

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1217**

[Document Number AMS-FV-10-0015; PR-A2]

RIN 0581-AD03

**Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order**

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

**ACTION:** Proposed rule and referendum order.

**SUMMARY:** This rule proposes a Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (Order). Softwood lumber is used in products like flooring, siding and framing. The program would be financed by an assessment on softwood lumber domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary of Agriculture (Secretary). The initial assessment rate would be \$0.35 per thousand board feet of softwood lumber shipped within or imported to the United States. The purpose of the program would be to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. This rule also announces that the U.S. Department of Agriculture (USDA) is conducting a referendum among eligible domestic softwood lumber manufacturers and importers to determine whether they favor implementation of the program. The program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum. A separate final rule on referendum procedures is being published in this issue of the **Federal Register**.

**DATES:** The voting period is May 23 through June 10, 2011. To be eligible to vote, softwood lumber domestic manufacturers and importers must have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period from January 1 through December 31, 2010. Ballots will be mailed to all known domestic manufacturers and importers of softwood lumber on or before May 16, 2011. Ballots must be received by the

referendum agents no later than the close of business 4:30 p.m. (Eastern Standard Time) on June 10, 2011.

**ADDRESSES:** Copies of the proposed Order may be obtained from the Referendum Agent, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 0632-S, Stop 0244, Washington, DC 20250-0244; telephone: (202) 720-9915 or (888) 720-9917 (toll free); or facsimile: (202) 205-2800; or can be viewed at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Maureen T. Pello, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 831, Beavercreek, Oregon 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: [Maureen.Pello@ams.usda.gov](mailto:Maureen.Pello@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

As part of this rulemaking process, a proposed rule was published in the **Federal Register** on October 1, 2010 (75 FR 61002). That rule provided for a 60-day comment period which ended on November 30, 2010. Fifty-five comments were received. The comments are addressed later in this document.

**Executive Order 12866**

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

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act, a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the

opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

**Background**

This rule proposes an industry-funded research, promotion, and information program for softwood lumber. Softwood lumber is used in products like flooring, siding and framing. The program would be financed by an assessment on softwood lumber domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary. The initial assessment rate would be \$0.35 per thousand board feet of softwood lumber shipped within or imported to the United States. Entities that domestically ship or import less than 15 million board feet per fiscal year would be exempt from the payment of assessments. Additionally, assessed entities would not pay assessments on the first 15 million board feet of softwood lumber shipped domestically or imported during the year. Exports from the United States would also be exempt from assessments. The purpose of the program would be to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. The proposal was submitted to USDA by the Blue Ribbon Commission (BRC), a committee of 21 chief executive officers and heads of businesses that domestically manufacture and import softwood lumber.

This rule also announces that USDA is conducting a referendum among eligible domestic manufacturers and importers to determine whether they favor implementation of the program. The program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum.

**Authority in 1996 Act**

The proposed Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer

information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities. As defined under section 513(1)(D) of the 1996 Act, agricultural commodities include the products of forestry, which includes softwood lumber.

The 1996 Act provides for a number of optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 1996 Act provides for orders applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments). Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; provision for reserve funds; provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. An order also may provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board or council from among producers, first handlers and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

### Industry Background

The softwood lumber industry is comprised of sawmills that make products from softwood trees. Softwoods include the botanical group of trees that have needle-like or scale-

like leaves, or conifers. Softwood lumber includes certain products manufactured from softwoods (or coniferous trees). Softwood lumber is used in products like flooring, siding, and framing.

Softwood lumber sizes are identified by the thickness and width of the board when it is first cut from the log. This is known as "rough cut" when the wood is still green and wet. Once the wood dries, it shrinks. After the wood dries, the surface of the board is smoothed to make the wood a uniform size. This is known as "planing" the wood. Once planed, the wood is considered finished. In the industry, the term nominal is used to describe the size of the rough cut board, prior to finishing. For example, a 2 x 4 board is a nominal size. The actual size of a 2 x 4 board is 1.5 inches in thickness by 3.5 inches in width. The length of the board is typically the actual length. Usually there is a 1/2 inch difference in measurements over 2 inches and 1/4 inch difference in measurements less than 2 inches. For purposes of the proposed Order and the tables in this rule, nominal sizes are used. One nominal board foot is a unit of measurement of softwood lumber represented by a board 12-inches long, 12-inches wide, and 1-inch thick or its cubic equivalent. A board foot calculation for softwood lumber 1 inch or more in thickness is based on its nominal thickness and width by the actual length. Softwood lumber with a nominal thickness of less than 1 inch is calculated as 1 inch.

### Regional U.S. Timber Production<sup>1</sup>

According to USDA's Forest Service, the main species of softwoods in the southern United States are pines that grow fast and can be sold for lumber in 25 to 30 years. Southern pines are often treated with preservatives. About a third of the region's lumber is sold to treaters for further processing (*i.e.*, apply preservatives).<sup>2</sup>

Most of the northern U.S. softwood lumber industry is in Maine where the predominant species are white spruce and balsam fir. These trees are typically

used for light framing such as wall studs. Second growths of red pine planted in the 1930s and later have been harvested by a few firms in the lake states. Red pine is also easy to treat and much of it is processed. White pine trees are also prevalent in the northern United States. They are used for paneling, millwork, and joinery. Millwork includes woodwork that has been made at a mill, and joinery is the trade of constructing articles by joining together pieces of wood.

The bulk of timber production in the western United States is on the coast of the Pacific Northwest. Douglas fir and hemlock trees dominate while farther south in northern California, redwood trees, suitable for outdoor structures like fences, siding and decks, are common. East of these regions, ponderosa pine dominates and is used for millwork and joinery. Northern Idaho and Montana contain lodgepole pine and other species suitable for light framing.

### U.S. Softwood Lumber Output by Region<sup>3</sup>

According to USDA's Forest Service, for 2007–2008 (most recent data available to USDA), total output (production) of softwood lumber by U.S. sawmills averaged about 29.5 billion board feet annually. Of the 29.5 billion board feet, 12.6 billion board feet were from the U.S. South, 14.4 billion board feet were from the U.S. West, and 2.5 billion board feet were from the Northeast and Lake States. Data for the western states is from the Western Wood Products Association<sup>4</sup> and data for the other two regions is from the U.S. Census Bureau.<sup>5</sup>

### Softwood Lumber Markets<sup>6</sup>

The residential market is the largest consumer of softwood lumber in the United States. This includes single and multifamily homes, mobile homes, and remodeling. The residential market accounted for 75 percent of the total U.S. softwood lumber market in 2006 and 63 percent of the market in 2009. Table 1 below shows this data from 2003 through 2009.

TABLE 1—U.S. SOFTWOOD LUMBER MARKETS FROM 2003–2009

	Single family homes	Multi-family homes	Mobile homes	Residential remodeling	Non-residential, buildings	Non-residential, other	Industrial and other	Total U.S.
Volume (billion board feet)								
2003 .....	20.2	1.7	1.1	19.3	3.6	0.6	10.2	56.7

<sup>1</sup> Spelter, H., D. McKeever, D. Toth, Profile 2009: Softwood Sawmills in the United States, USDA, p. 7.

<sup>2</sup> Micklewright, J.T., Wood preservation statistics, American Wood Preservers Association, p. 25.

<sup>3</sup> Spelter, McKeever and Toth, Profile 2009, p. 15.

<sup>4</sup> Western Wood Products Association, 2008 Statistical Yearbook, p. 32.

<sup>5</sup> U.S. Census Bureau, 2009, Construction, <http://www.census.gov/mcd/>.

<sup>6</sup> Spelter, McKeever and Toth, Profile 2009, p. 2–5.

TABLE 1—U.S. SOFTWOOD LUMBER MARKETS FROM 2003–2009—Continued

	Single family homes	Multi-family homes	Mobile homes	Residential remodeling	Non-residential, buildings	Non-residential, other	Industrial and other	Total U.S.
2004 .....	22.2	1.8	1.1	20.3	3.9	0.5	11.1	60.8
2005 .....	24.5	1.9	1.2	20.9	3.8	0.6	11.7	64.6
2006 .....	21.3	1.9	0.9	21.4	3.6	0.6	11.3	61.0
2007 .....	14.9	1.7	0.8	19.7	4.0	0.6	11.4	53.1
2008 .....	8.4	1.4	0.6	17.5	3.9	0.6	9.6	42.0
2009 .....	5.3	0.7	0.4	14.2	3.6	0.6	7.8	32.6
Shares (percent)								
2003 .....	36	3	2	34	6	1	18	.....
2004 .....	36	3	2	33	6	1	18	.....
2005 .....	38	3	2	32	6	1	18	.....
2006 .....	35	3	2	35	6	1	18	.....
2007 .....	28	3	1	37	8	1	21	.....
2008 .....	20	3	1	42	9	1	23	.....
2009 .....	16	2	1	44	11	2	24	.....

During normal economic conditions, single family homes comprise the largest share of the softwood lumber market in the United States. Single family home use rose from 20.2 billion board feet in 2003 to 24.5 billion board feet in 2005 and fell to 5.3 billion board feet in 2009. Single family homes comprised 38 percent of the market for softwood lumber in 2005 and 16 percent of the market by 2009.

Home building is cyclical in nature (follows a pattern of highs and lows) as compared to other end uses for softwood lumber. Residential remodeling and other uses experienced downturns between 2006 and 2009, but less severe than the market for single family homes. Softwood lumber used for residential remodeling fell from 21.4 billion board feet in 2006 to 14.2 billion board feet in 2009. As a percentage of softwood lumber market share, residential remodeling rose from 35 percent in 2006 to 44 percent in 2009.

#### Export Markets <sup>7</sup>

Export markets are another outlet for softwood lumber. Two decades ago, U.S. exports were about seven times greater than they were in recent years, but a strong U.S. dollar from the mid-1990s

onward helped to reduce exports. Additionally, different size and grade standards for softwood lumber in export markets complicate production when log sizes have to be converted from imperial units (feet) to metric (meters). Most manufacturers have thus focused on North American sales. However, in slow periods such as in recent years, efforts have been made to supply export markets to the extent possible.

#### Competition <sup>8</sup>

Softwood lumber competes with several alternative products. Steel and concrete dominate larger residential and nonresidential projects. Brick, concrete, and vinyl are often used in low-rise residential and nonresidential buildings. Within the last decade, wood-plastic composite lumber has become popular for outdoor decking, railing, trim, and fencing. Other wood-based products such as laminated veneer are becoming more popular in place of softwood lumber.

#### Imports

According to U.S. Department of Commerce, Census Bureau, Foreign Trade Statistics data (Census),<sup>9</sup> imports of softwood lumber from 2008 through

2010 averaged about 10.2 billion board feet annually. During those years, imports from Canada averaged 9.6 billion board feet annually, comprising about 94 percent of total imports; imports from western Europe averaged 224 million board feet annually, comprising about 2.2 percent of total imports; and imports from Chile averaged 174 million board feet annually, comprising about 1.8 percent of total imports. Imports from other countries accounted for the remaining 2 percent of total imports for 2008 through 2010.

#### Price and Cost Trends <sup>10</sup>

Prices in the lumber industry can change rapidly in response to shifts in demand or supply. Prices are set competitively with many buyers and sellers bidding in a business that tends to be cyclical in nature. As shown in Table 2 below, revenue for the State of Oregon per thousand board feet was about \$309 in 2003, rose to \$420 in 2004, and fell to \$219 in 2008. In comparison, revenue for the State of Georgia per thousand board feet was about \$323 in 2003, rose to \$418 in 2005, and fell to \$262 in 2008.

TABLE 2—TYPICAL SAWMILL OPERATING COSTS 2003–2008

	Oregon		Georgia	
	Costs (\$ per thousand board feet)	Revenue (\$ per thousand board feet)	Costs (\$ per thousand board feet)	Revenue (\$ per thousand board feet)
2003 .....	295	309	311	323
2004 .....	330	420	335	378
2005 .....	349	370	349	418
2006 .....	335	316	349	330
2007 .....	297	260	300	269

<sup>7</sup> Spelter, McKeever and Toth, Profile 2009, p. 15.

<sup>8</sup> Ibid.

<sup>9</sup> <http://www.fas.usda.gov/gats>; accessed 3/12/11.

<sup>10</sup> Spelter, McKeever and Toth, Profile 2009, p. 5–6.

TABLE 2—TYPICAL SAWMILL OPERATING COSTS 2003–2008—Continued

	Oregon		Georgia	
	Costs (\$ per thousand board feet)	Revenue (\$ per thousand board feet)	Costs (\$ per thousand board feet)	Revenue (\$ per thousand board feet)
2008 .....	238	219	328	262

Several factors contributed to the revenue changes shown in Table 2. Some mills in the interior western United States were forced to close because of constraints on the availability of timber. A dispute with Canada over lumber imports that resulted in a 15 percent export levy for some U.S.-bound shipments and quotas on others after October 2006 impacted supply.

Wood, labor, and operating costs also impact revenue. The cost of wood in the United States is negotiated between buyers and sellers. Companies often enter into long-term supply contracts with timber owners where the price is negotiated quarterly based on sales and market conditions. Labor is the second biggest component of lumber costs. According to the U.S. Department of Labor, U.S. wages have increased about 3 percent per year during this decade.<sup>11</sup> At the same time, labor productivity in sawmilling has increased by a like amount leaving unit labor costs flat. The other main cost for sawmills is energy, but most mills use their own residues to generate heat for their drying needs. This has lessened the impact of rising energy prices on sawmills. As shown in Table 2, total operating costs in Oregon per thousand board feet averaged \$295 in 2003, rose to \$349 in 2005, and fell to \$238 in 2008. In comparison, total operating costs in Georgia per thousand board feet averaged \$311 in 2003, rose to \$349 in 2005 and 2006, and fell to \$328 in 2008.

#### Need for a Program

The softwood lumber industry is experiencing one of the worst markets in history. The collapse of the housing market caused prices to fall from \$404 per thousand board feet in 2004 to \$222 per thousand board feet in 2009. Prices rose slightly in 2010 to \$284 per thousand board feet.<sup>12</sup> Competition

from other building products like cement and vinyl has also helped to reduce demand for softwood lumber.

Additionally, at the request of the U.S. and Canadian governments, the U.S. Endowment for Forestry and Communities (Endowment) and the Binational Softwood Lumber Council (BSLC) were formed in 2006 in accordance with the 2006 Softwood Lumber Agreement. The Endowment is a non-profit organization that works with public and private sectors to advance the interests of the forestry community. The Endowment conducted a study to assess the feasibility of a softwood lumber research and promotion program. In the past, the industry attempted voluntary efforts to promote forest products, but they were sporadic, underfunded, and narrowly targeted. These campaigns did not last long enough to succeed. The Endowment recommended to the industry that Canadian and U.S. companies pursue a shared vision and achieve broad agreement on creating a unified softwood lumber research and promotion program. In 2008, the Endowment held an industry meeting in Seattle, Washington, to discuss the merits of such a program and obtain industry feedback.

As a result of the Endowment's efforts, the BRC was subsequently formed to pursue an industry research and promotion program. The BRC is comprised of 21 members representing the United States and Canada. Funding and support for the BRC's efforts come from the BSLC, a non-profit organization whose mission is to promote increased cooperation between the U.S. and Canadian softwood lumber industries and to strengthen and expand markets for softwood lumber products in both countries. The BRC submitted an initial proposal for a program to USDA in February 2010.

The BRC proposed a program that would be financed by an assessment on softwood lumber domestic manufacturers and importers and administered by a board of industry members selected by the Secretary. The initial assessment rate would be \$0.35 per thousand board feet shipped within

or imported to the United States and could be increased up to a maximum of \$0.50 per thousand board feet. Entities that domestically ship or import less than 15 million board feet would be exempt along with shipments exported outside of the United States. Assessed entities would not pay assessments on the first 15 million board feet shipped or imported. The purpose of the program would be to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. A referendum will be held among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. A majority of domestic manufacturers and importers by both number and volume represented in the referendum must support the program for it to be implemented. The specific provisions of the program are discussed below.

#### Provisions of Proposed Program

##### Definitions

Pursuant to section 513 of the 1996 Act, §§ 1217.1 through 1217.30 of the proposed Order define certain terms that would be used throughout the Order. Several of the terms are common to all research and promotion programs authorized under the 1996 Act while other terms are specific to the proposed softwood lumber Order.

Section 1217.1 would define the term "Act" to mean the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

Section 1217.2 would define the term "Blue Ribbon Commission" to mean the 21-member committee representing businesses that manufacture softwood lumber in the United States or import softwood lumber to the United States formed to pursue an industry research, promotion, and information program. As specified in proposed § 1217.41, the BRC would conduct the initial nominations for the Softwood Lumber Board and submit them to the Secretary.

<sup>11</sup> U.S. Department of Labor, Bureau of Labor Statistics, 2009, Employment cost index, Washington, DC, <http://data.bls.gov/PDQ/outside.jsp?survey=ci>, accessed 3/27/09.

<sup>12</sup> Price data was obtained from Random Lengths Publications, Inc., and is a framing composite price that is designed as a broad measure of price movement in the lumber market (<http://www.randomlengths.com>).

This would be the only role of the BRC under the program.

Section 1217.3 would define the term “Board” or “Softwood Lumber Board” to mean the administrative body established pursuant to § 1217.40, or such other name as recommended by the Board and approved by the Secretary.

Section 1217.4 would define the term “board foot” or “BF” to mean a unit of measurement of softwood lumber represented by a board 12-inches long, 12-inches wide, and 1-inch thick or its cubic equivalent. A board foot calculation for softwood lumber 1 inch or more in thickness is based on its nominal thickness and width by the actual length. Softwood lumber with a nominal thickness of less than 1 inch is calculated as 1 inch.

The term “nominal” means the size by which softwood lumber is known and sold in the marketplace. As previously mentioned, it differs from the actual size and is based on the thickness and width of a board when it is first cut from a log, or rough cut, prior to drying and planing. Nominal size would be defined in § 1217.16 of the Order. The term “planing” means the act of smoothing the surface of a board to make the wood a uniform size and would be defined in § 1217.20 of the Order.

Section 1217.6 would define the term “Customs” to mean Customs and Border Protection or CBP, an agency of the United States Department of Homeland Security.

Section 1217.8 would define the term “domestic manufacturer” to mean any person who is a first handler and is engaged in the manufacturing, sale and shipment of softwood lumber in the United States during a fiscal period and who owns, or shares in the ownership and risk of loss of manufacturing of softwood lumber or a person who is engaged in the business of manufacturing, or causes to be manufactured, sold and shipped such softwood lumber in the United States beyond personal use. The term would not include any person who re-manufactures softwood lumber that had already been subject to assessment under the Order.

Section 1217.9 would define the term “export” to mean to manufacture and ship softwood lumber from within the United States to locations outside of the United States.

Section 1217.10 would define the term “fiscal period” or “fiscal year” to mean a calendar year from January 1 through December 31, or other period as recommended by the Board and approved by the Secretary.

Section 1217.12 would define the term “information” to mean activities or programs designed to disseminate the results of research, new and existing marketing programs, new and existing marketing strategies, new and existing uses and applications, and to enhance the image of softwood lumber and the forests from which it comes. This would include consumer education, which would mean any action taken to provide information to, and broaden the understanding of, the general public regarding softwood lumber. This would also include industry information, which would mean information and programs that would enhance the image of the softwood lumber industry.

Section 1217.13 would define the term “manufacture” to mean the process of transforming softwood logs into softwood lumber.

Section 1217.14 would define the term “manufacturer for the U.S. market” to mean domestic manufacturers and importers of softwood lumber. Such importers may not have manufactured the softwood lumber, but would be importing softwood lumber that had been manufactured from softwood logs. This definition is intended to provide a common term for the domestic and importing members of the softwood lumber industry.

Section 1217.15 would define the term “marketing” to mean the sale or other disposition of softwood lumber in interstate, foreign, or intrastate commerce. The sale or disposition of softwood lumber within a state would constitute marketing.

Section 1217.18 would define the terms “part” and “subpart.” The term “part” would mean the Softwood Lumber Research, Promotion, Consumer Education, and Industry Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order would be a “subpart” of the part.

Section 1217.21 would define the terms programs, plans and projects to mean research, promotion and information programs, plans, or projects established under the Order.

Section 1217.22 would define the term “promotion” to mean any action taken, including paid advertising, public relations and other communications, and promoting the results of research, that presents a favorable image of softwood lumber and the forests from which it comes to the public and to any and all consumers and those who influence consumption of softwood lumber with the intent of improving the perception, markets and competitive position of softwood

lumber and stimulating sales of softwood lumber.

Section 1217.23 would define the term “research” to mean any activity that advances the position of softwood lumber in the marketplace that includes any type of test, study, or analysis designed to advance the image, desirability, use, marketability, sales, product development, or quality of softwood lumber; new applications; improving softwood lumber’s position in building and fire codes; softwood lumber product testing and safety; and evaluating the effectiveness of market development and promotion efforts including life cycle studies, forestry, sustainable forest management, environmental preferability, competitiveness, efficiency, pest and disease control, water quality and other management aspects of forestry and the forests from which softwood lumber originates.

Sections 1217.25 and 1217.26 would define the terms softwood and softwood lumber, respectively. It is noted that these section numbers are reversed in this proposed rule so that the terms appear alphabetically in the Order. Thus, the definition for softwood was renumbered from § 1217.26 to § 1217.25, and the definition for softwood lumber was renumbered from § 1217.25 to § 1217.26.

Section 1217.25 would then define the term “softwood” to mean one of the botanical groups of trees that have needle-like or scale-like leaves, or conifers.

Section 1217.26 would define the term “softwood lumber” to mean softwood lumber and products manufactured from softwood as described in section 804(a) within Title VIII (Softwood Lumber Act of 2008 or SLA of 2008) of the Tariff Act of 1930 (19 U.S.C. 1202–1683g), as amended by section 3301 of the Food, Conservation and Energy Act of 2008 (Pub. L. 110–246, enacted June 18, 2008), and as assessed under § 1217.52 of this Order.

The definition for softwood lumber in this proposed rule was modified to better state what is subject to this proposed program and to make clear what softwood lumber is subject to assessment. Further, modifications were made to § 1217.52 regarding the collection of assessments in this proposed rule.

Accordingly, softwood lumber and softwood lumber products described in section 804 of the SLA of 2008 and classified under subheading 4407.10.00, 4409.10.10, 4409.10.20, and 4409.10.90 of the HTSUS and would be covered

under this Order is described in the following paragraphs:<sup>13</sup>

(1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 millimeters;

(2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded, or the like) along any of its edges or faces, whether or not planed, sanded, or finger-jointed;

(3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded, or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded, or finger-jointed;

(4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded, or the like) along any of its edges or faces, whether or not planed, sanded, or finger jointed; and

(5) Coniferous drilled and notched lumber and angle cut lumber.

In addition, any product classified under subheading 4409.10.05 of the HTSUS that is continually shaped along its end and or side edges is covered under the SLA of 2008 and would be covered under this Order. All product classified under 4418.90.25 would also be covered under this Order.

Sections 1217.5, 1217.7, 1217.11, 1217.17, 1217.19, 1217.24, 1217.27, 1217.28, 1217.29, and 1217.30 would define the terms "conflict of interest," "Department or USDA," "importer," "Order," "person," "Secretary," "State," "suspend," "terminate," and "United States," respectively. The definitions are the same as those specified in section 513 of the 1996 Act.

#### Establishment of the Board

Pursuant to section 515 of the 1996 Act, §§ 1217.40 through 1217.47 of the proposed Order would detail the establishment and membership of the proposed Softwood Lumber Board, nominations and appointments, the term of office, removal and vacancies, procedure, reimbursement and attendance, powers and duties, and prohibited activities.

Section 1217.40 would specify the Board establishment and membership.

The Board would be composed of manufacturers for the U.S. market who manufacture and domestically ship or import 15 million board feet or more of softwood lumber in the United States during a fiscal period. Seats on the Board would be apportioned based on the volume of softwood lumber manufactured and shipped within the United States by domestic manufacturers and the volume of softwood lumber imported into the United States.

The Board would be composed of 18 or 19 members, depending upon whether it is appropriate to appoint an additional importer member to the Board. Twelve members would be domestic manufacturers and would be allocated to three regions in the United States based on the volume of softwood lumber manufactured in and shipped from the respective region. Of the 12 members, 6 would be from the U.S. South Region, 5 would be from the U.S. West Region, and 1 member would be from the Northeast and Lake States Region and any other part of the United States not included in the southern and western regions. Specific areas within each domestic region would be specified in § 1217.40(b)(1) of the proposed Order.

Six members would be importers who import the majority of their softwood lumber from two regions in Canada and would be allocated based on the volume of softwood lumber imported from those two respective regions. Of the six Canadian importers, four would represent the Canadian West Region and two would represent the Canadian East Region. Specific areas within each Canadian region would be specified in § 1217.40(b)(2) of the proposed Order. An additional member would represent a region representing all countries except Canada and the United States, if appropriate.

The volume of softwood lumber imported from other countries besides Canada is relatively low, averaging about 6 percent of total imports from 2008 through 2010. Thus, the BRC recommended that, if the Secretary, at the request of the Board or on his or her own, determines that it would be consistent with the provisions of the Act, the Secretary could appoint an additional importer to the Board to represent the region outside of the regions specified for Canada. Nominees would be solicited as prescribed for other regions, and all the names of eligible candidates would be submitted to the Secretary for consideration. Such nominees would have to certify that the majority of their softwood lumber is imported from the region (which would

include imports from all countries except Canada).

The BRC also opted to have no alternate Board members. It wants to ensure that industry members who seek representation and serve on the Board are committed to their service and participate in all Board meetings.

Every 5 years, but no more often than once every 3 years, the Board must review, based on a 3-year average, the geographical distribution of the volume of softwood lumber manufactured and shipped within the United States by domestic manufacturers and the volume of softwood lumber imported into the United States. If warranted, the Board would recommend to the Secretary that the Board membership be reapportioned appropriately to reflect such changes. The distribution of volumes between regions also shall be considered (domestic versus importer regions and within domestic and importing regions). The number of Board members may also be changed. Any changes in Board composition would be implemented by the Secretary through rulemaking.

Section 1217.41 of the proposed Order would specify Board nominations and appointments. The initial nominations would be submitted to the Secretary by the BRC. The BRC would publicize the nomination process, using trade press or other means it deems appropriate, and outreach to all manufacturers for the U.S. market who domestically ship and/or import 15 million board feet or more of softwood lumber per fiscal year. The BRC would use regional caucuses, mail or other methods to solicit potential nominees and would work with USDA to help ensure that all interested persons are apprised of the nomination process. The BRC would submit the nominations to the Secretary and recommend two nominees for each Board position. The Secretary would select the members of the Board from the nominations submitted by the BRC.

Regarding subsequent nominations, the Board would solicit nominations as described in the preceding paragraph. Nominees would have the opportunity to provide the Board a short background statement outlining their qualifications and desire to serve on the Board. They must domestically ship and/or import 15 million board feet or more of softwood lumber per fiscal year. Entities that are both a domestic manufacturer and an importer could seek nomination to the Board and vote in the nomination process described below depending on whether the majority of their business is domestic manufacturing or imports. Such nominees who domestically manufacture the majority of their

<sup>13</sup> The HTSUS numbers referred to in this discussion are as of January 1, 2008. However, HTS subheading 4407.10.00 is now HTS subheading 4407.10.01.

softwood lumber could seek nomination and vote as a domestic manufacturer, and such nominees who import the majority of their softwood lumber could seek nomination and vote as an importer.

Domestic manufacturers who manufacture softwood lumber in more than one region could seek nomination in only the region in which they manufacture the majority of their softwood lumber. The names of domestic manufacturer nominees would be placed on a ballot by region. The ballots along with the background statements would be mailed to domestic manufacturers in each respective region for a vote. Domestic manufacturers who manufacture softwood lumber in more than one region could only vote in the region in which they manufacture the majority of their softwood lumber. The votes would be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position would be submitted to the Secretary.

Importer nominees would certify that the majority of their softwood lumber was imported from the respective region for which they were seeking representation on the Board. They would provide documentation to verify this if requested by the Board. The names of importer nominees would then be placed on a ballot by region. The ballots along with the background statements would be mailed to importers in each respective region for a vote. Importers who import softwood lumber from more than one region could only vote in the region from which they import the majority of their softwood lumber. The votes would be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position would then be submitted to the Secretary.

The Board would submit nominations to the Secretary at least 6 months before the new Board term begins. The Secretary would select the members of the Board from the nominations submitted by the Board.

The BRC also recommended that no two Board members be employed by a single corporation, company, partnership, or any other legal entity. This is to ensure that no one entity has control on the Board.

In order to provide the Board flexibility, the Board could recommend to the Secretary modifications to its nomination procedures. Any such modifications would be implemented through rulemaking by the Secretary.

Section 1217.42 of the proposed Order would specify the term of office for Board members. With the exception of the initial Board, each Board member would serve a three-year term or until the Secretary selected his or her successor. Each term of office would begin on January 1 and end on December 31. No member could serve more than two consecutive terms, excluding any term of office less than three years. For the initial Board, the terms of office for Board members would be staggered for two, three, and four years and would be recommended to the Secretary by the BRC.

Section 1217.43 of the proposed Order would specify criteria for the removal of members and for filling vacancies. If a Board member ceased to work for or be affiliated with a domestic manufacturer or importer or ceased to do business in the region he or she represented, such position would become vacant. Additionally, the Board could recommend to the Secretary that a member be removed from office if the member consistently refused to perform his or her duties or engaged in dishonest acts or willful misconduct. The Secretary could remove the member if he or she finds that the Board's recommendation shows adequate cause. If a position became vacant, nominations to fill the vacancy would be conducted using the nominations process for subsequent nominations as proposed in § 1217.41 of the Order. A vacancy would not be required to be filled if the unexpired term is less than six months.

Section 1217.44 of the proposed Order would specify procedures of the Board. A majority of the Board members (10) would constitute a quorum, provided that at least three of the members present were importers and six were domestic manufacturers. If participation by telephone or other means were permitted, members participating by such means would count towards the quorum requirements or other voting requirements as authorized under the Order. Proxy voting would not be permitted. A motion would carry if supported by 10 Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which would require affirmation by at least two-thirds of the Board members (12 members for an 18 member Board and 13 members for a 19 member Board). If a Board has vacant positions, recommendations to change the assessment rate or to adopt a budget would have to pass by an affirmative vote of two-thirds of the Board members, exclusive of the vacant seats.

For example, if a 19 member Board had a vacancy, there would be 18 Board members, and thus 10 members would constitute a quorum and the majority needed to carry a motion except for changes to the assessment rate and the adoption of the budget where 12 members must agree.

The proposed Order would also provide for the Board to take action by mail, telephone, electronic mail, facsimile, or any other electronic means when the chairperson believes it is necessary. Actions taken under these procedures would be valid only if all members and the Secretary were notified of the meeting and all members were provided the opportunity to vote and at least 10 Board members voted in favor of the action (unless two-thirds vote were required under the Order). Additionally, all votes would have to be confirmed in writing and recorded in Board minutes.

The proposed Order would specify that Board members would serve without compensation. However, Board members would be reimbursed for reasonable travel expenses, as approved by the Board, incurred when performing Board business.

Section 1217.46 of the proposed Order would specify powers and duties of the Board. These are similar to powers and duties of boards in other promotion programs authorized under the 1996 Act. They include, among other things, to administer the Order and collect assessments; to develop bylaws and recommend regulations necessary to administer the Order; to select a chairperson and other Board officers; to create an executive committee and form other committees and subcommittees as necessary; to hire staff or contractors; to provide appropriate notice of meetings to the industry and USDA and keep minutes of such meetings; to develop programs and enter into contracts to implement programs; to submit a budget to USDA for approval 60 calendar days prior to the start of the fiscal year; to borrow funds necessary to cover startup costs of the Order; to invest Board funds appropriately; to recommend changes in the assessment rate as appropriate and within the limits of the Order; to have its books audited by an outside certified public accountant at the end of each fiscal period and at other times as requested by the Secretary; to report its activities to manufacturers for the U.S. market; to make public an accounting of funds received and expended; to receive, investigate and report to the Secretary complaints of violations of the Order; and to recommend amendments to the Order as appropriate.

Section 1217.47 of the proposed Order would specify prohibited activities that are common to all promotion programs authorized under the 1996 Act. In summary, the Board nor its employees and agents could engage in actions that would be a conflict of interest; use Board funds to lobby (influencing legislation or governmental action or policy, by local, state, national, and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order); and engage in any advertising or activities that may be false, misleading or disparaging to another agricultural commodity.

As an example, § 1217.60 of the proposed Order provides authority for the Board to conduct research as defined in § 1217.23 that includes projects to improve softwood lumber's position in building and fire codes. While the Board may conduct such research, it could not engage in efforts to influence government officials to modify building and fire codes or establish new codes.

#### **Expenses and Assessments**

Pursuant to sections 516 and 517 of the 1996 Act, §§ 1217.50 through 1217.53 of the proposed Order detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from assessments. At least 60 calendar days before the start of the fiscal period, and as necessary during the year, the Board would submit a budget to USDA covering its projected expenses. The budget must include a summary of anticipated revenue and expenses for each program along with a breakdown of staff and administrative expenses. Except for the initial budget, the Board's budgets should include comparative data for at least one preceding fiscal period.

Each budget must provide for adequate funds to cover the Board's anticipated expenses. Any amendment or addition to an approved budget must be approved by USDA, including shifting of funds from one program, plan or project to another. Shifts of funds that do not result in an increase in the Board's approved budget would not have to have prior approval from USDA. For example, if the Board's approved budget provided for \$1 million in consumer advertising and \$500,000 in research projects, a shift of \$50,000 from consumer advertising to research would require USDA approval. However, a shift within the \$1 million consumer advertising line item would not require prior USDA approval.

The Board would be authorized to incur reasonable expenses for its maintenance and functioning. During its first year of operation, the Board could borrow funds for startup costs and capital outlay. Any borrowed funds would be subject to the same fiscal, budget and audit controls as other funds of the Board.

The Board could also accept voluntary contributions. Any contributions received by the Board would be free from encumbrances by the donor and the Board would retain control over use of the funds. For example, the Board could receive Federal grant funds, subject to approval by the Secretary, for a specific research project. The Board would also be required to reimburse USDA for costs incurred by USDA in overseeing the Order's operations, including all costs associated with referenda.

The Board would be limited to spending no more than 8 percent of its available funds for administration, maintenance, and the functioning of the Board. This limitation would begin two fiscal years after the Board's first meeting. Reimbursements to USDA would not be considered administrative costs. As an example, if the Board received \$15 million in assessments during fiscal year 5, and had available \$1 million in reserve funds, the Board's available funds would be \$16 million. In this scenario, the Board would be limited to spending no more than \$1.28 million ( $.08 \times \$16$  million) on administrative costs. While section 515 of the 1996 Act limits such spending to 15 percent of a board's budget, the BRC believes that 8 percent is appropriate.

The Board could also maintain a monetary reserve and carry over excess funds from one fiscal period to the next. However, such reserve funds could not exceed one fiscal year's budgeted expenses. For example, if the Board's budgeted expenses for a fiscal year were \$15 million, it could carry over no more than \$15 million in reserve. With approval of the Secretary, reserve funds could be used to pay expenses.

The Board could invest its revenue collected under the Order in the following: (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; and (4) Obligations fully guaranteed as to principal interest by the United States.

The Board would be required to submit to USDA financial statements on a quarterly basis, or at any other time as

requested by the Secretary. Financial statements should include, at a minimum, a balance sheet, an income statement, and an expense budget.

#### *Assessments*

The Board's programs and expenses would be funded through assessments on manufacturers for the U.S. market, other income, and other funds available to the Board. The Order would provide for an initial assessment rate of \$0.35 per thousand board feet. Domestic manufacturers would pay assessments based on the volume of softwood lumber shipped within the United States and importers would pay assessments based on the volume of softwood lumber imported to the United States.

Two years after the Order becomes effective and periodically thereafter, the Board would review the assessment rate and, if appropriate, recommend a change in the rate. At least two-thirds of the Board members would have to favor a change in the assessment rate. The assessment rate could be no less than \$0.35 per thousand board feet and no more than \$0.50 per thousand board feet. Any change in the assessment rate within this range would be subject to rulemaking by the Secretary. Anticipated income generated within the assessment range is addressed in the section titled Regulatory Flexibility Act Analysis.

Domestic manufacturers would be required to pay their assessments owed to the Board by the 30th calendar day of the month following the end of the quarter in which the softwood lumber was shipped. Thus, the January to December fiscal year would have four quarters ending the last day of March, June, September, and December, respectively. Assessments would be due April 30th, July 30th, October 30th, and January 30th. As an example, assessments for lumber shipped in January would be due to the Board by April 30th.

Additionally, domestic product that could not be categorized in the HTSUS numbers listed in § 1217.52(h) if it were an import would not be covered under the Order. Further, softwood lumber originating in the United States that is shipped to locations outside of the United States and then shipped back to the United States would be covered under the Order, provided it could be categorized in the HTSUS numbers listed in § 1217.52(h).

Importer assessments would be collected through Customs. If Customs did not collect the assessment from an importer, then the importer would be responsible for paying the assessment



directly to the Board by the 30th calendar day of the month following the end of the quarter in which the softwood lumber was imported.

Imported softwood lumber that would be covered under the program would have a quantity associated with it in cubic meters. To compute the assessments owed, USDA converted the quantity of softwood lumber in cubic meters to the thousand board feet equivalent, and then that number was multiplied by the applicable assessment rate. One cubic meter is equal to 423.776001 board feet. The factor used to convert one cubic meter to one thousand board feet is 423.776001 divided by 1,000, or 0.423776001. For example, if 500,000 cubic meters of softwood lumber covered under the program is imported, and the assessment rate is \$0.35 per thousand board feet, the assessments owed would be \$74,160.80 ( $500,000 \times 0.423776001 \times \$0.35$ ).

Section 1217.52(h) of the Order would prescribe the HTSUS categories covered under the program. In the event an HTSUS number subject to assessment changed and the change is merely a replacement of a previous number and has no impact on the description of the softwood lumber involved, assessments would continue to be collected based on the new number.

Articles brought into the United States temporarily and for which an exemption is claimed under subchapter XIII of chapter 98 of the HTSUS would not be covered under this Order. If assessments are collected by Customs for these products, the importer may apply to the Board for a refund of assessments.

The Order would provide authority for the Board to impose a late payment charge and interest for assessments overdue to the Board by 60 calendar days. The late payment charge and rate of interest would be prescribed in the Order's regulations issued by the Secretary.

As previously mentioned, § 1217.52 regarding the collection of assessments has been modified in this proposed rule to make clear what softwood lumber is subject to assessment. Additionally, § 1217.52 was modified to link assessable imported product directly to HTSUS codes.

Further, all imported softwood lumber covered under the Order would have a quantity associated with it in cubic meters or an equivalent measure. Thus, the factor listed in the first proposed rule used to convert value in dollars to a quantity has been removed because it is no longer necessary.

### *Exemptions*

The Order would provide for four exemptions. First, manufacturers for the U.S. market who domestically ship or import less than 15 million board feet during a fiscal year would be exempt from paying assessments. Domestic manufacturers and importers would apply to the Board for an exemption prior to the start of the fiscal year. This would be an annual exemption; entities would have to reapply each year. They would have to certify that they expect to domestically ship or import less than 15 million board feet for the applicable fiscal year. The Board could request past shipment or import data to support the exemption request. The Board would then issue, if deemed appropriate, a certificate of exemption to the eligible manufacturer for the U.S. market.

Once approved, domestic manufacturers would not have to pay assessments to the Board for the applicable fiscal year. Approved importers would present a copy of the certificate to Customs. If accepted by Customs, such imported softwood lumber would not be subject to assessments. If Customs collects the assessment, the Board would refund such importers their assessments no later than 60 calendar days after receipt of such assessments by the Board. No interest would be paid on the assessments collected by Customs.

Manufacturers for the U.S. market who did not apply to the Board for an exemption and domestically shipped or imported less than 15 million board feet of softwood lumber during the fiscal year would receive a refund from the Board for the applicable assessments within 30 calendar days after the end of the fiscal year. Board staff would determine the assessments paid and refund the domestic manufacturer accordingly. On the other hand, manufacturers for the U.S. market who receive an exemption certificate but domestically ship or import more than 15 million board feet of softwood lumber during the fiscal year would have to pay the Board the applicable assessments owed within 30 calendar days after the end of the fiscal year and submit any necessary reports to the Board.

If an entity is a domestic manufacturer and importer of softwood lumber, such entity's domestic shipments and imports together would count towards the 15 million board foot exemption. For example, if an entity domestically ships 12 million board feet and imports 10 million board feet during a fiscal year, the entity would pay assessments on 7 million board feet of softwood lumber.

The Board could recommend additional procedures to administer the exemption as appropriate. Any procedures would be implemented through rulemaking by the Secretary.

The second exemption under the proposed Order would be for manufacturers for the U.S. market who domestically ship or import more than 15 million board feet of softwood lumber annually. Domestic manufacturers would not pay assessments on their first 15 million board feet of softwood lumber shipped during the applicable fiscal year. Importers would receive a refund from the Board for the applicable assessments collected by Customs no later than 60 calendar days after receipt of such assessments by the Board.

The third exemption under the proposed Order would be for exports. The Board would develop procedures for approval by USDA for refunding assessments that may be inadvertently paid on such shipments and establish any necessary safeguards as appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking.

If the Board determined that exports should be assessed, it would make that recommendation to the Secretary. Any such action would be implemented by USDA through rulemaking.

As previously mentioned, softwood lumber manufactured in the United States that is shipped to locations outside of the United States for minor processing and then shipped back to the United States would be subject to assessment.

The fourth exemption under the proposed Order would be for organic lumber. A domestic manufacturer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, only manufactures and ships softwood lumber that is eligible to be labeled as 100 percent organic under the NOP and is not a split operation would be exempt from payment of assessments. Likewise, an importer who imports only softwood lumber that is eligible to be labeled as 100 percent organic under the NOP and is not a split operation would be exempt from the payment of assessments.

### **Promotion, Research and Information**

Pursuant to section 516 of the 1996 Act, §§ 1217.60 through 1217.62 of the proposed Order would detail requirements regarding promotion, research and information programs, plans and projects authorized under the Order. The Board would develop and submit to the Secretary for approval programs, plans and projects regarding

promotion, research, education, and other activities, including consumer and industry information and advertising designed to, among other things, build markets for softwood lumber, enhance the image and reputation of softwood lumber and the forests from which it comes, and develop new applications for softwood lumber. The Board would be required to evaluate each plan and program to ensure that it contributes to an effective promotion program.

Softwood lumber of all origins would have to be treated equally by the Board, and no program, plan, or project could be false, misleading, or disparage against another agricultural commodity.

The Order would also require that, at least once every five years, the Board fund an independent evaluation of the effectiveness of the Order and programs conducted by the Board. Finally, the Order would specify that any patents, copyrights, trademarks, inventions, product formulations and publications developed through the use of funds received by the Board would be the property of the U.S. Government, as represented by the Board. These along with any rents, royalties and the like from their use would be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board, and could be licensed with approval of the Secretary.

#### **Reports, Books and Records**

Pursuant to section 515 of the 1996 Act, §§ 1217.70 through 1217.72 specify the reporting and recordkeeping requirements under the proposed Order as well as requirements regarding confidentiality of information.

Manufacturers for the U.S. market would be required to submit periodically to the Board certain information as the Board may request. Specifically, domestic manufacturers would submit a report to the Board that would include, but not be limited to, the manufacturer's name, address, and telephone number; the board feet of softwood lumber shipped within the United States; the board feet of softwood lumber for which assessments were paid; and the board feet of softwood lumber that was exported. Manufacturers would submit this report at the same time they remit their assessments to the Board. Domestic manufacturers who received a certificate of exemption from the Board would not have to submit such a report to the Board. However, exempt domestic manufacturers who shipped over the exemption threshold of 15 million board feet during the fiscal year would have to submit such reports to the Board with

the payment of assessments on a quarterly basis as specified in § 1217.53.

Likewise, importers who pay their assessments directly to the Board would be required to submit a report to the Board that would include, but not be limited to, the importer's name, address, and telephone number; the board feet of softwood lumber imported to the United States; the board feet of softwood lumber for which assessments were paid; and country of export for such softwood lumber. Importers would submit this report at the same time they remit their assessments to the Board. Importers who paid their assessments through Customs would not have to submit such reports to the Board because Customs would collect this information upon entry.

Additionally, manufacturers for the U.S. market, including those who were exempt, would be required to maintain books and records needed to verify any required reports. Such books and records must be made available during normal business hours for inspection by the Board's or USDA's employees or agents. Manufacturers for the U.S. market would be required to maintain such books and records for two years beyond the applicable fiscal period.

The Order would also require that all information obtained from persons subject to the Order as a result of proposed recordkeeping and reporting requirements would be kept confidential by all officers, employees, and agents of the Board and USDA. Such information could only be disclosed if the Secretary considered it relevant, and the information were revealed 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 USDA were a party. Other exceptions for disclosure of confidential information would include the issuance of general statements based on reports or on information relating to a number of persons subject to the Order, if the statements did not identify the information furnished by any person, or the publication, by direction of the Secretary, of the name of any person violating the Order and a statement of the particular provisions of the Order violated.

#### **Miscellaneous Provisions**

##### *Referenda*

Pursuant to section 518 of the 1996 Act, § 1217.81(a) of the proposed Order specifies that the program would not go into effect unless it is approved by a majority of domestic manufacturers and importers voting in a referendum who

also represent a majority of the volume of softwood lumber represented in the referendum who, during a representative period determined by the Secretary, were engaged in the domestic manufacturing or importation of softwood lumber into the United States. For example, if 500 domestic manufacturers and importers representing 100 million board feet of softwood lumber voted in a referendum, 251 domestic manufacturers and importers representing over 50 million board feet would have to vote in favor of the Order for it to pass in the referendum.

Section 1217.81(b) of the proposed Order specifies criteria for subsequent referenda. Under the Order, a referendum would be held to ascertain whether the program should continue, be amended, or be terminated. This section specifies that a referendum would be held 5 years after the Order becomes effective, and every 5 years thereafter, to determine whether domestic manufacturers and importers favor continuation of the Order. The Order would continue if favored by a majority of domestic manufacturers and importers voting in the referendum that also represented a majority of the volume of softwood lumber represented in the referendum.

Additionally, a referendum could be conducted at the request of the Board. A referendum could also be conducted at the request of 10 percent or more of the number of persons eligible to vote in a referendum under the Order. Finally, a referendum could be conducted at any time as determined by the Secretary.

#### **Other Miscellaneous Provisions**

Sections 1217.80 and §§ 1217.82 through 1217.88 describe the rights of the Secretary; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers. These provisions are common to all research and promotion programs authorized under the 1996 Act.

#### **Regulatory Flexibility Act Analysis**

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS is required to examine the impact of the proposed rule on small entities. Accordingly, AMS has prepared this regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small

Business Administration defines, in 13 CFR Part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (domestic manufacturers and importers) as those having annual receipts of no more than \$7.0 million.

According to USDA's Forest Service, it is estimated that, between 2007 and 2009 (most recent data available to USDA), there were an average of 595 domestic manufacturers of softwood lumber in the United States annually.<sup>14</sup> This number represents separate business entities; one business entity may include multiple sawmills. Using an average price of \$280 per thousand board feet, a domestic manufacturer who ships less than 25 million board feet per year would be considered a small entity. It is estimated that, between 2007 and 2009, about 363 domestic manufacturers, or about 61 percent,<sup>15</sup> shipped less than 25 million board feet annually.

Likewise, according to Customs data, it is estimated that, between 2007 and 2009, there were about 883 importers of softwood lumber annually. About 798 importers, or about 90 percent, imported less than \$7.0 million worth of softwood lumber annually. Thus, the majority of domestic manufacturers and importers of softwood lumber would be considered small entities.

Regarding value of the commodity, with domestic production averaging 29.5 billion board feet (2007 and 2008), and using an average price for those years of \$268 per thousand board feet,<sup>16</sup> the average annual value for softwood lumber is about \$7.9 billion. According to Customs data, the average annual value for softwood lumber imports for 2007 and 2008 is about \$4.7 billion.

This rule proposes an industry-funded research, promotion, and information program for softwood lumber. Softwood lumber is used in products like flooring, siding and

framing. The program would be financed by an assessment on softwood lumber domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary. The initial assessment rate would be \$0.35 per thousand board feet shipped within or imported to the United States and could be increased to \$0.50 per thousand board feet. Entities that ship or import less than 15 million board feet would be exempt along with shipments exported outside of the United States. No entity would pay assessments on the first 15 million board feet shipped or imported. The purpose of the program would be to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. A referendum will be held among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. A majority of entities by both number and volume would have to support the program for it to be implemented. The program is authorized under the 1996 Act.

Regarding the economic impact of the proposed Order on affected entities, softwood lumber domestic manufacturers and importers would be required to pay assessments to the Board. As previously mentioned, the initial assessment rate would be \$0.35 per thousand board feet shipped within or imported to the United States and could be increased to no more than \$0.50 per thousand board feet.

The Order would provide for an exemption for domestic manufacturers and importers who ship or import less than 15 million board feet annually. Of the 595 domestic manufacturers, it is estimated that about 232, or 39 percent, ship less than 15 million board feet per year and would thus be exempt from

paying assessments under the proposed Order. Of the 883 importers, it is estimated that about 780, or 88 percent, import less than 15 million board feet per year and would also be exempt from paying assessments. Thus, about 363 domestic manufacturers and 103 importers would pay assessments under the Order. It is estimated that if \$17.5 million were collected in assessments (\$0.35 per thousand board feet assessment rate with 50 billion board feet assessed), 25 percent, or about \$4 million, would be paid by importers and 75 percent, or about \$13 million, would be paid by domestic manufacturers.

Regarding the impact on the industry as a whole, the proposed program is expected to grow markets for softwood lumber by stopping the erosion of market share in single family residential market, increasing the market share in multi-family residential construction, significantly increasing the use of softwood lumber in non-residential markets, and rebuilding softwood lumber's share in the outdoor living market. The BRC estimates the long-term market growth opportunity in the non-residential market and the raised wood segment of the residential market is between 10 and 12 billion board feet. USDA's Forest Service in a 2007 study estimated a more conservative potential growth at around 8 billion board feet.<sup>17</sup> While the benefits of the proposed program are difficult to quantify, the benefits are expected to outweigh the program's costs.

Regarding alternatives, the BRC considered various options to the proposed range in assessment rates and options to the proposed exemption. The BRC believes that \$20 million in assessment income is an ideal threshold for an effective program that could help to improve the market for softwood lumber. Table 3 below shows the range in assessments projected at various industry shipment levels per year.

TABLE 3—PROJECTED INCOME GENERATED AT VARIOUS ASSESSMENT RATES AND SHIPMENT LEVELS <sup>1</sup>

Assessment options (per thousand board feet)	Annual shipment levels (billion board feet)		
	40	50	60
\$0.25 .....	\$10 million .....	\$12.5 million .....	\$15 million.
\$0.35 .....	\$14 million .....	\$17.5 million .....	\$21 million.
\$0.50 .....	\$20 million .....	\$25 million .....	\$30 million.

<sup>1</sup> Assumes no exemption.

<sup>14</sup> Spelter, McKeever and Toth, Profile 2009, p. 15.

<sup>15</sup> Percentages were obtained from the American Lumber Standard Committee, Inc. (ALSC). The ALSC administers an accreditation program for the

grademarking of lumber produced under the American Softwood Lumber Standard (Voluntary Product Standard 20).

<sup>16</sup> Spelter, McKeever and Toth, Profile 2009, p. 2–5.

<sup>17</sup> Spelter, H.D. McKeever, M. Alderman, Profile 2007: Softwood Sawmills in the United States and Canada, USDA, p. 10.

Regarding exemption levels, the BRC explored projected assessment income at exemption levels of 15, 20, and 30 million board feet. With a 15 million board foot exemption, the BRC projected

a deduction of 11.3 percent in assessment income.

Table 4 below shows the BRC's projected income levels at various assessment options in light of the

proposed 15 million board foot exemption.

TABLE 4—PROJECTED INCOME GENERATED AT VARIOUS ASSESSMENT RATES AND SHIPMENT LEVELS <sup>1</sup>

Assessment options (per thousand board feet)	Annual shipment levels (billion board feet)		
	40	50	60
\$0.25 .....	\$8.9 million .....	\$11.1 million .....	\$13.3 million.
\$0.35 .....	\$12.4 million .....	\$15.5 million .....	\$18.9 million.
\$0.50 .....	\$17.7 million .....	\$22.2 million .....	\$26.6 million.

<sup>1</sup> Assumes 15 million board foot exemption.

Ultimately the BRC concluded that an assessment rate range of \$0.35 to a maximum of \$0.50 per thousand board feet with an exemption threshold of 15 million board feet was appropriate and would generate sufficient income to support an effective promotion program for softwood lumber. At an initial assessment rate of \$0.35 per thousand board feet, the BRC projects assessment income between \$12.4 million and almost \$19 million with shipment levels ranging from 40 to 60 billion board feet, respectively.

The industry explored the merits of a voluntary promotion program. Over the years, the industry organized various public outreach, education and promotion campaigns funded through voluntary assessments. Although some were partially effective, none fully accomplished their objectives and the gains either disappeared quickly or eroded over time.

This action would impose additional reporting and recordkeeping burden on domestic manufacturer and importers of softwood lumber. Domestic manufacturers and importers interested in serving on the Board would be asked to submit a nomination form to the Board indicating their desire to serve or nominating another industry member to serve on the Board. Interested persons could also submit a background statement outlining their qualifications to serve on the Board. Except for the initial Board nominations, domestic manufacturers and importers would have the opportunity to cast a ballot and vote for candidates to serve on the Board. Domestic manufacturer and importer nominees to the Board would have to submit a background form to the Secretary to ensure they are qualified to serve on the Board.

Additionally, domestic manufacturers and importers who ship or import less than 15 million board feet annually could submit a request to the Board for an exemption from paying assessments

on this volume. Domestic manufacturers and importers would also be asked to submit a report regarding their shipments/imports that would accompany their assessments paid to the Board. Domestic manufacturers and importers who would qualify as 100 percent organic under the NOP and are not a split operation could submit a request to the Board for an exemption from assessments. Importers could also request a refund of any assessments paid to Customs.

Finally, domestic manufacturers and importer who wanted to participate in a referendum to vote on whether the Order should become effective would have to complete a ballot for submission to the Secretary. These forms have been submitted to the OMB for approval under OMB Control No. 0581–NEW. Specific burdens for the forms are detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, as previously mentioned, the Endowment conducted a study to assess the feasibility of a softwood lumber research and promotion program. According to the BRC, at the beginning of the study (early 2008), in-depth interviews were conducted among North American softwood lumber industry leaders to explore the level of interest in a generic promotion program to help grow the

market for softwood lumber. The Endowment interviewed 35 companies, which included a cross section of various levels of size and ownership types within the softwood lumber industry. Of the 35 companies surveyed, 86 percent by number representing 54 percent of the volume favored exploring a mandatory promotion program for softwood lumber.

In early 2009, the BRC was formed and began a comprehensive process to develop a program. According to the BRC, its membership is diverse and represents 44 percent of softwood lumber shipments within the U.S. market. Efforts were made to inform various associations throughout the country through presentations at their meetings. Articles and notices were also published in various newspapers and newsletters about the proposed program.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS has requested approval of a new information collection and recordkeeping requirements for the proposed lumber program.

*Title:* Advisory Committee or Research and Promotion Background Information.

*OMB Number for background form AD-755:* (Approved under OMB No. 0505–0001).

*Expiration Date of Approval:* July 31, 2012.

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

*OMB Number:* 0581–NEW.

*Expiration Date of Approval:* 3 years from approval date.

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

*Abstract:* The information collection requirements in the request are essential to carry out the intent of the 1996 Act.

The information collection concerns a proposal received by USDA for a national research and promotion program for the softwood lumber industry. The program would be financed by an assessment on softwood lumber domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary. The program would provide for an exemption for the first 15 million board feet of softwood lumber shipped by domestic manufacturers within the United States or imported into the United States during the year. A referendum will be held among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. The purpose of the program would be to help build the market for softwood lumber.

In summary, the information collection requirements under the program concern Board nominations, the collection of assessments, and referenda. For Board nominations, domestic manufacturers and importers interested in serving on the Board would be asked to submit a "Nomination Form" to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Interested persons could also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, domestic manufacturers and importers would have the opportunity to submit a "Nomination Ballot" to the Board where they would vote for candidates to serve on the Board. Nominees would also have to submit a background information form, "AD-755," to the Secretary to ensure they are qualified to serve on the Board.

Regarding assessments, domestic manufacturers and importers who ship or import less than 15 million board feet annually could submit a request, "Application for Exemption from Assessments," to the Board for an exemption from paying assessments. Domestic manufacturers and importers would be asked to submit a "Shipment/Import Report" that would accompany their assessments paid to the Board and report the quantity of softwood lumber shipped domestically or imported during the applicable period, the quantity exported from the United States, the quantity for which assessments were paid, and the country of export (for imports). Domestic manufacturers who ship less than 15 million board feet annually and are exempt from paying assessments would not be required to submit this report.

Additionally, only importers who pay their assessments directly to the Board would be required to submit this report. As previously mentioned, the majority of importer assessments would be collected by Customs. Customs would remit the funds to the Board and the other information would be available from Customs (*i.e.*, country of export, quantity of softwood lumber imported). Finally, domestic manufacturers and importers who would qualify as 100 percent organic under the NOP and are not a split operation could submit an "Organic Exemption Form" to the Board and request an exemption from assessments. Importers could also request a refund of any assessments paid to Customs.

There would also be an additional burden on domestic manufacturers and importers voting in referenda. The referendum ballot, which represents the information collection requirement relating to referenda, is addressed in a final rule on referendum procedures which is published separately in this issue of the **Federal Register**.

Information collection requirements that are included in this proposal include:

#### (1) NOMINATION FORM

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Domestic manufacturers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

#### (2) BACKGROUND STATEMENT

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Domestic manufacturers and importers.

*Estimated Number of Respondents:* 50.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 12.5 hours.

#### (3) NOMINATION BALLOT

*Estimate of Burden:* Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

*Respondents:* Domestic manufacturers and importers.

*Estimated Number of Respondents:* 300.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 75 hours.

#### (4) BACKGROUND INFORMATION FORM AD-755 (OMB Form No. 0505-0001)

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 0.5 hour per response for each Board nominee.

*Respondents:* Domestic manufacturers and importers.

*Estimated Number of Respondents:* 13 (38 for initial nominations to the Board, 0 for the second year, and up to 13 annually thereafter).

*Estimated Number of Responses per Respondent:* 1 every 3 years. (0.3)

*Estimated Total Annual Burden on Respondents:* 19 hours for the initial nominations to the Board, 0 hours for the second year of operation, and up to 6.5 hours annually thereafter.

#### (5) APPLICATION FOR EXEMPTION FROM ASSESSMENTS

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour per domestic manufacturer or importer reporting on softwood lumber shipped domestically or imported. Upon approval of an application, domestic manufacturers and importers would receive exemption certification.

*Respondents:* Domestic manufacturers (232) and importers (780) who ship domestically or import less than 15 million board feet of softwood lumber annually.

*Estimated Number of Respondents:* 1,012.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 253 hours.

#### (6) SHIPMENT/IMPORT REPORT

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.5 hour per domestic manufacturer or importer.

*Respondents:* Domestic manufacturers who ship 15 million board feet or more annually (363) and importers who remit their assessments directly to the Board (assume 5 percent of 103 importers, or 5).

*Estimated Number of Respondents:* 368.

*Estimated Number of Responses per Respondent:* 4.

*Estimated Total Annual Burden on Respondents:* 736 hours.

#### (7) ORGANIC EXEMPTION FORM

*Estimate of Burden:* Public recordkeeping burden for this collection

of information is estimated to average 0.5 hours per exemption form.

*Respondents:* Organic domestic manufacturers and importers.

*Estimated Number of Respondents:* 1.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 0.5 hour.

**(8) REFUND OF ASSESSMENTS PAID ON ORGANIC SOFTWOOD LUMBER**

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hour.

*Respondents:* Organic importers.

*Estimated Number of Respondents:* 1.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 0.25 hour.

**(9) A REQUIREMENT TO MAINTAIN RECORDS SUFFICIENT TO VERIFY REPORTS SUBMITTED UNDER THE ORDER**

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

*Recordkeepers:* Domestic manufacturers (595) and importers (883).

*Estimated number of recordkeepers:* 1,478.

*Estimated total recordkeeping hours:* 739 hours.

As noted above, under the proposed program, domestic manufacturers and importers would be required to pay assessments and file reports with and submit assessments to the Board (importers through Customs). While the proposed Order would impose certain recordkeeping requirements on domestic manufacturers and importers, information required under the proposed Order could be compiled from records currently maintained. Such records shall be retained for at least two years beyond the fiscal year of their applicability.

An estimated 1,478 respondents would provide information to the Board (595 domestic manufacturers and 883 importers). The estimated cost of providing the information to the Board by respondents would be \$24,387. This total has been estimated by multiplying 739 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor Statistics.

The proposed Order's provisions have been carefully reviewed, and every

effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs.

The proposed forms would require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms would be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information quarterly would coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for two years is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual domestic manufacturers and importers who are subject to the provisions of the 1996 Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

**Analysis of Comments**

The previously proposed rule concerning this action published in the **Federal Register** on October 1, 2010, provided a 60-day comment period ending November 30, 2010. Fifty-five comments were received. Of the 55 comments, 3 were duplicates. Of the remaining 52 comments, 41 supported the proposed Order, 7 were opposed, 3 commented without taking a position on the program and 1 comment was not related to this rulemaking action. Of the 41 comments in support, 27 supported the rule with no changes and 14 recommended changes. The comments are addressed in the following paragraphs.

**Comments in Full Support**

The 27 comments which supported the proposed Order with no changes noted the difficult economic conditions that the softwood lumber industry is experiencing. They stated that marketing campaigns from competing products have contributed to softwood

lumber's loss of market share. Several commenters mentioned the need to promote the environmental benefits of wood and how this would likely result in a greater acceptance of lumber for residential, commercial, and outdoor construction in the United States. Several commenters also stated that a program to promote the benefits of softwood lumber and stimulate demand would benefit rural communities where many softwood lumber mills are located.

**Comments in Support, with Modification**

Fourteen comments which supported the proposed Order reiterated the comments in full support, but also suggested some changes. Four comments raised concerns regarding the definition of domestic manufacturer in § 1217.8 and the definition of softwood lumber in § 1217.26 and which products would be assessed. One commenter stated that domestic manufacturers do not include entities that remanufacture softwood lumber that has already been assessed, but the definition of softwood lumber includes things like coniferous wood siding and wood flooring which are remanufactured products that would likely be assessed when originally shipped from a sawmill. The commenter stated that such products should not be assessed again. The commenter also believes there is a difference in the way domestic and imported fence pickets and cedar fencing would be treated under the program, stating that imported fence pickets and cedar fencing would be exempt from assessment and that such domestically manufactured products should also be exempt. The commenter recommended that the proposed Order be clarified accordingly.

The commenter is correct in that under § 1217.8 of the proposed Order, the term domestic manufacturer would not include any person who remanufactures softwood lumber that has already been subject to assessment. Pursuant to § 1217.8, domestic manufacturers are first handlers, and a first handler is defined in the 1996 Act as the first person who buys or takes possession of an agricultural commodity like softwood lumber directly from a producer (i.e., tree farmer) for marketing. Thus, softwood lumber that is manufactured domestically, sold, and shipped within the United States to another manufacturer who makes another softwood lumber product would only be assessed once. For example, if domestic manufacturer A (a first handler) manufactures softwood lumber, pays an assessment, and ships

the lumber to domestic manufacturer B who remanufactures the lumber into a product such as coniferous wood siding or wood flooring that is covered under the definition of softwood lumber in § 1217.26, such product(s) would not be subject to another assessment.

Additionally, if the first domestic manufacturer (first handler) manufactures softwood lumber and makes a product that would not be covered under the softwood lumber definition if it were an import, such product would not be assessed. For example, if domestic manufacturer A manufactures softwood lumber and makes cedar fence pickets or cedar fencing, such products would be exempt from assessment. However, if domestic manufacturer A manufactures softwood lumber, sells and ships the lumber to manufacturer B who makes fence pickets or cedar fencing, manufacturer A would pay assessments.

As previously mentioned, USDA has modified § 1217.26 regarding the definition of softwood lumber and § 1217.52 regarding the collection of assessments on imports. While modifications have been made to the proposed rule to facilitate program administration, no changes have been made to the proposed Order based on this comment.

Two comments raised concern that softwood lumber produced domestically that is exported for minor processing and subsequently re-imported would be exempt from assessment. The commenters expressed concern that softwood lumber manufactured in the United States for U.S. consumption would avoid assessment. USDA concurs with the comment. Accordingly, § 1217.52 has been modified to specify that softwood lumber that originates in the United States, is shipped to locations outside of the United States, and is then shipped back to the United States would be covered under the proposed Order and subject to assessments, provided it could be categorized in the HTSUS numbers listed in § 1217.52(h).

Three comments in support of the program made suggestions regarding the composition of the Board. One commenter stated that the Canadian east includes three production areas that supply the U.S. market—Ontario, Quebec, and four maritime provinces and that the Board member seats representing the Canadian East Region should be increased from two to three.

Section 1217.40(b) of the proposed Order provides that on the 18 or 19 member Board, 4 members shall import softwood lumber from the Canadian West Region, which consists of British

Columbia and Alberta, and 2 members shall import softwood lumber from the Canadian East Region, which consists of the Canadian territories and all other Canadian provinces other than British Columbia and Alberta. According to Customs data, imports of softwood lumber from the proposed Canadian East Region comprised one-third or less of the total Canadian softwood lumber imports from 2008 through 2010. The proposed Order provides that 2 of the 6 Canadian importers on the Board, or one-third, shall be from the Canadian East Region. Thus, the allocation of membership reflects the current distribution of the volume softwood lumber imports between the eastern and western regions of Canada. Should this distribution change, § 1217.40(c)(2) of the proposed Order provides authority for reapportionment of the Board membership through rulemaking by the Secretary. The proposed Order requires the Board to review in each 5-year period, based on a 3-year average, the geographical distribution of the volume of softwood lumber manufactured and shipped within the United States and the volume of softwood lumber imported into the United States. The destination of volumes between regions must also be considered. Thus, no changes have been made to the proposed Order based on this comment.

One comment also recommended that members of the Board be allowed to designate an alternate with participation and voting rights in case the member is unable to participate in a meeting. The BRC recommended that the Board have no alternates. It wants to ensure that industry members who seek representation and serve on the Board are committed to their service and participate in all Board meetings. Further, the 1996 Act does not require alternates. Additionally, the proposed Order provides flexibility for the Board to permit participation in meetings by telephone or other means. Specifically, § 1217.44(a) states that, if participation by telephone or other means is permitted, members participating by such means would count as present in determining quorum or other applicable voting requirements. No changes have been made to the proposed Order based on this comment.

One comment in support of the proposed Order recommended that the lumber retail and distribution sector be represented on the Board. The commenter cited section 515 of the 1996 Act that authorizes the Secretary to appoint members and alternates to a board from among producers and first handlers and others in the marketing chain as appropriate. The commenter is

correct regarding the authority in the 1996 Act. However, the BRC recommended that the Board be composed of domestic manufacturers and importers only. If at a future time the Board determined that representation from other industry sectors was warranted, the Board could make a recommendation to the Secretary. Such a change would require rulemaking by the Secretary. If other industry sectors were to also pay assessments, the Secretary would conduct a referendum among those new sectors, domestic manufacturers and importers to determine if the change was supported by the industry. Additionally, the Order provides that Board committees and subcommittees could include individuals other than Board members. Representatives from other industry sectors could serve on these committee and subcommittees. No changes have been made to the proposed Order based on this comment.

One comment in support of the program suggested several changes to various sections of the proposed Order. First, in § 1217.47(b) regarding prohibited activities, the commenter suggested adding the phrase “other than recommending to the Secretary amendments to this Order.” However, § 1217.47(b) currently reads that the Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in: “\* \* \* (b) Using funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, State, national, and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order \* \* \*” Thus, the language suggested by the commenter is already in proposed § 1217.47(b). Thus, no change has been made to the proposed Order based on this comment.

In § 1217.47(c), the commenter suggested adding the word “geographic” before the word “origins” so the paragraph would read as follows: “No program, plan or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Softwood lumber of all geographic origins shall be treated equally.” The commenter believes this would clarify that origins refers to regions and not species. USDA concurs with the comment and has modified paragraph (c) of § 1217.47 accordingly.

Eight comments in support of the program made recommendations regarding assessments and program coverage. One comment suggested reducing the assessment rate and



expanding program coverage to other wood products like wood panel products and engineered wood products. The proposal and supporting data submitted by proponent BRC pertained to softwood lumber. USDA does not have sufficient data to warrant expanding program coverage. Regarding the assessment rate, the BRC reviewed various options in assessment rates and exemption levels and concluded that \$20 million in assessment income is an ideal threshold for an effective program that could help to improve the market for softwood lumber. Ultimately the BRC determined that an assessment range of \$0.35 to a maximum of \$0.50 per thousand board feet with an exemption threshold of 15 million board feet would generate sufficient income to support an effective promotion program for softwood lumber. A lower assessment rate would not generate sufficient funds to meet the goals of this program. No change has been made to the proposed Order based on this comment.

One comment recommended that assessments be based on the ability of the residential market to support an increase in the cost of softwood lumber. The commenter also opined that the Order should not establish marketing, research, or promotion programs that require assessments greater than the current residential market can support. The Board may consider such information when it formulates its budget each year. The proposed Order provides for a range in the assessment rate from \$0.35 to \$0.50 per thousand board feet. The range is intended to provide the Board flexibility to respond to such economic conditions. Thus, there is already a mechanism in place for the Board to consider market conditions. No change has been made to the proposed Order based on this comment.

Six comments requested that the collection of assessments be delayed until January 2012 due to the economic hardship that the softwood lumber industry is currently facing. Allowing for the assessment rate to start in January 2012 would provide the industry with additional time to prepare for the program. Accordingly, assessments would be collected under the program no earlier than January 2012.

Two comments suggested making a change to § 1217.50(f) by adding the phrase "that are inconsistent with the goals of the Order" after the phrase "free from any encumbrances" so the section would read as follows: "The Board may accept voluntary contributions, and is encouraged to seek other appropriate

funding sources to carry out activities authorized by the Order. Such contributions shall be free from any encumbrances that are inconsistent with the goals of this Order by the donor and the Board shall retain complete control of their use \* \* \*". USDA has determined that this addition is not necessary because USDA would not permit any action that was inconsistent with the Order. No change has been made to the proposed Order based on this comment.

Two comments suggested that the proposed Order be revised so that the Board had the option to pursue international markets with assessment funds or in conjunction with Foreign Agricultural Service (FAS) funds. Under the proposed Order, § 1217.53(c) would exempt exports of softwood lumber from the United States from assessment. Thus, since exports would not be assessed, assessment funds could not be used to promote exports. However, this section also provides authority for the Board to recommend to the Secretary that exports be assessed if deemed appropriate. Should exports ever be assessed and covered under the program, assessment funds could then be used for international promotion. Additionally, § 1217.50(f) specifies that the Board may receive funds from outside sources, including FAS, with approval of the Secretary, for specific authorized projects. Thus, the Order as proposed has a mechanism in place to conduct international promotion in the future. No change to the proposed Order has been made based on this comment.

Four comments in support of the program expressed concern regarding the minimum quantity exemption under the proposed Order. One comment recommended lowering the exemption level of 15 million board feet to reduce the unit cost incurred by those paying into the program. The commenter referenced the term *de minimis* as it is used in the North American Free Trade Agreement and the World Trade Organization glossary. One commenter requested that exemption procedures be developed so that entities exempt under the Order would not pay assessments and then have their funds later refunded back. The commenter opined that this would place a heavy burden on smaller importers because Customs would collect the assessment and the funds would be tied up for about 90 days until refunded by the Board.

Finally, two comments requested assurance that companies who import and domestically manufacture softwood lumber receive only one 15 million board foot exemption.

Section 516(a)(1) of the 1996 Act provides authority for the Secretary to exempt from an order any *de minimis* quantity of an agricultural commodity otherwise covered by the order. However, the 1996 Act does not define the term *de minimis* and USDA is not limited to using the definition of *de minimis* as specified in another law or agreement. The *de minimis* quantity is defined for a particular program and industry. The BRC reviewed various options for the exemption and determined that 15 million board feet would be appropriate because such a level would still provide the Board with resources to have a program that could be successful. USDA concurs with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment.

In response to the commenters' request for assurance that a company who imports and domestically manufactures softwood lumber would only be eligible for one 15 million board foot exemption, USDA confirms that limitation. For example, if company A imports 20 million board feet of softwood lumber and domestically manufactures and ships within the United States 40 million board feet of softwood lumber during a fiscal year, company A's exemption would be limited to one 15 million board feet exemption on the total 60 million board feet assessable under this proposed program. No changes to the proposed Order have been made based on these comments.

In response to the comment about exemption procedures, USDA is working to develop a process whereby an importer could provide Customs a copy of the exemption certificate issued by the Board. However, the only available alternative at this time is for Customs to collect the assessment, and the Board to refund such importers their assessments no later than 60 calendar days after receipt of by the Board. Section 1217.53(a) has been revised accordingly.

Three comments in support of the program expressed concern with the exemption for organic softwood lumber. Two commenters were concerned with a potential loophole. One commenter requested that the exemption be removed from the proposed Order. Specifically, the commenter argued that softwood lumber cannot be labeled or marketed as organic product under the Organic Food Production Act of 1990 because it is not marketed for human or livestock consumption. The commenter referenced the cotton promotion program and exemption for organic



cotton, but added that cottonseed oil is used in a number of food products (*i.e.*, cottonseed oil for humans and cottonseed meal for livestock and poultry).

The reference to the term consumption under the Organic Food Production Act of 1990 includes the consumption of non-food products. For example, under the cotton research and promotion program, organic cotton products are exempt from assessment, including non-food products. Thus, organic softwood lumber would be exempt from assessment under the proposed Order. Regarding the concern about a loophole, domestic manufacturers and importers would have to provide sufficient information to the Board to warrant an organic exemption. No changes have been made to the proposed Order based on these comments.

Three comments in support of the program expressed concern with the section of the proposed Order on programs, plans, and projects. One commenter wants to ensure that the Board has the flexibility to use the Forest Products Laboratory in Wisconsin for research projects and would not be limited to certain USDA laboratories. Section 1217.60 of the proposed order provides that the Board would have such flexibility. Another comment opined that an appropriate amount of funds raised should be reinvested in marketing, research, and promotion towards the use of softwood lumber in construction, renovation and repair of residential and light commercial structures. Under proposed § 1217.60, the Board would have the flexibility to conduct such research projects as it determines are appropriate and within the scope of the Order. Another commenter argued that the proposed rule was unclear as to what programs and/or organizations would be eligible to receive Board funds. As an example, the commenter asked whether existing codes and standards activities would be eligible expenses under the program. Pursuant to § 1217.60, the Board, with approval of the Secretary, could fund projects for purposes authorized under the Order. The Board could not fund programs to influence government action such as the development of codes and standards or lobbying for changes in codes and standards. No changes have been made to the proposed Order based on these comments.

#### *Comments Opposed*

Seven comments received were opposed to the proposed program. One commenter argued that there was no

need for the program to spend American tax dollars and that another Federal bureaucracy is unnecessary. The proposed program would be paid for by the softwood lumber industry through assessments on domestic manufacturers and importers of 15 million board feet or more annually. Research and promotion programs overseen by USDA are self-help programs funded by their respective industry and do not receive taxpayer funds.

One commenter opined that, with the economy today now is not the time to assess lumber companies an extra \$0.35 per thousand board feet. Another commenter opined that the economic downturn in the softwood lumber industry was not due to the lack of advertising dollars spent promoting softwood lumber but is more directly related to the housing crisis in the United States. As previously discussed, the economic downturn has had an adverse effect on the softwood lumber industry. USDA also recognizes the impact of the housing crisis on the softwood lumber industry. However, USDA has received sufficient justification to warrant proceeding to a referendum so that industry members may vote as to whether a softwood lumber research and promotion program should be implemented. Additionally, as previously mentioned, USDA received several comments that referenced the state of the economy and requested that assessments be collected no earlier than January 2012. Allowing for the assessment rate to start in January 2012 would provide the industry with additional time to prepare for the program. USDA has accepted those comments and ensures that, if the program passes in referendum, assessments would be collected no earlier than January 2012.

One commenter asked why all forest product industry segments would not participate in the assessment since assessment funds would be used to promote the use of forest products. The proposed program and justification that USDA received from the BRC was for softwood lumber only and is consistent with the enabling statute. It is AMS' understanding that other forest product industry segments discussed the possibility of joining with softwood lumber segments but the decision was made to pursue promotion efforts separately.

Two commenters opined that softwood lumber is different from beef and milk (that have active promotion programs) in that the softwood lumber industry encompasses many different factions, species, and sources. They argued that it would be difficult to see

a singular promotion campaign for softwood lumber (like "Got Milk?"). Other similar promotion programs administered by USDA cover commodities that are from various sources and made into multiple products. Potatoes are produced in the U.S. and imported from Canada and other places and made into French fries, potato chips, and also used in many recipes. Generic promotion programs increase the total market for a product to the benefit of an industry, even when the commodity may be made into various products.

One commenter opined that it was difficult to support an unknown program with unknown financial costs and details. The program as proposed would provide for an initial assessment rate of \$0.35 per thousand board feet. The assessment rate could be raised through rulemaking by the Secretary up to a maximum of \$0.50 per thousand board feet. With the 15 million board foot exemption and the initial \$0.35 per thousand board foot assessment rate, it is estimated that between \$12.4 and almost \$19 million would be raised annually with shipment levels ranging from 40 to 60 billion board feet, respectively. While the benefits of the program are difficult to quantify prior to it going into effect, § 1217.61 of the proposed Order would require the Board to conduct at least once every 5 years an independent evaluation of the effectiveness of the Order and the programs conducted. Thus, the proposed Order would include a mechanism whereby its effectiveness would be periodically evaluated. Similar evaluations are required of other research and promotion programs overseen by USDA and can be viewed at <http://www.ams.usda.gov/FVPromotion>.

Two commenters stated that most of their product line is sold in a niche market and that they would not benefit from the program. They are concerned that, if they are forced to sponsor efforts in other markets, they could not survive in their own market niche. Another commenter wants to continue to have freedom of choice as to where they decide to put their funds. One commenter expressed concern that the program would favor large mills producing into the commodity markets.

Generic promotion, research, and information activities for agricultural commodities play a unique role in advancing the demand for such commodities, since such activities increase the total market for a product to the benefit of consumers and all producers. These generic activities are of particular benefit to small producers

who lack the resources or market power to advertise on their own. As contemplated by the 1996 Act, generic activities increase the general market demand for an agricultural commodity. The Board, with the approval of the Secretary, would decide how the funds are used and all sectors of the industry would be encouraged to participate in the deliberations.

One commenter stated that softwood lumber does not compete with other construction material like concrete and steel, which is the primary target of the program. The commenter stated further that the domestic industry does compete with imported softwood lumber, primarily from Europe and South Africa. According to USDA's Forest Service, softwood lumber competes with numerous alternatives in domestic end uses, including steel, concrete, brick, concrete block, poured concrete, vinyl, wood-plastic composite lumber, and laminated veneer.<sup>18</sup> Additionally, according to Census data, the major source of imported softwood lumber is from Canada. As previously mentioned, from 2007 through 2009, imports from Canada comprised about 92 percent of the total softwood lumber imports into the United States. The purpose of research and promotion programs is to maintain and expand the market for the respective commodity. If the market for softwood lumber in the United States is expanded, both domestic and imported softwood lumber would benefit.

No changes have been made to the proposed Order based on these seven opposing comments.

#### *Additional Comments*

Three comments were received that neither supported nor opposed the program, but raised concerns or made recommendations. One comment recommended that USDA first seek funds from the BSCL to jump start the program because it already has funds from the United States and Canada. However, the 1996 Act requires promotion programs to be funded by the industry itself. Specifically, section 517 of the 1996 Act provides that while an order issued under the 1996 Act is in effect, assessment shall be paid by first handlers (domestic manufacturers) with respect to the agricultural commodity produced and marketed and by importers with respect to the agricultural commodity imported into the United States, if the imported agricultural commodity is covered by the order. Further, the Board could accept donations to conduct its programs. Thus, no change has been

made to the proposed Order based on this comment.

The commenter also recommended collecting \$20 million in assessments as a start-up, and then after 2 years, have an informed vote, adding that a proper assessment rate could then be justified. While the 1996 Act allows for a referendum to be conducted not later than 3 years after assessments first begin under an order, the BRC recommended that an initial referendum be conducted prior to the order going into effect. The BRC also recommended that a referendum be conducted every 5 years thereafter to determine whether the program should continue. The BRC's proposal is consistent with the 1996 Act and an initial referendum will be conducted prior to program implementation. No change has been made to the proposed Order based on this comment.

One comment raised concerns regarding imports. The commenter expressed concern with § 1217.52(g) in the proposed rule which stated that if Customs does not collect an assessment from the importer, the importer must pay the assessment directly to the Board within 30 calendar days after importation. The commenter noted that domestic manufacturers would pay assessments to the Board no later than the 30th calendar day of the month following the end of the quarter in which the softwood lumber was shipped. Given this difference in payment times between domestic manufacturers and importers who pay assessments directly to the Board, USDA revised the proposed Order to require importers who submit their assessments to the Board to pay such assessments no later than the 30th calendar day of the month following the end of the quarter in which the softwood lumber was imported. This would bring the payment time frame for import assessments paid directly to the Board in line with the domestic industry. Section 1217.52(g) has been renumbered as § 1217.52(j) and revised accordingly.

The commenter expressed concern with assessing the importer of record. The commenter stated that imported volume would incur additional Customs brokerage and other related charges that would disproportionately impact the importer of record. The commenter also was concerned that one company could use multiple entities for importation and circumvent the assessment by importing less than the 15 million board foot exemption threshold through each entity. The commenter is also concerned that smaller Canadian companies who ship to the United States through larger

wholesalers and brokers may not receive the benefit of an exemption for their first 15 million board feet of softwood lumber imported. The commenter stated further that smaller Canadian softwood lumber producers are generally not the importer of record but are represented by brokers and wholesalers who take ownership of the product and import it into the United States. The commenter is concerned that the larger entities could pass the assessment on to the smaller Canadian producer for 100 percent of the product although the first 15 million board feet should be exempt. The commenter suggested that, while the SLA is in effect, the assessment could be applied to those Canadian producers accessing the U.S. market according to the applicable Export Import Control Bureau Number that has been assigned to Canadian companies who produce softwood lumber destined for the United States.

Section 517(a)(2) of the 1996 Act provides authority to assess importers under an order, and section 513(6) defines the term importer to mean any person who imports an agricultural commodity from outside of the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person. The 1996 Act provides no authority to assess foreign producers. Transactions between foreign producers and brokers/wholesalers are outside the scope of an order. Additionally, each importer assessed under the program must be a separate entity with a separate tax identification number. Otherwise, all entities under the same tax identification number would be considered one entity subject to the Order. This information would be reviewed periodically by the Board during audits to check compliance with the program. Thus, no change has been made to the proposed Order based on this comment.

One commenter suggested that the exemption level of 15 million board feet be raised to 100 million board feet and/or that the exemption be made available to qualified Small Business Administration companies. As previously mentioned, the BRC reviewed various options for the exemption and determined that 15 million board feet would be appropriate. This level, based on the data reviewed, is not unreasonable. Furthermore, raising the exemption to 100 million board feet or another level would not generate sufficient income to fund the program. Thus, no change has been made to the proposed Order based on this comment.

One commenter suggested that USDA be more proactive to directly inform

<sup>18</sup> Spelter, McKeever and Toth, Profile 2009, p. 2.

every affected manufacturer of the impending vote. The commenter did not believe that publication of the proposed rule in the **Federal Register** and receiving information through various industry association networks was sufficient. In order to provide additional outreach to those who USDA believes would be regulated under the proposed rule, USDA is mailing a copy of this rule to all known potentially affected industry members and will do a subsequent mailing of ballots, instructions and a summary of the program to all industry members.

In the October 1, 2010, proposed rule, comments were also invited on the information collection requirements prescribed in the Paperwork Reduction Act section of this rule. Specifically, comments were solicited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal manufacturing areas in the United States for softwood lumber; (d) the accuracy of USDA's estimate of the number of domestic manufacturers and importers of softwood lumber that would be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. No comments were received regarding information collection.

While the proposal set forth below has not received the approval of USDA, it is determined that this proposed Order is consistent with and would effectuate the purposes of the 1996 Act.

As previously mentioned, for the proposed Order to become effective, it must be approved by a majority of domestic manufacturers and importers voting for approval in a referendum who also represent a majority of the volume of softwood lumber represented in the referendum. Referendum procedures will be published separately in this issue of the **Federal Register**.

#### Referendum Order

Pursuant to the 1996 Act, a referendum will be conducted to

determine whether eligible domestic manufacturers and importers favor issuance of the proposed Order. Section 518 of the 1996 Act authorizes USDA to conduct a referendum prior to the Order going into effect.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1 through December 31, 2010. Domestic manufacturers must have manufactured and shipped 15 million or more board feet of softwood lumber within the United States and importers must have imported 15 million board feet or more of softwood lumber to the United States during the representative period to be eligible to vote. The Order shall become effective if it is approved by a majority of those eligible persons voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum.

The referendum procedures that were issued pursuant to the 1996 Act shall be used to conduct the referendum (7 CFR 1217.100 through 1217.108). The referendum shall be conducted by mail from May 23 through June 10, 2011. Ballots must be received by the referendum agents no later than the close of business, 4:30 p.m. (Eastern Standard Time) on June 10, 2011, to be counted.

Maureen T. Pello of the USDA, AMS, Research and Promotion Branch is designated as the referendum agent to conduct the referendum. Prior to the first day of the voting period, the referendum agents will mail the ballots to be cast in the referendum and voting instructions to all eligible voters. Any domestic manufacturer or importer who does not receive a ballot should contact the referendum agent cited in the **FOR FURTHER INFORMATION CONTACT** section no later than one week before the end of the voting period.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the referendum ballot was submitted to the OMB and approved under OMB Control No. 0581-NEW.

#### List of Subjects in 7 CFR Part 1217

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Softwood lumber promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that Title 7, Chapter XI of the Code of Federal Regulations be amended by adding part 1217 to read as follows:

### PART 1217—SOFTWOOD LUMBER RESEARCH, PROMOTION, CONSUMER EDUCATION AND INDUSTRY INFORMATION ORDER

#### Subpart A—Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order

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**Subpart B—[Reserved]**

Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

**Subpart A—Softwood Lumber Research, Promotion, Consumer Education, and Industry Information Order Definitions**

**§ 1217.1 Act.**

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

**§ 1217.2 Blue Ribbon Commission or BRC.**

*Blue Ribbon Commission* or *BRC* means the 21-member committee representing businesses that manufacture softwood lumber in the United States or import softwood lumber to the United States formed to pursue an industry research, promotion, and information program.

**§ 1217.3 Board or Softwood Lumber Board.**

*Board* or *Softwood Lumber Board* means the administrative body established pursuant to § 1217.40, or such other name as recommended by the Board and approved by the Department.

**§ 1217.4 Board foot.**

*Board foot* or *BF* means a unit of measurement of softwood lumber represented by a board 12-inches long, 12-inches wide, and 1-inch thick or its cubic equivalent. A board foot calculation for softwood lumber 1 inch or more in thickness is based on its nominal thickness and width and the actual length. Softwood lumber with a nominal thickness of less than 1 inch is calculated as 1 inch.

**§ 1217.5 Conflict of interest.**

*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 who performs a service for, or enters into a contract with, the Board for anything of economic value.

**§ 1217.6 Customs or CBP.**

*Customs* or *CBP* means Customs and Border Protection, an agency of the United States Department of Homeland Security.

**§ 1217.7 Department or USDA.**

*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.

**§ 1217.8 Domestic manufacturer.**

*Domestic manufacturer* means any person who is a first handler and is engaged in the manufacturing, sale and shipment of softwood lumber in the United States during a fiscal period and who owns, or shares in the ownership and risk of loss of manufacturing of softwood lumber or a person who is engaged in the business of manufacturing, or causes to be manufactured, sold and shipped such softwood lumber in the United States beyond personal use. This term does not include any person who re-manufactures softwood lumber that has already been subject to assessment under this Order.

**§ 1217.9 Export.**

*Export* means to manufacture and ship softwood lumber from within the United States to locations outside of the United States.

**§ 1217.10 Fiscal period or year.**

*Fiscal period or year* means a calendar year from January 1 through December 31, or such other period as recommended by the Board and approved by the Secretary.

**§ 1217.11 Importer.**

*Importer* means any person who imports softwood lumber from outside the United States for sale in the United States as a principal or as an agent, broker, or consignee of any person who manufactures softwood lumber outside the United States for sale in the United States, and who is listed in the import records as the importer of record for such softwood lumber.

**§ 1217.12 Information.**

*Information* means activities or programs designed to disseminate the results of research, new and existing marketing programs, new and existing marketing strategies, new and existing uses and applications, and to enhance the image of softwood lumber and the forests from which it comes. These include:

- (a) Consumer education, which means any action taken to provide information to, and broaden the understanding of, the general public regarding softwood lumber; and
- (b) Industry information, which means information and programs that would enhance the image of the softwood lumber industry.

**§ 1217.13 Manufacture.**

*Manufacture* means the process of transforming softwood logs into softwood lumber.

**§ 1217.14 Manufacturer for the U.S. market.**

*Manufacturer for the U.S. market* means domestic manufacturers and importers of softwood lumber as defined in this Order.

**§ 1217.15 Marketing.**

*Marketing* means the sale or other disposition of softwood lumber in interstate, foreign, or intrastate commerce.

**§ 1217.16 Nominal size.**

*Nominal size* means the size by which softwood lumber is known and sold in the marketplace that differs from actual size and is based on the thickness and width of a board when it is first cut from a log, or rough cut, prior to drying and planing.

**§ 1217.17 Order.**

*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.

**§ 1217.18 Part and subpart.**

*Part* means the Softwood Lumber Research, Promotion, Consumer Education, and Industry Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Order shall be a *subpart* of such part.

**§ 1217.19 Person.**

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

**§ 1217.20 Planing.**

*Planing* means the act of smoothing the surface of a board to make the wood a uniform size.

**§ 1217.21 Programs, plans and projects.**

*Programs, plans and projects* mean those research, promotion and information programs, plans, or projects established pursuant to this Order.

**§ 1217.22 Promotion.**

*Promotion* means any action taken, including paid advertising, public relations and other communications, and promoting the results of research, that presents a favorable image of softwood lumber to the public and to any and all consumers and those who influence consumption of softwood

lumber with the intent of improving the perception, markets and competitive position of softwood lumber and stimulating sales of softwood lumber.

#### **§ 1217.23 Research.**

*Research* means any activity that advances the position of softwood lumber in the marketplace that includes any type of test, study, or analysis designed to advance the image, desirability, use, marketability, sales, product development, or quality of softwood lumber; new applications; improving softwood lumber's position in building and fire codes; softwood lumber product testing and safety; and evaluating the effectiveness of market development and promotion efforts including life cycle studies, forestry, sustainable forest management, environmental preferability, competitiveness, efficiency, pest and disease control, water quality and other management aspects of forestry and the forests from which softwood lumber originates.

#### **§ 1217.24 Secretary.**

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

#### **§ 1217.25 Softwood.**

*Softwood* means one of the botanical groups of trees that have needle-like or scale-like leaves, or conifers.

#### **§ 1217.26 Softwood lumber.**

*Softwood lumber* means and includes softwood lumber and products manufactured from softwood as described in section 804(a) of Title VIII of the Tariff Act of 1930, as amended (19 U.S.C. 1202–1683g), and as assessed under § 1217.52.

#### **§ 1217.27 State.**

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

#### **§ 1217.28 Suspend.**

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

#### **§ 1217.29 Terminate.**

*Terminate* means to issue a rule under section 553 of title 5 U.S.C. to cancel permanently the operation of an order

or part thereof beginning on a date certain specified in the rule.

#### **§ 1217.30 United States.**

*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.

#### **Softwood Lumber Board**

#### **§ 1217.40 Establishment and membership.**

(a) *Establishment of the Board.* There is hereby established a Softwood Lumber Board to administer the terms and provisions of this Order and promote the use of softwood lumber. The Board shall be composed of manufacturers for the U.S. market who manufacture and domestically ship or import 15 million board feet or more of softwood lumber in the United States during a fiscal period. Seats on the Board shall be apportioned based on the volume of softwood lumber manufactured and shipped within the United States by domestic manufacturers and the volume of softwood lumber imported into the United States.

(b) The Board shall be composed of 18 or 19 members, depending upon whether an additional importer member is appointed to the Board, pursuant to paragraph (b)(2)(iii) of this section. The Board shall be established as follows:

(1) *Domestic manufacturers.* Twelve members shall be domestic manufacturers from the following three regions:

(i) Six members shall be from the U.S. South Region, which consists of the states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas;

(ii) Five members shall be from the U.S. West Region, which consists of the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming; and

(iii) One member shall be from the Northeast and Lake States Region, which consists of the states of Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, Vermont, West Virginia, Wisconsin, and all other parts of the United States not listed in paragraphs (b)(1)(i), (b)(1)(ii), or (b)(1)(iii) of this section.

(2) *Importers.* Six members shall be importers who represent the following regions and import the majority of their

softwood lumber from the respective region:

(i) Four members shall import softwood lumber from the Canadian West Region, which consists of the provinces of British Columbia and Alberta; and

(ii) Two members shall import softwood lumber from the Canadian East Region, which consists of the Canadian territories and all other Canadian provinces not listed in paragraph (b)(2)(i) of this section that import softwood lumber into the United States.

(iii) If the Secretary, at the request of the Board or on his or her own, determines that it would be consistent with the provisions of the Act, the Secretary may appoint an additional importer to the Board to represent a region not otherwise specified in paragraphs (b)(2)(i) and (b)(2)(ii) of this section. Nominees would be solicited as prescribed in paragraph (b) of § 1217.41, or in the case of the Secretary acting on his or her own will be handled by the Secretary, and all the names of eligible candidates would be submitted to the Secretary for consideration. Such nominees must certify that the majority of their softwood lumber is imported from such region. In addition, representation for the region not otherwise specified in paragraphs (b)(2)(i) and (ii) of this section would be subject to the Board review and reapportionment provided for in paragraph (c) of this section.

(c) In each five-year period, but not more frequently than once in each three-year period, the Board shall:

(1) Review, based on a three-year average, the geographical distribution of the volume of softwood lumber manufactured and shipped within the United States by domestic manufacturers and the volume of softwood lumber imported into the United States; and

(2) If warranted, recommend to the Secretary the reapportionment of the Board membership to reflect changes in the geographical distribution of the volume of softwood lumber manufactured and shipped within the United States by domestic manufacturers and the volume of softwood lumber imported into the United States. The destination of volumes between regions also shall be considered. The number of Board members may also be changed. Any changes in Board composition shall be implemented by the Secretary through rulemaking.

**§ 1217.41 Nominations and appointments.**

(a) Initial nominations will be submitted to the Secretary by the Blue Ribbon Commission. Before considering any nominations, the BRC shall publicize the nomination process, using trade press or other means it deems appropriate, and shall outreach to all known manufacturers for the U.S. market who domestically manufacture and/or import 15 million board feet or more of softwood lumber per fiscal year in order to generate nominees that reflect the different operations within the softwood lumber industry. The BRC may use regional caucuses, mail or other methods to elicit potential nominees. The BRC shall submit the nominations to the Secretary and recommend two nominees for each Board position specified in paragraphs (b)(1), (b)(2)(i) and (b)(2)(ii) of § 1217.40. All nominees solicited pursuant to § 1217.40(b)(2)(iii) shall be submitted to the Secretary through the BRC. From the nominations submitted by the BRC, the Secretary shall select the members of the Board.

(b) Subsequent nominations shall be conducted as follows:

(1) The Board shall outreach to all segments of the softwood lumber industry. Softwood lumber domestic manufacturers and importers may submit nominations to the Board. Subsequent nominees must domestically manufacture and/or import 15 million board feet or more of softwood lumber per fiscal year;

(2) Domestic manufacturers and importer nominees may provide the Board a short background statement outlining their qualifications to serve on the Board;

(3) Nominees that are both a domestic manufacturer and an importer may seek nomination to the Board and vote in the nomination process as either a domestic manufacturer or an importer, but not both: *Provided*, That, such nominees who domestically manufacture the majority of their softwood lumber may seek nomination and vote as a domestic manufacturer, and such nominees who import the majority of their softwood lumber may seek nomination and vote as an importer. Such nominees must domestically manufacture and import 15 million board feet or more of softwood lumber per fiscal year;

(4) Domestic manufacturers who manufacture softwood lumber in more than one region may seek nomination only in the region in which they manufacture the majority of their softwood lumber. The names of domestic manufacturer nominees shall be placed on a ballot by region. The ballots along with the background statements shall be mailed to domestic

manufacturers in each respective region for a vote. Domestic manufacturers who manufacture softwood lumber in more than one region may only vote in the region in which they manufacture the majority of their softwood lumber. The votes shall be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position shall be submitted to the Secretary;

(5) Importer nominees shall certify that the majority of their softwood lumber is imported from the respective region for which they are seeking to represent on the Board and shall provide documentation to verify this if requested by the Board. The names of importer nominees shall be placed on a ballot by region. The ballots along with the background statements shall be mailed to importers in each respective region for a vote. Importers who import softwood lumber from more than one region may only vote in the region from which they import the majority of their softwood lumber. The votes shall be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. The top two candidates for each position shall be submitted to the Secretary.

(6) The Board must submit nominations to the Secretary at least six months before the new Board term begins. From the nominations submitted by the Board, the Secretary shall select the members of the Board;

(7) No two members shall be employed by a single corporation, company, partnership, or any other legal entity; and

(8) The Board may recommend to the Secretary modifications to its nomination procedures as it deems appropriate. Any such modifications shall be implemented through rulemaking by the Secretary.

**§ 1217.42 Term of office.**

(a) With the exception of the initial Board, each Board member will serve a three-year term or until the Secretary selects his or her successor. Each term of office shall begin on January 1 and end on December 31. No member may serve more than two consecutive terms, excluding any term of office less than three years.

(b) For the initial board, the terms of Board members shall be staggered for two, three, and four years. Determination of which of the initial members shall serve a term of two, three, or four years shall be recommended to the Secretary by the Blue Ribbon Commission.

**§ 1217.43 Removal and vacancies.**

(a) In the event that any member of the Board ceases to work for or be affiliated with a domestic manufacturer or importer or ceases to do business in the region he or she represents, such position shall become vacant.

(b) The Board may recommend to the Secretary that a member be removed from office if the member consistently refuses to perform his or her duties or engages in dishonest acts or willful misconduct. The Secretary may remove the member if he or she finds that the Board's recommendation shows adequate cause. Further, without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

(c) If a position becomes vacant, nominations to fill the vacancy will be conducted using the nominations process set forth in this Order. A vacancy will not be required to be filled if the unexpired term is less than six months.

**§ 1217.44 Procedure.**

(a) A majority of the Board members (10) will constitute a quorum so long as at least three of the members present are importer members and six of the members present are domestic manufacturers. If participation by telephone or other means is permitted, members participating by such means shall count as present in determining quorum or other voting requirements set forth in this section.

(b) All votes at meetings of the Board and executive committee will be cast in person or by electronic voting or other means as the Board and Secretary deem appropriate to allow members participating by telephone or other electronic means to cast votes. Voting by proxy will not be allowed.

(c) Each member of the Board will be entitled to one vote on any matter put to the Board and the motion will carry if supported by 10 Board members, except for recommendations to change the assessment rate or to adopt a budget, both of which require affirmation by at least two-thirds (12 members for an 18 member Board and 13 members for a 19 member Board) of the Board members. If a Board has vacant positions, recommendations to change the assessment rate or to adopt a budget must pass by an affirmative vote of at

least two-thirds of the Board members, exclusive of the vacant seats.

(d) The Board must give members and the Secretary timely notice of all Board, executive and committee meetings.

(e) In lieu of voting at a properly convened meeting, and when, in the opinion of the Board's chairperson, such action is considered necessary, the Board may take action by mail, telephone, electronic mail, facsimile, or any other means of communication. Any action taken under this procedure is valid only if:

(1) All members and the Secretary are notified and the members are provided the opportunity to vote;

(2) Ten (10) Board members vote in favor of the action (unless two-thirds vote of the Board members is required under the Order); and

(3) All votes are promptly confirmed in writing and recorded in the Board minutes.

#### **§ 1217.45 Reimbursement and attendance.**

Board members will serve without compensation. Board members will be reimbursed for reasonable travel expenses, as approved by the Board, which they incur when performing Board business.

#### **§ 1217.46 Powers and duties.**

The Board shall have the following powers and duties:

(a) To administer this 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, regulations 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 its members a chairperson and, such other officers as may be necessary;

(d) To create an executive committee of five members of the Board comprised of the chairperson and four other members elected by the Board. The duties of the executive committee shall be specified in bylaws that are recommended by the Board and approved by the Secretary;

(e) To create other committees or subcommittees, which may include individuals other than Board members, as the Board deems necessary from its membership and other representatives it deems appropriate;

(f) To employ or contract with such persons, other than the members, as it may deem necessary to assist the Board in carrying out its duties, and to determine the compensation and define the duties of each;

(g) To notify manufacturers for the U.S. market of all Board meetings through press releases or other means and to give the Secretary the same notice of Board meetings, executive committee, and subcommittee meetings that is given to members in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting to the Secretary;

(h) 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 promotion, research, and information, including consumer and industry information, research and advertising designed to strengthen the softwood lumber industry's position in the marketplace and to maintain, develop, and expand markets for softwood lumber. The payment of costs for such activities shall be with funds collected pursuant to the Order, including funds collected pursuant to § 1217.50(f). Each contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program, plan, or project together with a budget that specifies the cost to be incurred to carry out the activity;

(2) The contractor or agreeing party shall keep accurate records of all of 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 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.

(i) To prepare and submit to the Secretary for approval 60 calendar days in advance of the beginning of a fiscal period, rates of assessment and a budget of the anticipated expenses to be incurred in the administration of the Order, including the probable cost of each promotion, research, and information activity proposed to be developed or carried out by the Board;

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

(k) To invest assessments collected and other funds received pursuant to the Order and use earnings from invested assessments to pay for activities carried out pursuant to the Order;

(l) To recommend changes to the assessment rates as provided in this part;

(m) To cause its books to be audited by a certified public accountant at the end of each fiscal period and at such other times as the Secretary may request, and to submit a report of each audit directly to the Secretary;

(n) To periodically prepare and make public and to make available to manufacturers for the U.S. market reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended;

(o) To maintain minutes, books, and records and prepare and submit to the Secretary such reports from time to time as may be required for appropriate accounting with respect to the receipt and disbursement of funds entrusted to it, and to submit to the Secretary such information pertaining to this part or subpart as he or she may request;

(p) To act as an intermediary between the Secretary and any manufacturer for the U.S. market;

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

(r) To develop and recommend such rules and regulations to the Secretary for approval as may be necessary for the development and execution of plans or activities to effectuate the purposes of the Act.

#### **§ 1217.47 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 g funds collected by the Board under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments or subdivision thereof, other than recommending to the Secretary amendments to the Order; and

(c) No program, plan or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Softwood lumber of all geographic origins shall be treated equally.

#### **Expenses and Assessments**

##### **§ 1217.50 Budget and expenses.**

(a) At least 60 calendar days prior to the beginning of each fiscal period, and as may be necessary thereafter, the Board shall prepare and submit to the Department a budget for the fiscal period covering its anticipated expenses and disbursements in administering this part. 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 fiscal 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 fiscal 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 Department, including shifting funds from one program, plan, or project to another.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Secretary finds 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 Department, 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 contributions shall be free from any encumbrances 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, Foreign Agricultural Service funds), 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 two years after the date of the first Board meeting, the Board may not expend for

administration, maintenance, and the functioning of the Board an amount that is greater than 8 percent of the assessment and other income received by and available to 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 one fiscal period's budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this subpart.

(j) 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.

#### **§ 1217.51 Financial statements.**

(a) The Board shall prepare and submit financial statements to the Department 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, 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 30 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 90 calendar days after the end of the fiscal year to which it applies.

#### **§ 1217.52 Assessments.**

(a) The Board's programs and expenses shall be paid by assessments on manufacturers for the U.S. market, other income of the Board, and other funds available to the Board.

(b) Subject to the exemptions specified in § 1217.53, each

manufacturer for the U.S. market shall pay an assessment to the Board at the rate of \$0.35 per thousand board feet of softwood lumber except that no person shall pay an assessment on the first 15 million board feet of softwood lumber otherwise subject to assessment in a fiscal year. Domestic manufacturers shall pay assessments based on the volume of softwood lumber shipped within the United States and importers shall pay assessments based on the volume of softwood lumber imported to the United States.

(c) At least 24 months after the Order becomes effective and periodically thereafter, the Board shall review and may recommend to the Secretary, upon an affirmative vote by at least two-thirds of the Board members, a change in the assessment rate. In no event may the rate be less than \$0.35 per thousand board feet nor more than \$0.50 per thousand board feet. A change in the assessment rate is subject to rulemaking by the Secretary.

(d) Domestic manufacturers shall remit to the Board the amount due no later than the 30th calendar day of the month following the end of the quarter in which the softwood lumber was shipped.

(e) Domestic product that cannot be categorized in the Harmonized Tariff Schedule of the United States (HTSUS) numbers listed in paragraph (h) of this section if it were an import is not covered under this Order.

(f) Softwood lumber originating in the United States that is exported to another country and shipped back to the United States is covered under this Order, provided that it can be categorized in the HTSUS numbers listed in paragraph (h) of this section.

(g) Each importer of softwood lumber shall pay through Customs to the Board an assessment on softwood lumber imported into the United States as described in section 804(a) of Title VIII of the Tariff Act of 1930, as amended (19 U.S.C. 1202–1683g), provided that it can be categorized in the HTSUS numbers listed in paragraph (h) of this section.

(h) The HTSUS categories and assessment rates on imported softwood lumber are listed in the table below. A factor shall be used to determine the equivalent volume of softwood lumber in thousand board feet. The factor used to convert one cubic meter to one thousand board feet is 0.423776001. Accordingly, the assessment rate per cubic meter is as follows.



Softwood lumber	Assessment \$/cubic meter
4407.10.01 .....	\$0.1483
4409.10.05 .....	0.1483
4409.10.10 .....	0.1483
4409.10.20 .....	0.1483
4409.10.90 .....	0.1483
4418.90.25 .....	0.1483

(i) In the event that any HTSUS number subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of the softwood lumber involved, assessments will continue to be collected based on the new number.

(j) If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment directly to the Board no later than the 30th calendar day of the month following the end of the quarter in which the softwood lumber was imported.

(k) Articles brought into the United States temporarily and for which an exemption is claimed under subchapter XIII of chapter 98 of the HTSUS are not covered under this Order. If assessments are collected by Customs for these products, the importer may apply to the Board for a refund of assessments.

(l) When a domestic manufacturer or importer fails to pay the assessment within 60 calendar days of the date it is due, the Board may impose a late payment charge and interest. The late payment charge and rate of interest shall be prescribed in regulations issued by the Secretary. All late assessments shall be subject to the specified late payment charge and interest. Persons failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures.

(m) The Board may accept advance payment of assessments from any manufacturer for the U.S. market that will be credited toward any amount for which that person may become liable. The Board may not pay interest on any advance payment.

(n) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall receive assessments and shall pay such assessments and any interest earned to the Board when it is formed.

#### **§ 1217.53 Exemption from assessment.**

(a) *Manufacturers for the U.S. market who domestically ship and/or import less than 15 million board feet annually.*

(1) Domestic manufacturers who ship less than 15 million board feet of softwood lumber within the United States in a fiscal year are exempt from

paying assessments. Such manufacturers must apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the fiscal year. This is an annual exemption and domestic manufacturers must reapply each year. Such manufacturers shall certify that they will ship less than 15 million board feet of softwood lumber during the fiscal year for which the exemption is claimed. Upon receipt of an application for exemption, the Board shall determine whether an exemption may be granted. The Board may request past shipment data to support the exemption request. The Board will then issue, if deemed appropriate, a certificate of exemption to the eligible domestic manufacturer. It is the responsibility of the domestic manufacturer to retain a copy of the certificate of exemption.

(2) Importers who import into the United States less than 15 million board feet of softwood lumber in a fiscal year are exempt from paying assessments. Such importers must apply to the Board, on a form provided by the Board, for a certificate of exemption prior to the start of the fiscal year. This is an annual exemption and importers must reapply each year. Such importers shall certify that they will import less than 15 million board feet of softwood lumber during the fiscal year for which the exemption is claimed. Upon receipt of an application for exemption, the Board shall determine whether an exemption is granted. The Board may request past import data to support the exemption request. The Board will then issue, if deemed appropriate, a certificate of exemption to the eligible importer. It is the responsibility of the importer to retain a copy of the certificate of exemption. The importer shall present a copy of the certificate to Customs. If accepted by Customs, such imported softwood lumber shall not be subject to assessments. If Customs collects the assessment, the Board shall refund such importers their assessments no later than 60 calendar days after receipt of such assessments by the Board. No interest shall be paid on the assessments collected by Customs.

(3) Domestic manufacturers who did not apply to the Board for an exemption and shipped less than 15 million board feet of softwood lumber within the United States during the fiscal year shall receive a refund from the Board for the applicable assessments within 30 calendar days after the end of the fiscal year. Board staff shall determine the assessments paid and refund the amount due to the domestic manufacturer accordingly.

(4) Importers who did not apply to the Board for an exemption and imported less than 15 million board feet of softwood lumber during the fiscal year shall receive a refund from the Board for the applicable assessments within 30 calendar days after the end of the fiscal year.

(5) If an entity is both a domestic manufacturer and an importer, the sum of such entity's domestic shipments and imports during a fiscal year shall count towards the 15 million board feet exemption.

(6) Domestic manufacturers and importers who received an exemption certificate from the Board but shipped or imported 15 million board feet or more of softwood lumber during the fiscal year shall pay the Board the applicable assessments owed on the domestic shipments or imports over the 15 million board foot-exemption threshold within 30 calendar days after the end of the fiscal year and submit any necessary reports to the Board pursuant to § 1217.70.

(7) The Board may develop additional procedures to administer this exemption as appropriate. Such procedures shall be implemented through rulemaking by the Secretary.

(b) *Manufacturers for the U.S. market who domestically ship and/or import 15 million board feet or more annually.*

(1) Domestic manufacturers who domestically ship 15 million board feet or more per fiscal year shall not pay assessments on their first 15 million board feet of softwood lumber shipped during the applicable fiscal year.

(2) Importers who import 15 million board feet or more per fiscal year shall be exempt from paying assessments on their first 15 million board feet of softwood lumber imported during the applicable fiscal year. Such importers shall receive a refund from the Board for the applicable assessments collected by Customs. The Board shall refund such importers their assessments no later than 60 calendar days after receipt by the Board.

(c) *Export.* Shipments of softwood lumber by domestic manufacturers to locations outside of the United States are exempt from assessment. The Board shall establish procedures for approval by the Secretary for refunding assessments that may be paid on such shipments and establish any necessary safeguards as deemed appropriate. Safeguard procedures would be implemented by the Secretary through rulemaking. The Board may also recommend to the Secretary that such shipments be assessed if it deems appropriate. Such action shall be

implemented by the Secretary through rulemaking.

(d) *Organic*. (1) Organic Act means section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522).

(2) A domestic manufacturer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, only manufactures and ships softwood lumber that is eligible to be labeled as 100 percent organic under the NOP and is not a split operation shall be exempt from payment of assessments. To obtain an organic exemption, an eligible domestic manufacturer shall submit a request for exemption to the Board, on a form provided by the Board, at any time initially and annually thereafter on or before the start of the fiscal year as long as such manufacturer continues to be eligible for the exemption. The request shall include the following: The manufacturer's name and address; a copy of the organic operation certificate provided by a USDA-accredited certifying agent as defined in the Organic Act, a signed certification that the applicant meets all of the requirements specified for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary. The Board shall have 30 calendar days to approve the exemption request. If the exemption is not granted, the Board will notify the applicant and provide reasons for the denial within the same time frame.

(3) An importer who imports only softwood lumber that is eligible to be labeled as 100 percent organic under the NOP and is not a split operation shall be exempt from the payment of assessments. To obtain an organic exemption, an eligible importer must submit documentation to the Board and request an exemption from assessment on 100 percent of organic softwood lumber, on a form provided by the Board, at any time initially and annually thereafter on or before the beginning of the fiscal year as long as the importer continues to be eligible for the exemption. This documentation shall include the same information as required by domestic manufacturers in paragraph (d)(2) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer. The Board will also issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule of the United States (HTSUS) classification valid for 1 year from the date of issue. This HTSUS classification should be entered by the

importer on the Customs entry documentation. Any line item entry of 100 percent organic softwood lumber bearing this HTSUS classification assigned by the Board will not be subject to assessments.

(4) Importers who are exempt from assessment in paragraph (d)(3) of this section shall also be eligible for reimbursement of assessments collected by Customs and may apply to the Board for a reimbursement. The importer would be required to submit satisfactory proof to the Board that the importer paid the assessment on exempt organic products.

(5) The exemption will apply immediately following the issuance of the exemption certificate.

#### Promotion, Research and Information

##### § 1217.60 Programs, plans and projects.

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

(1) Maintain, develop, expand and grow markets for softwood lumber;

(2) Enhance and strengthen the image, reputation and public acceptance of softwood lumber and the forests from which it comes;

(3) Develop new markets and marketing strategies for softwood lumber;

(4) Expand the knowledge and understanding of the strength, safety and technical applications and encourage innovation in the use of softwood lumber;

(5) Transfer and disseminate the knowledge and understanding of the strength, safety, environmental and sustainable benefits and technical applications of softwood lumber; and

(6) Develop, expand and grow existing and new opportunities and applications for softwood lumber.

(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 must evaluate each program, plan and project authorized under this subpart to ensure that it contributes to an effective and coordinated program of research, promotion and information. The Board must submit the evaluations to the Secretary. If the Board finds that a program, plan or project does not contribute to an effective program of

promotion, research, or information, then the Board shall terminate such plan or program.

##### § 1217.61 Independent evaluation.

At least once every five years, the Board shall 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.

##### § 1217.62 Patents, copyrights, trademarks, inventions, product formulations, and publications.

Any patents, copyrights, trademarks, inventions, product formulations, and publications 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, inventions, 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. Upon termination of this subpart, § 1217.83 shall apply to determine disposition of all such property.

#### Reports, Books, and Records

##### § 1217.70 Reports.

(a) Each manufacturer for the U.S. market will be required to provide periodically to the Board such information as the Board, with the approval of the Secretary, may require. Such information may include, but not be limited to:

(1) For domestic manufacturers:

(i) The name, address and telephone number of the domestic manufacturer;

(ii) The board feet of softwood lumber shipped within the United States;

(iii) The board feet of softwood lumber for which assessments were paid; and

(iv) The board feet of softwood lumber that was exported.

(2) For importers:

(i) The name, address and telephone number of the importer;

(ii) The board feet of softwood lumber imported;

(iii) The board feet of softwood lumber for which assessments were paid; and

(iv) The country of export.

(b) For domestic manufacturers, such information shall accompany the collected payment of assessments on a quarterly basis specified in § 1217.52. For importers who pay their assessments directly to the Board, such information shall accompany the payment of collected assessments within 30 calendar days after importation specified in § 1217.52.

#### **§ 1217.71 Books and records.**

Each manufacturer for the U.S. market, including those exempt under § 1217.53, shall maintain any books and records necessary to carry out the provisions of this subpart and regulations issued thereunder, including such records as are necessary to verify any required reports. Domestic manufacturers who only export softwood lumber shall also retain such books and records. Such books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. A manufacturer for the U.S. market must maintain the books and records for two years beyond the fiscal period to which they apply.

#### **§ 1217.72 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 or other manufacturers for the U.S. market. 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 part, together with a statement of the particular provisions of this part violated by such person.

#### **Miscellaneous**

##### **§ 1217.80 Right of the Secretary.**

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

##### **§ 1217.81 Referenda.**

(a) *Initial referendum.* The Order shall not become effective unless the Order is approved by a majority of domestic manufacturers and importers voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the domestic manufacturing or importation of softwood lumber. A single entity who domestically manufactures and imports softwood lumber may cast one vote in the referendum.

(b) *Subsequent referenda.* The Secretary shall conduct subsequent referenda:

(1) For the purpose of ascertaining whether manufacturers for the U.S. market favor the amendment, continuation, suspension, or termination of the Order;

(2) Five years after this Order becomes effective and every five years thereafter, to determine whether softwood lumber manufacturers for the U.S. market favor the continuation of the Order. The Order shall continue if it is favored by a majority of domestic manufacturers and importers voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the domestic manufacturing or importation of softwood lumber;

(3) At the request of the Board established in this Order;

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

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

##### **§ 1217.82 Suspension or termination.**

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof, if the Secretary finds that this part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if

the Secretary determines that this 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 period whenever the Secretary determines that its suspension or termination is favored by a majority of domestic manufacturers and importers voting in the referendum who also represent a majority of the volume represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the domestic manufacturing or importation of softwood lumber.

(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 subpart.

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

##### **§ 1217.83 Proceedings after termination.**

(a) Upon termination of this subpart, the Board shall recommend to the Secretary up to nine of its members, representing all regions specified in § 1217.40(b), three of whom shall be importers and six of whom shall be domestic manufacturers, to serve as trustees for the purpose of liquidating the Board's affairs. 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 existing claim 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 trustees, to such person or persons as the Secretary directs; and

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

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to one or more softwood lumber industry organizations in the United States whose mission is generic softwood lumber promotion, research, and information programs.

**§ 1217.84 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.

**§ 1217.85 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.

**§ 1217.86 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.

**§ 1217.87 Amendments.**

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

**§ 1217.88 OMB control numbers.**

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

**Subpart B—[Reserved]**

Dated: April 13, 2011.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

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