (a) Review and approve each board's contract with its CPA; (b) review and approve the details of the engagement between the board and its CPA; (c) have the option of attending any entrance or exit conference with the CPA; and (d) receive a copy of the CPA's audit report and copies of all correspondence between the board and its CPA. AMS officials will evaluate each audit report and may request additional information if needed. Boards must promptly follow up on all audit findings and auditor's recommendations and must fully inform AMS of all such activity.

If special circumstances arise, (e.g., a theft or loss of control of board assets or a serious breakdown in internal controls), AMS may require a board to engage a CPA to perform a one-time, focused review to ascertain the causes and results of a problem and to make recommendations for corrective or preventive action.

Board Administrative Expenses

Recognizing inherent differences in implementing laws or regulations, scope, and funding among promotion programs, AMS expects each board and state association or other organization, authorized by law to receive assessment funding, to establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs mandated by law. Each board shall include its annual administrative expenses as a separate item in its annual report. AMS or the board may require a state association or other organization receiving board funds to report its annual administrative expenses in a similar manner. Each board must adhere to its fiduciary responsibilities and ensure that all monies are spent wisely and in accordance with laws and regulations.

The Secretary's costs for oversight of the commodity boards should not be considered as an administrative expense of the boards as these charges are outside of the boards' control and management.

Pursuant to 7 U.S.C. 7401, Commodity Promotion and Evaluation,

AMS will annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on the administrative expenses of each research and promotion board.

Board Meetings

AMS requires advance notification from the boards of all board and committee meetings as well as conference calls. AMS will attend all board meetings and participate in conference calls and committee meetings when deemed necessary by AMS.

In addition, it is important for boards to recognize that there are many religious practices, and boards should keep this in mind when scheduling meetings.

Board Member Orientation

AMS will participate in the orientation of new board members for all programs. AMS will discuss USDA oversight responsibilities and policies, including these Guidelines, so that new members can understand and comply with them as well as the applicable statute and order. AMS will require that all board members certify that they understand the prohibition against using board funds to influence legislation or government action or policy. The Office of the General Counsel (OGC) will participate in the initial orientation of members of new boards at the board's organizational meeting. OGC may participate, at the request of AMS, in the orientation of new board members for existing programs.

Board Travel and Meeting Expenses

Board members are not allowed a fee or compensation for board service other than reimbursement for reasonable travel costs. However, board members and employees (including staff contracted to perform management and administrative services for a board) may be reimbursed for reasonable and appropriate expenses.

AMS will provide guidance for boards to develop a written policy, approved by AMS, for travel and meeting expenses. In addition, boards must have in place sufficient internal controls to prevent reimbursements or expenditures for unreasonable and potentially controversial travel and meeting expenses. Unreasonable and potentially controversial travel and meeting expenses include, but are not limited to, first class travel, member golf outings, and entertainment that does not directly

further the purposes of the acts and orders.

Boards are prohibited from using assessment funds for expenses for spouses or other family members of board members or employees, open bars, and adult entertainment.

Bylaws and Policy Statements

AMS will review for approval the bylaws and amendments to bylaws developed by the boards and require boards to establish policies which cover board member and staff responsibilities, meeting procedures, and travel and related expenses.

Compliance

The respective boards are responsible for promptly identifying violations and violators and for securing compliance with the statutes, order, and rules and regulations wherever possible. AMS will develop with each board requirements and a timetable for the referral of compliance cases to AMS for appropriate action. Upon receipt of compliance cases, AMS will take one or more of the following actions: (1) Send a certified letter requesting compliance within a specified period; (2) Utilize National Finance Center collection procedures, including administrative offset; and/or (3) Refer violations to the OGC for action. Before discharging any delinquent debt, AMS will take all appropriate steps to collect such debt.

Investments of Funds

AMS shall require the boards to follow the AMS investment policy to ensure proper investment of board funds.

Legal Counsel

OGC will provide all legal counsel to the boards, except as may be provided for under a Memorandum of Understanding (MOU) between a board and OGC. OGC will review all existing MOU's and recommend any needed changes to ensure consistency among the boards.

User Fees

The authorizing legislation for each program requires the various boards to reimburse AMS for its costs in overseeing the programs. It is the policy of AMS that all of these programs be charged in a fair and equitable manner and that all costs be covered.

All direct program costs should be charged to the appropriate program. These costs include salaries and benefits of employees directly involved in the daily workload associated with commodity boards. Other costs would be travel to board meetings, rent for

office space for the employees directly working on the programs, printing of any documents, supplies, equipment, and anything else needed to complete the necessary work involved in overseeing the programs.

Direct program costs, including costs billed to AMS by other USDA and government agencies for authorized services provided in the support of the various boards, will be charged to the appropriate board. In addition, costs billed to AMS by states for actual unemployment claims paid to former board employees will be charged to the appropriate board when the bills are received by AMS.

The cost of agency overhead should also be charged to the boards. Overhead includes those costs incurred by the agency, the respective Deputy Administrator, and other offices involved in board oversight. These costs should be distributed in proportion to the direct program cost. In order to ensure that these costs are readily available for billing, internal AMS distributive subcenters should include a percentage charge for each program. As an option, depending on the organization levels involved in supervision of the boards and the amount of oversight provided, Deputy Administrator charges may be included in direct costs. The cost of agency overhead for the oversight of the boards is also charged to the boards.

Budgets

AMS will review for approval board-submitted budgets prior to the start of the board's fiscal year. When submitting budgets to AMS, the boards must include detailed information regarding administrative expenses and a written description of contract costs. Budget submissions must include, at a minimum, the following components:

(1) A statement of objectives and strategy in each major program area (promotion, advertising, research, etc.), including reasons for significant changes from the preceding budget period.

(2) A summary of anticipated revenue (assessments, interest, donations, etc.) and anticipated refunds, where applicable, with comparative data for at least one preceding year.

(3) A summary of proposed expenditures by major program areas with comparative data for at least one preceding year.

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

AMS will review for approval amendments or additions to approved budgets, including shifting of program

funds from one major area to another. Shifts that are consistent with governing bylaws need not have prior approval by AMS.

Conflict of Interest

AMS will provide guidance to assist boards in developing written policies to safeguard against and deal with conflict of interest situations, and such policies will be reviewed and approved by AMS. These policies shall include, at a minimum, the requirements that: (1) Board members and employees must disclose any relationship with any organization or company that has a contract with the board or that operates a qualified state or regional program and (2) No board member may vote on any matter in which the member has a financial interest, or regarding any contract with any entity of which the member is a member of the board.

In addition, each board should ensure that its responsibilities and duties have not been delegated or otherwise relinquished to another organization.

Programs issued under the generic statute shall comply with the conflict of interest provisions of that statute.

Contracts

Competitive Bids

Boards must follow sound business principles and practices in awarding contracts. Fundamental elements of good contracting are the identification of realistic alternates and the use of competitive bidding procedures. AMS believes it is each board's responsibility to incorporate these principles and practices into its operation procedures. Accordingly, each board must (1) develop an acquisition plan that specifies its processes for identifying alternative sources and obtaining competitive bids and (2) assign to a board committee the responsibility for monitoring contracting practices. These practices should also be reviewed regularly by the board's CPA.

The principles applied in awarding board contracts must also be followed by those contractors in awarding subcontracts.

If competitive bidding is not used, a reason for not doing so will be stated and placed in the board's contract file along with an alternative process to verify the reasonableness of the cost.

None of the requirements stated here shall be interpreted to (1) prohibit multi-year contracting or (2) require boards to select the lowest cost bidder when, in the board's judgment, other factors are deemed more important.

Contract Approval

AMS will review for approval written contracts for the development and carrying out of programs or projects of promotion, advertising, development, or education and written contracts for legal assistance and other consultants. AMS will review contracts for conformance with the applicable statutes and regulations and with AMS and USDA requirements. Contracts must include a provision prohibiting the use of assessment funds for lobbying activities. Contracts must be approved prior to the start of activities to be carried out under the contract. AMS will require boards to formally notify potential contractors that any work they undertake prior to contract approval by USDA is at their own risk as boards are not financially liable if the contract is not approved by USDA. AMS reserves the right to review for approval any and all contracts and subcontracts and to require AMS prior approval of any such contracts.

When a board relies heavily on its industry trade association in carrying out its program, there must be highly effective "fire walls" between board activities and other activities of the trade association. These fire walls should include: (1) Completely separate accounting systems and thorough segregation of board funds from trade association funds, all of which should be audited each year by the board's independent CPA; (2) Careful computation and documentation of the trade association's overhead or indirect charges to the board, supported by strict recordkeeping; and (3) Strict policies on what the trade association may and may not do with checkoff funds.

Contract Compliance

Boards are responsible for ensuring compliance by the contractors and subcontractors with the terms of their contracts.

Diversity and Nominations

Diversity on Boards

It is USDA policy that membership on industry-governed boards and committees accurately reflect, to the extent practicable, the diversity of individuals served by the programs. Diversity includes the size of operation, segment of the industry, and geographical distribution as well as gender, ethnicity, race, and disability.

Nominations

To facilitate the nomination of individuals to serve as members of boards and nominating entities, AMS will work with the boards to establish time frames to seek to avoid bottlenecks

in the clearance process within USDA. Boards are urged to provide, to the extent possible, statements to nominating entities that "all nominees must be in good standing with Department of Agriculture programs." AMS will also include this statement in news releases and other publicity announcing nominations for boards and nominating entities.

Financial Accountability

Each board must maintain a comprehensive financial accounting system and must maintain and make available to USDA representatives, on request, all appropriate books and records.

Each board must prepare a comprehensive set of annual financial statements. These statements, which must be prepared in accordance with generally accepted accounting principles, should include:

- (1) a balance sheet;
- (2) a statement of revenues and expenses;
- (3) a statement of changes in fund balance;
- (4) a statement of cash flows;
- (5) a schedule, showing the following in three columns and containing footnotes explaining any significant variances: (a) The USDA-approved budget (plan) by each major category; (b) The annual expenditures against each budget category (actual); and (c) and variances between planned and actual expenditures; and
- (6) any other financial statements, schedules, or explanations as may be requested by the board or USDA to provide sufficient information for effective management, monitoring, or decision making.

Where refunds are applicable, the financial records should include all appropriate details on assessments paid, requests for refunds, and refunds issued.

Influencing Legislation or Government Policy or Action

In the process of monitoring board activities, it is important for AMS to be aware of any actions which may be in conflict with the legislative prohibitions regarding influencing legislative and/or government policy. This prohibition on the use of check-off funds applies equally to any trade/producer organizations funded wholly or in part by a particular board or contractors to the boards.

However, this does not affect a trade/producer organization's ability to lobby with non-check-off funds. Likewise, there are no restrictions on individual board members, except when acting in an official capacity for the board.

Influencing legislation is defined as (1) any attempt to influence any legislation or any attempt to affect the opinions of the general public or any segment thereof concerning legislation; or (2) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any governmental official who may participate in the formulation of legislation.

Influencing of governmental policy or action is defined as any action the principal purpose of which is to bring about a change in existing policy or regulation or affect the outcome of proposed policy or regulation, except those actions which are specifically provided for in the act, order, and/or rules and regulations. *Exceptions:* With the approval of the Secretary, a board may request a ceremonial government action, such as the proclamation of a state or national month for the commodity it represents, and may provide information to USDA regarding government purchases of the commodity it represents.

These prohibitions do not preclude commodity boards from providing factual information to government officials, provided the information is presented in an unbiased manner and does not advocate a specific course of action.

AMS will require each board member to acknowledge in writing that the person understands the prohibition on using assessment funds for lobbying or attempting to influence legislation, government action or government policy, and agrees to act in accordance with that prohibition.

Other Government Agencies

AMS will be responsible for developing appropriate working relationships with other government agencies which have responsibilities related to these programs. For example, AMS will be responsible for ensuring close coordination with the FAS any time check-off funds are used for foreign activities. FAS has oversight responsibility of the Foreign Market Development and the Market Access Programs, and checkoff funding is made available to some participants in these FAS supervised programs. However, in all cases, FAS must have the opportunity to approve the boards' budgets, plans, and projects that focus on international activities. FAS approval will be subject to compliance with the checkoff legislation as well as other FAS requirements. Likewise, for programs with import assessment provisions, it is the responsibility of AMS to maintain a close liaison with

the U.S. Customs Service. Similarly, as required by section 1999T of the Food, Agriculture, Conservation, and Trade Act of 1990, AMS will consult with the United States Trade Representative on any proposed new or amended commodity promotion order which would assess imports.

Program Progress and Evaluation

AMS will receive copies of annual progress reports on program activities and expenditures.

Not less often than every five years, each board shall obtain an independent evaluation of the effectiveness of its generic promotion program. Each board shall submit to the Secretary and make available to the public the results of each periodic independent evaluation.

The methodology of the results must be credible, shareholder returns must be estimated, and the results must be presented in non-technical terms. Ideally, each board will commission econometric studies or other formal statistical models which would be subject to peer review. However, AMS recognizes differences in the availability of data and financial resources among the various boards. Therefore, other types of evaluation may also be used to meet the requirement to conduct periodic evaluations. Other types of evaluation include, but are not limited to, focus group interviews, Nielson and Gallup polls, National Eating Trend data, and supermarket scanning data. Boards which do not conduct econometric evaluations are required to submit their evaluation plans to AMS for review and comment.

Promotional and Educational Materials

AMS will review all plans and projects of commodity boards and approve those that are in compliance with the applicable legislative authority.

AMS will disapprove any advertising that it considers to be disparaging to another commodity or false and misleading. AMS will also disapprove any promotional material that it deems derogatory to individuals with respect to ethnicity, gender, race, physical abilities, or religion. The commodity programs may refer any questionable advertisements to the AMS Functional Committee on Research and Promotion Programs for review and for its recommendation.

Each board shall regularly provide to AMS all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials for review and approval and the advertisements or printed materials generated in the campaign.

AMS review of nutritional claims will include verification of the supporting data to determine compliance with USDA Agricultural Handbook 8–1, the Dietary Guidelines for Americans, Federal Trade Commission policy, Food and Drug Administration food labeling regulations, and other applicable Federal regulations.

Referendum Policies

Bonds

AMS will require the proponent of a new program to post a bond or submit an irrevocable letter of credit to cover any up-front referendum and other implementation costs.

Influencing Voters

Boards, board members, and board employees acting in their official capacities are prohibited from attempting to influence voters, and no board funds may be expended for that purpose. Board funds may not be used to state a position for or against a referendum issue or a petition or to promote a “yes” or a “no” vote in a referendum.

During period of referenda, requests for referenda, polls, or any petition process, however, board funds may be used: (1) For communication activities to inform industry how checkoff dollars are being spent and (2) to provide unbiased factual information concerning the referendum, poll, or petition process. Board funds may also be used to encourage those covered by a program to exercise their right to vote.

Petitions for Referenda

All of the statutes provide some type of mechanism for industry to request a referendum to determine if an individual program should be terminated. The most common requirement is that the Secretary must hold a referendum at the request of 10 percent or more of the persons who are covered by the program.

Referendum Ballots

Unless another method is required by statute, AMS will conduct all referenda by mail ballot, fax, or electronic means (when proper safeguards are in place). Further, in order to facilitate the verification of voter eligibility and the validity of ballots cast in referenda, the voters' name, address, telephone number, and certification will not be separated from the vote. All referenda includes referenda on implementing, continuing, amending, suspending, or terminating national research and promotion programs.

Refunds for Programs Under the Generic Statute

When a new program is implemented with a delayed referendum and refunds of assessments are required if the industry votes to terminate the program:

- (1) boards must disseminate procedures for receiving refunds to all persons subject to assessments under the program in a timely manner;
- (2) boards, board members, and board employees may not exert pressure of any kind to discourage the application for refunds;
- (3) the names of individuals applying for or obtaining refunds must be kept confidential and made available only to appropriate staff personnel; and
- (4) refund information released will be limited to the aggregate dollar amount and the number of persons receiving refunds by State, region, or nationwide. No information may be released that would in any way readily identify individual persons or firms.

Appendix I—Industry-Specific Legislation

Legislation for Current Programs

Beef Promotion and Research Act (1985)
 Cotton Research and Promotion Act (1996)
 Dairy Production Stabilization Act (1983)
 Egg Research and Consumer Information Act (1974)
 Fluid Milk Promotion Act of 1990
 Honey Research Promotion and Consumer Information Act of 1984)
 Mushroom Promotion, Research and Consumer Information Act of 1990
 Popcorn Promotion, Research, and Consumer Information Act of 1996
 Pork Promotion, Research, and Consumer Information Act of 1985
 Potato Research and Promotion Act (1971)
 Soybean Promotion, Research, and Consumer Information Act of (1990)
 Watermelon Research and Promotion Act (1985)

Other Legislation

Canola and Rapeseed Research, Promotion, and Consumer Information Act of (1996)
 Floral Research and Consumer Information Act of (1981)
 Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993
 Lime Research, Promotion and Consumer Information Act of 1990
 National Kiwifruit Research, Promotion, and Consumer Information Act (1996)
 Pecan Promotion and Research Act of 1990
 Sheep Promotion, Research and Information Act of 1994
 Wheat and Wheat Foods Research and Nutrition Education Act (1977)

Dated: December 14, 1999.

Kathleen A. Merrigan,
Administrator, Agricultural Marketing Service.

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