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# CODE OF FEDERAL REGULATIONS

# Title 7
## Agriculture

Parts 1200 to 1599

Revised as of January 1, 2011

Containing a codification of documents
of general applicability and future effect

As of January 1, 2011

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*Cite this Code:* CFR

*To cite the regulations in this volume use title, part and section number. Thus,* 7 CFR 1200.1 *refers to title 7, part 1200, section 1.*

# Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

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The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

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Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 2001, consult either the List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, or 1986–2000, published in eleven separate volumes. For the period beginning January 1, 2001, a "List of CFR Sections Affected" is published at the end of each CFR volume.

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The term "[Reserved]" is used as a place holder within the Code of Federal Regulations. An agency may add regulatory information at a "[Reserved]" location at any time. Occasionally "[Reserved]" is used editorially to indicate that a portion of the CFR was left vacant and not accidentally dropped due to a printing or computer error.

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(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

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An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

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RAYMOND A. MOSLEY,
*Director,*
*Office of the Federal Register.*
*January 1, 2011.*

# THIS TITLE

Title 7—AGRICULTURE is composed of fifteen volumes. The parts in these volumes are arranged in the following order: Parts 1–26, 27–52, 53–209, 210–299, 300–399, 400–699, 700–899, 900–999, 1000–1199, 1200–1599, 1600–1759, 1760–1939, 1940–1949, 1950–1999, and part 2000 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2011.

The Food and Nutrition Service current regulations in the volume containing parts 210–299, include the Child Nutrition Programs and the Food Stamp Program. The regulations of the Federal Crop Insurance Corporation are found in the volume containing parts 400–699.

All marketing agreements and orders for fruits, vegetables and nuts appear in the one volume containing parts 900–999. All marketing agreements and orders for milk appear in the volume containing parts 1000–1199.

For this volume, Michele Bugenhagen was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.

# Title 7—Agriculture

(This book contains parts 1200 to 1599)

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1200.50 Words in the singular form.
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AUTHORITY: 7 U.S.C. 2111, 2620, 2713, 4509, 4609, 4814, 4909, 6106, 6306, 6410, 7418, and 7486.

## Subpart A—Rules of Practice and Procedure Governing Proceedings To Formulate and Amend an Order

AUTHORITY: 7 U.S.C. 2103, 2614, 2704, and 4804.

SOURCE: 47 FR 44684, Oct. 8, 1982, unless otherwise noted.

### § 1200.1 Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

### § 1200.2 Definitions.

(a) The term *Act* means the Cotton Research and Promotion Act, as amended [7 U.S.C. 2101–2119]; the Egg Research and Consumer Information Act, as amended [7 U.S.C. 2701–2718]; the Pork Promotion, Research, and Consumer Information Act [7 U.S.C. 4801–4819]; and the Potato Research and Promotion Act, as amended [7 U.S.C. 2611–2627].

(b) *Administrator* means the Administrator of the Agricultural Marketing Service or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act for the Administrator.

(b) *Board* means the board or council established by the order to administer the program.

(c) *Department* means the U.S. Department of Agriculture.

(d) FEDERAL REGISTER means the publication provided for by the FEDERAL REGISTER Act, approved July 26, 1935 [44 U.S.C. 1501–1511], and acts supplementing and amending it.

(e) *Hearing* means that part of the proceeding which involves the submission of evidence.

(f) *Judge* means any administrative law judge appointed pursuant to 5 U.S.C. 3105 and assigned to conduct the hearing.

(g) *Hearing* means that part of the proceeding that involves the submission of evidence.

(h) *Hearing clerk* means the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C.

(i) *Order* means any order or any amendment thereto which may be issued pursuant to the Act. The term *order* shall include plans issued under the Acts listed in paragraph (a) of this section.

(j) *Proceeding* means a proceeding before the Secretary arising under the pertinent section of an Act.

(k) *Secretary* means the Secretary of Agriculture of the United States, 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 for the Secretary.

[67 FR 44350, July 2, 2002]

**§ 1200.3 Proposals.**

(a) An order may be proposed by any organization certified pursuant to the Act or any interested person affected by the Act, including the Secretary. Any person or organization other than the Secretary proposing an order shall file with the Administrator a written application, together with a copy of the proposal, requesting the Secretary to hold a hearing upon the proposal. Upon receipt of such proposal, the Administrator shall cause such investigation to be made and such consideration to be given as, in the Administrator's opinion, are warranted. If the investigation and consideration lead the Administrator to conclude that the proposed order will not tend to effectuate the declared policy of the Act, or that for other proper reasons a hearing should not be held on the proposal, the Administrator shall deny the application, and promptly notify the applicant of such denial, which notice shall be accompanied by a brief statement of the grounds for the denial.

(b) If the investigation and consideration lead the Administrator to conclude that the proposed order will tend to effectuate the declared policy of the Act, or if the Secretary desires to propose an order, the Administrator shall sign and cause to be served a notice of hearing, as provided herein.

**§ 1200.4 Reimbursement of Secretary's expenses.**

If provided for in the Act or any amendment thereto, expenses incurred by the Secretary in preparing or amending the order, administering the order, and conducting the referendum shall be reimbursed.

**§ 1200.5 Institution of proceedings.**

(a) *Filing and contents of the notice of hearing*. The proceeding shall be instituted by filing the notice of hearing with the hearing clerk. The notice of hearing shall contain a reference to the authority under which the order is proposed; shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed order or a description of the subjects and issues involved; and shall state the time and place of such hearing, and the place where copies of such proposed order may be obtained or examined. The time of the hearing shall not be less than 15 days after the date of publication of the notice in the FEDERAL REGISTER, as provided herein, unless the Administrator shall determine that an emergency exists which requires a shorter period of notice, in which case the period of notice shall be that which the Administrator may determine to be reasonable in the circumstances: Except that in the case of hearings on amendments to an order, the time of the hearing may be less than 15 days but shall not be less than three days after the date of publication in the FEDERAL REGISTER.

(b) *Giving notice of hearing and supplemental publicity*. (1) The Administrator shall give or cause to be given notice of hearing in the following manner:

(i) By publication of the notice of hearing in the FEDERAL REGISTER;

(ii) By mailing a copy of the notice of hearing to each organization known by the Administrator to be interested therein;

(iii) By issuing a press release containing the complete text or a summary of the contents of the notice of hearing and making the same available to such newspapers as, in the Administrator's discretion, are best calculated to bring the notice to the attention of the persons interested therein; and

(iv) By forwarding copies of the notice of hearing addressed to those Governors of the States and executive heads of territories and possessions of the United States and the mayor of the District of Columbia that are directly affected by such order.

(2) Legal notice of the hearing shall be deemed to be given if notice is given in the manner provided by paragraph (b)(1)(i) of this section; failure to give notice in the manner provided in paragraphs (b)(2) (ii), (iii), and (iv) of this section shall not affect the legality of the notice.

(c) *Record of notice and supplemental publicity*. There shall be filed with the hearing clerk or submitted to the judge at the hearing an affidavit or certificate of the person giving the notice provided in paragraphs (b)(1) (iii) and (iv) of this section. In regard to the

provisions relating to mailing in paragraph (b)(1)(ii) of this section, determination by the Administrator that such provisions have been complied with shall be filed with the hearing clerk or submitted to the judge at the hearing. In the alternative, if notice is not given in the manner provided in paragraphs (b)(1) (ii), (iii), and (iv) of this section there shall be filed with the hearing clerk or submitted to the judge at the hearing a determination by the Administrator that such notice is impracticable, unnecessary, or contrary to the public interest with a brief statement of the reasons for such determination. Determinations by the Administrator as herein provided shall be final.

### § 1200.6 Docket number.

Each proceeding, immediately following its institution, shall be assigned a docket number by the hearing clerk and thereafter the proceeding may be referred to by such number.

### § 1200.7 Judge.

(a) *Assignment*. No judge who has any pecuniary interest in the outcome of a proceeding shall serve as judge in such proceeding.

(b) *Power of judge*. Subject to review by the Secretary, as provided elsewhere in this subpart, the judge in any proceeding shall have power to:

(1) Rule upon motions and requests;

(2) Change the time and place of hearings, and adjourn the hearing from time to time or from place to place;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine and cross-examine witnesses and receive evidence;

(5) Admit or exclude evidence;

(6) Hear oral argument on facts or law; and

(7) Do all acts and take all measures necessary for the maintenance of order at the hearings and the efficient conduct of the proceeding.

(c) *Who may act in absence of judge*. In case of the absence of the judge or the judge's inability to act, the powers and duties to be performed by the judge under this part in connection with a proceeding may, without abatement of the proceeding unless otherwise ordered by the Secretary, be assigned to any other judge.

(d) *Disqualification of judge*. The judge may at any time withdraw as judge in a proceeding if such judge deems himself or herself to be disqualified. Upon the filing by an interested person in good faith of a timely and sufficient affidavit of personal bias or disqualification of a judge, the Secretary shall determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as the Secretary may deem appropriate in the circumstances.

### § 1200.8 Motions and requests.

(a) *General*. (1) All motions and requests shall be filed with the hearing clerk, except that those made during the course of the hearing may be filed with the judge or may be stated orally and made a part of the transcript.

(2) Except as provided in § 1200.17(b) such motions and requests shall be addressed to, and ruled on by, the judge if made prior to certification of the transcript pursuant to § 1200.11 or by the Secretary if made thereafter.

(b) *Certification to Secretary*. The judge may, in his or her discretion, submit or certify to the Secretary for decision any motion, request, objection, or other question addressed to the judge.

### § 1200.9 Conduct of the hearing.

(a) *Time and place*. The hearing shall be held at the time and place fixed in the notice of hearing, unless the judge shall have changed the time or place, in which event the judge shall file with the hearing clerk a notice of such change, which notice shall be given in the same manner as provided in § 1200.5 (relating to the giving of notice of the hearing): Except that if the change in time or place of hearing is made less than five days prior to the date previously fixed for the hearing, the judge either in addition to or in lieu of causing the notice of the change to be given, shall announce, or cause to be announced, the change at the time and place previously fixed for the hearing.

(b) *Appearances*—(1) *Right to appear*. At the hearing, any interested person

shall be given an opportunity to appear, either in person or through authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding. Any interested person who desires to be heard in person at any hearing under these rules shall, before proceeding to testify, state his or her name, address, and occupation. If any such person is appearing through a counsel or representative, such person or such counsel or representative shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names, addresses, and occupations of such person and such counsel or representative. Any such person or such counsel or representative shall give such other information respecting such appearance as the judge may request.

(2) *Debarment of counsel or representative.* (i) Whenever, while a proceeding is pending before the judge, such judge finds that a person, acting as counsel or representative for any person participating in the proceeding, is guilty of unethical or unprofessional conduct, the judge may order that such person be precluded from further acting as counsel or representative in such proceeding. An appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal: Except that the judge may suspend the proceeding for a reasonable time for the purpose of enabling the client to obtain other counsel or representative.

(ii) In case the judge has ordered that a person be precluded from further action as counsel or representative in the proceeding, the judge within a reasonable time thereafter shall submit to the Secretary a report of the facts and circumstances surrounding such order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter the Secretary may, after notice and an opportunity for hearing, issue such order respecting the appearance of such person as counsel or representative in proceedings before the Secretary as the Secretary finds to be appropriate.

(3) *Failure to appear.* If any interested person fails to appear at the hearing, that person shall be deemed to have waived the right to be heard in the proceeding.

(c) *Order of procedure.* (1) The judge shall, at the opening of the hearing prior to the taking of testimony, have noted as part of the record the notice of hearing as filed with the Office of the Federal Register and the affidavit or certificate of the giving of notice or the determination provided for in § 1200.5(c).

(2) Evidence shall then be received with respect to the matters specified in the notice of the hearing in such order as the judge shall announce.

(d) *Evidence*—(1) *General.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

(i) Every witness shall, before proceeding to testify, be sworn or make affirmation. Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts.

(ii) When necessary, in order to prevent undue prolongation of the hearing, the judge may limit the number of times any witness may testify to the same matter or the amount of corroborative or cumulative evidence.

(iii) The judge shall, insofar as practicable, exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to any other ruling of the judge during the hearing, such party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the judge. The transcript shall not include argument or debate thereon except as ordered by the judge. The ruling of the judge on any objection shall be a part of the transcript. Only objections made before the judge may subsequently be relied upon in the proceeding.

(3) *Proof and authentication of official records or documents.* An official record or document, when admissible for any

purpose, shall be admissible as evidence without the presence of the person who made or prepared the same. The judge shall exercise discretion in determining whether an official publication of such record or document shall be necessary, or whether a copy would be permissible. If permissible such a copy should be attested to by the person having legal custody of it, and accompanied by a certificate that such person has the custody.

(4) *Exhibits.* All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon satisfactory showing of authenticity, relevancy, and materiality, be numbered as exhibits and received in evidence and made a part of the record. Such exhibits shall be submitted in quadruplicate and in documentary form. In case the required number of copies is not made available, the judge shall exercise discretion as to whether said exhibits shall, when practicable, be read in evidence or whether additional copies shall be required to be submitted within a time to be specified by the judge. If the testimony of a witness refers to a statute, or to a report or document (including the record of any previous hearing), the judge, after inquiry relating to the identification of such statute, report, or document, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report or document (including the record of any previous hearing) containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the judge.

(5) *Official notice.* Official notice at the hearing may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: Except that interested persons shall be given an adequate period of time, at the hearing or subsequent to it, of matters so noticed and shall be given adequate opportunity to show that such facts are inaccurate or are erroneously noticed.

(6) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the judge's ruling in excluding the evidence was erroneous. The judge shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the judge erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

### § 1200.10 Oral and written arguments.

(a) *Oral argument before the judge.* Oral argument before the judge shall be in the discretion of the judge. Such argument, when permitted, may be limited by the judge to any extent that the judge finds necessary for the expeditious disposition of the proceeding and shall be reduced to writing and made part of the transcript.

(b) *Briefs, proposed findings, and conclusions.* The judge shall announce at the hearing a reasonable period of time within which interested persons may file with the hearing clerk proposed findings and conclusions, and written arguments or briefs, based upon the evidence received at the hearing, citing, where practicable, the page or pages of the transcript of the testimony where such evidence appears. Factual material other than that adduced at the hearing or subject to official notice shall not be alluded to therein, and, in any case, shall not be considered in the formulation of the order. If the person filing a brief desires the Secretary to consider any objection made by such person to a ruling of the judge, as provided in § 1200.9(d), that person shall include in the brief a

concise statement concerning each such objection, referring, where practicable, to the pertinent pages of the transcript.

### § 1200.11 Certification of the transcript.

The judge shall notify the hearing clerk of the close of a hearing as soon as possible thereafter and of the time for filing written arguments, briefs, proposed findings, and proposed conclusions and shall furnish the hearing clerk with such other information as may be necessary. As soon as possible after the hearing, the judge shall transmit to the hearing clerk an original and three copies of the transcript of the testimony and the original and all copies of the exhibits not already on file in the office of the hearing clerk. The judge shall attach to the original transcript of the testimony a certificate stating that, to the best of the judge's knowledge and belief, the transcript is a true transcript of the testimony given at the hearing, except in such particulars as the judge shall specify, and that the exhibits transmitted are all the exhibits as introduced at the hearing with such exceptions as the judge shall specify. A copy of such certificate shall be attached to each of the copies of the transcript of testimony. In accordance with such certificate the hearing clerk shall note upon the official record copy, and cause to be noted on other copies of the transcript, each correction detailed therein by adding or crossing out (but without obscuring the text as originally transcribed) at the appropriate place any words necessary to make the same conform to the correct meaning, as certified by the judge. The hearing clerk shall obtain and file certifications to the effect that such corrections have been effectuated in copies other than the official record copy.

### § 1200.12 Copies of the transcript.

(a) During the period in which the proceeding has an active status in the Department, a copy of the transcript and exhibits shall be kept on file in the office of the hearing clerk where it shall be available for examination during official hours of business. Thereafter said transcript and exhibits shall be made available by the hearing clerk for examination during official hours of business after prior request and reasonable notice to the hearing clerk.

(b) Transcripts of hearings shall be made available to any person at actual cost of duplication.

[47 FR 44684, Oct. 8, 1982, as amended at 67 FR 10830, Mar. 11, 2002]

### § 1200.13 Administrator's recommended decision.

(a) *Preparation.* As soon as practicable following the termination of the period allowed for the filing of written arguments or briefs and proposed findings and conclusions the Administrator shall file with the hearing clerk a recommended decision.

(b) *Contents.* The Administrator's recommended decision shall include: (1) a preliminary statement containing a description of the history of the proceedings, a brief explanation of the material issues of fact, law, or discretion presented on the record, and proposed findings and conclusions about such issues, including the reasons or basis for such proposed findings; (2) a ruling upon each proposed finding or conclusion submitted by interested persons; and (3) an appropriate proposed order effectuating the Administrator's recommendations.

(c) *Exceptions to recommended decision.* Immediately following the filing of the recommended decision, the Administrator shall give notice thereof and opportunity to file exceptions thereto by publication in the FEDERAL REGISTER. Within a period of time specified in such notice any interested person may file with the hearing clerk exceptions to the Administrator's proposed order and a brief in support of such exceptions. Such exceptions shall be in writing, shall refer, where practicable, to the related pages of the transcript, and may suggest appropriate changes in the proposed order.

(d) *Omission of recommended decision.* The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that due and timely execution of the Secretary's functions imperatively and unavoidably requires such omission.

### § 1200.14 Submission to Secretary.

Upon the expiration of the period allowed for filing exceptions or upon request of the Secretary, the hearing clerk shall transmit to the Secretary the record of the proceeding. Such record shall include: All motions and requests filed with the hearing clerk and rulings thereon; the certified transcript; any proposed findings or conclusions or written arguments or briefs that may have been filed; the Administrator's recommended decision, if any; and such exceptions as may have been filed.

### § 1200.15 Decision by the Secretary.

After due consideration of the record, the Secretary shall render a decision. Such decision shall become a part of the record and shall include: (a) a statement of findings and conclusions, including the reasons or basis for such findings, upon all the material issues of fact, law, or discretion presented on the record, (b) a ruling upon each proposed finding and proposed conclusion not previously ruled upon in the record, (c) a ruling upon each exception filed by interested persons, and (d) either (1) denial of the proposal to issue an order, or (2) if the findings upon the record so warrant, an order, the provisions of which shall be set forth and such order shall be complete except for its effective date and any determinations to be made under § 1200.16: *Except that* such order shall not be executed, issued, or made effective until and unless the Secretary determines that the requirements of § 1200.16 have been met.

### § 1200.16 Execution of the order.

(a) *Issuance of the order*. The Secretary shall, if the Secretary finds that it will tend to effectuate the purposes of the Act, issue and make effective the order which was filed as part of the Secretary's decision pursuant to § 1200.15: Except that the issuance of such order shall have been approved or favored by eligible voters as required by the applicable Act.

(b) *Effective date of order*. No order shall become effective in less than 30 days after its publication in the FEDERAL REGISTER, unless the Secretary, upon good cause found and published with the order, fixes an earlier effective date.

(c) *Notice of issuance*. After issuance of the order, such order shall be filed with the hearing clerk, and notice thereof, together with notice of the effective date, shall be given by publication in the FEDERAL REGISTER.

### § 1200.17 Filing, extension of time, effective date of filing, and computation of time.

(a) *Number of copies*. Except as provided otherwise herein, all documents or papers required or authorized by the foregoing provisions hereof to be filed with the hearing clerk shall be filed in quadruplicate. Any documents or papers so required or authorized to be filed with the hearing clerk shall be filed with the judge during the course of an oral hearing.

(b) *Extension of time*. The time for filing of any document or paper required or authorized by the foregoing provisions to be filed may be extended by the judge (before the record is so certified by the judge) or by the Administrator (after the record is so certified by the judge but before it is transmitted to the secretary), or by the Secretary (after the record is transmitted to the secretary) upon request filed, and if, in the judgment of the judge, Administrator, or the Secretary, as the case may be, there is good reason for the extension. All rulings made pursuant to this paragraph shall be filed with the hearing clerk.

(c) *Effective date of filing*. Any document or paper required or authorized in this subpart to be filed shall be deemed to be filed at the time it is received by the Hearing Clerk.

(d) *Computation of time*. Each day, including Saturdays, Sundays, and legal public holidays, shall be included in computing the time allowed for filing any document or paper: *Provided*, That when the time for filing a document or paper expires on a Saturday, Sunday, or legal public holiday, the time allowed for filing the document or paper shall be extended to include the following business day.

[47 FR 44684, Oct. 8, 1982, as amended at 67 FR 10830, Mar. 11, 2002]

### § 1200.18 Ex parte communications.

(a) At no stage of the proceeding following the issuance of a notice of hearing and prior to the issuance of the Secretary's decision thereon shall an employee of the Department who is or may reasonably be expected to be involved in the decision process of the proceeding discuss ex parte the merits of the proceeding with any person having an interest in the proceeding or with any representative of such person: Except that procedural matters and status reports shall not be included within the limitation: And except further that an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding may discuss the merits of the proceeding with such a person if all parties known to be interested in the proceeding have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record of the proceeding.

(b) No person interested in the proceeding shall make or knowingly cause to be made to an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding an ex parte communication relevant to the merits of the proceeding except as provided in paragraph (a) of this section.

(c) If an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding receives or makes a communication prohibited by this section, the Department shall place on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda, stating the substance of all oral responses thereto.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Department may, to the extent consistent with the interest of justice and the policy of the underlying statute, take whatever steps are deemed necessary to nullify the effect of such communication.

(e) For the purposes of this section, *ex parte communication* means any oral or written communication not on the public record with respect to which reasonable prior notice to all interested parties is not given, but which shall not include requests for status reports (including requests on procedural matters) on a proceeding.

### § 1200.19 Additional documents to be filed with hearing clerk.

In addition to the documents or papers required or authorized by the foregoing provisions of this subpart to be filed with the hearing clerk, the hearing clerk shall receive for filing and shall have custody of all papers, reports, records, orders, and other documents which relate to the administration of any order and which the Secretary is required to issue or to approve.

### § 1200.20 Hearing before Secretary.

The Secretary may act in the place and stead of a judge in any proceeding herein. When the Secretary so acts, the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions, and orders, and the Secretary shall then, after due consideration of the record, issue the final decision in the proceeding: Except the Secretary may issue a tentative decision in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final decision.

## Subpart B—Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted from Research, Promotion and Information Programs

AUTHORITY: 7 U.S.C. 2111, 2620, 2713, 4509, 4609, 4814, 4909, 6008, 6106, 6306, 6410, 6807, 7106, 7418, 7486, and 7806.

SOURCE: 60 FR 37326, July 20, 1995, unless otherwise noted.

### § 1200.50 Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the

plural, and *vice versa*, as the case may demand.

**§ 1200.51 Definitions.**

As used in this subpart, the terms as defined in the Act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term *Act* means the Commodity Research, Promotion, and Information Act of 1996 [7 U.S.C. 7401–7425]; the Cotton Research and Promotion Act, as amended [7 U.S.C. 2101–2119]; the Dairy Production Stabilization Act of 1983 [7 U.S.C. 4501–4513]; the Egg Research and Consumer Information Act, as amended [7 U.S.C. 2701–2718]; the Fluid Milk Promotion Act of 1990 [7 U.S.C. 6401–6417]; the Hass Avocado Promotion, Research, and Information Act of 2000 [7 U.S.C. 7801–7813]; the Honey Research, Promotion, and Consumer Information Act, as amended [7 U.S.C. 4601–4612]; the Mushroom Promotion, Research, and Consumer Information Act of 1990 [7 U.S.C. 6101–6112]; the Pecan Promotion and Research Act of 1990 [7 U.S.C. 6001–6013]; the Popcorn Promotion, Research, and Consumer Information Act [7 U.S.C. 7481–7491]; the Pork Promotion, Research, and Consumer Information Act [7 U.S.C. 4801–4819]; the Potato Research and Promotion Act, as amended [7 U.S.C. 2611–2627]; the Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7101–7111]; the Soybean Promotion, Research, and Consumer Information Act [7 U.S.C. 6301–6311]; and the Watermelon Research and Promotion Act, as amended, [7 U.S.C. 4901–4916].

(b) *Administrator* means the Administrator of the Agricultural Marketing Service or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act for the Administrator.

(c) *Decision* means the judge's initial decision and includes the judge's:

(1) Findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(2) Order; and

(3) Rulings on findings, conclusions and orders submitted by the parties.

(d) *Department* means the U.S. Department of Agriculture.

(e) Hearing means that part of the proceedings which involves the submission of evidence.

(f) *Hearing clerk* means the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C.

(g) *Judge* means any administrative law judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved.

(h) *Order* means any order or any amendment thereto which may be issued pursuant to the Act. The term order shall include plans issued under the Acts listed in paragraph (a) of this section.

(i) *Party* includes the Department.

(j) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity subject to an order or to whom an order is sought to be made applicable, or on whom an obligation has been imposed or is sought to be imposed under an order.

(k) *Petition* includes an amended petition.

(l) *Proceeding* means a proceeding before the Secretary arising under the pertinent section of an Act.

(m) *Secretary* means the Secretary of Agriculture of the United States, 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 for the Secretary.

[67 FR 44350, July 2, 2002]

**§ 1200.52 Institution of proceeding.**

(a) *Filing and service of petitions.* Any person subject to an order desiring to complain that such order or any provision of such order or any obligation imposed in connection with an order is not in accordance with law, shall file with the hearing clerk, in quintuplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition in writing the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petitions.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If the petitioner is a corporation, such fact shall be stated, together

with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers and directors; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application of such terms or provisions, which are complained of;

(3) A full statement of the facts, avoiding a mere repetition of detailed evidence, upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Requests for the specific relief which the petitioner desires the Secretary to grant; and

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *A motion to dismiss a petition: filing, contents, and responses to a petition.* If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the Act or with requirements of paragraph (b) of this section, the Administrator may, within 30 days after the service of the petition, file with the hearing clerk a motion to dismiss the petition, or any portion of the petition, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds for objection to the petition and if based, in whole or in part, on allegations of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the hearing clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion, including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the judge for the judge's consideration.

(d) *Further proceedings.* Further proceedings on petitions to modify or to be exempted from the Order shall be governed by §§ 900.52(c)(2) through 900.71 of the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders. However, each reference to *marketing order* in the title shall mean *order*.

[47 FR 44684, Oct. 8, 1982, as amended at 67 FR 10830, Mar. 11, 2002]

# PART 1205—COTTON RESEARCH AND PROMOTION

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### Subpart—Fiscal Period [Reserved]

AUTHORITY: 7 U.S.C. 2101–2118 and 7 U.S.C. 7401.

## Subpart—Procedures for Conduct of Sign-up Period

SOURCE: 62 FR 1660, Jan. 13, 1997, unless otherwise noted.

DEFINITIONS

### § 1205.10 Act.

The term *Act* means the Cotton Research and Promotion Act, as amended [7 U.S.C 2101–2118; Public Law 89–502, 80 Stat 279, as amended].

### § 1205.11 Administrator.

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

### § 1205.12 Cotton.

The term *cotton* means all Upland cotton harvested in the United States and all imports of Upland cotton, including the Upland cotton content of products derived thereof. The term *cotton* does not include imported cotton for which the assessment is less than the value of $2.00 per line item entry as established by regulations.

[62 FR 1660, Jan. 13, 1997, as amended at 67 FR 21169, Apr. 30, 2002]

### § 1205.13 Upland cotton.

The term *Upland cotton* means all cultivated varieties of the species *Gossypium hirsutum L.*

### § 1205.14 Department.

The term *Department* means the U.S. Department of Agriculture.

### § 1205.15 Farm Service Agency.

The term *Farm Service Agency*—formerly Agricultural Stabilization and Conservation Service (ASCS)—also referred to as "FSA," means the Farm Service Agency of the Department.

### § 1205.16 Order.

The term *Order* means the Cotton Research and Promotion Order.

### § 1205.17 Person.

The term *person* means any individual 18 years of age or older, or any partnership, corporation, association, or any other entity.

### § 1205.18 Producer.

The term *producer* means any person who shares in a cotton crop, or in the proceeds thereof, as an owner of the farm, cash tenant, landlord of a share tenant, share tenant, or sharecropper, that planted the cotton during the representative period.

[67 FR 21169, Apr. 30, 2002]

### § 1205.19 Importer.

The term *importer* means any person who enters, or withdraws from warehouse, cotton for consumption in the customs territory of the United States, and the term import means any such entry.

### § 1205.20 Representative period.

The term *representative period* means the 2006 calendar year.

[72 FR 51160, Sept. 6, 2007]

### § 1205.21 Secretary.

The term *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 to act in the Secretary's stead.

### § 1205.22 State.

The term *State* means each of the 50 states.

### § 1205.23 United States.

The term *United States* means the 50 states of the United States of America.

PROCEDURES

### § 1205.24 General.

A sign-up period will be conducted to determine whether eligible producers and importers favor the conduct of a referendum on the continuance of the 1991 amendments to the Order.

(a) If the Secretary determines, based on the results of the sign-up period, that at least 10 percent (4,622) or more of the number of cotton producers and importers who voted in the 1991 referendum request the conduct of a continuance referendum on the 1991 Order amendments, a referendum will be held within 12 months after the end of the sign-up period. Not more than 20 percent of the total requests counted toward the 10 percent figure may be from producers from any one state or from importers of cotton.

(b) If the Secretary determines that fewer than 10 percent (4,622) of the number of producers and importers who voted in the 1991 referendum do not favor a continuance referendum, no referendum will be held.

### § 1205.25 Supervision of sign-up period.

The Administrator shall be responsible for conducting the sign-up period in accordance with this subpart.

### § 1205.26 Eligibility.

Only persons who meet the eligibility requirements in this subpart may participate in the sign-up period. No person is entitled to sign up more than once.

(a) Except as set forth in paragraphs (b) and (c) of this section, the following persons are eligible to request the conduct of a continuance referendum:

(1) Any person who was engaged in the production of Upland cotton during calendar year 2006; and

(2) Any person who was an importer of Upland cotton and imported Upland cotton in excess of the value of $2.00 per line item entry during calendar year 2006.

(b) A general partnership is not eligible to request a continuance referendum, however, the individual partners of an eligible general partnership are each entitled to submit a request.

(c) Where a group of individuals is engaged in the production of Upland cotton under the same lease or cropping agreement, only the individual or individuals who signed or entered into the lease or cropping agreement are eligible to participate in the sign-up period. Individuals who are engaged in the production of Upland cotton as joint tenants, tenants in common, or owners of community property, are each entitled to submit a request if they share in the proceeds of the required crop as owners, cash tenants, share tenants, sharecroppers or landlords of a fixed rent, standing rent or share tenant.

(d) An officer or authorized representative of a qualified corporation, association, or limited partnership may submit a request on behalf of that corporation, association, or limited partnership.

(e) A guardian, administrator, executor, or trustee of any qualified estate or trust may submit a request on behalf of that estate or trust.

(f) An individual may not submit a request on behalf of another individual.

(g) Participation in the sign-up by proxy or power of attorney is not authorized.

[62 FR 1660, Jan. 13, 1997, as amended at 67 FR 21169, Apr. 30, 2002; 72 FR 51160, Sept. 6, 2007]

### § 1205.27 Participation in the sign-up period.

The sign-up period will be from September 4, 2007, through November 30, 2007. Those persons who favor the conduct of a continuance referendum and who wish to request that USDA conduct such a referendum may do so by submitting such request in accordance with this section. All requests must be received by the appropriate USDA office by November 30, 2007.

(a) Before the sign-up period begins, FSA shall establish a list of known, eligible, Upland cotton producers in the country that it serves during the representative period, and AMS shall also establish a list of known, eligible Upland cotton importers.

(b) Before the start of the sign-up period, AMS shall mail a request form to

each known, eligible, cotton importer. Importers who wish to request a referendum and who do not receive a request form in the mail by September 4, 2007, may particiapte in the sign-up period by submitting a signed, written request for a continuance referendum, along with a copy of a U.S. Customs and Border Protection form 7501 showing payment of a cotton assessment for calendar year 2006. Importers must submit their requests and supporting documents to USDA, FSA, DAFO, Attention: Rick Pinkston, P.O. Box 23103, Washington, DC 20026–3103. All requests and supporting documents must be received by November 30, 2007.

(c) Each person on the county FSA office lists may participate in the sign-up period. Eligible producers must date and sign their name on the "County FSA Office Sign-up Sheet." A person whose name does not appear on the county FSA office list may participate in the sign-up period.

Such person must be identified on FSA–578 during the representative period or provide documentation that demonstrates that the person was a cotton producer during the representative period. Cotton producers not listed on the FSA–578 shall submit at least one sales receipt for cotton they planted during the representative period. Cotton producers must make requests to the county FSA office where the producer's farm is located. If the producer's land is in more than one county, the producer shall make request at the county officer where FSA administratively maintains and processes the producer's farm records. It is the responsibility of the person to provide the information need by the county FSA office to determine eligibility. It is not the responsibility of the county FSA office to obtain this information. If any person whose name does not appear on the county FSA office list fails to provide at least one sales receipt for the cotton they produced during the representative period, the county FSA office shall determine that such person is ineligible to participate in the sign-up period, and shall note "ineligible" in the remarks section next to the person's name on the county FSA office sign-up sheet. In lieu of personally appearing at a county FSA office, eligible producers may request a sign-up form from the county FSA office where the producer's farm is located. If the producer's land is in more than one county, the producer shall make the request for the sign-up form at the county office where the FSA administratively maintains and processes the producer's farm records. Such request must be accompanied by a copy of at least one sales receipt for cotton they produced during the representative period. The appropriate FSA office must receive all completed forms and supporting documentation by November 30, 2007.

[72 FR 51161, Sept. 6, 2007]

### § 1205.28 Counting.

County FSA offices and FSA, Deputy Administrator for Field Operations (DAFO), shall begin counting requests no later than November 30, 2007. FSA shall determine the number of eligible persons who favor the conduct of a continuance referendum.

[62 FR 1660, Jan. 13, 1997, as amended at 67 FR 21170, Apr. 30, 2002; 72 FR 51161, Sept. 6, 2007]

### § 1205.29 Reporting results.

(a) Each county FSA office shall prepare and transmit to the state FSA office by December 7, 2007, a written report of the number of eligible producers who requested the conduct of a referendum, and the number of ineligible persons who made requests.

(b) DAFO shall prepare, by December 7, 2007, a written report of the number of eligible importers who requested the conduct of a referendum, and the number of ineligible persons who made requests.

(c) Each state FSA office shall, by December 7, 2007, forward all county reports to DAFO. By December 14, 2007, DAFO shall forward its report of the total number of eligible producers and importers that requested a continuance referendum, through the sign-up period, to the Deputy Administrator, Cotton Program, AMS, Stop 0224, 1400 Independence Ave., SW., Washington, DC 20250–0224.

[72 FR 51161, Sept. 6, 2007]

### § 1205.30 Instructions and forms.

The Administrator is hereby authorized to prescribe additional instructions and forms consistent with the provisions of this subpart to govern conduct of the sign-up period.

## Subpart—Procedures for the Conduct of Referenda in Connection With Cotton Research and Promotion Order

SOURCE: 74 FR 51070, Oct. 5, 2009, unless otherwise noted.

### § 1205.200 General.

Referenda for the purpose of ascertaining whether producers and importers favor the issuance, continuance, amendment, suspension, or termination of the Cotton Research and Promotion Order shall be conducted in accordance with this subpart.

### § 1205.201 Definitions.

(a) *Act* means the Cotton Research and Promotion Act, as amended (7 U.S.C. 2101–2118; Pub. L. 89–502, as amended).

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

(c) *Agricultural Marketing Service* also referred to as "AMS" means the Agricultural Marketing Service of the Department.

(d) *Cotton* means all Upland cotton harvested in the United States or imports of Upland cotton, including the Upland cotton content of the products derived thereof. The term *cotton* shall not, however, include any entry of imported cotton by an importer which has a value or weight less than the *de minimis* value established by the Secretary or industrial products as that term is defined by regulation.

(e) *Upland Cotton* means all cultivated varieties of the species *Gossypium hirsutum L.*

(f) *Department* means the U.S. Department of Agriculture.

(g) *Deputy Administrator* means the Deputy Administrator for Field Operations and also referred to as "DAFO."

(h) *Farm Service Agency* also referred to as "FSA" means the Farm Service Agency of the Department.

(i)(1) *Importer* means any person who enters, or withdraws from warehouse, cotton for consumption in the customs territory of the United States and who, during a 12-month period ending no later than 90 days prior to the conduct of the referendum, imported Upland cotton, and

(2) the term *import* means any such entry.

(j) *Order* means the Cotton Research and Promotion Order.

(k) *Person* means any individual 18 years of age or older, or any partnership, corporation, association, or any other entity.

(l) *Producer* means any person who shares in a cotton crop, or in the proceeds thereof, as an owner of the farm, cash tenant, landlord of a share tenant, share tenant, or sharecropper, that planted the cotton during the representative period.

(m) *Representative Period* means the period designated by the Secretary pursuant to section 8 of the Act (7 U.S.C. 2107).

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

(o) *State* means each of the 50 states.

(p) *United States* means 50 states of the United States of America.

(q) *Customs and Border Protection* means the U.S. Customs and Border Protection of the Department of Homeland Security. Customs and Border Protection is also referred to as "CBP."

### § 1205.202 Agencies through which a referendum shall be conducted.

(a) Agricultural Marketing Service. The Administrator shall:

(1) Determine the referendum period.

(2) Give producers and importers reasonable advance notice of the referendum

(i) by utilizing without advertising expense, available media of public information (including, but not being limited to, press and radio facilities) to announce the dates, places, or methods

of voting, and other pertinent information, and

(ii) by such other means as the Administrator may deem advisable.

(3) Provide ballots and related material to be used in the referendum to FSA. The ballots:

(i) shall provide for recording essential information for ascertaining whether the person voting is an eligible voter, and

(ii) may provide for recording the total amount of Upland cotton produced by the producer or the total amount of cotton imported by the importer during the appropriate representative period.

(4) Make available to producers through FSA county offices instructions on voting, an appropriate ballot and, except in the case of a referendum on the termination or suspension of an order, a summary of the terms and conditions of the order. The instructions on voting shall explain the method to be used in determining the amount of Upland cotton produced during the representative period and shall specify whether such amount is to be entered on the ballot by the voter, subject to the following terms and conditions:

(i) If a current production year for which harvesting has not been completed is designated as the representative period, the amount of Upland cotton produced shall be determined by the FSA county office on the basis of the acreage planted or in the case of approved prevented plantings under the disaster payment program, the acreage the person intended to plant up to the allotted acreage as determined by the FSA county office, and the established yield for FSA program payment purposes: *Provided,* That on farms for which an established yield has not been established, the county committee shall determine an established yield based on actual production records on the farm for the preceding three years, as adjusted for any abnormal conditions, if available; if not available, on the basis of yield on similar farms in the area.

(ii) On farms in which more than one eligible voter is engaged in production, the vote cast by each voter shall represent only the amount of Upland cotton that is the voter's share of the crop, or proceeds thereof.

(iii) If an eligible voter is engaged in production of Upland cotton on more than one farm, such voter is entitled to only one vote but any vote cast by such voter shall represent the total amount of Upland cotton that is that voter's share of the crop, or proceeds thereof, on all such farms: *Provided,* That only farms for which records are maintained by the FSA county office designated as the voter's polling place shall be considered unless the voter, prior to the expiration of the referendum period, establishes to the satisfaction of such county office the voter's share of the crop, or proceeds thereof, on an additional farm or farms.

(5) Make available to importers through FSA instructions on voting, an appropriate ballot and, except in the case of a referendum on the termination or suspension of an order, a summary of the terms and conditions of the order. The instructions on voting shall explain the appropriate method to be used in determining the amount of cotton imported during the representative period and specify whether such amount is to be entered on the ballot. If applicable, the following terms and conditions apply:

(i) For importer entities in which more than one importer is eligible to vote, the vote cast by each importer shall represent only the amount in weight or value of cotton imported by each eligible voter.

(ii) If an eligible importer is engaged in importation of cotton as more than one importer entity, such voter is entitled to only one vote but any vote cast by such voter shall represent the total amount in weight or value, of cotton in the voters share of cotton imported from each such importer entity: Provided, that only the importer entities for which records are maintained by CBP or other source determined by the Administrator shall be considered unless the voter, prior to the expiration of the referendum period, establishes to the satisfaction of the Administrator the voters share, in weight or value, of the imported cotton.

(b) *Farm Service Agency.* Except for the functions specified in paragraph (a)

of this section the Deputy Administrator shall be in charge of and responsible for conducting the referendum. Each FSA county office shall be in charge and responsible for conducting such referendum in its State. Each county office shall be responsible for the proper holding of such referendum in its county. It shall be the duty of each FSA county office to conduct each referendum in a fair, unbiased, and impartial manner in accordance with the regulations in this subpart.

**§ 1205.203 Voting eligibility.**

(a) *General eligibility requirements.* The following persons shall be eligible to vote in an announced referendum—

(1) each person who was engaged in the production of Upland cotton during the representative period; and

(2) each person who is an importer of Upland cotton and who, during a 12-month period ending no later than 90 days prior to the conduct of the referendum, imported Upland cotton.

(b) *Special eligibility requirements.* (1)(i) A person may qualify as an eligible voter by meeting the eligibility requirements, but no such person shall be entitled to more than one vote regardless of the number of importing entities or Upland cotton farms in which the person is interested or the number of communities, counties, or States in which are located farms in which such person is interested: *Provided, however,* That the individual members of a qualified partnership shall each have one vote, but the partnership as such shall not have a vote and an individual who qualifies as an eligible voter by reason of that individual's separate farming or importing operations will be entitled to one vote even though that person is interested in an entity such as (but not limited to) a corporation which is also eligible as a voter and entitled to one vote. A person who, as a guardian, administrator, executor, or trustee engages in the production of Upland cotton or importation of cotton will be eligible to vote in such a fiduciary capacity if, in such a capacity, that person qualifies as an eligible voter.

(ii) In such cases the person for whom he or she is acting in a fiduciary capacity will not be eligible to vote. An individual may, if otherwise eligible, cast a ballot in his or her individual capacity although that person may also cast a ballot as a guardian, administrator, executor, or trustee. An individual who holds more than one fiduciary position may vote as a fiduciary in each case in which that person is otherwise eligible, as for example, if an individual is administrator of estate X, he or she may cast a ballot as administrator of estate X, and if the same individual is administrator of estate Y, he or she may cast another ballot as administrator or estate Y.

(2) Where a group of several persons, such as a spouse or marital partner, and children, or unrelated individuals, are engaged in the production of Upland cotton under the same lease or cropping agreement, only the person or persons who signed or entered into the lease or cropping agreement shall be eligible to vote. In the event two or more persons are engaged in the production of Upland cotton as joint tenants, tenants in common, or owners of community property, each such person shall be entitled to one vote if otherwise qualified. For example, a husband or a wife is eligible to vote if he or she shares with his or her spouse in the proceeds of the required crop as an owner, cash tenant, share tenant, sharecropper or landlord of a fixed rent, standing rent or share tenant. Thus, if a husband and wife are tenants or sharecropper on a farm, jointly responsible under the rental or sharecropping agreement, both are eligible to vote. This is true whether the rental or sharecropping agreement is written, signed by both parties, or oral, provided both husband and wife made the oral agreement. A minor is not disqualified from voting solely because of minority if otherwise eligible and the minor is not less than 18 years of age.

(c) *Voting by proxy prohibited.* There shall be no voting by proxy or agent but a duly authorized officer of a corporation, association or their legal entity may cast its vote.

**§ 1205.204 Voting.**

(a) *Place of voting.* The FSA county office serving the county in which the producer's farm is located shall be the producer's polling place. For a person

not participating in an FSA program, the opportunity to vote in a referendum will be provided at the FSA county office serving the county where the person owns or rents land. If a person's operation is located in several counties, the voting office shall be determined based on the major portion of the operation's location. The U.S. Department of Agriculture, FSA, DAFO, P.O. Box 23704, Washington, DC 20026–3704 shall be the polling place for all cotton importers.

(b) *Register of eligible voters.* The FSA county office shall establish a register of known eligible producer voters prior to the referendum. AMS shall establish a register of known eligible importer voters prior to the referendum and provide the list to FAS.

(c) *Voting.* (1) For Upland producers to vote, eligible persons may obtain form CN–100 in-person, by mail or by facsimile from FSA county offices or through the Internet during the voting period. A completed and signed CN–100 and supporting documentation, such as a sales receipt or remittance form, must be returned to the appropriate FSA county office. Forms obtained via the Internet will be located at *http://www.ams.usda.gov/Cotton*. Upon request by Upland producers, ballots shall be mailed by FSA county offices.

(2) For cotton importers to vote, eligible persons may obtain form CN–100 in-person, by mail or by facsimile from USDA, FSA in Washington, D.C. or through the Internet during the voting period. In addition, before the referendum, USDA shall mail a request form to each known, eligible, cotton importer. A completed and signed CN–100 and supporting documentation of CBP Form 7501, must be returned USDA, FSA, DAFO, P.O. Box 23704, Washington, DC 20026–3704. Forms obtained via the Internet will be located at *http://www.ams.usda.gov/Cotton*.

(d) Returning ballot to polling place. Each person to whom a ballot is issued by Internet, mail, facsimile, or in-person shall only be allowed to vote in the referendum by completing and signing the ballot, placing it in an envelope, and delivering or mailing it to the appropriate polling place. In order to be eligible for tabulation, voted ballots must be received at the polling place during the period established for holding the referendum. A ballot shall be considered to have been received during the referendum period if:

(1) In the case of the ballot delivered to the polling place, it was received in the office prior to the close of the work day on the final day of the referendum period, or

(2) In the case of the mailed ballot, it was postmarked not later than midnight of the final day of the referendum period and was received in the polling place prior to the start of canvassing the ballots.

(e) *Placing ballots in ballot box.* Notwithstanding the fact that a ballot(s) may be later challenged by FSA county office or a representative of FSA, envelopes containing ballots received at the polling place during the referendum period shall remain unopened and shall be placed immediately in a ballot box provided by FSA for producers and importers. Such ballot box shall be arranged so that ballots cannot be read or moved without breaking the seal on the container.

### § 1205.205 Canvass of ballots.

(a) *Canvassing procedure.* Canvassing of returned ballots shall take place as soon as possible after the opening of the FSA offices on the fifth day following the close of the referendum period. Such canvassing shall be in the presence of at least one member of the FSA county office for producer ballots or an FSA representative for importer ballots and shall be open to the public. The canvassing and ballots shall be handled in such a manner so that no member of the public may see how any person voted in the referendum. The county office or FSA representative shall supervise the opening of the sealed ballot box, the opening of the envelopes containing the ballots and a determination as to:

(1) The number of eligible voters favoring the Order and where necessary, the amount of cotton represented by them,

(2) The number of eligible voters disapproving the Order and, where necessary, the amount of cotton represented by them.

(3) The number of ballots cast by voters found to be ineligible to vote in the referendum, and

(4) The number of spoiled ballots. The ballots determined to be spoiled or cast by ineligible voters shall not be considered as approving or disapproving the Order, and the persons who cast such ballots shall not be regarded as participating in the referendum.

(b) *Spoiled ballots*. A ballot shall be considered as a spoiled ballot if:

(1) It is mutilated or marked in such a way that it is not possible to determine with certainty how the ballot was intended to be counted, or

(2) It does not contain the signature of the voter, or the voter's properly witnessed mark.

(c) *Challenge of ballots*. A producer ballot may be challenged by the member of the FSA county office and the importer ballot may be challenged by the representative of FSA. Before a challenged ballot is either counted or declared invalid, a determination shall be made by the FSA county office or representative of FSA as to the eligibility of the voter to vote in the referendum.

### § 1205.206 Reporting results of referendum.

(a) Each FSA county office shall transmit a written county summary of ballots showing the results of the referendum in its county to its State office.

(b) Each State office shall transmit a written summary of the referendum results from the county offices within its State to DAFO, and DAFO will provide a copy to the AMS. AMS will make the results available for public inspection for a period of 5 years following the end of the referendum period.

(c) AMS shall prepare and submit to the Secretary a report as to the results of the referendum. The Secretary shall then publically proclaim the results of the referendum.

### § 1205.207 Challenge of correctness of county summary of ballots.

The FSA state offices shall make a prompt investigation and decision in case of any dispute or challenge regarding the correctness of the county summary of ballots in any county:*Provided*, That no dispute of challenge shall be investigated unless it is brought to the attention of the State FSA office within 3 days after receipt by the FSA State office of the county summary of ballots from such county.

### § 1205.208 Disposition of ballots and records.

The FSA county office shall seal the voted ballots, challenged ballots found to be ineligible, spoiled ballots, register sheets, and summary sheets for the county in one or more envelopes or packages, plainly marked with the identification of the referendum, the date and the names of the county and State, and place them under lock and key in a safe place under the custody of the FSA county office for a period of 45 days after the referendum period. If no notice to the contrary is received by the end of such time, and after the ballots and other records have been examined by a representative of the State FSA office, the voted ballots and challenged ballots shall be destroyed, but the registers and county summary sheets shall be filed for a period of 5 years in the office of the FSA county office.

### § 1205.209 Confidential information.

(a) The ballots cast or the manner in which any person voted and all information furnished to, compiled by, or in the possession of the referendum agent shall be regarded as confidential.

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

### § 1205.210 Additional instructions and forms.

AMS is hereby authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart for the use of State and County FSA offices in conducting a referendum. Such additional instructions may include procedures for FSA county and State offices to report and announce the results of the preliminary count of the votes in the county and the State.

## Subpart—Cotton Research and Promotion Order

SOURCE: 31 FR 16758, Dec. 31, 1966, unless otherwise noted.

DEFINITIONS

### § 1205.301 Secretary.

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

### § 1205.302 Act.

*Act* means the Cotton Research and Promotion Act, as amended (7 U.S.C. 2101–2118; Public Law 89–502, 80 Stat 279, as amended).

[56 FR 64472, Dec. 10, 1991]

### § 1205.303 Person.

*Person* means any individual, partnership, corporation, association, or any other entity.

### § 1205.304 Cotton.

*Cotton* means:

(a) All Upland cotton harvested in the United States, and, except as used in §§ 1205.311 and 1205.335, includes cottonseed of such cotton and the products derived from such cotton and its seed, and

(b) Imports of Upland cotton, including the Upland cotton content of the products derived thereof. The term "cotton" shall not, however, include:

(1) Any entry of imported cotton by an importer which has a value or weight less than a de minimis amount established in regulations issued by the Secretary and

(2) Industrial products as that term is defined by regulation.

[56 FR 64472, Dec. 10, 1991]

### § 1205.305 Upland cotton.

*Upland cotton* means all cultivated varieties of the species Gossypium hirsutum L.

[56 FR 64472, Dec. 10, 1991]

### § 1205.306 Bale.

Except as used in § 1205.322, *Bale* means the package of lint cotton produced at a cotton gin or the amount of processed cotton in a manufactured product that is equivalent to a 500 pound bale of lint cotton.

[56 FR 64472, Dec. 10, 1991]

### § 1205.307 Fiscal period.

*Fiscal period* is the 12-month budgetary period and means the calendar year unless the Cotton Board, with the approval of the Secretary, selects some other 12-months budgetary period.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.308 Cotton Board.

*Cotton Board* means the administrative body established pursuant to § 1205.318.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.309 Producer.

*Producer* means any person who shares in a cotton crop actually harvested on a farm, or in the proceeds thereof, as an owner of the farm, cash tenant, landlord of a share tenant, share tenant, or sharecropper.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.310 Importer.

*Importer* means many person who enters, or withdraws from warehouse, cotton for consumption in the customs territory of the United States, and the term *import* means any such entry.

[56 FR 64472, Dec. 10, 1991]

### § 1205.311 Handler.

*Handler* means any person who handles cotton, including the Commodity Credit Corporation.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.312 Handle.

*Handle* means to harvest, gin, warehouse, compress, purchase, market,

transport, or otherwise acquire ownership or control of cotton.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.313 United States.

*United States* means the 50 States of the United States of America.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.314 Cotton-producing State.

*Cotton-producing State* means each of the following States and combination of States: Alabama; Arizona; Arkansas; California-Nevada; Florida; Georgia; Kansas; Louisiana; Mississippi; Missouri-Illinois; New Mexico; North Carolina; Oklahoma; South Carolina; Tennessee-Kentucky; Texas; Virginia.

[75 FR 24374, May 5, 2010]

### § 1205.315 Marketing.

*Marketing* includes the sale of cotton or the pledging of cotton to the Commodity Credit Corporation as collateral for a price support loan.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.316 Cotton-Producer organization.

*Cotton-Producer organization* means any organization which has been certified by the Secretary pursuant to § 1205.341.

[56 FR 64472, Dec. 10, 1991]

### § 1205.317 Cotton-Importer organization.

*Cotton-Importer organization* means any organization which has been certified by the Secretary pursuant to § 1205.342.

[56 FR 64472, Dec. 10, 1991]

### § 1205.318 Contracting organization or association.

*Contracting organization or association* means the organization or association with which the Cotton Board has entered into a contract or agreement pursuant to § 1205.328(c).

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.319 Cotton-producing region.

*Cotton-producing region* means each of the following groups of cotton-producing States:

(a) Southeast Region: Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia;

(b) Midsouth Region: Arkansas, Louisiana, Mississippi, Missouri-Illinois, and Tennessee-Kentucky;

(c) Southwest Region: Kansas, Oklahoma and Texas;

(d) Western Region: Arizona, California-Nevada, and New Mexico.

[75 FR 24374, May 5, 2010]

### § 1205.320 Marketing year.

*Marketing year* means a consecutive 12-month period ending on July 31.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.321 Part and subpart.

*Part* means the cotton research and promotion order and all rules, regulations and supplemental orders issued pursuant to the act and the order, and the aforesaid order shall be a "subpart" of such part.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

## COTTON BOARD

### § 1205.322 Establishment and membership.

(a) There is hereby established a Cotton Board composed of:

(1) Representatives of cotton producers, each of whom shall have an alternate, selected by the Secretary from nominations submitted by eligible producer organizations within a cotton-producing state, as certified pursuant to § 1205.341, or, if the Secretary determines that a substantial number of producers are not members of or their interests are not represented by any such eligible organizations, from nominations made by producers in a manner authorized by the Secretary, and

(2) Representatives of cotton importers, each of whom shall have an alternate, selected by the Secretary from nominations submitted by eligible importer organizations, as certified pursuant to § 1205.342, or, if the Secretary determines that a substantial number

of importers are not members of or their interests are not represented by any such eligible organization, from nominations made by importers in a manner authorized by the Secretary.

(b) Representation on the Cotton Board shall be as follows:

(1) Each cotton-producing state shall have at least one member and an additional member for each 1 million bales or major fraction (more than half) thereof of cotton produced in the state and marketed above one million bales during the period specified in the regulations for determining Board membership; and

(2) Cotton importers shall be represented by an appropriate number of representatives, as determined by the Secretary, of importers of cotton subject to assessment during the period specified in the regulations for determining Board membership. That number shall not be less than two members. The initial importer representation on the Board shall consist of four representatives. The Secretary may, after consultation with organizations representing importers, reduce or increase the number of importer representatives, in the manner prescribed by the Secretary.

[56 FR 64472, Dec. 10, 1991]

### § 1205.323 Term of office.

All members of the Board and their alternatives shall serve for terms of three years. Each member and alternate shall continue to serve until a successor is selected and has qualified.

[56 FR 64472, Dec. 10, 1991]

### § 1205.324 Nominations.

All nominations authorized under § 1205.322 shall be made within such a period of time and in such a manner as the Secretary shall prescribe. The eligible producer organizations within each cotton-producing state, as certified pursuant to § 1205.341, shall caucus for the purpose of jointly nominating two qualified persons for each member and each alternate member to be selected to represent the cotton producers of such cotton-producing state. The eligible importer organizations, as certified pursuant to § 1205.342, shall caucus for the purpose of jointly nominating two qualified persons for each member and alternate member to be selected to represent cotton importers. If joint agreement is not reached with respect to the nominees for any such position, each such organization may nominate two qualified persons for any position on which there is no agreement.

[56 FR 64472, Dec. 10, 1991; 56 FR 66670, Dec. 24, 1991]

### § 1205.325 Selection.

From the nominations made pursuant to §§ 1205.322 and 1205.324, the Secretary shall select the members of the Board and an alternate for each member on the basis of representation provided for in §§ 1205.322 and 1205.323.

[56 FR 64473, Dec. 10, 1991]

### § 1205.326 Acceptance.

Any person selected by the Secretary as a member or as an alternate member of the Board shall qualify by filing a written acceptance with the Secretary promptly after being notified of such selection.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.327 Vacancies.

To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the Board to qualify, or in the event of death, removal, resignation or disqualification of any member or alternate member of the Board, a successor for the unexpired term of such member or alternate member of the Board shall be nominated and selected in the manner specified in §§ 1205.322, 1205.324 and 1205.325.

[56 FR 64473, Dec. 10, 1991]

### § 1205.328 Alternate members.

An alternate member of the Board, during the absence of the member for whom the person is the alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event of death, removal, resignation or disqualification of a member, the alternate for the member shall act for the member until a successor for such member is selected

and qualified. In the event that both a producer member of the Board and the member's alternate are unable to attend a meeting, the Board may designate any other alternate member from the same cotton-producing state or region to serve in such member's place and stead of such meeting. In the event that both an importer member and the member's alternate are unable to attend a meeting, the Board may designate any other importer alternate member to serve in such member's place and stead at such meeting.

[56 FR 64473, Dec. 10, 1991]

### § 1205.329 Procedure.

A majority of the members of the Board, or alternates acting for members, shall constitute a quorum and any action of the Board shall require the concurring votes of at least a majority of those present and voting. At assembled meetings all votes shall be cast in person. For routine and noncontroversial matters which do not require deliberation and the exchange of views, and in matters of an emergency nature when there is not enough time to call an assembled meeting of the Board, the Board may also take action upon the concurring votes of a majority of its members by mail, telegraph or telephone, but any such action by telephone shall be confirmed promptly in writing.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.330 Compensation and reimbursement.

The members of the Board, and alternates when acting as members, shall serve without compensation but shall be reimbursed for necessary expenses, as approved by the Board, incurred by them in the performance of their duties under this subpart.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.331 Powers.

The Board shall have the following powers:

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

(b) Subject to the approval of the Secretary, to make rules and regulations to effectuate the terms and provisions of this subpart including the designation of the handler, importer, or other person responsible for collecting the assessments authorized by § 1205.335, which designation may be of different handlers, importers, or other persons, or classes of handlers, importers, or other persons, to recognize differences in marketing practices or procedures in any state or area;

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

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

[31 FR 16758, Dec. 31, 1966, as amended at 42 FR 4813, Jan. 26, 1977. Redesignated and amended at 56 FR 64472, 64473, Dec. 10, 1991]

### § 1205.332 Duties.

The Board shall have the following duties:

(a) To select from among its members a chairman and such other officers as may be necessary for the conduct of its business, and to define their duties;

(b) To appoint or employ such persons as it may deem necessary and to determine the compensation and to define the duties of each;

(c) With the approval of the Secretary, to enter into contracts or agreements for the development and submission to it of research and promotion plans or projects authorized by § 1205.333, and for the carrying out of such plans or projects when approved by the Secretary, and for the payment of costs thereof with funds collected pursuant to § 1205.335, with an organization or association whose governing body consists of cotton producers selected by the cotton-producer organizations certified by the Secretary under § 1205.341, in such manner that the producers of each cotton-producing state will, to the extent practicable, have representation on the governing body of such organization in the proportion that the cotton marketed by the producers of such state bears to the total marketed by the producers of all cotton-producing states. Any such contract or agreement shall provide that

such contracting organization or association shall develop and submit annually to the Cotton Board, for the purpose of review and making recommendations to the Secretary, a program of research, advertising, and sales promotion projects, together with a budget, or budgets, which shall show the estimated cost to be incurred for such projects, and that any such projects shall become effective upon approval by the Secretary. Any such contract or agreement shall also provide that the contracting organization shall keep accurate records of all its transactions, which shall be available to the Secretary and Board on demand, and make an annual report to the Cotton Board of activities carried out and an accounting for funds received and expended, and such other reports as the Secretary may require;

(d) To review and submit to the Secretary any research and promotion plans or projects which have been developed and submitted to it by the contracting organization or association, together with its recommendations with respect to the approval thereof by the Secretary;

(e) To submit to the Secretary for his approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of advertising and promotion and research and development projects as estimated in the budget or budgets submitted to it by the contracting organization or association, with the Board's recommendations with respect thereto;

(f) To maintain such books and records and prepare and submit such reports from time to time to the Secretary as he may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(g) To cause its books to be audited by a competent public accountant at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit to the Secretary;

(h) To give the Secretary the same notice of meetings of the Board as is given to members in order that his representative may attend such meetings;

(i) To act as intermediary between the Secretary and any producer, importer, or handler.

(j) To submit to the Secretary such information as he may request.

[31 FR 16758, Dec. 31, 1966. Redesignated and amended at 56 FR 64472, 64473, Dec. 10, 1991]

RESEARCH AND PROMOTION

### § 1205.333 Research and promotion.

The Cotton Board shall in the manner prescribed in § 1205.332(c) establish or provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate plans or projects for the advertising and sales promotion of cotton and its products, which plans or projects shall be directed toward increasing the general demand for cotton or its products in accordance with section 6(a) of the act;

(b) The establishment and carrying on of research and development projects and studies with respect to the production, ginning, processing, distribution, or utilization of cotton and its products in accordance with section 6(b) of the act, to the end that the marketing and utilization of cotton may be encouraged, expanded, improved, or made more efficient.

[31 FR 16758, Dec. 31, 1966. Redesignated and amended at 56 FR 64472, 64473, Dec. 10, 1991]

EXPENSES AND ASSESSMENTS

### § 1205.334 Expenses.

(a) The Board is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart.

(b) The Board shall reimburse the Secretary for:

(1) Expenses up to $300,000 incurred by the Secretary in connection with any referendum conducted under the Act and

(2) Expenses incurred by the Department of Agriculture for administrative and supervisory costs up to five employee years annually.

(c) The Board shall reimburse any agency of the United States Government that assists in administering the import provisions of the order for a reasonable amount of the expenses incurred by that agency in connection therewith.

(d) The funds to cover such expenses incurred under paragraphs (a), (b) and (c) of this section shall be paid from assessments received pursuant to § 1205.335.

[42 FR 4813, Jan. 26, 1977. Redesignated and amended at 56 FR 64472, 64473, Dec. 10, 1991]

**§ 1205.335 Assessments.**

(a) Each cotton producer or other person for whom cotton is being handled shall pay to the handler thereof designated by the Cotton Board pursuant to regulations issued by the Secretary and such handler shall collect from the producer or other person for whom the cotton, including cotton owned by the handler, is being handled, and shall pay to the Cotton Board, at such times and in such manner as prescribed by regulations issued by the Secretary, assessments as prescribed in paragraphs (a) (1) and (2) of this section:

(1) An assessment at the rate of $1 per bale of cotton handled;

(2) A supplemental assessment on cotton handled which shall not exceed one percent of the value of such cotton as determined by the Cotton Board and approved by the Secretary and published in the Cotton Board rules and regulations. The rate of the supplemental assessment may be increased or decreased by the Cotton Board with the approval of the Secretary. The Secretary shall prescribe by regulation whether the assessment rate shall be levied on:

(i) The current value of the cotton, or

(ii) An average value determined from current and/or historical cotton prices and converted to a fixed amount for each bale.

(b) Each importer of cotton shall pay to the Cotton Board through the U.S. Customs Service, or in such other manner and at such times as prescribed by regulations issued by the Secretary, assessments as prescribed in paragraphs (b)(1) and (2) of this section:

(1) An assessment of $1 per bale of cotton imported or the bale equivalent thereof for cotton products.

(2) A supplemental assessment on each bale of cotton imported, or the bale equivalent thereof for cotton products, which shall not exceed one percent of the value of such cotton as determined by the Cotton Board and approved by the Secretary and published in the Cotton Board rules and regulations. The rate of the supplemental assessment on imported cotton shall be the same as that paid on cotton produced in the United States. The rate of the supplemental assessment may be increased or decreased by the Cotton Board with the approval of the Secretary. The Secretary shall prescribe by regulation the value of imported cotton based on an average of current and/or historical cotton prices.

(c) The Secretary may designate by regulation exemptions to assessments provided for in this section for the following:

(1) Entries of products designated by specific Harmonized Tariff Schedule numbers which the Secretary determines are composed of U.S. cotton or other than Upland cotton, and for;

(2) Cotton contained in entries of imported cotton and cotton products that is U.S. produced cotton or is other than Upland cotton.

(d) Assessments collected under this section are to be used for such expenses and expenditures, including provision for a reasonable reserve, as the Secretary finds reasonable and likely to be incurred by the Cotton Board and the Secretary under this subpart.

[56 FR 64473, Dec. 10, 1991]

**§ 1205.336 "Importer Reimbursements".**

Any cotton importer against whose imports any assessment is made and collected under the authority of the Act who has reason to believe that such assessment or any portion of such assessment was made on U.S. produced cotton or cotton other than Upland cotton shall have the right to demand and receive from the Cotton Board a reimbursement of the assessment or portion of the assessment upon submission of proof satisfactory to the Board that the importer paid the assessment and that the cotton was produced in

the U.S. or is other than Upland cotton. Any such demand shall be made by the importer in accordance with regulations and on a form and within a time period prescribed by the Board and approved by the Secretary. Such time periods shall provide the importer at least 90 days from the date of collection to submit the reimbursement form to the Board. Any such reimbursement shall be made within 60 days after demand therefor.

[56 FR 64474, Dec. 10, 1991]

### § 1205.337 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this subpart.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

REPORTS, BOOKS, AND RECORDS

### § 1205.338 Reports.

Each handler and importer subject to this subpart and importers of de minimis amounts of cotton may be required to report to the Cotton Board periodically such information as is required by regulations, which may include but not be limited to the following:

(a) Number of bales handled or imported;

(b) Number of bales on which an assessment was collected;

(c) Name and address of person from whom the handler has collected the assessments on each bale handled or imported;

(d) Date collection was made on each bale handled or imported.

[56 FR 64474, Dec. 10, 1991]

### § 1205.339 Books and records.

Each handler and importer subject to this subpart and importers of de minimis amounts of cotton shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the marketing year of their applicability.

[56 FR 64474, Dec. 10, 1991]

### § 1205.340 Confidential treatment.

All information obtained from such books, records or reports shall be kept confidential by all officers and employees of the Department of Agriculture and of the Cotton Board, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this § 1205.340 shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of a number of handlers or importers subject to this subpart or importers of de minimis amounts of cotton, which statements do not identify the information furnished by any person, or

(b) The publication by the direction of the Secretary, of the name of any person violating this subpart, together with a statement of the particular provisions of this subpart violated by such person.

[56 FR 64474, Dec. 10, 1991]

CERTIFICATION OF COTTON PRODUCER ORGANIZATION

### § 1205.341 Certification of cotton producer organization.

Any cotton producer organization within a cotton-producing State may request the Secretary for certification of eligibility to participate in nominating members and alternate members to represent such State on the Cotton Board. Such eligibility shall be based in addition to other available information upon a factual report submitted by the organization which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(a) Geographic territory within the State covered by the organization's active membership;

(b) Nature and size of the organization's active membership in the State, proportion of total of such active membership accounted for by farmers, a map showing the cotton-producing counties in such State in which the organization has members, the volume of cotton produced in each such county, the number of cotton producers in each such county, and the size of the organization's active cotton producer membership in each such county;

(c) The extent to which the cotton producer membership of such organization is represented in setting the organization's policies;

(d) Evidence of stability and permanency of the organization;

(e) Sources from which the organization's operating funds are derived;

(f) Functions of the organization; and

(g) The organization's ability and willingness to further the aims and objectives of the act.

The primary consideration in determining the eligibility of an organization shall be whether its cotton producer membership consists of a sufficiently large number of cotton producers who produce a relatively significant volume of cotton to reasonably warrant its participation in the nomination of members for the Cotton Board. Any cotton producer organization found eligible by the Secretary under this § 1205.341 will be certified by the Secretary, and the Secretary's determination as to eligibility is final.

[31 FR 16758, Dec. 31, 1966. Redesignated and amended at 56 FR 64472, 64474, Dec. 10, 1991]

### § 1205.342 Certification of cotton importer organizations.

Any importer organization may request the Secretary for certification of eligibility to participate in nominating members and alternate members to represent cotton importers on the Cotton Board. Such eligibility shall be based, in addition to other available information, upon a factual report submitted by the organization which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(a) Nature and size of organization's active membership, proportion of total active membership accounted for by cotton importers and the total amount of cotton imported by the organization's cotton importer members;

(b) The extent to which the cotton importer membership of such organization is represented in setting the organization's policies;

(c) Evidence of stability and permanency of the organization;

(d) Sources from which the organization's operating funds are derived;

(e) Functions of the organization; and

(f) The organization's ability and willingness to further the aims and objectives of the Act.

The primary consideration in determining the eligibility of an organization shall be whether its membership consist of a sufficient large number of cotton importers who import a relatively significant volume of cotton to reasonably warrant its participation in the nomination of members for the Cotton Board. Any importer organization found eligible by the Secretary under this § 1205.342 will be certified by the Secretary, and the Secretary's determination as to eligibility is final.

[56 FR 64475, Dec. 10, 1991]

## MISCELLANEOUS

### § 1205.343 Suspension and termination.

(a) The Secretary will, whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, terminate or suspend the operation of this subpart or such provision.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of 10 percent or more of the number of cotton producers and importers (if subject to the Order) voting in the most recent referendum, to determine whether cotton producers and importers subject to the Order favor the suspension or termination of this subpart, except that in counting such request for a referendum, not more than 20 percent of such request may be from producers from any one state or importers of cotton (if subject to the Order). The Secretary shall suspend or terminate such subpart at the end of the marketing

year whenever the Secretary determines that its suspension or termination is approved or favored by a majority of producers and importers subject to the Order voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of cotton, and who produced and imported more than 50 percent of the volume of cotton produced and imported by those voting in the referendum.

[56 FR 64474, Dec. 10, 1991]

### § 1205.345 Proceedings after termination.

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

(b) The said trustees shall—

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

(2) Carry out the obligations of the Cotton Board under any contracts or agreements entered into by it pursuant to § 1205.332 (c);

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

(4) Upon request of the Secretary execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all funds, property and claims vested in the Board or the trustees pursuant to this § 1205.345.

(c) Any person to whom funds, property or claims have been transferred or delivered pursuant to this § 1205.345 shall be subject to the same obligation imposed upon the Cotton 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 practicable, in the interest of continuing one or more of the cotton research or promotion programs hitherto authorized.

[31 FR 16758, Dec. 31, 1966. Redesignated and amended at 56 FR 64472, 64475, Dec. 10, 1991]

### § 1205.346 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, or (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 person, with respect to any such violation.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.347 Personal liability.

No member or alternate member of the Cotton 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 alternate, except for acts of dishonesty or willful misconduct.

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

### § 1205.348 Separability.

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

[31 FR 16758, Dec. 31, 1966. Redesignated at 56 FR 64472, Dec. 10, 1991]

## Subpart—Members of Cotton Board

### § 1205.401 Definitions.

(a) *Cotton Division*. *Cotton Division* means the Cotton Division of the Agricultural Marketing Service of the U.S. Department of Agriculture.

(b) *Director*. *Director* means the Director of the Cotton Division.

[32 FR 1084, Jan. 31, 1967, as amended at 41 FR 37092, Sept. 2, 1976]

### § 1205.402 Determination of Cotton Board membership.

(a) In determining whether any cotton-producing state is entitled to be represented by more than one member of the Cotton Board as provided in § 1205.322, average annual production of Upland cotton in terms of 480-pound net weight bales for the five most recent marketing years will be used as the criteria for determination of such additional members.

(b) In determining whether importers of cotton and cotton-containing products are entitled to be represented by more than a minimum of two members on the Cotton Board as provided in § 1205.322, the average annual volume of imported cotton and the cotton content of imported products on which assessments have been collected will be used as the criteria for determination of such additional members. This volume of cotton will be expressed in terms of 480-pound net weight bales for the five most recent calendar years. The initial importer representation on the Board shall consist of four importer representatives.

(c) All members appointed from a state will be entitled to serve a full three-year term even though it is determined in a subsequent year that a state should have fewer additional members by using the average production of the five most recent marketing years as specified in paragraph (a) of this section.

(d) All members appointed to represent importers will be entitled to serve a full three-year term even though it is determined in a subsequent year that importers should be represented by fewer additional members by using the average volume of imports of cotton and the cotton content of products on which assessments have been collected as specified in paragraph (b) of this section.

(e) Each year the Director shall:

(1) Based on the average annual production of Upland cotton in terms of 480-pound net weight bales for the five most recent marketing years, notify all certified cotton producer organizations in each cotton-producing state of the number of vacancies to be filled by cotton producers on the Cotton Board; and

(2) Based on the average annual volume of imports of cotton and the cotton content of cotton-containing products on which assessments as provided for in § 1205.335 have been collected in terms of 480-pound net weight bales for the five most recent calendar years, notify all certified cotton importer organizations of the number of vacancies to be filled by cotton importers on the Cotton Board.

[56 FR 65980, Dec. 20, 1991]

### § 1205.403 Nomination procedure.

(a) The Director shall notify all certified producer organizations within each cotton-producing state and all certified importer organizations of the location, date, and time of the caucus for nominating producer and importer representatives for the Cotton Board as specified in § 1205.324. The Director will designate a representative from the Cotton Division to attend the caucus meeting of cotton producer organizations in each state, and of cotton importer organizations. Each eligible cotton producer organization within each cotton-producing state and each importer organization will be entitled to only one representative at the caucus for the purpose of nominating two qualified persons for each member and for each alternate member to be selected. The representative of a cotton producer organization shall be a cotton producer and resident of such state, an officer or member of the Board of Directors of such organization, and duly and unqualifiedly authorized in writing by such organization to make nominations on its behalf. The representative of an importer organization shall be an importer of cotton and/or products containing cotton, an officer or member of

the Board of Directors of such organization, and duly and unqualifiedly authorized in writing by such organization to make nominations on its behalf. The representative of the Director designated to attend the caucus meeting of cotton producer organizations in each state and of cotton importer organizations will ascertain the qualifications and eligibility of each representative of a cotton producer organization or cotton importer organization to participate in said meeting and to make nominations.

(b) Each caucus will be conducted as follows:

(1) The representative from the Cotton Division will act as temporary chairperson and will explain the procedure for nominations and the duties of the Cotton Board;

(2) The representatives in attendance from the certified organizations will then select a chairperson and secretary;

(3) At each caucus there will be presented for nomination and there will be nominated not less than the number of nominees required under the provisions of §§ 1205.322, 1205.324, and 1205.402.

[56 FR 65981, Dec. 20, 1991]

## Subpart—Cotton Board Rules and Regulations

SOURCE: 42 FR 35974, July 13, 1977, unless otherwise noted.

DEFINITIONS

### § 1205.500 Terms defined.

As used throughout this subpart, unless the context otherwise requires, the following terms shall mean:

(a) *ASCS* means the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture.

(b) *Cotton Board* means the administrative body established pursuant to the Cotton Research and Promotion Order.

(c) *CCC* means the Commodity Credit Corporation.

(d) *Current value of Cotton* means the gross price per pound of lint cotton received by the producer for cotton as shown on the producers' settlement document before deductions are made for weight penalties, buyer's commission or brokerage fees, marketing fees, the $1 per bale cotton research and promotion assessment, picking charges, ginning charges, warehouse receiving charges, warehouse storage charges, transportation charges or any other charges, plus any amount received by a producer in the form of a loan deficiency payment with respect to such cotton.

(e) *Form A* means Cotton Producer's Note, Form CCC Cotton A.

(f) *Gin code number* means the identification number assigned to each cotton gin by the Cotton Division, Agricultural Marketing Service, U.S. Department of Agriculture.

(g) *Handle* means to harvest, gin, warehouse, compress, purchase, market, transport, or otherwise acquire ownership or control of cotton.

(h) *Handler* means any person who handles cotton, including CCC.

(i) *Marketing* means any sale of cotton, or the pledging of cotton to CCC as collateral for a price support loan.

(j) *Marketing year* means a consecutive 12-month period ending on July 31.

(k) *Person* means any individual, partnership, corporation, association, or any other entity, whether governmental or private.

(l) *Producer* means any person who owns or shares in a cotton crop (or in the proceeds thereof) as landowner, landlord, tenant, or sharecropper.

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

(n) *Loan deficiency payment* means any payment on Upland cotton made by the Commodity Credit Corporation to a producer in accordance with 7 CFR 713.55.

(o) *Importer* means any person who enters, or withdraws from warehouse, cotton for consumption in the customs territory of the United States and *import* means any such entry.

(p) *Customs Service* means the United States Customs Service of the United States Department of Treasury.

(q) *Cotton* means:

(1) All Upland cotton harvested in the United States, and, except as used in section 7(e) of the Act, includes cottonseed of such cotton and the products derived from such cotton and its seed, and

(2) Imports of Upland cotton, including the Upland cotton content of the products derived thereof. The term *cotton* shall not, however, include:

(i) Any entry of imported cotton by an importer which has a value or weight less than a de minimis amount established in regulations issued by the Secretary and

(ii) Industrial products as that term is defined by regulation.

(r) *Industrial products* means cotton-containing products which are classified in the Harmonized Tariff Schedule of the United States under classifications other than textile classifications. Certain cotton-containing textile products under textile classifications shall also be considered to be industrial products, and are therefore not included in the table appearing in these regulations as products subject to assessment. Such products include, but are not limited to textile fabrics coated, impregnated, covered, or laminated, with other materials, textile piping and tubing, and belting materials.

[42 FR 35974, July 13, 1977, as amended at 50 FR 10932, Mar. 19, 1985; 51 FR 6098, Feb. 20, 1986; 51 FR 37705, Oct. 24, 1986; 57 FR 29185, July 1, 1992]

GENERAL

### § 1205.505 Communication.

All reports, requests, applications for reimbursements, and communications in connection with the Cotton Research and Promotion Order shall be addressed as follows: Cotton Board, Post Office Box 2121, Memphis, Tennessee, 38101–2121.

[57 FR 29186, July 1, 1992]

ASSESSMENTS

### § 1205.510 Levy of assessments.

(a) *Producer assessments*. An assessment of $1 per bale for cotton research and promotion is hereby levied on each bale of Upland cotton that is produced from cotton harvested and ginned except cotton consumed by any governmental agency from its own production. Such assessment shall be payable and collected only once on each bale.

(1) A supplemental assessment for cotton research and promotion in addition to the $1 per bale assessment provided for in paragraph (a) of this section, is hereby levied on each bale of Upland cotton harvested and ginned except cotton consumed by any governmental agency from its own production. The supplemental assessment rate shall be levied at the rate of five-tenths of one percent of:

(i) The current value of the cotton multiplied by the number of pounds of lint cotton or;

(ii) The current value of the cotton converted to a fixed amount per bale as reflected in the following assessment chart:

ASSESSMENT CHART [1]

| Current value (cents per pound) | Supplemental Assessment, dollars per bale |
|---|---|
| .00 to 9.99 | 0.15 |
| 10.00 to 19.99 | .40 |
| 20.00 to 29.99 | .65 |
| 30.00 to 39.99 | .90 |
| 40.00 to 49.99 | 1.15 |
| 50.00 to 59.99 | 1.40 |
| 60.00 to 69.99 | 1.65 |
| 70.00 to 79.99 | 1.90 |
| 80.00 to 89.99 | 2.15 |
| 90.00 to 99.99 | 2.40 |
| 100.00 to 109.99 | 2.65 |
| 110.00 to 119.99 | 2.90 |

[1] Assessment is calculated on 5/10 of 1 percent of the midpoint of each 10¢ increment, based on a 500 lb. bale and converted to a fixed amount per bale.

(2) Each marketing year the collecting handler must select one of the two options for collecting the supplemental assessment as provided in paragraph (a)(1) of this section. The handler shall notify the Cotton Board as to the method selected at the time the handler files the first handler report each marketing year.

(b) *Importer assessment*. An assessment for cotton research and promotion of $1 per bale is hereby levied on each bale of cotton, or the bale equivalent thereof for cotton in cotton-containing products identified in the HTS conversion factor table in paragraph (b)(3) of this section and imported into the United States on or

after July 31, 1992. The $1 per bale assessment shall be converted to a fixed amount per kilogram to facilitate the U.S. Customs Service in collecting this assessment.

(1) A supplemental assessment for cotton research and promotion in addition to the $1 per bale assessment provided for in paragraph (b) of this section is hereby levied on each bale of cotton or bale equivalent of cotton in cotton-containing products, identified in this subpart, imported into the United States on or after July 31, 1992. The supplemental assessment shall be levied at the rate of five-tenths of one percent of the historical value of cotton as determined by the Secretary and expressed in paragraph (b)(2) of this section. The rate of the supplemental assessment on imported cotton will be the same as that levied on cotton produced within the United States. The supplemental assessment will be calculated as a fixed amount per kilogram and added to the $1 per bale or bale equivalent assessment to facilitate the Customs Service in collecting assessments.

(2) The 12-month average of monthly weighted average prices received by U.S. farmers will be calculated annually. Such weighted average will be used as the value of imported cotton for the purpose of levying the supplemental assessment on imported cotton and will be expressed in kilograms. The value of imported cotton for the purpose of levying this supplemental assessment is $1.0880 cents per kilogram.

(3) The following table contains Harmonized Tariff Schedule (HTS) classification numbers and corresponding conversion factors and assessments. The left column of the following table indicates the HTS classifications of imported cotton and cotton-containing products subject to assessment. The center column indicates the conversion factor for determining the raw fiber content for each kilogram of the HTS. HTS numbers for raw cotton have no conversion factor in the table. The right column indicates the total assessment per kilogram of the article assessed.

(i) Any line item entry of cotton appearing on Customs entry documentation in which the value of the cotton contained therein results in the calculation of an assessment of two dollars ($2.00) or less will not be subject to assessments as described in this section.

(ii) In the event that any HTS number subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the physical properties, description, or cotton content of the product involved, assessments will continue to be collected based on the new number.

IMPORT ASSESSMENT TABLE

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 5201000500 | 0 | 1.0880 |
| 5201001200 | 0 | 1.0880 |
| 5201001400 | 0 | 1.0880 |
| 5201001800 | 0 | 1.0880 |
| 5201002200 | 0 | 1.0880 |
| 5201002400 | 0 | 1.0880 |
| 5201002800 | 0 | 1.0880 |
| 5201003400 | 0 | 1.0880 |
| 5201003800 | 0 | 1.0880 |
| 5204110000 | 1.1111 | 1.2089 |
| 5204200000 | 1.1111 | 1.2089 |
| 5205111000 | 1.1111 | 1.2089 |
| 5205112000 | 1.1111 | 1.2089 |
| 5205121000 | 1.1111 | 1.2089 |
| 5205122000 | 1.1111 | 1.2089 |
| 5205131000 | 1.1111 | 1.2089 |
| 5205132000 | 1.1111 | 1.2089 |
| 5205141000 | 1.1111 | 1.2089 |
| 5205210020 | 1.1111 | 1.2089 |
| 5205210090 | 1.1111 | 1.2089 |
| 5205220020 | 1.1111 | 1.2089 |
| 5205220090 | 1.1111 | 1.2089 |
| 5205230020 | 1.1111 | 1.2089 |
| 5205230090 | 1.1111 | 1.2089 |
| 5205240020 | 1.1111 | 1.2089 |
| 5205240090 | 1.1111 | 1.2089 |
| 5205310000 | 1.1111 | 1.2089 |
| 5205320000 | 1.1111 | 1.2089 |
| 5205330000 | 1.1111 | 1.2089 |
| 5205340000 | 1.1111 | 1.2089 |
| 5205410020 | 1.1111 | 1.2089 |
| 5205410090 | 1.1111 | 1.2089 |
| 5205420021 | 1.1111 | 1.2089 |
| 5205420090 | 1.1111 | 1.2089 |
| 5205440021 | 1.1111 | 1.2089 |
| 5205440090 | 1.1111 | 1.2089 |
| 5206120000 | 0.5556 | 0.6045 |
| 5206130000 | 0.5556 | 0.6045 |
| 5206140000 | 0.5556 | 0.6045 |
| 5206220000 | 0.5556 | 0.6045 |
| 5206230000 | 0.5556 | 0.6045 |
| 5206240000 | 0.5556 | 0.6045 |
| 5206310000 | 0.5556 | 0.6045 |
| 5207100000 | 1.1111 | 1.2089 |
| 5207900000 | 0.5556 | 0.6045 |
| 5208112020 | 1.1455 | 1.2463 |
| 5208112040 | 1.1455 | 1.2463 |
| 5208112090 | 1.1455 | 1.2463 |
| 5208114020 | 1.1455 | 1.2463 |
| 5208114060 | 1.1455 | 1.2463 |
| 5208114090 | 1.1455 | 1.2463 |
| 5208118090 | 1.1455 | 1.2463 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 5208124020 | 1.1455 | 1.2463 |
| 5208124040 | 1.1455 | 1.2463 |
| 5208124090 | 1.1455 | 1.2463 |
| 5208126020 | 1.1455 | 1.2463 |
| 5208126040 | 1.1455 | 1.2463 |
| 5208126060 | 1.1455 | 1.2463 |
| 5208126090 | 1.1455 | 1.2463 |
| 5208128020 | 1.1455 | 1.2463 |
| 5208128090 | 1.1455 | 1.2463 |
| 5208130000 | 1.1455 | 1.2463 |
| 5208192020 | 1.1455 | 1.2463 |
| 5208192090 | 1.1455 | 1.2463 |
| 5208194020 | 1.1455 | 1.2463 |
| 5208194090 | 1.1455 | 1.2463 |
| 5208196020 | 1.1455 | 1.2463 |
| 5208196090 | 1.1455 | 1.2463 |
| 5208224040 | 1.1455 | 1.2463 |
| 5208224090 | 1.1455 | 1.2463 |
| 5208226020 | 1.1455 | 1.2463 |
| 5208226060 | 1.1455 | 1.2463 |
| 5208228020 | 1.1455 | 1.2463 |
| 5208230000 | 1.1455 | 1.2463 |
| 5208292020 | 1.1455 | 1.2463 |
| 5208292090 | 1.1455 | 1.2463 |
| 5208294090 | 1.1455 | 1.2463 |
| 5208296090 | 1.1455 | 1.2463 |
| 5208298020 | 1.1455 | 1.2463 |
| 5208312000 | 1.1455 | 1.2463 |
| 5208321000 | 1.1455 | 1.2463 |
| 5208323020 | 1.1455 | 1.2463 |
| 5208323040 | 1.1455 | 1.2463 |
| 5208323090 | 1.1455 | 1.2463 |
| 5208324020 | 1.1455 | 1.2463 |
| 5208324040 | 1.1455 | 1.2463 |
| 5208325020 | 1.1455 | 1.2463 |
| 5208330000 | 1.1455 | 1.2463 |
| 5208392020 | 1.1455 | 1.2463 |
| 5208392090 | 1.1455 | 1.2463 |
| 5208394090 | 1.1455 | 1.2463 |
| 5208396090 | 1.1455 | 1.2463 |
| 5208398020 | 1.1455 | 1.2463 |
| 5208412000 | 1.1455 | 1.2463 |
| 5208416000 | 1.1455 | 1.2463 |
| 5208418000 | 1.1455 | 1.2463 |
| 5208421000 | 1.1455 | 1.2463 |
| 5208423000 | 1.1455 | 1.2463 |
| 5208424000 | 1.1455 | 1.2463 |
| 5208425000 | 1.1455 | 1.2463 |
| 5208430000 | 1.1455 | 1.2463 |
| 5208492000 | 1.1455 | 1.2463 |
| 5208494020 | 1.1455 | 1.2463 |
| 5208494090 | 1.1455 | 1.2463 |
| 5208496010 | 1.1455 | 1.2463 |
| 5208496090 | 1.1455 | 1.2463 |
| 5208498090 | 1.1455 | 1.2463 |
| 5208512000 | 1.1455 | 1.2463 |
| 5208516060 | 1.1455 | 1.2463 |
| 5208518090 | 1.1455 | 1.2463 |
| 5208523020 | 1.1455 | 1.2463 |
| 5208523045 | 1.1455 | 1.2463 |
| 5208523090 | 1.1455 | 1.2463 |
| 5208524020 | 1.1455 | 1.2463 |
| 5208524045 | 1.1455 | 1.2463 |
| 5208524065 | 1.1455 | 1.2463 |
| 5208525020 | 1.1455 | 1.2463 |
| 5208591000 | 1.1455 | 1.2463 |
| 5208592025 | 1.1455 | 1.2463 |
| 5208592095 | 1.1455 | 1.2463 |
| 5208594090 | 1.1455 | 1.2463 |
| 5208596090 | 1.1455 | 1.2463 |
| 5209110020 | 1.1455 | 1.2463 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 5209110035 | 1.1455 | 1.2463 |
| 5209110090 | 1.1455 | 1.2463 |
| 5209120020 | 1.1455 | 1.2463 |
| 5209120040 | 1.1455 | 1.2463 |
| 5209190020 | 1.1455 | 1.2463 |
| 5209190040 | 1.1455 | 1.2463 |
| 5209190060 | 1.1455 | 1.2463 |
| 5209190090 | 1.1455 | 1.2463 |
| 5209210090 | 1.1455 | 1.2463 |
| 5209220020 | 1.1455 | 1.2463 |
| 5209220040 | 1.1455 | 1.2463 |
| 5209290040 | 1.1455 | 1.2463 |
| 5209290090 | 1.1455 | 1.2463 |
| 5209313000 | 1.1455 | 1.2463 |
| 5209316020 | 1.1455 | 1.2463 |
| 5209316035 | 1.1455 | 1.2463 |
| 5209316050 | 1.1455 | 1.2463 |
| 5209316090 | 1.1455 | 1.2463 |
| 5209320020 | 1.1455 | 1.2463 |
| 5209320040 | 1.1455 | 1.2463 |
| 5209390020 | 1.1455 | 1.2463 |
| 5209390040 | 1.1455 | 1.2463 |
| 5209390060 | 1.1455 | 1.2463 |
| 5209390080 | 1.1455 | 1.2463 |
| 5209390090 | 1.1455 | 1.2463 |
| 5209413000 | 1.1455 | 1.2463 |
| 5209416020 | 1.1455 | 1.2463 |
| 5209416040 | 1.1455 | 1.2463 |
| 5209420020 | 1.0309 | 1.1216 |
| 5209420040 | 1.0309 | 1.1216 |
| 5209430030 | 1.1455 | 1.2463 |
| 5209430050 | 1.1455 | 1.2463 |
| 5209490020 | 1.1455 | 1.2463 |
| 5209490090 | 1.1455 | 1.2463 |
| 5209516035 | 1.1455 | 1.2463 |
| 5209516050 | 1.1455 | 1.2463 |
| 5209520020 | 1.1455 | 1.2463 |
| 5209590025 | 1.1455 | 1.2463 |
| 5209590040 | 1.1455 | 1.2463 |
| 5209590090 | 1.1455 | 1.2463 |
| 5210114020 | 0.6873 | 0.7478 |
| 5210114040 | 0.6873 | 0.7478 |
| 5210116020 | 0.6873 | 0.7478 |
| 5210116040 | 0.6873 | 0.7478 |
| 5210116060 | 0.6873 | 0.7478 |
| 5210118020 | 0.6873 | 0.7478 |
| 5210191000 | 0.6873 | 0.7478 |
| 5210192090 | 0.6873 | 0.7478 |
| 5210214040 | 0.6873 | 0.7478 |
| 5210216020 | 0.6873 | 0.7478 |
| 5210216060 | 0.6873 | 0.7478 |
| 5210218020 | 0.6873 | 0.7478 |
| 5210314020 | 0.6873 | 0.7478 |
| 5210314040 | 0.6873 | 0.7478 |
| 5210316020 | 0.6873 | 0.7478 |
| 5210318020 | 0.6873 | 0.7478 |
| 5210414000 | 0.6873 | 0.7478 |
| 5210416000 | 0.6873 | 0.7478 |
| 5210418000 | 0.6873 | 0.7478 |
| 5210498090 | 0.6873 | 0.7478 |
| 5210514040 | 0.6873 | 0.7478 |
| 5210516020 | 0.6873 | 0.7478 |
| 5210516040 | 0.6873 | 0.7478 |
| 5210516060 | 0.6873 | 0.7478 |
| 5211110090 | 0.6873 | 0.7478 |
| 5211120020 | 0.6873 | 0.7478 |
| 5211190020 | 0.6873 | 0.7478 |
| 5211190060 | 0.6873 | 0.7478 |
| 5211202125 | 0.6873 | 0.7478 |
| 5211202135 | 0.4165 | 0.4532 |
| 5211202150 | 0.6873 | 0.7478 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 5211202990 | 0.6873 | 0.7478 |
| 5211320020 | 0.6873 | 0.7478 |
| 5211390040 | 0.6873 | 0.7478 |
| 5211390060 | 0.6873 | 0.7478 |
| 5211490020 | 0.6873 | 0.7478 |
| 5211490090 | 0.6873 | 0.7478 |
| 5211590025 | 0.6873 | 0.7478 |
| 5212146090 | 0.9164 | 0.9970 |
| 5212156020 | 0.9164 | 0.9970 |
| 5212216090 | 0.9164 | 0.9970 |
| 5509530030 | 0.5556 | 0.6045 |
| 5509530060 | 0.5556 | 0.6045 |
| 5513110020 | 0.4009 | 0.4362 |
| 5513110040 | 0.4009 | 0.4362 |
| 5513110060 | 0.4009 | 0.4362 |
| 5513110090 | 0.4009 | 0.4362 |
| 5513120000 | 0.4009 | 0.4362 |
| 5513130020 | 0.4009 | 0.4362 |
| 5513210020 | 0.4009 | 0.4362 |
| 5513310000 | 0.4009 | 0.4362 |
| 5514120020 | 0.4009 | 0.4362 |
| 5516420060 | 0.4009 | 0.4362 |
| 5516910060 | 0.4009 | 0.4362 |
| 5516930090 | 0.4009 | 0.4362 |
| 5601210010 | 1.1455 | 1.2463 |
| 5601210090 | 1.1455 | 1.2463 |
| 5601300000 | 1.1455 | 1.2463 |
| 5602109090 | 0.5727 | 0.6231 |
| 5602290000 | 1.1455 | 1.2463 |
| 5602906000 | 0.526 | 0.5723 |
| 5604909000 | 0.5556 | 0.6045 |
| 5607909000 | 0.8889 | 0.9671 |
| 5608901000 | 1.1111 | 1.2089 |
| 5608902300 | 1.1111 | 1.2089 |
| 5609001000 | 1.1111 | 1.2089 |
| 5609004000 | 0.5556 | 0.6045 |
| 5701104000 | 0.0556 | 0.0605 |
| 5701109000 | 0.1111 | 0.1209 |
| 5701901010 | 1.0444 | 1.1363 |
| 5702109020 | 1.1 | 1.1968 |
| 5702312000 | 0.0778 | 0.0846 |
| 5702411000 | 0.0722 | 0.0786 |
| 5702412000 | 0.0778 | 0.0846 |
| 5702421000 | 0.0778 | 0.0846 |
| 5702913000 | 0.0889 | 0.0967 |
| 5702990500 | 1.1111 | 1.2089 |
| 5702991500 | 1.1111 | 1.2089 |
| 5703900000 | 0.4489 | 0.4884 |
| 5801210000 | 1.1455 | 1.2463 |
| 5801230000 | 1.1455 | 1.2463 |
| 5801250010 | 1.1455 | 1.2463 |
| 5801250020 | 1.1455 | 1.2463 |
| 5801260020 | 1.1455 | 1.2463 |
| 5802190000 | 1.1455 | 1.2463 |
| 5802300030 | 0.5727 | 0.6231 |
| 5804291000 | 1.1455 | 1.2463 |
| 5806200010 | 0.3534 | 0.3845 |
| 5806200090 | 0.3534 | 0.3845 |
| 5806310000 | 1.1455 | 1.2463 |
| 5806400000 | 0.4296 | 0.4674 |
| 5808107000 | 0.5727 | 0.6231 |
| 5808900010 | 0.5727 | 0.6231 |
| 5811002000 | 1.1455 | 1.2463 |
| 6001106000 | 1.1455 | 1.2463 |
| 6001210000 | 0.8591 | 0.9347 |
| 6001220000 | 0.2864 | 0.3116 |
| 6001910010 | 0.8591 | 0.9347 |
| 6001910020 | 0.8591 | 0.9347 |
| 6001920020 | 0.2864 | 0.3116 |
| 6001920030 | 0.2864 | 0.3116 |
| 6001920040 | 0.2864 | 0.3116 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6003203000 | 0.8681 | 0.9445 |
| 6003306000 | 0.2894 | 0.3149 |
| 6003406000 | 0.2894 | 0.3149 |
| 6005210000 | 0.8681 | 0.9445 |
| 6005220000 | 0.8681 | 0.9445 |
| 6005230000 | 0.8681 | 0.9445 |
| 6005240000 | 0.8681 | 0.9445 |
| 6005310010 | 0.2894 | 0.3149 |
| 6005310080 | 0.2894 | 0.3149 |
| 6005320010 | 0.2894 | 0.3149 |
| 6005320080 | 0.2894 | 0.3149 |
| 6005330010 | 0.2894 | 0.3149 |
| 6005330080 | 0.2894 | 0.3149 |
| 6005340010 | 0.2894 | 0.3149 |
| 6005340080 | 0.2894 | 0.3149 |
| 6005410010 | 0.2894 | 0.3149 |
| 6005410080 | 0.2894 | 0.3149 |
| 6005420010 | 0.2894 | 0.3149 |
| 6005420080 | 0.2894 | 0.3149 |
| 6005430010 | 0.2894 | 0.3149 |
| 6005430080 | 0.2894 | 0.3149 |
| 6005440010 | 0.2894 | 0.3149 |
| 6005440080 | 0.2894 | 0.3149 |
| 6006211000 | 1.1574 | 1.2593 |
| 6006221000 | 1.1574 | 1.2593 |
| 6006231000 | 1.1574 | 1.2593 |
| 6006241000 | 1.1574 | 1.2593 |
| 6006310040 | 0.1157 | 0.1259 |
| 6006310080 | 0.1157 | 0.1259 |
| 6006320040 | 0.1157 | 0.1259 |
| 6006320080 | 0.1157 | 0.1259 |
| 6006330040 | 0.1157 | 0.1259 |
| 6006330080 | 0.1157 | 0.1259 |
| 6006340040 | 0.1157 | 0.1259 |
| 6006340080 | 0.1157 | 0.1259 |
| 6006410085 | 0.1157 | 0.1259 |
| 6006420085 | 0.1157 | 0.1259 |
| 6006430085 | 0.1157 | 0.1259 |
| 6006440085 | 0.1157 | 0.1259 |
| 6101200010 | 1.0094 | 1.0982 |
| 6101200020 | 1.0094 | 1.0982 |
| 6102200010 | 1.0094 | 1.0982 |
| 6102200020 | 1.0094 | 1.0982 |
| 6103421020 | 0.8806 | 0.9581 |
| 6103421040 | 0.8806 | 0.9581 |
| 6103421050 | 0.8806 | 0.9581 |
| 6103421070 | 0.8806 | 0.9581 |
| 6103431520 | 0.2516 | 0.2737 |
| 6103431540 | 0.2516 | 0.2737 |
| 6103431550 | 0.2516 | 0.2737 |
| 6103431570 | 0.2516 | 0.2737 |
| 6104220040 | 0.9002 | 0.9794 |
| 6104220060 | 0.9002 | 0.9794 |
| 6104320000 | 0.9207 | 1.0017 |
| 6104420010 | 0.9002 | 0.9794 |
| 6104420020 | 0.9002 | 0.9794 |
| 6104520010 | 0.9312 | 1.0131 |
| 6104520020 | 0.9312 | 1.0131 |
| 6104622006 | 0.8806 | 0.9581 |
| 6104622011 | 0.8806 | 0.9581 |
| 6104622016 | 0.8806 | 0.9581 |
| 6104622021 | 0.8806 | 0.9581 |
| 6104622026 | 0.8806 | 0.9581 |
| 6104622028 | 0.8806 | 0.9581 |
| 6104622030 | 0.8806 | 0.9581 |
| 6104622060 | 0.8806 | 0.9581 |
| 6104632006 | 0.3774 | 0.4106 |
| 6104632011 | 0.3774 | 0.4106 |
| 6104632026 | 0.3774 | 0.4106 |
| 6104632028 | 0.3774 | 0.4106 |
| 6104632030 | 0.3774 | 0.4106 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6104632060 | 0.3774 | 0.4106 |
| 6104692030 | 0.3858 | 0.4198 |
| 6105100010 | 0.985 | 1.0717 |
| 6105100020 | 0.985 | 1.0717 |
| 6105100030 | 0.985 | 1.0717 |
| 6105202010 | 0.3078 | 0.3349 |
| 6105202030 | 0.3078 | 0.3349 |
| 6106100010 | 0.985 | 1.0717 |
| 6106100020 | 0.985 | 1.0717 |
| 6106100030 | 0.985 | 1.0717 |
| 6106202010 | 0.3078 | 0.3349 |
| 6106202030 | 0.3078 | 0.3349 |
| 6107110010 | 1.1322 | 1.2318 |
| 6107110020 | 1.1322 | 1.2318 |
| 6107120010 | 0.5032 | 0.5475 |
| 6107210010 | 0.8806 | 0.9581 |
| 6107220015 | 0.3774 | 0.4106 |
| 6107220025 | 0.3774 | 0.4106 |
| 6107910040 | 1.2581 | 1.3688 |
| 6108210010 | 1.2445 | 1.3540 |
| 6108210020 | 1.2445 | 1.3540 |
| 6108310010 | 1.1201 | 1.2187 |
| 6108310020 | 1.1201 | 1.2187 |
| 6108320010 | 0.2489 | 0.2708 |
| 6108320015 | 0.2489 | 0.2708 |
| 6108320025 | 0.2489 | 0.2708 |
| 6108910005 | 1.2445 | 1.3540 |
| 6108910015 | 1.2445 | 1.3540 |
| 6108910025 | 1.2445 | 1.3540 |
| 6108910030 | 1.2445 | 1.3540 |
| 6108920030 | 0.2489 | 0.2708 |
| 6109100004 | 0.9956 | 1.0832 |
| 6109100007 | 0.9956 | 1.0832 |
| 6109100011 | 0.9956 | 1.0832 |
| 6109100012 | 0.9956 | 1.0832 |
| 6109100014 | 0.9956 | 1.0832 |
| 6109100018 | 0.9956 | 1.0832 |
| 6109100023 | 0.9956 | 1.0832 |
| 6109100027 | 0.9956 | 1.0832 |
| 6109100037 | 0.9956 | 1.0832 |
| 6109100040 | 0.9956 | 1.0832 |
| 6109100045 | 0.9956 | 1.0832 |
| 6109100060 | 0.9956 | 1.0832 |
| 6109100065 | 0.9956 | 1.0832 |
| 6109100070 | 0.9956 | 1.0832 |
| 6109901007 | 0.3111 | 0.3385 |
| 6109901009 | 0.3111 | 0.3385 |
| 6109901049 | 0.3111 | 0.3385 |
| 6109901050 | 0.3111 | 0.3385 |
| 6109901060 | 0.3111 | 0.3385 |
| 6109901065 | 0.3111 | 0.3385 |
| 6109901090 | 0.3111 | 0.3385 |
| 6110202005 | 1.1837 | 1.2879 |
| 6110202010 | 1.1837 | 1.2879 |
| 6110202015 | 1.1837 | 1.2879 |
| 6110202020 | 1.1837 | 1.2879 |
| 6110202025 | 1.1837 | 1.2879 |
| 6110202030 | 1.1837 | 1.2879 |
| 6110202035 | 1.1837 | 1.2879 |
| 6110202040 | 1.1574 | 1.2593 |
| 6110202045 | 1.1574 | 1.2593 |
| 6110202067 | 1.1574 | 1.2593 |
| 6110202069 | 1.1574 | 1.2593 |
| 6110202077 | 1.1574 | 1.2593 |
| 6110202079 | 1.1574 | 1.2593 |
| 6110909022 | 0.263 | 0.2861 |
| 6110909024 | 0.263 | 0.2861 |
| 6110909030 | 0.3946 | 0.4293 |
| 6110909040 | 0.263 | 0.2861 |
| 6110909042 | 0.263 | 0.2861 |
| 6111201000 | 1.2581 | 1.3688 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6111202000 | 1.2581 | 1.3688 |
| 6111203000 | 1.0064 | 1.0950 |
| 6111205000 | 1.0064 | 1.0950 |
| 6111206010 | 1.0064 | 1.0950 |
| 6111206020 | 1.0064 | 1.0950 |
| 6111206030 | 1.0064 | 1.0950 |
| 6111206050 | 1.0064 | 1.0950 |
| 6111206070 | 1.0064 | 1.0950 |
| 6111305020 | 0.2516 | 0.2737 |
| 6111305050 | 0.2516 | 0.2737 |
| 6111305070 | 0.2516 | 0.2737 |
| 6112110050 | 0.7548 | 0.8212 |
| 6112120010 | 0.2516 | 0.2737 |
| 6112120030 | 0.2516 | 0.2737 |
| 6112120040 | 0.2516 | 0.2737 |
| 6112120050 | 0.2516 | 0.2737 |
| 6112120060 | 0.2516 | 0.2737 |
| 6112390010 | 1.1322 | 1.2318 |
| 6112490010 | 0.9435 | 1.0265 |
| 6114200005 | 0.9002 | 0.9794 |
| 6114200010 | 0.9002 | 0.9794 |
| 6114200015 | 0.9002 | 0.9794 |
| 6114200020 | 1.286 | 1.3992 |
| 6114200040 | 0.9002 | 0.9794 |
| 6114200046 | 0.9002 | 0.9794 |
| 6114200052 | 0.9002 | 0.9794 |
| 6114200060 | 0.9002 | 0.9794 |
| 6114301010 | 0.2572 | 0.2798 |
| 6114301020 | 0.2572 | 0.2798 |
| 6114303030 | 0.2572 | 0.2798 |
| 6115101510 | 1.0417 | 1.1334 |
| 6115103000 | 1.0417 | 1.1334 |
| 6115298010 | 1.0417 | 1.1334 |
| 6115959000 | 1.0417 | 1.1334 |
| 6115966020 | 0.2315 | 0.2519 |
| 6116101300 | 0.3655 | 0.3977 |
| 6116101720 | 0.8528 | 0.9278 |
| 6116926420 | 1.0965 | 1.1930 |
| 6116926430 | 1.2183 | 1.3255 |
| 6116926440 | 1.0965 | 1.1930 |
| 6116928800 | 1.0965 | 1.1930 |
| 6117809510 | 0.9747 | 1.0605 |
| 6117809540 | 0.3655 | 0.3977 |
| 6201121000 | 0.948 | 1.0314 |
| 6201122010 | 0.8953 | 0.9741 |
| 6201122050 | 0.6847 | 0.7450 |
| 6201122060 | 0.6847 | 0.7450 |
| 6201134030 | 0.2633 | 0.2865 |
| 6201921000 | 0.9267 | 1.0082 |
| 6201921500 | 1.1583 | 1.2602 |
| 6201922010 | 1.0296 | 1.1202 |
| 6201922021 | 1.2871 | 1.4004 |
| 6201922031 | 1.2871 | 1.4004 |
| 6201922041 | 1.2871 | 1.4004 |
| 6201922051 | 1.0296 | 1.1202 |
| 6201922061 | 1.0296 | 1.1202 |
| 6201931000 | 0.3089 | 0.3361 |
| 6201933511 | 0.2574 | 0.2801 |
| 6201933521 | 0.2574 | 0.2801 |
| 6201999060 | 0.2574 | 0.2801 |
| 6202121000 | 0.9372 | 1.0197 |
| 6202122010 | 1.1064 | 1.2038 |
| 6202122025 | 1.3017 | 1.4162 |
| 6202122050 | 0.8461 | 0.9206 |
| 6202122060 | 0.8461 | 0.9206 |
| 6202134005 | 0.2664 | 0.2898 |
| 6202134020 | 0.333 | 0.3623 |
| 6202921000 | 1.0413 | 1.1329 |
| 6202921500 | 1.0413 | 1.1329 |
| 6202922026 | 1.3017 | 1.4162 |
| 6202922061 | 1.0413 | 1.1329 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6202922071 | 1.0413 | 1.1329 |
| 6202931000 | 0.3124 | 0.3399 |
| 6202935011 | 0.2603 | 0.2832 |
| 6202935021 | 0.2603 | 0.2832 |
| 6203122010 | 0.1302 | 0.1417 |
| 6203221000 | 1.3017 | 1.4162 |
| 6203322010 | 1.2366 | 1.3454 |
| 6203322040 | 1.2366 | 1.3454 |
| 6203332010 | 0.1302 | 0.1417 |
| 6203392010 | 1.1715 | 1.2746 |
| 6203399060 | 0.2603 | 0.2832 |
| 6203422010 | 0.9961 | 1.0838 |
| 6203422025 | 0.9961 | 1.0838 |
| 6203422050 | 0.9961 | 1.0838 |
| 6203422090 | 0.9961 | 1.0838 |
| 6203424006 | 1.2451 | 1.3547 |
| 6203424011 | 1.2451 | 1.3547 |
| 6203424016 | 0.9961 | 1.0838 |
| 6203424021 | 1.2451 | 1.3547 |
| 6203424026 | 1.2451 | 1.3547 |
| 6203424031 | 1.2451 | 1.3547 |
| 6203424036 | 1.2451 | 1.3547 |
| 6203424041 | 0.9961 | 1.0838 |
| 6203424046 | 0.9961 | 1.0838 |
| 6203424051 | 0.9238 | 1.0051 |
| 6203424056 | 0.9238 | 1.0051 |
| 6203424061 | 0.9238 | 1.0051 |
| 6203431500 | 0.1245 | 0.1355 |
| 6203434010 | 0.1232 | 0.1340 |
| 6203434020 | 0.1232 | 0.1340 |
| 6203434030 | 0.1232 | 0.1340 |
| 6203434040 | 0.1232 | 0.1340 |
| 6203498045 | 0.249 | 0.2709 |
| 6204132010 | 0.1302 | 0.1417 |
| 6204192000 | 0.1302 | 0.1417 |
| 6204198090 | 0.2603 | 0.2832 |
| 6204221000 | 1.3017 | 1.4162 |
| 6204223030 | 1.0413 | 1.1329 |
| 6204223040 | 1.0413 | 1.1329 |
| 6204223050 | 1.0413 | 1.1329 |
| 6204223060 | 1.0413 | 1.1329 |
| 6204223065 | 1.0413 | 1.1329 |
| 6204292040 | 0.3254 | 0.3540 |
| 6204322010 | 1.2366 | 1.3454 |
| 6204322030 | 1.0413 | 1.1329 |
| 6204322040 | 1.0413 | 1.1329 |
| 6204423010 | 1.2728 | 1.3848 |
| 6204423030 | 0.9546 | 1.0386 |
| 6204423040 | 0.9546 | 1.0386 |
| 6204423050 | 0.9546 | 1.0386 |
| 6204423060 | 0.9546 | 1.0386 |
| 6204522010 | 1.2654 | 1.3768 |
| 6204522030 | 1.2654 | 1.3768 |
| 6204522040 | 1.2654 | 1.3768 |
| 6204522070 | 1.0656 | 1.1594 |
| 6204522080 | 1.0656 | 1.1594 |
| 6204533010 | 0.2664 | 0.2898 |
| 6204594060 | 0.2664 | 0.2898 |
| 6204622010 | 0.9961 | 1.0838 |
| 6204622025 | 0.9961 | 1.0838 |
| 6204622050 | 0.9961 | 1.0838 |
| 6204624006 | 1.2451 | 1.3547 |
| 6204624011 | 1.2451 | 1.3547 |
| 6204624021 | 0.9961 | 1.0838 |
| 6204624026 | 1.2451 | 1.3547 |
| 6204624031 | 1.2451 | 1.3547 |
| 6204624036 | 1.2451 | 1.3547 |
| 6204624041 | 1.2451 | 1.3547 |
| 6204624046 | 0.9961 | 1.0838 |
| 6204624051 | 0.9961 | 1.0838 |
| 6204624056 | 0.9854 | 1.0721 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6204624061 | 0.9854 | 1.0721 |
| 6204624066 | 0.9854 | 1.0721 |
| 6204633510 | 0.2546 | 0.2770 |
| 6204633530 | 0.2546 | 0.2770 |
| 6204633532 | 0.2437 | 0.2651 |
| 6204633540 | 0.2437 | 0.2651 |
| 6204692510 | 0.249 | 0.2709 |
| 6204692540 | 0.2437 | 0.2651 |
| 6204699044 | 0.249 | 0.2709 |
| 6204699046 | 0.249 | 0.2709 |
| 6204699050 | 0.249 | 0.2709 |
| 6205202016 | 0.9961 | 1.0838 |
| 6205202021 | 0.9961 | 1.0838 |
| 6205202026 | 0.9961 | 1.0838 |
| 6205202031 | 0.9961 | 1.0838 |
| 6205202036 | 1.1206 | 1.2192 |
| 6205202047 | 0.9961 | 1.0838 |
| 6205202051 | 0.9961 | 1.0838 |
| 6205202061 | 0.9961 | 1.0838 |
| 6205202066 | 0.9961 | 1.0838 |
| 6205202071 | 0.9961 | 1.0838 |
| 6205202076 | 0.9961 | 1.0838 |
| 6205302010 | 0.3113 | 0.3387 |
| 6205302030 | 0.3113 | 0.3387 |
| 6205302040 | 0.3113 | 0.3387 |
| 6205302050 | 0.3113 | 0.3387 |
| 6205302080 | 0.3113 | 0.3387 |
| 6206100040 | 0.1245 | 0.1355 |
| 6206303011 | 0.9961 | 1.0838 |
| 6206303021 | 0.9961 | 1.0838 |
| 6206303031 | 0.9961 | 1.0838 |
| 6206303041 | 0.9961 | 1.0838 |
| 6206303051 | 0.9961 | 1.0838 |
| 6206303061 | 0.9961 | 1.0838 |
| 6206403010 | 0.3113 | 0.3387 |
| 6206403030 | 0.3113 | 0.3387 |
| 6206900040 | 0.249 | 0.2709 |
| 6207110000 | 1.0852 | 1.1807 |
| 6207199010 | 0.3617 | 0.3935 |
| 6207210030 | 1.1085 | 1.2060 |
| 6207220000 | 0.3695 | 0.4020 |
| 6207911000 | 1.1455 | 1.2463 |
| 6207913010 | 1.1455 | 1.2463 |
| 6207913020 | 1.1455 | 1.2463 |
| 6208210010 | 1.0583 | 1.1514 |
| 6208210020 | 1.0583 | 1.1514 |
| 6208220000 | 0.1245 | 0.1355 |
| 6208911010 | 1.1455 | 1.2463 |
| 6208911020 | 1.1455 | 1.2463 |
| 6208913010 | 1.1455 | 1.2463 |
| 6209201000 | 1.1577 | 1.2596 |
| 6209203000 | 0.9749 | 1.0607 |
| 6209205030 | 0.9749 | 1.0607 |
| 6209205035 | 0.9749 | 1.0607 |
| 6209205040 | 1.2186 | 1.3258 |
| 6209205045 | 0.9749 | 1.0607 |
| 6209205050 | 0.9749 | 1.0607 |
| 6209303020 | 0.2463 | 0.2680 |
| 6209303040 | 0.2463 | 0.2680 |
| 6210109010 | 0.2291 | 0.2493 |
| 6210403000 | 0.0391 | 0.0425 |
| 6210405020 | 0.4556 | 0.4957 |
| 6211111010 | 0.1273 | 0.1385 |
| 6211111020 | 0.1273 | 0.1385 |
| 6211118010 | 1.1455 | 1.2463 |
| 6211118020 | 1.1455 | 1.2463 |
| 6211320007 | 0.8461 | 0.9206 |
| 6211320010 | 1.0413 | 1.1329 |
| 6211320015 | 1.0413 | 1.1329 |
| 6211320030 | 0.9763 | 1.0622 |
| 6211320060 | 0.9763 | 1.0622 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6211320070 | 0.9763 | 1.0622 |
| 6211330010 | 0.3254 | 0.3540 |
| 6211330030 | 0.3905 | 0.4249 |
| 6211330035 | 0.3905 | 0.4249 |
| 6211330040 | 0.3905 | 0.4249 |
| 6211420010 | 1.0413 | 1.1329 |
| 6211420020 | 1.0413 | 1.1329 |
| 6211420025 | 1.1715 | 1.2746 |
| 6211420060 | 1.0413 | 1.1329 |
| 6211420070 | 1.1715 | 1.2746 |
| 6211430010 | 0.2603 | 0.2832 |
| 6211430030 | 0.2603 | 0.2832 |
| 6211430040 | 0.2603 | 0.2832 |
| 6211430050 | 0.2603 | 0.2832 |
| 6211430060 | 0.2603 | 0.2832 |
| 6211430066 | 0.2603 | 0.2832 |
| 6212105020 | 0.2412 | 0.2624 |
| 6212109010 | 0.9646 | 1.0495 |
| 6212109020 | 0.2412 | 0.2624 |
| 6212200020 | 0.3014 | 0.3279 |
| 6212900030 | 0.1929 | 0.2099 |
| 6213201000 | 1.1809 | 1.2848 |
| 6213202000 | 1.0628 | 1.1563 |
| 6213901000 | 0.4724 | 0.5140 |
| 6214900010 | 0.9043 | 0.9839 |
| 6216000800 | 0.2351 | 0.2558 |
| 6216001720 | 0.6752 | 0.7346 |
| 6216003800 | 1.2058 | 1.3119 |
| 6216004100 | 1.2058 | 1.3119 |
| 6217109510 | 1.0182 | 1.1078 |
| 6217109530 | 0.2546 | 0.2770 |
| 6301300010 | 0.8766 | 0.9537 |
| 6301300020 | 0.8766 | 0.9537 |
| 6302100005 | 1.1689 | 1.2718 |
| 6302100008 | 1.1689 | 1.2718 |
| 6302100015 | 1.1689 | 1.2718 |
| 6302215010 | 0.8182 | 0.8902 |
| 6302215020 | 0.8182 | 0.8902 |
| 6302217010 | 1.1689 | 1.2718 |
| 6302217020 | 1.1689 | 1.2718 |
| 6302217050 | 1.1689 | 1.2718 |
| 6302219010 | 0.8182 | 0.8902 |
| 6302219020 | 0.8182 | 0.8902 |
| 6302219050 | 0.8182 | 0.8902 |
| 6302222010 | 0.4091 | 0.4451 |
| 6302222020 | 0.4091 | 0.4451 |
| 6302313010 | 0.8182 | 0.8902 |
| 6302313050 | 1.1689 | 1.2718 |
| 6302315050 | 0.8182 | 0.8902 |
| 6302317010 | 1.1689 | 1.2718 |
| 6302317020 | 1.1689 | 1.2718 |
| 6302317040 | 1.1689 | 1.2718 |
| 6302317050 | 1.1689 | 1.2718 |
| 6302319010 | 0.8182 | 0.8902 |
| 6302319040 | 0.8182 | 0.8902 |
| 6302319050 | 0.8182 | 0.8902 |
| 6302322020 | 0.4091 | 0.4451 |
| 6302322040 | 0.4091 | 0.4451 |
| 6302402010 | 0.9935 | 1.0809 |
| 6302511000 | 0.5844 | 0.6358 |
| 6302512000 | 0.8766 | 0.9537 |
| 6302513000 | 0.5844 | 0.6358 |
| 6302514000 | 0.8182 | 0.8902 |
| 6302600010 | 1.1689 | 1.2718 |
| 6302600020 | 1.052 | 1.1446 |
| 6302600030 | 1.052 | 1.1446 |
| 6302910005 | 1.052 | 1.1446 |
| 6302910015 | 1.1689 | 1.2718 |
| 6302910025 | 1.052 | 1.1446 |
| 6302910035 | 1.052 | 1.1446 |
| 6302910045 | 1.052 | 1.1446 |

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

| HTS No. | Conv. fact. | Cents/kg. |
|---|---|---|
| 6302910050 | 1.052 | 1.1446 |
| 6302910060 | 1.052 | 1.1446 |
| 6303191100 | 0.9448 | 1.0279 |
| 6303910010 | 0.6429 | 0.6995 |
| 6303910020 | 0.6429 | 0.6995 |
| 6304111000 | 1.0629 | 1.1564 |
| 6304190500 | 1.052 | 1.1446 |
| 6304191000 | 1.1689 | 1.2718 |
| 6304191500 | 0.4091 | 0.4451 |
| 6304192000 | 0.4091 | 0.4451 |
| 6304910020 | 0.9351 | 1.0174 |
| 6304920000 | 0.9351 | 1.0174 |
| 6505901540 | 0.181 | 0.1969 |
| 6505902060 | 0.9935 | 1.0809 |
| 6505902545 | 0.5844 | 0.6358 |

(4) Any entry of cotton that qualifies for informal entry according to regulations issued by the Customs Service will not be subject to the assessment.

(5) Imported textile and apparel articles assembled of components formed from cotton produced in the Unites States and identified by HTS numbers 9819.11.03, 9819.11.06, 9820.11.03, 9820.11.06, 9820.11.09, 9820.11.12, 9820.11.18, 9820.11.21, 9802.00.8015, 9802.00.9000, 9802.00.8044, or 9802.00.8046 shall not subject to assessment.

(6) Imported cotton and products may be exempted by the Cotton Board from assessment under this paragraph. Such imported cotton and products may include, but are not limited to cotton and the cotton content of products which is U.S. produced cotton, or cotton other than Upland cotton.

(i) A request for such exemption must be submitted to the Cotton Board by the importer, prior to the importation of the cotton product. The Cotton Board will then issue, if deemed appropriate, a numbered exemption certificate valid for 1 year from the date of issue. The exemption number should be entered by the importer on the Customs entry documentation in the appropriate location as determined by the U.S. Customs Service.

(ii) The request for exemption should include:

(A) the name, address, and importer identification number for the importer;

(B) the HTS classification of the imported product;

(C) weight of the product for which the exemption is sought;

(D) estimated date of entry;

(E) commercial invoices of other such documentation indicating the origin or production or type of the cotton fiber used to produce the imported product;

(F) manufacture's description of the imported product.

(7) The exemption number "999999999" shall be entered on the Customs entry summary document, in the appropriate location as determined by the U.S. Customs Service, by the importer when, based on the importer's own determination, the imported product is identified by a Harmonized Tariff Schedule classification number which is subject to assessment but the particular article contains no cotton.

(8) Articles imported into the United States temporarily and under bond which are classified by the Harmonized Tariff Schedule heading which begins with "9813" shall not be subject to assessment.

(9) Articles imported into the U.S. after being exported from the U.S. for alterations and which are classified by the Harmonized Tariff Schedule subheadings 9802.00.40 and 9802.00.50 shall not be subject to assessment.

[57 FR 29432, July 2, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1205.510, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 1205.511 Payment and collection.

(a) The $1 per bale assessment shall be paid by:

(1) The producer of the cotton to the collecting handler designated in § 1205.512, and

(2) The importer of cotton to the Customs Service as provided in § 1205.514.

(b) The supplemental assessment shall be paid by:

(1) The producer of the cotton to the collecting handler designated in § 1205.513, and

(2) The importer of cotton to the Customs Service as described in § 1205.515.

(c) If more than one person subject to assessment shares in the proceeds received from a bale or bale equivalent, each such person is obligated to pay that portion of the assessment that is equivalent to that person's proportionate share of the proceeds.

(d) Failure of the handler to collect the assessments on each bale shall not relieve the handler of the handler's obligation to remit the assessments to the Cotton Board as required in §§ 1205.512, 1205.513 and 1205.516.

[57 FR 29190, July 1, 1992]

### § 1205.512 Collecting handlers and time of collection of $1 per bale assessment.

Collecting handlers and the time of collecting the $1 per bale assessment shall be as follows:

(a) Except as provided in paragraph (b) of this section, any person who purchases a bale of cotton from the producer of the cotton shall be the collecting handler for such cotton. The handler shall collect the assessment at the time the handler first makes any payment or any credit to the producer's account for the cotton. The handler shall give the producer a receipt indicating payment of the assessment.

(b) Any cooperative marketing association or other person that accepts a bale of cotton from the producer of the cotton under an oral or written contract or agreement providing for the marketing of the cotton shall be the collecting handler for such cotton. Such association or person shall collect the assessment regardless of whether the cotton is marketed or tendered to CCC for price support loan. The handler shall collect the assessment at the time the handler first makes any cash advance, any payment, or any credit to the producer's account for the cotton. The handler shall give the producer a receipt indicating payment of the assessment.

(c) For bales of cotton tendered to CCC for Form A loan, except bales tendered pursuant to paragraph (b) of this section:

(1) The ASCS County Office shall be the collecting handler except as provided in paragraph (c)(2) of this section. The ASCS County Office shall collect the assessment when it makes disbursement based on the Form A loan documents. The producer's copy of the Cotton Producer's Note (Form CCC Cotton A) shall show payment of the assessment and shall constitute the

producer's receipt for payment of the assessment.

(2) Any person (other than an ASCS County Office) who advances to the producer the loan value of the cotton as shown on a Cotton Producer's Note (Form CCC Cotton A) shall be the collecting handler for such cotton. The handler shall collect the $1 per bale assessment at the time the handler makes any advance to the producer on the loan value of the cotton. The handler shall give the producer a receipt indicating payment of the assessment.

(d) Any person who purchases cotton in the cotton field where produced or who purchases seed cotton or unbaled lint cotton from the producer of the cotton shall be the collecting handler. The handler shall collect the assessment at the time such cotton is ginned and shall give the producer a receipt indicating payment of the assessment. When a bale is ginned that contains any such cotton purchased from more than one producer, the handler shall collect each producer's proportionate share of the assessment and shall give each producer a receipt indicating the producer's proportionate share of the assessment payment.

(e) Any person who purchases cotton from a producer whereby the producer agrees to deliver a certain quantity of cotton but retains the right to establish the price at some future date shall be the collecting handler for such cotton. The handler shall collect the $1 per bale assessment at the time final settlement is made on the cotton. The handler shall give the producer a receipt indicating payment of the $1 per bale assessment.

(f) Any person who consumes domestically or exports cotton of that person's own production shall be the collecting handler for such cotton. Such handler shall pay the assessment to the Cotton Board at the time the cotton is consumed or exported.

(g) Any person who obtains ownership of a bale of cotton from the producer of the cotton by transfer of any kind or by any means, under conditions other than those described in paragraph (a), (b), (c), (d) or (e) of this section shall be the collecting handler for such cotton. Such handler shall collect the assessment at the time such handler takes ownership of the cotton. The handler shall give the producer a receipt indicating payment of the assessment.

(h) In the event of a producer's death, bankruptcy, receivership, or incapacity to act, the representative of such producer, or the producer's estate, or the person acting on behalf of creditors, shall be considered the producer for the purposes of this section.

[42 FR 35974, July 31, 1977, as amended at 50 FR 10932, Mar. 19, 1985; 57 FR 29190, July 1, 1992]

### § 1205.513 Collecting handlers and time of collection of the supplemental assessment.

Collecting handlers and the time of collecting the supplemental assessment shall be as follows:

(a) Except as provided in paragraph (b) of this section, any person who purchases a bale of cotton from the producer of the cotton shall be the collecting handler for such cotton. The handler shall collect the supplemental assessment at the time the handler first makes any payment or any credit to the producer's account for the cotton. The handler shall give the producer a receipt indicating payment of the supplemental assessment.

(b) Any cooperative marketing association or other person that accepts a bale of cotton from the producer of the cotton under an oral or written contract or agreement providing for the marketing of the cotton shall be the collecting handler for such cotton. Such association or person shall collect the supplemental assessment regardless of whether the cotton is marketed or tendered to CCC for price support loan. The handler shall collect the supplemental assessment at the time the handler first makes any cash advance, any payment, or any credit to the producer's account for the cotton. Supplemental assessments due on any subsequent cash advances, payments, or credits to the producer's account shall be collected by the handler at the time final settlement is made on the cotton. The handler shall give the producer a receipt each time a supplemental assessment is collected.

(c) For bales of cotton tendered to CCC for Form A loan, except bales tendered pursuant to paragraph (b) of this section:

(1) The ASCS County Office shall be the collecting handler except as provided in paragraph (c)(2) of this section. The ASCS County Office shall collect the supplemental assessment when it makes disbursement based on the Form A loan value of cotton. The producer's copy of the Cotton Producer's Note (Form CCC Cotton A) shall show payment of the supplemental assessment and shall constitute the producer's receipt for payment of the supplemental assessment.

(2) Any person (other than an ASCS County Office) who advances to the producer the loan value of the cotton as shown on a Cotton Producer's Note (Form CCC Cotton A) shall be the collecting handler for such cotton. The handler shall collect the supplemental assessment at the time the handler makes any advance to the producer on the loan value of the cotton. The handler shall give the producer a receipt indicating payment of the supplemental assessment.

(d) With respect to any Upland cotton on which the producer or a cooperative marketing association acting on behalf of a producer receives a loan deficiency payment, the ASCS County Office or the cooperative marketing association shall be the collecting handler of the supplemental assessment on the value of the cotton represented by the loan deficiency payment at the time such payment is made to the producer or the cooperative marketing association. A copy of a document reflecting this transaction issued by the ASCS County Office or cooperative marketing association shall show the amount collected as the supplemental assessment and shall constitute the producer's receipt for payment of the supplemental assessment.

(e) Any person who (1) purchases a producer's equity in cotton tendered to CCC for Form A loan or (2) purchases cotton that a producer has redeemed from the Form A loan, shall be the collecting handler for the portion of the total supplemental assessment not collected under paragraph (c) of this section. The handler shall give the producer a receipt indicating payment of that portion of the supplemental assessment.

(f) Any person who purchases cotton in the cotton field where produced or who purchases seed cotton or unbaled lint cotton from the producer of the cotton shall be the collecting handler. The handler shall collect the supplemental assessment at the time such cotton is ginned and shall give the producer a receipt indicating payment of the supplemental assessment. When a bale is ginned and baled that contains any such cotton purchased from more than one producer, the handler shall collect each producer's proportionate share of the supplemental assessment and shall give each producer a receipt indicating the producer's proportionate share of the supplemental assessment payment.

(g) Any person who purchases cotton from a producer whereby the producer agrees to deliver a certain quantity of cotton but retains the right to establish the price at some future date shall be the collecting handler for such cotton. The handler shall collect the supplemental assessment at the time final settlement is made on the cotton. The handler shall give the producer a receipt indicating payment of the supplemental assessment.

(h) Any person who consumes domestically cotton of that person's own production shall be the collecting handler for such cotton. The handler shall pay the supplemental assessment at the time of consumption on the basis of a market value determined in consultation with the Cotton Board.

(i) Any person who exports cotton of that person's own production shall be the collecting handler for such cotton. Such handler shall pay the supplemental assessment on the basis of the current value of cotton as reflected on the export settlement document.

(j) Any person who obtains ownership of a bale of cotton from the producer of the cotton by transfer of any kind or by any means, under conditions other than those described in paragraph (a), (b), (c), (d), (e), or (f) of this section shall be the collecting handler for such cotton. Such handler shall collect the supplemental assessment at the time

the handler takes ownership of the cotton. The handler shall give the producer a receipt indicating payment of the supplemental assessment.

(k) In the event of a producer's death, bankruptcy, receivership, or incapacity to act, the representative of such producer or the producer's estate, or the person acting on behalf of creditors, shall be considered the producer for the purposes of this section.

[42 FR 35974, July 31, 1977, as amended at 50 FR 10932, Mar. 19, 1985; 51 FR 37705, Oct. 24, 1986; 57 FR 29190, July 1, 1992]

### § 1205.514 Customs Service and the Collection of the $1 per bale assessment.

The Collection of the $1 per bale assessment by the Customs Service shall be as follows:

(a) The Customs Service will collect the assessment from the importer or from any person acting as principal, agent, broker or consignee for cotton or cotton-containing products produced outside the United States and imported into the United States. The Customs Service will collect the assessment on cotton and cotton-containing products identified by Harmonized Tariff Schedule heading numbers in § 1205.510(b)(2) at the time of importation and forward such assessment as per the agreement between the United States Customs Service and the U.S. Department of Agriculture.

(b) In the event of an importer's death, bankruptcy, receivership, or incapacity to act, the representative of such importer, or the importer's estate, or the person acting on behalf of creditors, shall be considered the importer for the purposes of this section.

[57 FR 29191, July 1, 1992]

### § 1205.515 Customs Service and the collection of the supplemental assessment.

The collection of the supplemental assessment by the Customs Service shall be as follows:

(a) The Customs Service will collect the supplemental assessment from any person acting as principal, agent, broker or consignee for cotton or cotton-containing products produced outside the United States and imported into the United States. Customs Service will collect the assessment on all cotton and cotton-containing products identified by Harmonized Tariff Schedule heading numbers in § 1205.510(b)(2) at the time of importation and forward such assessment as per the agreement between the United States Customs Service and the U.S. Department of Agriculture.

(b) In the event of an importer's death, bankruptcy, receivership, or incapacity to act, the representative of such importer, or the importer's estate, or the person acting on behalf of creditors, shall be considered the importer for the purposes of this section.

[57 FR 29191, July 1, 1992]

### § 1205.516 Reports and remittance to the Cotton Board.

(a) *Handler reports and remittances.* Each collecting handler shall transmit assessments to the Cotton Board as follows:

(1) *Reporting periods.* Each calendar month shall be a reporting period and the period shall end on the close of business on the last day of the month.

(2) *Reports.* Each collecting handler shall make reports on forms made available or approved by the Cotton Board. Each report shall be mailed to the Cotton Board and postmarked within ten days after the close of the reporting period.

(i) *Collecting handler report.* Each collecting handler shall prepare a separate report form each reporting period for each gin from which such handler handles cotton on which the handler is required to collect the assessments during the reporting period. Each report shall be mailed in duplicate to the Cotton Board and shall contain the following information:

(A) Date of report;

(B) Reporting period covered by report;

(C) Gin code number;

(D) Name and address of handler;

(E) Listing of all producers from whom the handler was required to collect the assessments, their addresses, total number of bales, and total assessment collected and remitted for each producer;

(F) Date of last report remitting assessments to the Cotton Board.

(ii) *No cotton purchased report.* Each collecting handler shall submit a no cotton purchased report form for each reporting period in which no cotton was handled for which the handler is required to collect assessments during the reporting period. A collecting handler who handles cotton only during certain months shall file a final no cotton purchased report at the conclusion of such handlers marketing season. If a collecting handler handles cotton during any month following submission of the final report for the handlers marketing season, such handler shall send a collecting handler report and remittance to the Cotton Board by the 10th day of the month following the month in which cotton was handled. The no cotton purchased report shall be signed and dated by the handler of the handler's agent.

(3) *Remittances.* The collecting handler shall remit all assessments to the Cotton Board with the report required in paragraph (a)(2) of this section. All remittances sent to the Cotton Board by collecting handlers shall be made by check, draft, or money order payable to the order of the "Cotton Board". All remittances shall be received subject to collection and payment at par.

(4) *Interest and late payment charges.* (i) There shall be an interest charge, at rates prescribed by the Cotton Board with the approval of the Secretary, on any handler who is sent a second certified mail notice of past-due assessments from the Cotton Board in any one marketing year (August 1–July 31).

(ii) In addition to the interest charge specified in paragraph (a)(4)(i) of this section, there shall be a late payment charge on any handler whose remittance is not received by the Cotton Board within 10 days after the close of the reporting period in which interest charges were first accrued. The late payment charge shall be 5 percent of the unpaid balance before interest charges have accrued.

(iii) The interest and late payment charges on the unremitted assessments for a particular reporting period will be applied from the first working day on or following the 20th day of the month in which the assessments were due.

(b) *Importer reports and remittance.* The United States Customs Service will transmit reports and assessments collected on imported cotton to the Agricultural Marketing Service according to the agreement between the Customs Service and the Agricultural Marketing Service. Upon the request of the Cotton Board, an importer shall file with the Board a report, for a period of time specified in the request, that includes the following information:

(1) The importer's name and address;

(2) The quantity of cotton and cotton products imported;

(3) The amount of the assessment paid on imported cotton and cotton products;

(4) The amount of imported cotton and cotton products on which the assessment was not paid to the Customs Service.

[57 FR 29190, July 1, 1992]

### § 1205.517 Failure to report and remit.

(a) Any collecting handler who fails to submit reports and remittances according to reporting periods and time schedules required in § 1205.516 shall be subject to appropriate action by the Cotton Board which may include one or more of the following actions:

(1) Audits of the collecting handler's books and records to determine the amount owed the Cotton Board;

(2) Requirement that an escrow account for the deposit of assessments collected be established. Frequency and schedule of deposits and withdrawals from the escrow account shall be determined by the Cotton Board with the Approval of the Secretary;

(3) Referral to the Secretary for appropriate enforcement action;

(4) Publication of a collecting handler's name in accordance with the following provisions:

(i) The name of any collecting handler will be subject to publication if the collecting handler:

(A) is sent two certified mail notices of past due assessments and/or collecting handler reports from the Cotton Board in any one marketing year (August 1–July 31), or

(B) is required by the Cotton Board to establish an escrow account for depositing assessments, in accordance with paragraph (a)(2) of this section, and does not comply with the deposit

procedures established by the Cotton Board with approval of the Secretary.

(ii) The name of any collecting handler who is subject to publication will be published by the Cotton Board with the approval of the Secretary in a monthly listing during the primary cotton marketing season (September through March) and a bi-monthly listing during the remainder of the year. The published listing will be distributed by the Cotton Board.

(iii) The Cotton Board, with approval of the Secretary, may notify individual producers that the assessments collected by such producer's collecting handler, whose name is subject to publication in accordance with the provisions of paragraph (a)(4)(i) of this section, have not been remitted to the Cotton Board as required.

(b) Any importer who fails to submit reports to the Cotton Board pursuant to request made according to § 1205.516 or assessments to the Customs Service, shall be subject to one or more of the following actions:

(1) Audits of the importer's books and records to determine the amount owed the Cotton Board.

(2) A deduction for the amount of any unpaid assessment by the Customs Service from the importers surety bond.

(3) Referral to the Secretary for appropriate enforcement action.

[57 FR 29191, July 1, 1992]

### § 1205.518 Receipts for payment of assessments.

Each collecting handler who is required by § 1205.512 and § 1205.513 to give the producer a receipt showing payment of cotton research and promotion assessments shall provide the producer with an invoice or settlement sheet for the cotton. Such document shall serve as a receipt shall contain the following information:

(a) Name and address of collecting handler.

(b) Gin code number of gin at which cotton was ginned.

(c) Name and address of producer who paid assessment.

(d) Number of bales on which assessment was paid.

(e) Gross price per pound received by the producer.

(f) Total assessments paid by the producer.

(g) Date on which assessment was paid by producer.

(Approved by the Office of Management and Budget under control number 0581–0115)

[42 FR 35974, July 13, 1977, as amended at 49 FR 8420, Mar. 7, 1984. Redesignated and amended at 51 FR 6099, Feb. 20, 1986. Further redesignated at 57 FR 29190, July 1, 1992]

### § 1205.519 Organic exemption.

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (h) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for an exemption under this section, an eligible cotton producer 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 beginning of the crop year as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: The producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(d) If the producer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each handler to whom the producer sells cotton. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic cotton and 100 percent organic cotton products—on a form provided by the Board—at any time initially and annually thereafter as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic cotton and cotton products bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2754, Jan. 14, 2005]

REIMBURSEMENTS

### § 1205.520 Procedure for obtaining reimbursement.

Each importer against whose imports of cotton or cotton-containing products any assessments are made and collected may obtain a reimbursement on that portion of the assessment that was collected on cotton produced in the United States or cotton other than Upland cotton by following the procedures prescribed in this section.

(a) *Application form.* An importer shall obtain a reimbursement application form from the Cotton Board. Such form may be obtained by written request to the Cotton Board and the request shall bear the importer's signature or the importer's properly-witnessed mark.

(b) *Submission of reimbursement application to Cotton Board.* Any importer requesting a reimbursement shall mail the application on the prescribed form to the Cotton Board. The application shall be postmarked within 180 days from the date the assessments were paid on the cotton by such importer. The reimbursement application shall show:

(1) The importer's name, address, phone number and Customs Service identification number;

(2) Weight of the cotton in each HTS category for which the reimbursement is requested;

(3) Subtotal amounts to be reimbursed for each HTS number and grand total to be reimbursed;

(4) Date or inclusive dates on which the assessments were paid;

(5) The name of the port of entry; and

(6) Certification by the importer that the cotton was grown in the U.S. or is other than Upland cotton.

(c) Where more than one importer shared in the assessment payment on cotton, joint or separate reimbursement application forms may be filed. In any such case, the reimbursement application shall show the names, addresses and proportionate shares of assessments paid by all importers. The

reimbursement application shall bear the signature of each importer seeking reimbursement.

(d) *Proof of payment of the assessment on U.S. produced or other than Upland cotton.* A copy of the Customs entry form and the commercial invoice filed with the Customs Service shall accompany the importer's reimbursement application. Within 60 days from the date the properly executed application for reimbursement is received by the Cotton Board, the Cotton Board shall make reimbursement to the importer. For joint applications, the reimbursement shall be made payable to all eligible importers signing the reimbursement application. Documentation submitted with reimbursement applications shall not be returned to the importer.

[57 FR 29192, July 1, 1992, as amended at 62 FR 22879, Apr. 28, 1997]

WAREHOUSE RECEIPTS

### § 1205.525 Entry of gin code number.

The warehouse that first receives a bale for storage after ginning shall enter the gin code number of the gin at which the bale was ginned on the warehouse receipt issued for the bale.

[57 FR 29192, July 1, 1992]

REPORTS AND RECORDS

### § 1205.530 Gin reports and reporting schedule.

(a) *Gin reports.* Each year each cotton gin in the United States shall submit reports to the Cotton Board on forms or certificates made available or approved by the Cotton Board as follows:

(1) *End-of-season report.* Except as provided in paragraph (a)(2) of this section, each gin shall report to the Cotton Board an alphabetical listing of producer names, their addresses, and the number of bales ginned for each such producer during its ginning season.

(2) *Certificate in Lieu of End-of-Season Report.* If a gin is the collecting handler on every bale ginned at such gin and collecting handler reports and remittances of assessments have been made in accordance with § 1205.516, a certification to that effect may be made to the Cotton Board in lieu of an end-of-season report.

(b) *Reporting schedule.* The schedule for submitting gin reports is as follows:

(1) Each gin that completes ginning operations prior to January 16 shall make a report to the Cotton Board within 10 days after completion of ginning.

(2) Each gin that operates on or after January 16 will make a report to the Cotton Board not later than January 25 covering bales ginned through January 15.

(3) Each gin that operates after January 15 shall make a supplemental report to the Cotton Board within 10 days after the close of ginning operations covering bales ginned after January 15.

[42 FR 35974, July 13, 1977, as amended at 57 FR 29192, July 1, 1992]

### § 1205.531 Records.

Each handler or importer required to make reports pursuant to this subpart shall maintain such books and records as are necessary to verify the reports.

[57 FR 29192, July 1, 1992]

### § 1205.532 Retention period for reports and records.

Each handler and importer required to make reports pursuant to this subpart shall retain for at least 2 years beyond the marketing year of their applicability:

(a) One copy of the report made to the Cotton Board; and

(b) Such books and records as are necessary to verify such reports.

[57 FR 29192, July 1, 1992]

### § 1205.533 Availability of reports and records.

Each handler and importer required to make reports pursuant to this subpart shall make available for inspection by the Cotton Board, including its designated employees, and the Secretary any reports, books, or records required under this subpart.

[57 FR 29192, July 1, 1992]

CONFIDENTIAL INFORMATION

### § 1205.540 Confidential books, records, and reports.

All information obtained from the books, records, and reports of handlers and importers shall be kept confidential in the manner and to the extent provided for in § 1205.340.

[57 FR 29192, July 1, 1992]

### § 1205.541 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Public Law 96–511, is OMB number 0581–0093, except Board member nominee information sheets are assigned OMB number 0505–0001.

[57 FR 29192, July 1, 1992]

## Subpart—Fiscal Period [Reserved]

# PART 1206—MANGO PROMOTION, RESEARCH, AND INFORMATION

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AUTHORITY: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

SOURCE: 68 FR 58554, Oct. 9, 2003, unless otherwise noted.

## Subpart A—Mango Promotion, Research, and Information Order Definitions

SOURCE: 69 FR 59122, Oct. 4, 2004, unless otherwise noted.

**§ 1206.1 Act.**

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425; Public Law 104–127; 110 Stat. 1029), or any amendments thereto.

**§ 1206.2 Board.**

*Board* or National Mango Promotion Board means the administrative body established pursuant to § 1206.30, or such other name as recommended by the Board and approved by the Department.

**§ 1206.3 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.

**§ 1206.4 Customs.**

*Customs* means the Customs and Border Protection of the U.S. Department of Homeland Security.

**§ 1206.5 Department.**

*Department* 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.

**§ 1206.6 First handler.**

*First handler* means any person, (excluding a common or contract carrier), receiving 500,000 or more pounds of mangos from producers in a calendar year and who as owner, agent, or otherwise ships or causes mangos to be shipped as specified in this Order. This definition includes those engaged in the business of buying, selling and/or offering for sale; receiving; packing; grading; marketing; or distributing mangos in commercial quantities. The term first handler includes a producer who handles or markets mangos of the producer's own production.

**§ 1206.7 Fiscal period.**

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

**§ 1206.8 Foreign producer.**

*Foreign producer* means any person:

(1) Who is engaged in the production and sale of mangos outside of the United States and who owns, or shares the ownership and risk of loss of the crop for sale in the U.S. market or

(2) Who is engaged, outside of the United States, in the business of producing, or causing to be produced, mangos beyond the person's own family use and having value at first point of sale.

**§ 1206.9 Importer.**

*Importer* means any person importing 500,000 or more pounds of mangos into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or handles mangos outside of the United States for sale in the United States, and who is listed as the importer of record for such mangos.

**§ 1206.10 Information.**

*Information* means information and programs that are designed to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of mangos in the United States. These include:

(a) Consumer information, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of mangos; and

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the mango industry, and activities to enhance the image of the mango industry.

**§ 1206.11 Mangos.**

*Mangos* means all fresh fruit of *Mangifera indica L.* of the family *Anacardiaceae*.

**§ 1206.12 Market or marketing.**

*Marketing* means the sale or other disposition of mangos in the U.S. domestic market. To market means to sell or otherwise dispose of mangos in interstate or intrastate channels of commerce.

**§ 1206.13 Order.**

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

**§ 1206.14 Part.**

*Part* means part 1206 which includes the Mango Promotion, Research, and Information Order and all rules, regulations, and supplemental orders issued pursuant to the Act and the Order.

**§ 1206.15 Person.**

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

**§ 1206.16 Producer.**

*Producer* means any person who is engaged in the production and sale of mangos in the United States and who owns, or shares the ownership and risk of loss of, the crop or a person who is engaged in the business of producing, or causing to be produced, mangos beyond the person's own family use and having value at first point of sale.

**§ 1206.17 Promotion.**

*Promotion* means any action taken to present a favorable image of mangos to the general public and the food industry for the purpose of improving the competitive position of mangos and stimulating the sale of mangos in the United States. This includes paid advertising and public relations.

**§ 1206.18 Research.**

*Research* means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of mangos, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value and benefits, and marketing of mangos.

**§ 1206.19 Retailer.**

*Retailer* means a person engaged in the business of selling mangos only to consumers.

**§ 1206.20 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States.

**§ 1206.21 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.

**§ 1206.22 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 certain date specified in the rule.

**§ 1206.23 United States.**

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

**§ 1206.24 Wholesaler.**

*Wholesaler* means any person engaged in the purchase, assembly, transportation, storage, and distribution of mangos for sale to other wholesalers, retailers, and foodservice firms.

NATIONAL MANGO PROMOTION BOARD

**§ 1206.30 Establishment and membership.**

(a) *Establishment of the National Mango Promotion Board.* There is hereby established a National Mango Promotion Board composed of eight importers, one first handler, two domestic producers, seven foreign producers, and two non-voting wholesalers and/or retailers of mangos in the United States. The chairperson shall reside in the United States and the Board office shall also be located in the United States.

(b) *Importer districts.* The importer seats shall be allocated based on the

volume of mangos imported into the Customs Districts identified by their name and Code Number as defined in the Harmonized Tariff Schedule of the United States. The initial allocation will be two seats for District I, three seats for District II, two seats for District III, and one seat for District IV.

(1) *District I* includes the Customs Districts of Portland, ME (01), St. Albans, VT (02), Boston, MA (04), Providence, RI (05), Ogdensburg, NY (07), Buffalo, NY (09), New York City, NY (10), Philadelphia, PA (11), Baltimore, MD (13), Norfolk, VA (14), Charlotte, NC (15), Charleston, SC (16), Savannah, GA (17), Tampa, FL (18), San Juan, PR (49), Virgin Islands of the United States (51), Miami, FL (52) and Washington, DC (54).

(2) *District II* includes the Customs Districts of Mobile, AL (19), New Orleans, LA (20), Port Arthur, TX (21), Laredo, TX (23), Minneapolis, MN (35), Duluth, MN (36), Milwaukee, WI (37), Detroit, MI (38), Chicago, IL (39), Cleveland, OH (41), St. Louis, MO (45), Houston, TX (53), and Dallas-Fort Worth, TX (55).

(3) *District III* includes the Customs Districts of El Paso, TX (24), Nogales, AZ (26), Great Falls, MT (33), and Pembina, ND (34).

(4) *District IV* includes the Customs Districts of San Diego, CA (25), Los Angeles, CA (27), San Francisco, CA (28), Columbia-Snake, OR (29), Seattle, WA (30), Anchorage, AK (31), and Honolulu, HI (32).

(c) *Adjustment of membership.* At least once every five years, the Board will review the geographical distribution of production of mangos in the United States, the geographical distribution of the importation of mangos into the United States, the quantity of mangos produced in the United States, and the quantity of mangos imported into the United States. The review will be based on Board assessment records and statistics from the Department. If warranted, the Board will recommend to the Department that membership on the Board be altered to reflect any changes in geographical distribution of domestic mango production and importation and the quantity of domestic production and imports. To ensure equitable representation, additional first handlers may be added to the Board to reflect increases in domestic production.

**§ 1206.31 Nominations and appointments.**

(a) Voting for first handler, importer, and domestic producer members will be made by mail ballot.

(b) There shall be two nominees for each position on the Board.

(c) Nominations for the initial Board will be handled by the Department. Subsequent nominations will be handled by the Board's staff.

(d) Nominees to fill the first handler member position on the Board shall be solicited from all known first handlers. The nominees shall be placed on a ballot which will be sent to all first handlers for a vote. The nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the first handlers' first and second choice nominees.

(e) Nominees to fill the importer positions on the Board shall be solicited from all known importers of mangos. The members from each district shall select the nominees for two positions on the Board. Two nominees shall be submitted for each position. The nominees shall be placed on a ballot which will be sent to importers in the districts for a vote. For each position, the nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the importers' first and second choice nominees.

(f) Nominees to fill the domestic producer member positions on the Board shall be solicited from all known domestic producers. The nominees shall be placed on a ballot which will be sent to all domestic producers for a vote. The nominee receiving the highest number of votes and the nominee receiving the second highest number of votes shall be submitted to the Department as the producers' first and second choice nominees.

(g) Nominees to fill the foreign producer member positions on the Board shall be solicited from organizations of foreign mango producers. Each organization shall submit two nominees for

each position, and the nominees shall be representative of the major countries exporting mangos to the United States.

(h) The Board will nominate the wholesaler and/or retailer members.

(i) From the nominations, the Secretary shall select the members of the Board.

### § 1206.32 Term of office.

The term of office for first handler, importer, domestic producer, foreign producer, and wholesaler/retailer members of the Board will be three years, and these members may serve a maximum of two consecutive three-year terms. When the Board is first established, the first handler, two importers, one domestic producer, and two foreign producers will be assigned initial terms of four years; three importers, one domestic producer, and two foreign producers will be assigned initial terms of three years; and three importers, three foreign producers, and two wholesaler and/or retailer members will be assigned initial terms of two years. Thereafter, each of these positions will carry a full three-year term. Members serving initial terms of two or four years will be eligible to serve a second term of three years. Each term of office will end on December 31, with new terms of office beginning on January 1.

[72 FR 41427, July 30, 2007]

### § 1206.33 Vacancies.

(a) In the event that any member of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such position shall automatically become vacant.

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

(c) Should any member position become vacant, successors for the unexpired term of the member shall be appointed in the manner specified in § 1206.31, except that nomination and replacement shall not be required if the unexpired term is less than six months.

### § 1206.34 Procedure.

(a) At a Board meeting, it will be considered a quorum when at least ten voting members are present.

(b) At the start of each fiscal period, the Board will select a chairperson and vice chairperson who will conduct meetings throughout that period.

(c) All Board members will be notified at least 30 days in advance of all Board and committee meetings unless an emergency meeting is declared.

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

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Committees may consist of individuals other than Board members, and such individuals may vote in committee meetings. Committee members shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

(f) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or any other means of communication. In that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All telephone votes shall be confirmed promptly in writing. All votes shall be recorded in Board minutes.

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting member and shall reside in the U.S.

(i) The organization of the Board and the procedures for conducting meetings of the Board shall be in accordance

with its bylaws, which shall be established by the Board and approved by the Department.

### § 1206.35 Compensation and reimbursement.

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

### § 1206.36 Powers and duties.

The Board shall have the following powers and duties:

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

(b) To develop and recommend to the Department for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines appropriate;

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

(e) To develop programs, plans, and projects, and enter into contracts or agreements, which must be approved by the Department before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that: any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and, make such other reports available as the Board or the Department considers relevant. Furthermore, any 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 or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

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

(3) The Department 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.

(f) To prepare and submit for approval of the Department calendar year budgets in accordance with § 1206.40;

(g) To maintain such records and books and prepare and submit such reports and records from time to time to the Department as the Department may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(h) To cause its books to be audited by a competent auditor at the end of each calendar year and at such other times as the Department may request, and to submit a report of the audit directly to the Department;

(i) To give the Department the same notice of Board and committee meetings as is given to members in order that the Department's representative(s) may attend such meetings.

(j) To act as intermediary between the Department and any first handler or importer;

(k) To furnish to the Department any information or records that the Department may request;

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

(m) To recommend to the Department such amendments to the Order as the Board considers appropriate; and

(n) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the mango industry's position in the U.S. domestic market; maintain and expand existing markets and uses for mangos; and to carry out programs, plans, and projects designed to provide maximum benefits to the mango industry.

### § 1206.37 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 is a conflict of interest; and

(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, other than recommending to the Department amendments to the Order.

EXPENSES AND ASSESSMENTS

### § 1206.40 Budget and expenses.

(a) At least 60 days prior to the beginning of each calendar year, and as may be necessary thereafter, the Board shall prepare and submit to the Department a budget for the calendar year covering its anticipated expenses and disbursements in administering this subpart. 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 or at least one preceding year (except for the initial budget);

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

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

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

(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. Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Department.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Department 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 administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for start-up costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Voluntary contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

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

(h) The Board may not expend for administration, maintenance, and functioning of the Board in any calendar year an amount that exceeds 15 percent of the assessments and other income received by the Board for that calendar year. Reimbursements to the Department required under paragraph (g) of this section, are excluded from this limitation on spending.

(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. Subject to approval by the Department, such reserve funds may be used to defray any expenses authorized under this part.

**§ 1206.41 Financial statements.**

(a) As requested by the Department, the Board shall prepare and submit financial statements to the Department on a periodic basis. 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 days after the end of the time period to which it applies.

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

**§ 1206.42 Assessments.**

(a) The funds to cover the Board's expenses shall be paid from assessments on first handlers and importers, donations from any person not subject to assessments under this Order, and other funds available to the Board and subject to the limitations contained therein.

(b) The assessment rate shall be ½ cent per pound on all mangos. The assessment rate will be reviewed and may be modified by the Board with the approval of the Department, after the first referendum is conducted as stated in § 1206.71(b). The Department will amend this section if the assessment rate is modified.

(c) *Domestic mangos.* First handlers of domestic mangos are required to pay assessments on all mangos handled for the U.S. market. This includes mangos of the first handler's own production.

(d) *Imported mangos.* Each importer of mangos shall pay an assessment to the Board through Customs on mangos imported for marketing in the United States.

(1) The assessment rate for imported mangos shall be the same or equivalent to the rate for mangos produced in the United States.

(2) The import assessment shall be uniformly applied to imported mangos that are identified by the numbers 0804.50.4040 and 0804.50.6040 in the Harmonized Tariff Schedule of the United States.

(3) The assessments due on imported mangos shall be paid when they enter or are withdrawn for consumption in the United States.

(e) Each person responsible for remitting assessments under paragraph (c) of this section shall remit the amounts due to the Board's office on a monthly basis no later than the fifteenth day of the month following the month in which the mangos were marketed, in such manner as prescribed by the Board.

(f) A late payment charge shall be imposed on any person failing to remit to the Board the total amount for which the person is liable by the payment due date established under this section. The amount of the late payment charge shall be prescribed by the Department.

(g) An additional charge shall be imposed on any person subject to a late payment charge in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed by the Department.

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

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

**§ 1206.43 Exemptions.**

(a) Any first handler or importer of less than 500,000 pounds of mangos per calendar year may claim an exemption from the assessments required under § 1206.42. Mangos produced domestically and exported from the United States may annually claim an exemption from the assessments required under § 1206.42.

(b) A first handler or importer desiring an exemption shall apply to the

Board, on a form provided by the Board, for a certificate of exemption. A first handler shall certify that the first handler will handle less than 500,000 pounds of domestic mangos for the fiscal period for which the exemption is claimed. An importer shall certify that the importer will import less than 500,000 pounds of mangos during the fiscal period for which the exemption is claimed.

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

(d) Importers who receive a certificate of exemption shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessments paid. No interest will be paid on the assessments collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the mangos were actually imported.

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

(f) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt mangos and, in the case of importers, proof of payment of assessments.

PROMOTION, RESEARCH, AND INFORMATION

### § 1206.50 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Department for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to mangos; and

(2) The establishment and conduct of research with respect to: the use, nutritional value and benefits, sale, distribution, and marketing of mangos in the United States; the creation of new products thereof, to the end that the marketing and use of mangos in the United States may be encouraged, expanded, improved, or made more acceptable; and to advance the image, desirability, or quality of mangos in the United States.

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

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

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

### § 1206.51 Independent evaluation.

The Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other programs conducted by the Board pursuant to the Act. The Board shall submit to the Department, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

### § 1206.52 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board

under this subpart shall be the property of the U.S. Government, as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Department Upon termination of this subpart, § 1206.73 shall apply to determine disposition of all such property.

REPORTS, BOOKS, AND RECORDS

**§ 1206.60 Reports.**

(a) Each first handler will be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Department, which may include but not be limited to the following:

(1) Number of pounds of domestic mangos handled;

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

(3) Name and address of the producers from whom the first handler has received mangos;

(4) Date that assessment payments were made on each pound of domestic mangos handled;

(5) Number of pounds of domestic mangos exported;

(6) The first handler's tax identification number;

(b) Each importer may be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Department, which may include but not be limited to the following:

(1) Number of pounds of mangos imported;

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

(3) Name, address, and tax identification number of the importer; and

(4) Date that assessment payments were made on each pound imported.

**§ 1206.61 Books and records.**

Each first handler and importer shall maintain and make available for inspection by the Department such books and records as are necessary to carry out the provisions of this part, any regulations issued under this part, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

**§ 1206.62 Confidential treatment.**

All information obtained from books, records, or reports under the Act and this part 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, first handlers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on 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

### § 1206.70 Right of the Secretary.

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

### § 1206.71 Referenda.

(a) *Initial Referendum.* The Order shall not become effective unless:

(1) The Department determines that the Order is consistent with and will effectuate the purposes of the Act; and

(2) The Order is approved by a majority of the first handlers and importers voting, who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos.

(b) *Subsequent referenda.* Every five years, the Department shall hold a referendum to determine whether first handlers and importers of mangos favor the continuation of the Order. The Order shall continue if it is favored by a majority of the first handlers and importers voting who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos. The Department will also conduct a referendum if 10 percent or more of all non-exempt, first handlers and importers of mangos request the Department to hold a referendum. In addition, the Department may hold a referendum at any time.

### § 1206.72 Suspension and termination.

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

(b) The Department shall suspend or terminate this subpart at the end of the marketing year whenever the Department determines that its suspension or termination is approved or favored by a majority of the first handlers and importers voting who, during a representative period determined by the Department, have been engaged in the handling or importation of mangos.

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

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

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

### § 1206.73 Proceedings after termination.

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

(b) The said trustees shall:

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

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

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

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

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Department to be disposed of, to the extent practical, to one or more mango industry organizations in the interest of continuing mango promotion, research, and information programs.

### § 1206.74 Effect of termination or amendment.

Unless otherwise expressly provided by the Department, the termination or amendment of this part or any subpart 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 part; or

(b) Release or extinguish any violation of this part; or

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

### § 1206.75 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.

### § 1206.76 Separability.

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

### § 1206.77 Amendments.

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

### § 1206.78 OMB control number.

The control numbers assigned to the information collection requirements of this part 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 and OMB control number 0581–0209.

## Subpart B—Referendum Procedures.

### § 1206.100 General.

Referenda to determine whether eligible first handlers and importers of mangos favor the issuance, amendment, suspension, or termination of the Mango Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

### § 1206.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Department* 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.

(c) *Eligible first handler* means any person, (excluding a common or contract carrier), receiving 500,000 or more pounds of mangos from producers in a calendar year and who as owner, agent, or otherwise ships or causes mangos to be shipped as specified in this Order. This definition includes those engaged in the business of buying, selling and/or offering for sale; receiving; packing; grading; marketing; or distributing mangos in commercial quantities. The term first handler includes a producer who handles or markets mangos of the producer's own production.

(d) *Eligible importer* means any person importing 500,000 or more pounds of mangos into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or handles mangos outside of the United States for sale in the United States, and who is listed as the importer of record for such mangos that are identified in the Harmonized Tariff Schedule of the United States by

the numbers 0804.50.4040 and 0804.50.6040, during the representative period. Importation occurs when mangos originating outside of the United States are released from custody by the Customs and Border Protection and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced mangos immediately upon release by the Customs and Border Protection, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of mangos from the Customs and Border Protection when such mangos are entered or withdrawn for consumption in the United States.

(e) *Mangos* means all fresh fruit of *Mangifera indica L.* of the family *Anacardiaceae*.

(f) *Order* means the Mango Promotion, Research, and Information Order.

(g) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a mango farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(h) *Referendum agent* or *agent* means the individual or individuals designated by the Department to conduct the referendum.

(i) *Representative period* means the period designated by the Department.

(j) *United States* or *U.S.* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

### § 1206.102 Voting.

(a) Each eligible first handler and eligible importer of mangos shall be entitled to cast only one ballot in the referendum.

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

(c) All ballots are to be cast by mail, as instructed by the Department.

### § 1206.103 Instructions.

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

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

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

(c) Give reasonable public notice of the referendum:

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

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

(d) Mail to eligible first handlers and importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person

who claims to be eligible to vote shall be refused a ballot.

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

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

### § 1206.104 Subagents.

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

### § 1206.105 Ballots.

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

### § 1206.106 Referendum report.

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

### § 1206.107 Confidential information.

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

### § 1206.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581–0209.

## Subpart C—Rules and Regulations

SOURCE: 70 FR 2754, Jan. 14, 2005, unless otherwise noted.

### § 1206.200 Terms defined.

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions of such terms which appear in Subpart A—Mango Promotion, Research, and Information Order.

### § 1206.201 Definitions.

*Organic Act* means section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

### § 1206.202 Exemption for organic mangos.

(a) A first handler who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, handles only products that are 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.

(b) To obtain this exemption, an eligible first handler 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 beginning of the fiscal period as long as the first handler continues to be eligible for the exemption.

(c) The request shall include the following: The first handler's name and address, a copy of the organic farm or organic handling 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.

(d) If the first handler complies with the requirements of paragraph (a) of this section, the Board will grant an assessment exemption and shall issue a Certificate of Exemption to the first handler. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic mangos—on a form provided by the Board—at any time initially and annually thereafter on or before the beginning of the fiscal period as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of first handlers in paragraph (c). 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 within the applicable timeframe. The Board will also issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic mangos bearing this HTS classification assigned by the Board will not be subject to assessments.

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

# PART 1207—POTATO RESEARCH AND PROMOTION PLAN

## Subpart—Potato Research and Promotion Plan

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AUTHORITY: 7 U.S.C. 2611–2627 and 7 U.S.C. 7401.

## Subpart—Potato Research and Promotion Plan

SOURCE: 37 FR 5008, Mar. 9, 1972, unless otherwise noted.

DEFINITIONS

### § 1207.301 Secretary.

*Secretary* means the Secretary of Agriculture of the United States, 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 his stead.

### § 1207.302 Act.

*Act* means the Potato Research and Promotion Act, *Title III of Public Law 91–670, 91st Congress, approved January 11, 1971, 84 Stat. 2041,* as amended.

[56 FR 40229, Aug. 14, 1991]

### § 1207.303 Plan.

*Plan* means this potato research and promotion plan issued by the Secretary pursuant to the act.

### § 1207.304 Person.

*Person* means any individual, partnership, corporation, association, or other entity.

### § 1207.305 Producer.

*Producer* means any person engaged in the growing of 5 or more acres of potatoes who owns or shares the ownership and risk of loss of such potato crop.

### § 1207.306 Potatoes.

*Potatoes* means any or all varieties of Irish potatoes grown by producers in the 50 states of the United States and grown in foreign countries and imported into the United States.

[56 FR 40229, Aug. 14, 1991]

### § 1207.307 Handle.

*Handle* means to grade, pack, process, sell, transport, purchase, or in any other way to place potatoes or cause potatoes to be placed in the current of commerce. Such term shall not include the transportation or delivery of field-run potatoes by the producer thereof to a handler for grading, storage, or processing.

### § 1207.308 Handler.

*Handler* means any person (except a common or contract carrier of potatoes owned by another person) who handles potatoes, including a producer who handles potatoes of his own production.

### § 1207.309 Board.

*Board* means the National Potato Promotion Board, hereinafter established pursuant to § 1207.320.

### § 1207.310 Fiscal period and marketing year.

*Fiscal period* and *marketing year* mean the 12-month period from July 1 through June 30 of the following year or such other period which may be approved by the Secretary.

### § 1207.311 Programs and projects.

*Programs* and *projects* mean those research, development, advertising or promotion programs or projects developed by the Board pursuant to § 1207.335.

### § 1207.312 Importer.

*Importer* means any person who imports tablestock, frozen or processed potatoes for ultimate consumption by humans, or seed potatoes into the United States.

[56 FR 40229, Aug. 14, 1991]

### § 1207.313 Customs Service.

*Customs Service* means the United States Customs Service of the United States Department of the Treasury.

[56 FR 40229, Aug. 14, 1991]

NATIONAL POTATO PROMOTION BOARD

### § 1207.320 Establishment and membership.

(a) There is hereby established a National Potato Promotion Board, hereinafter called the "Board", composed of producers, importers, and a public member appointed by the Secretary. Producer members shall be appointed from nominations submitted by producers in the various States or groups of States pursuant to § 1207.322. Importer members shall be appointed from nominations submitted by importers pursuant to § 1207.322. The public member shall be nominated by Board members in such manner as recommended by the Board and approved by the Secretary, and shall be appointed by the Secretary.

(b) Producer membership upon the Board shall be determined on the basis of the potato production reported in the latest Crop Production Annual Summary Report issued by the Crop Reporting Board, U.S. Department of Agriculture. Unless the Secretary, upon recommendation of the Board, determines an alternate basis, for each five million hundredweight of such production, or major fraction thereof, produced within each State, such State shall be entitled to one member. However, each State shall initially be entitled to at least one member.

(c) The number of importer member positions on the Board shall be based on the hundredweights of potatoes, potato products equivalent to fresh potatoes, and seed potatoes imported into the United States but shall not exceed five importer members. Unless the Secretary, upon recommendation of the Board, determines an alternate basis, there shall be one importer member position for each 5 million hundredweight, or major fraction thereof, of potatoes, potato product equivalents, and seed potatoes imported into the United States.

(d) Any State in which the potato producers fail to respond to an officially called nomination meeting may be combined with an adjacent State for the purpose of representation on the Board, in which case the Board's producer member selected by the Secretary will represent both States, but such member's voting power under § 1207.325 shall not be increased.

(e) The Secretary, upon recommendation of the Board, may establish, through rule making procedure, districts or groups of States in order to change the representation requirements for membership on the Board. In such event the voting power of members under § 1207.325 would be based upon the total production within the new district or group of States.

(f) Should the Board fail to nominate a public member, the Secretary may appoint such member.

[37 FR 5008, Mar. 9, 1972, as amended at 49 FR 20806, May 17, 1984; 49 FR 31390, Aug. 7, 1984; 56 FR 40229, Aug. 14, 1991]

### § 1207.321 Term of office.

(a) The term of office of Board members shall be 3 years, beginning July 1, or such other beginning date as may be approved pursuant to regulations.

(b) The terms of office of the Board's producer members shall be so determined that approximately one-third of the terms will expire each year. Importer and public member terms shall run concurrently. All members serving on the Board on the effective date of this amendment to the Plan shall continue serving the term to which they were appointed.

(c) Board members shall serve during the term of office for which they are selected and have qualified, and until their successors are selected and have qualified.

(d) No member shall serve for more than two full successive terms of office.

[37 FR 5008, Mar. 9, 1972, as amended at 56 FR 40229, Aug. 14, 1991]

**§ 1207.322 Nominations and appointment.**

The Secretary shall select the producer, importer, and public members of the Board from nominations which may be made in the following manner.

(a) A meeting or meetings of producers shall be held in each State to nominate producer members for the Board. For nominations to the initial Board the meetings shall be announced by the U.S. Department of Agriculture. The Department may call upon other organizations to assist in conducting the meetings such as State and national organizations of potato producers. Such nomination meetings shall be held not later than 60 days after the issuance of this subpart. Any organization designated to hold such nomination meetings shall give adequate notice of such meetings to the potato producers affected; also to the Secretary so that a representative of the Secretary, if available, may conduct such meetings or act as secretary of such nomination meetings.

(b) After the establishment of the initial Board, the nominations for subsequent Board producer members shall be made by producers at meetings in the producing sections or States. The Board shall hold such meetings, or cause them to be held, in accordance with rules established pursuant to recommendation of the Board.

(c) Only producers may participate in designating producer nominees. Each producer is entitled to one vote only on behalf of himself, his partners, agents, subsidiaries, affiliates, and representatives for each position for which nominations are being held. If a producer is engaged in producing potatoes in more than one State, he shall elect the State in which he shall vote. In no event shall he vote in nominations in more than one meeting.

(d) The importer members shall be nominated by importers of potatoes, potato products and/or seed potatoes. The number of importer members on the Board shall be announced by the Secretary and shall not exceed five members. The Board may call upon organizations of potato, potato products and/or seed potato importers to assist in nominating importers for membership on the Board. If such organizations fail to submit nominees or are determined by the Board to not adequately represent importers, then the Board may conduct meetings of importers to nominate eligible importers for Board member positions. In determining if importer organizations adequately represent importers, the Board shall consider:

(1) How many importers belong to the association;

(2) What percentage of the total number of importers is represented by the association;

(3) Is the association representative of the potato, potato product, and seed potato import industry;

(4) Does the association speak for potato, potato product, and seed potato importers; and

(5) Other relevant information as may be warranted.

(e) The public member shall be nominated by the producer and importer members of the Board. The public member shall have no direct financial interest in the commercial production or marketing of potatoes except as a consumer and shall not be a director, stockholder, officer or employee of any firm so engaged. The Board shall prescribe such additional qualifications, administrative rules and procedures for selection and voting for each candidate as it deems necessary and the Secretary approves.

[37 FR 5008, Mar. 9, 1972, as amended at 49 FR 20806, May 17, 1984; 56 FR 40229, Aug. 14, 1991]

EFFECTIVE DATE NOTE: At 62 FR 46179, Sept. 2, 1997, in § 1207.322, paragraphs (a) and (d)(1) through (d)(5); in paragraph (b), the words "at meetings" in the first sentence and the entire last sentence; in paragraph (c), the last sentence; and in paragraph (d), the last two sentences of the introductory text were suspended, effective Sept. 3, 1997.

**§ 1207.323 Acceptance.**

Each person selected by the Secretary as a member of the Board shall qualify by filing a written acceptance with the Secretary promptly after being notified of such selection.

**§ 1207.324 Vacancies.**

To fill any vacancy caused by the failure of any person selected as a member of the Board to qualify, or in

the event of the death, removal, resignation, or disqualification of any member, a successor shall be nominated and selected in the manner specified in § 1207.322. In the event of failure to provide nominees for such vacancies, the Secretary may select other eligible persons.

### § 1207.325 Procedure.

(a) Each State (or district or group of States established pursuant to § 1207.320) which has a member on the Board shall be entitled to not less than one vote for any production up to 1 million hundredweight, plus one additional vote for each additional 1 million hundredweight of production, or major fraction thereof, as determined by the latest crop production annual summary report issued by the Crop Reporting Board, U.S. Department of Agriculture. The casting of the votes for each State shall be determined by the members of the Board from that State.

(b) A majority of the Board members shall constitute a quorum and any action of the Board shall require a majority of concurring votes of those present and voting. At assembled meetings all votes shall be cast in person or by duly authorized proxy.

(c) For routine and noncontroversial matters which do not require deliberation and the exchange of views, and for matters of an emergency nature when there is not enough time to call an assembled meeting, the Board may act upon a majority of concurring votes of its members cast by mail, telegraph, or telephone. Any vote cast by telephone shall be confirmed promptly in writing.

[37 FR 5008, Mar. 9, 1972, as amended at 57 FR 40083, Sept. 2, 1992]

### § 1207.326 Compensation and reimbursement.

Members of the Board shall serve without compensation but shall be reimbursed for reasonable expenses incurred by them in the performance of their duties as members of the Board.

### § 1207.327 Powers.

The Board shall have the following powers subject to § 1207.361:

(a) To administer the provisions of this plan in accordance with its terms and conditions;

(b) To make rules and regulations to effectuate the terms and conditions of this plan;

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

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

### § 1207.328 Duties.

The Board shall, among other things, have the following duties:

(a) To meet and organize and to select from among its members a president and such other officers as may be necessary; to select committees and subcommittees of Board members to nominate the public member; to adopt such rules for the conduct of its business as it may deem advisable; and it may establish advisory committees of persons other than Board members;

(b) To employ such persons as it may deem necessary and to determine the compensation and define the duties of each; and to protect the handling of Board funds through fidelity bonds;

(c) At the beginning of each fiscal period, to prepare and submit to the Secretary for his approval a budget on a fiscal period basis of the anticipated expenses in the administration of this plan including the probable costs of all programs or projects and to recommend a rate of assessment with respect thereto;

(d) To develop programs and projects and to enter into contracts or agreements for the development and carrying out of programs or projects of research, development, advertising or promotion, and the payment of the costs thereof with funds collected pursuant to this plan;

(e) To keep minutes, books, and records which clearly reflect all of the acts and transactions of the Board. Minutes of each Board meeting shall be promptly reported to the Secretary;

(f) To cause the books of the Board to be audited by a certified public accountant at least once each fiscal period, and at such other time as the Board may deem necessary. The report of such audit shall show the receipt and expenditure of funds collected pursuant to this part. Two copies of each such report shall be furnished to the

Secretary and a copy of each such report shall be made available at the principal office of the Board for inspection by producers, handlers, and importers;

(g) To give the Secretary the same notice of meetings of the Board and its subcommittees as is given to its members;

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

(i) To furnish the Secretary such information as he may request.

(j) To prepare and submit to the Secretary such reports from time to time as may be prescribed by the Secretary for appropriate accounting with respect to the receipt and disbursement of funds entrusted to the Board; and

[37 FR 5008, Mar. 9, 1972, as amended at 49 FR 20806, May 17, 1984; 56 FR 40230, Aug. 14, 1991; 57 FR 40083, Sept. 2, 1992]

RESEARCH AND PROMOTION

**§ 1207.335 Research and promotion.**

The Board shall develop and submit to the Secretary for approval any programs or projects authorized in this section. Such programs or projects shall provide for:

(a) The establishment, issuance, effectuation and administration of appropriate programs or projects for the advertising and promotion of potatoes and potato products: *Provided, however,* That any such program or project shall be directed toward increasing the general demand for potatoes and potato products;

(b) Establishing and carrying on research and development projects and studies to the end that the marketing and utilization of potatoes may be encouraged, expanded, improved, or made more efficient: *Provided,* That quality control, grade standards and supply management programs shall not be conducted under, or as a part of, this plan; and

(c) The development and expansion of potato and potato product sales in foreign markets.

(d) No advertising or promotion program shall make any reference to private brand names or use false or unwarranted claims in behalf of potatoes or their products or false or unwarranted statements with respect to the attributes or use of any competing products.

EXPENSES AND ASSESSMENTS

**§ 1207.341 Budget and expenses.**

(a) At the beginning of each fiscal period, or as may be necessary thereafter, the Board shall prepare and recommend a budget on a fiscal period basis of its anticipated expenses and disbursements in the administration of this plan, including probable costs of research, development, advertising, and promotion. The Board shall also recommend a rate of assessment calculated to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in § 1207.344.

(b) The Board is authorized to incur such expenses for research, development, advertising, or promotion of potatoes and potato products, such other expenses for the administration, maintenance, and functioning of the Board, and any referendum and administrative costs incurred by the Department of Agriculture as are approved pursuant to § 1207.361.

[37 FR 5008, Mar. 9, 1972, as amended at 49 FR 20806, May 17, 1984]

**§ 1207.342 Assessments.**

(a) The funds to cover the Board's expenses shall be acquired by the levying of assessments upon handlers and importers as designated in regulations recommended by the Board and issued by the Secretary. Such assessments shall be levied at a rate fixed by the Secretary which shall not exceed one-half of one per centum of the immediate past ten calendar years United States average price received for potatoes by growers as reported by the Department of Agriculture and not more than one such assessment may be collected on any potatoes.

(b) Each designated handler, as specified in regulations, shall pay assessments to the Board on all potatoes handled by him, including potatoes he produced. Assessments shall be paid to the Board at such time and in such manner as the Board shall direct pursuant to regulations issued hereunder. The designated handler may collect the

assessments from the producer, or deduct such assessments from the proceeds paid to the producer on whose potatoes the assessments are made, provided he furnishes the producer with evidence of such payment.

(c) The importer of imported potatoes, potato products, or seed potatoes shall pay the assessment to the Board at the time of entry, or withdrawal, for consumption of such potatoes and potato products into the United States.

(d) The assessment on imported tablestock potatoes and frozen or processed potato products for ultimate consumption by humans and on seed potatoes shall be established by the Board so that the effective assessment shall be equal to that on domestic production.

(e) The Board may authorize other organizations to collect assessments in its behalf.

(f) The Board may exempt potatoes used for nonfood purposes, other than seed, from the provisions of this plan and shall establish adequate safeguards against improper use of such exemptions.

[37 FR 5008, Mar. 9, 1972, as amended at 49 FR 20806, May 17, 1984; 56 FR 40230, Aug. 14, 1991]

### § 1207.343 [Reserved]

### § 1207.344 Operating reserve.

The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in a reserve so established: *Provided*, That funds in the reserve shall not exceed approximately two fiscal periods' expenses. Such reserve funds may be used to defray any expenses authorized under this part.

REPORTS, BOOKS, AND RECORDS

### § 1207.350 Reports.

(a) Each designated handler shall maintain a record with respect to each producer for whom he handled potatoes and for potatoes handled which he himself produced. He shall report to the Board at such times and in such manner as it may prescribe by regulations such information as may be necessary for the Board to perform its duties under this part. Such reports may include, but shall not be limited to, the following:

(1) Total quantity of potatoes handled for each producer and for himself, including those which are exempt under the plan;

(2) Total quantity of potatoes handled for each producer and for himself subject to the plan and assessments, and

(3) Name and address of each person from whom he collected an assessment, the amount collected from each person, and the date such collection was made.

(b) Each importer shall report to the Board at such times and in such manner as it may prescribe such information as may be necessary for the Board to perform its duties under this part.

[37 FR 5008, Mar. 9, 1972, as amended at 56 FR 40230, Aug. 14, 1991]

### § 1207.351 Books and records.

Each handler or importer subject to this part shall maintain and make available for inspection by authorized employees of the Board and the Secretary such books and records as are appropriate and necessary to carry out the provisions of this Plan and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall be maintained for at least 2 years beyond the marketing year of their applicability.

[37 FR 5008, Mar. 9, 1972, as amended at 56 FR 40230, Aug. 14, 1991]

### § 1207.352 Confidential treatment.

All information obtained from books, records, or reports required pursuant to this part shall be kept confidential by all employees of the Department of Agriculture and of the Board, and by all contractors and agents retained by the Board, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this Plan. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of a number of handlers or importers subject to this Plan, which statements do not identify the information furnished by any person; or

(b) The publication by direction of the Secretary of the name of any person violating this Plan, together with a statement of the particular provisions of this Plan violated by such person.

[56 FR 40230, Aug. 14, 1991]

MISCELLANEOUS

### § 1207.360 Influencing governmental action.

No funds collected by the Board under this plan shall in any matter be used for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this subpart.

### § 1207.361 Right of the Secretary.

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

### § 1207.362 Suspension or termination.

(a) The Secretary shall, whenever he finds that this plan or any provision thereof obstructs or does not tend to effectuate the declared policy of the act, terminate or suspend the operation of this plan or such provision thereof.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of the Board or of 10 percent or more of the potato producers and importers to determine whether potato producers and importers favor termination or suspension of this plan. The Secretary shall suspend or terminate such plan at the end of the marketing year whenever the Secretary determines that its suspension or termination is favored by a majority of the potato producers and importers voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of potatoes or potato products, and who produced or imported more than 50 percent of the volume of the potatoes or potato products produced or imported by the producers and importers voting in the referendum.

[37 FR 5008, Mar. 9, 1972, as amended at 56 FR 40230, Aug. 14, 1991]

### § 1207.363 Proceedings after termination.

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

(b) The said trustees shall (1) continue in such capacity until discharged by the Secretary; (2) carry out the obligations of the Board under any contracts or agreements entered into by it pursuant to this plan; (3) account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such person or persons as the Secretary may direct; and (4) upon the request of the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person or persons full title and right to all of the funds, property, and claims vested in the Board of the trustees pursuant to this section.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this section shall be subject to the same obligation imposed upon the Board and upon the trustee.

(d) A reasonable effort shall be made by the Board or its trustees to return to producers and importers any residual funds not required to defray the necessary expenses of liquidation. If it is found impractical to return such remaining funds to producers and importers, such funds shall be disposed of in such manner as the Secretary may determine to be appropriate.

[37 FR 5008, Mar. 9, 1972, as amended at 56 FR 40231, Aug. 14, 1991]

### § 1207.364 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this plan 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 plan or any regulation issued thereunder, or (b) release or extinguish any violation of this plan 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 person, with respect to any such violation.

### § 1207.365 Personal liability.

No member of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever to any person for errors in judgments, mistakes, or other acts, either of commission or omission, as such member except for acts of willful misconduct, gross negligence, or those which are criminal in nature.

### § 1207.366 Separability.

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

## Subpart—Rules and Regulations

SOURCE: 37 FR 17379, Aug. 26, 1972, unless otherwise noted.

DEFINITIONS

### § 1207.500 Definitions.

(a) Unless otherwise defined in this subpart, definitions of terms used in this subpart shall have the same meaning as the definitions of such terms which appear in Subpart—Potato Research and Promotion Plan.

(b) *Processor*. *Processor* means any person who commercially processes potatoes into potato products, including, but not restricted to, frozen, dehydrated, or canned potato products, potato chips and shoestrings, and flour.

(c) *Imported frozen or processed potatoes for ultimate consumption by humans*. *Imported frozen or processed potatoes for ultimate consumption by humans* means products which are imported into the United States which the Secretary determines contain a substantial amount of potato.

[37 FR 17379, Aug. 26, 1972, as amended at 56 FR 40231, Aug. 14, 1991; 57 FR 40083, Sept. 2, 1992]

GENERAL

### § 1207.501 Communications.

All communications in connection with the Potato Research and Promotion Plan shall be addressed to: National Potato Promotion Board, 7555 East Hampden Avenue, Suite 412, Denver, Colorado 80231.

[59 FR 44036, Aug. 26, 1994]

### § 1207.502 Determination of membership.

(a) Pursuant to § 1207.320 and the recommendation of the Board, annual producer memberships on the Board shall be determined on the basis of the average potato production of the 3 preceding years in each State as set forth in the Crop Production Annual Summary Reports issued by the Crop Reporting Board of the U.S. Department of Agriculture.

(b) Pursuant to § 1207.320 and the recommendation of the Board, annual importer memberships on the Board shall be determined on the basis of the average potato, potato product, and seed potato importation of the 3 preceding years as determined by the Board's records.

[56 FR 40231, Aug. 14, 1991]

### § 1207.503 Nominations.

(a) Pursuant to § 1207.322 of the plan, the Board shall assist producers in producing sections or States each year to nominate producer members for the Board. Such nominations may be conducted at meetings or by mail ballots. One individual shall be nominated for each position to become vacant. A list of nominees shall be submitted to the

Secretary for consideration by November 1 of each year.

(b) Pursuant to § 1207.322 of the plan, the Board shall assist importers each year to nominate importer members for the Board. Such nominations may be conducted at meetings or by mail ballots.

(c) Nomination meetings or mail balloting shall be well publicized with notice given to producers, importers, and the Secretary at least 10 days prior to each meeting or mailing of ballots.

(d) The public member shall be nominated by the producer and importer members of the Board.

[37 FR 17379, Aug. 26, 1972, as amended at 49 FR 2093, Jan. 18, 1984; 56 FR 40231, Aug. 14, 1991; 62 FR 46179, Sept. 2, 1997]

### § 1207.504 Term of office.

(a) The term of office of Board members shall be for three years and shall begin March 1 and end on the last day of February.

(b) Board members shall serve during the term of office for which they are selected and have qualified and until their successors are selected and have qualified.

[38 FR 7123, Mar. 16, 1973, as amended at 49 FR 2093, Jan. 18, 1984]

### § 1207.505 Procedure.

(a) The procedure for conducting the Board's meetings shall be in accordance with the bylaws adopted by the Board on June 7, 1972, and approved by the Secretary and any subsequent amendments adopted by the Board and approved by the Secretary.

(b) Each importer member shall be entitled to not less than one vote. Importer members shall also be entitled to one additional vote for each 1 million hundredweight, or major fraction thereof, on a fresh-weight basis, of imported tablestock potatoes, potato products, or seed potatoes, as determined by data on imports provided by the U.S. Department of Agriculture. The casting of such votes shall be determined by the importer members.

[62 FR 46179, Sept. 2, 1997]

### § 1207.506 Policy.

(a) It shall be the policy of the Board to carry out an effective and continuous coordinated program of marketing research, development, advertising, and promotion in order to help maintain and expand existing domestic and foreign markets for potatoes and to develop new or improved markets.

(b) It shall be the objective of the Board to carry out programs and projects which will provide maximum benefit to the potato industry and no undue preference shall be given to any of the various industry segments.

### § 1207.507 Administrative Committee.

(a) The Board shall annually select from among its members an Administrative Committee composed of producer members as provided for in the Board's bylaws, one or more importer members, and the public member. Selection shall be made in such manner as the Board may prescribe: Except that such committee shall include the Chairperson and seven Vice-Chairpersons, one of whom shall also serve as the Secretary and Treasurer of the Board.

(b) The Administrative Committee shall act for the Board in implementing such marketing research, development, advertising, and/or promotion activities as directed by the Board, and shall, subject to such direction, be charged with developing and submitting to the Secretary for his approval specific programs or projects in the name of the Board. The Administrative Committee shall further act for the Board in authorizing contracts or agreements for the development and carrying out of such programs or projects and the payment of the costs thereof with funds collected pursuant to § 1207.342 of the plan.

(1) The Administrative Committee also shall act for the Board in contracting with cooperating agencies for the collection of assessments pursuant to § 1207.513(d).

(2) [Reserved]

(c) The Board may assign such other administrative powers and duties to the Administrative Committee as it shall determine, and the Administrative Committee shall act on behalf of

and in the name of the Board in all administrative matters.

[37 FR 17379, Aug. 26, 1972, as amended by Amdt. 6, 42 FR 55879, Oct. 20, 1977; 44 FR 25621, May 2, 1979; 50 FR 25199, June 18, 1985; 56 FR 40231, Aug. 14, 1991; 59 FR 44036, Aug. 26, 1994; 71 FR 76901, Dec. 22, 2006]

### § 1207.508 USDA costs.

Pursuant to § 1207.341 of the Plan the Board shall pay those administrative costs incurred by the U.S. Department of Agriculture for the conduct of its duties under the Plan as are determined periodically by the Secretary. Payment shall be due promptly after billing for such costs.

[49 FR 26202, June 27, 1984]

ASSESSMENTS

### § 1207.510 Levy of assessments.

(a) *Domestic assessments.* (1) An assessment rate of 3 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States.

(2) No assessment shall be levied on potatoes grown in the 50 States of the United States by producers of less than 5 acres of potatoes.

(b) *Assessments on imports.* (1) An Assessment rate of 3 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes imported into the United States. An assessment rate of 3 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. The importer of imported tablestock potatoes, potato products, or seed potatoes shall pay the assessment to the Board through the U.S. Customs and Border Protection at the time of entry or withdrawal for consumption of such potatoes and potato products into the United States.

(2) The following conversion factors shall be used to determine the fresh weight equivalents of frozen and processed potato products:

| | |
|---|---|
| Frozen potato products | .50 |
| Canned potatoes | .636 |
| Potato chips and shoestring potatoes | .245 |
| Dehydrated potato products | .14 |
| Potato starch | .1111 |

(3) The Harmonized Tariff Schedule (HTS) categories and assessment rates on imported tablestock potatoes and frozen or processed potatoes for ultimate consumption by humans and on imported seed potatoes are as follows:

| Tablestock potatoes, frozen or processed potatoes, and seed potatoes | Assessment | |
|---|---|---|
| | Cents/cwt | Cents/kg |
| 0701.10.0020 | 3.0 | 0.066 |
| 0701.10.0040 | 3.0 | 0.066 |
| 0701.90.1000 | 3.0 | 0.066 |
| 0701.90.5015 | 3.0 | 0.066 |
| 0701.90.5025 | 3.0 | 0.066 |
| 0701.90.5035 | 3.0 | 0.066 |
| 0701.90.5045 | 3.0 | 0.066 |
| 0701.90.5055 | 3.0 | 0.066 |
| 0701.90.5065 | 3.0 | 0.066 |
| 0710.10.0000 | 6.0 | 0.132 |
| 2004.10.4000 | 6.0 | 0.132 |
| 2004.10.8020 | 6.0 | 0.132 |
| 2004.10.8040 | 6.0 | 0.132 |
| 2005.20.0070 | 4.716 | 0.104 |
| 0712.90.3000 | 21.429 | 0.472 |
| 1105.10.0000 | 21.429 | 0.472 |
| 1105.20.0000 | 21.429 | 0.472 |
| 2005.20.0040 | 21.429 | 0.472 |
| 2005.20.0020 | 12.240 | 0.27 |
| 1108.13.0010 | 27.0 | 0.595 |

(4) No assessments shall be levied on otherwise assessable potatoes which are contained in imported products wherein potatoes are not a principal ingredient.

(c) Potatoes and potato products used for nonhuman food purposes, other than seed, are exempt from assessment but are subject to the disposition of exempted potatoes provisions of § 1207.515 of this subpart.

(d) No more than one such assessment shall be made on any potatoes or potato products.

[57 FR 40083, Sept. 2, 1992, as amended at 58 FR 3359, Jan. 8, 1993; 59 FR 44036, Aug. 26, 1994; 71 FR 11296, Mar. 7, 2006; 71 FR 50330, Aug. 25, 2006; 74 FR 63543, Dec. 4, 2009; 75 FR 14491, Mar. 26, 2010]

### § 1207.511 Determination of assessable quantity.

The assessable quantity of potatoes in any lot shall be determined on the basis of utilization. Assessments shall be due on the entire lot handled for human consumption, seed, or unspecified purposes if there is no accounting made on the basis of the utilization of such lot. However, if the accounting identifies all or portions of such lot on the basis of utilization, assessments

shall be due only on that portion utilized for human consumption and seed.

**§ 1207.512 Designated handler.**

The assessment on each lot of potatoes produced in the 50 States of the United States and handled shall be paid by the designated handler as hereafter set forth.

(a) Unless otherwise provided in paragraphs (a)(8), (b), and (c) of this section, the designated handler shall be the first handler of such potatoes. The first handler is the person who initially performs a handler function as heretofore defined. Such person may be a fresh shipper, processor, or other person who first places the potatoes in the channels of commerce. A producer who grades, packs, or otherwise performs handler functions thereby becomes a handler and as such assumes first handler responsibilities under this part. The following examples are provided to aid in identification of first handlers who are designated handlers:

(1) Producer delivers field-run potatoes of his own production to a handler for preparation for market. The handler in this instance is the designated handler, regardless of whether he subsequently handles such potatoes for his own account or for the account of the producer.

(2) Producer delivers field-run potatoes of his own production to a handler who takes title to such potatoes and places them in storage for subsequent handling. The handler who purchases such potatoes from the producer is the designated handler.

(3) Producer delivers field-run potatoes to a commercial storage facility for the purpose of holding such potatoes under his own account for later sale. There is no designated handler in this instance since such potatoes have not been handled as heretofore defined and no assessment is due. The designated handler of such potatoes would be identified on the basis of subsequent handling of such potatoes.

(4) Fresh shipper purchases a lot of potatoes from a producer, packs a portion of such potatoes for fresh market, and delivers the balance to a processor. The fresh shipper is the designated handler for all potatoes in the lot.

(5) Handler purchases potatoes from a producer's field or storage for the purpose of preparing such potatoes for market or for transporting such potatoes to storage for subsequent handling. The handler who purchases such potatoes from the producer is the designated handler.

(6) Producer packs and sells potatoes of his own production from the field, roadside stand, or storage to a consumer, itinerant trucker, or other buyer. In performing such handler functions the producer assumes the responsibility of designated handler.

(7) Processor utilizes potatoes of his own production in the manufacture of potato chips, frozen, dehydrated, or canned products for human consumption. In so handling potatoes, the processor assumes the responsibility of designated handler.

(8) Producer utilizes potatoes of his own production for seed in planting his subsequent crop. Such seed potatoes do not enter the current of commerce; there is no designated handler in this instance since the potatoes have not been handled as heretofore defined and no assessment is due. However, seed potatoes sold or shipped to other producers for planting or to other persons for subsequent disposition enter the current of commerce and are subject to assessment. The producer of seed potatoes shall be the designated handler of such potatoes shipped to other producers for planting and the assessment is due when he first sells or otherwise handles such potatoes. The first person who acquires seed potatoes from the producer thereof for subsequent disposition other than planting by said person shall be the designated handler of such potatoes. However, the seed producer will be the designated handler responsible for filing reports and making payments, unless he can show that the first person who obtained the potatoes from him disposed of them other than by planting. To show this the seed producer must submit to the Potato Board the name and address of the first person who obtained the potatoes from him and an invoice of sale or settlement sheet on which it is indicated that such person will be the designated

handler and therefore will be responsible for the payment of the assessments. Only by showing this is the seed producer no longer considered the designated handler and therefore not liable for the assessments.

(b) Any person who handles potatoes for a producer thereof under oral or written contract or agreement providing for the sale thereof shall be the designated handler for such potatoes, notwithstanding the fact that the producer may have graded, packed, or otherwise handled such potatoes and thereby became the first handler of such potatoes.

*Examples.* A cooperative marketing association, or other person, who makes an accounting to the producer, or pay the proceeds of the sale to the producer would be the designated handler responsible for the assessment.

(c) Any processor who purchases potatoes from the producer thereof shall be the designated handler even though the producer may have graded, packed, or otherwise handled such potatoes and thereby became the first handler of such potatoes.

[37 FR 17379, Aug. 26, 1972, as amended by Amdt. 4, 40 FR 7893, Feb. 24, 1975; Amdt. 7, 43 FR 9133, Mar. 6, 1978; Amdt. 8, 43 FR 51001, Nov. 2, 1978; 56 FR 40231, Aug. 14, 1991]

### § 1207.513 Payment of assessments.

(a) *Time of payment.* The assessment on domestically produced potatoes shall become due at the time a determination of assessable potatoes is made in the normal handling process, pursuant to § 1207.511. If no determination is made of the utilization of a lot, assessments shall be due on the entire lot when it enters the current of commerce. The assessment on imported potatoes, potato products, and seed potatoes shall become due at the time of entry, or withdrawal, for consumption into the United States.

(b) *Responsibility for payment.* (1) The designated handler is responsible for payment of the assessment on domestically produced potatoes. He may pay with no reimbursement from the producer. In the alternative, he may collect the assessment from the producer, or deduct such assessment from the proceeds paid to the producer on whose potatoes the assessment is made, provided he furnishes the producer with evidence of such payment. Any such collection or deduction of assessment shall be made not later than the time when the assessment becomes payable by the handler to the Board. Failure of the handler to collect or deduct such assessment does not relieve the handler of his obligation to remit the assessment to the Board.

(2) The Customs Service shall collect payment of assessment on imported potatoes, potato products, and seed potatoes from importers and forward such assessment per agreement between the Customs Service and the U.S. Department of Agriculture. Importers shall be responsible for payment of assessment directly to the Board of any assessment due but not collected by the Customs Service at the time of entry, or withdrawal, for consumption into the United States. An importer may apply to the Board for reimbursement of assessments paid on exempted products.

(c) *Payment directly to the Board.* (1) Except as provided in paragraphs (b) and (d) of this section, each designated handler or importer shall remit assessments directly to the Board by check, draft, or money order payable to the National Potato Promotion Board, or NPPB, not later than 10 days after the end of the month such assessment is due together with a report (preferably on Board forms) thereon.

(2) All designated handlers, including a designated handler whose own production is handled and assessments to the Board paid by another designated handler, shall report to the Board:

(i) Date of report (which is also date of payment to the Board).

(ii) The name and address of the designated handler;

(iii) The period potatoes were handled;

(iv) The total quantity of potatoes determined to be assessable during the period potatoes were handled, pursuant to § 1207.511.

(3) Designated handlers who collect assessments from producers or withhold assessments from their accounts or pay the assessment themselves shall also include a list of all such producers whose potatoes were handled during the period, their addresses and the

total assessable quantities handled for each such producer.

(i) In lieu of such a list, the designated handler may substitute authentic copies of settlement sheets given to each producer provided such settlement sheets contain all the information listed above.

(ii) The words "final report" shall be shown on the last report at the close of his marketing season or at the end of each fiscal period if such handler markets potatoes on a year-round basis.

(4) Prepayment of assessment: (i) In lieu of the monthly assessment and reporting requirements of paragraph (b) of this section, the Board may permit designated handlers to make advance payments of their total estimated assessments for the season to the Board prior to their actual determination of assessable potatoes. Such procedure may be permitted when it is considered by the designated handler to be the more practical method of payment.

(ii) Persons using such procedure shall provide a final annual accounting of actual handling and assessments.

(iii) Specific requirements, instructions, and forms for making such advance payments shall be provided by the Board upon request.

(d) *Payment through cooperating agency*. The Board may authorize other organizations to collect assessments in its behalf. In any State or area in which the Board has negotiated an agreement to collect assessments with an agency such as a State Potato Commission or a Potato Association approved by the Secretary, the designated handler shall pay the assessment to such agency in the time and manner, and with such identifying information as specified in such agreement. Such an agreement shall not provide any cooperating agency with authority to collect confidential information from handlers; to qualify, the cooperating agency must on its own accord have access to all information required by the Board for collection purposes. If the Board requires further evidence of payment than provided, it may acquire such evidence from individual designated handlers.

(1) All such agreements are subject to the requirement of § 1207.352 *Confidential treatment*, of the plan, the provisions of section 310(c) of the Act, and all applicable rules and regulations and financial safeguards in effect under the Act and the plan; and all affected persons shall agree to, and conduct their operations and activities in accordance with, such requirements.

(2) [Reserved]

[37 FR 17379, Aug. 26, 1972, as amended by Amdt. 6, 42 FR 55879, Oct. 20, 1977; 56 FR 40231, Aug. 14, 1991; 62 FR 46179, Sept. 2, 1997]

### § 1207.514 Exemption for organic potatoes.

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (h) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for an exemption under this section, the producer 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 July 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: The producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified in paragraph (a) of this section for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(d) If the producer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each handler to whom the producer sells potatoes. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic potatoes, potato products, and seed potatoes—on a form provided by the Board—at any time initially and annually thereafter on or before July 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic potatoes, potato products, and seed potatoes bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2755, Jan. 14, 2005]

### § 1207.515 Safeguards.

The Board may require reports by designated handlers and importers on the handling, importation, and disposition of exempted potatoes. Also, authorized employees of the Board or the Secretary, may inspect such books and records as are appropriate and necessary to verify the reports on such disposition.

[37 FR 17379, Aug. 26, 1972, as amended at 56 FR 40232, Aug. 14, 1991]

## RECORDS

### § 1207.532 Retention period for records.

Each handler and importer required to make reports pursuant to this subpart shall maintain and retain such records for at least 2 years beyond the end of the marketing year of their applicability:

(a) One copy of each report made to the Board; and

(b) Such records as are necessary to verify such reports.

[37 FR 17379, Aug. 26, 1972, as amended at 56 FR 40232, Aug. 14, 1991]

### § 1207.533 Availability of records.

(a) Each handler and importer required to make reports pursuant to this subpart shall make available for inspection by authorized employees of the Board or the Secretary during regular business hours, such records as are appropriate and necessary to verify reports required under this subpart.

(b) Importers shall also maintain for 2 years records on the total quantities of potatoes imported and on the total quantities of potato products imported, and a record of each importation of potatoes, potato products, and seed potatoes including quantity, date, and port of entry, and shall make such records available for inspection by authorized employees of the Board or the Secretary during regular business hours.

[56 FR 40232, Aug. 14, 1991]

**§ 1207.534 OMB control number assigned pursuant to the Paperwork Reduction Act.**

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control number 0581–0093.

[49 FR 23826, June 8, 1984]

CONFIDENTIAL INFORMATION

**§ 1207.540 Confidential books, records, and reports.**

All information obtained from the books, records, and reports of handler and importers and all information with respect to refunds of assessments made to individual producers and importers shall be kept confidential in the manner and to the extent provided for in § 1207.352 of the Plan.

[56 FR 40232, Aug. 14, 1991]

**§ 1207.545 Right of the Secretary.**

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

**§ 1207.546 Personal liability.**

No member 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, except for acts of willful misconduct, gross negligence, or those which are criminal in nature.

# PART 1208—PROCESSED RASPBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

## Subpart A [Reserved]

## Subpart B—Referendum Procedures

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1208.101 Definitions.
1208.102 Voting.
1208.103 Instructions.
1208.104 Subagents.
1208.105 Ballots.
1208.106 Referendum report.
1208.107 Confidential information.
1208.108 OMB control number.

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

SOURCE: 75 FR 6091, Feb. 8, 2010, unless otherwise noted.

## Subpart A [Reserved]

## Subpart B—Referendum Procedures

**§ 1208.100 General.**

Referenda to determine whether eligible producers of raspberries for processing and importers of processed raspberries favor the issuance, amendment, suspension, or termination of the Processed Raspberry Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

**§ 1208.101 Definitions.**

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to delegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Department* 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.

(c) *Eligible producer* means any person who grows 20,000 pounds or more of raspberries for processing in the United States for sale in commerce, or a person who is engaged in the business of producing, or causing to be produced for any market, raspberries for processing beyond the person's own family use and having value at first point of sale.

(d) *Eligible importer* means any person importing 20,000 or more pounds of processed raspberries into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or handles processed raspberries outside of the United States for sale in the United

States, and who is listed as the importer of record for such processed raspberries that are identified in the Harmonized Tariff Schedule of the United States by the numbers 0811.20.20.20, during the representative period. Importation occurs when processed raspberries originating outside of the United States are released from custody by Customs and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced processed raspberries immediately upon release by Customs, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of processed raspberries from Customs when such processed raspberries are entered or withdrawn for consumption in the United States.

(e) *Raspberries* mean and include all kinds, varieties, and hybrids of cultivated raspberries of the genus "Rubus" grown in or imported into the United States.

(f) *Processed Raspberries* means raspberries which have been frozen, dried, pureed, made into juice, or delivered in any other form altered by mechanical processes other than fresh.

(g) *Order* means the Processed Raspberry Promotion, Research, and Information Order.

(h) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a raspberry farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

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

(j) *Representative period* means the period designated by the Department.

(k) *United States* or *U.S.* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

### § 1208.102 Voting.

(a) Each eligible producer of raspberries for processing and eligible importer of processed raspberries shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord/tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to process raspberries, in which more than one of the parties is a producer or importer, shall be entitled to cast one ballot in the referendum covering only such producer or importer's share of the ownership.

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

(c) All ballots are to be cast by mail as instructed by the Department.

### § 1208.103 Instructions.

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

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

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

(c) Give reasonable public notice of the referendum:

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

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

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

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

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

### § 1208.104 Subagents.

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

### § 1208.105 Ballots.

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

### § 1208.106 Referendum report.

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

### § 1208.107 Confidential information.

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

### § 1208.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581–NEW.

# PART 1209—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

## Subpart A—Mushroom Promotion, Research, and Consumer Information Order

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AUTHORITY: 7 U.S.C. 6101–6112 and 7 U.S.C. 7401.

SOURCE: 57 FR 31951, July 20, 1992, unless otherwise noted.

## Subpart A—Mushroom Promotion, Research, and Consumer Information Order

SOURCE: 58 FR 3449, Jan. 8, 1993, unless otherwise noted.

DEFINITIONS

### § 1209.1 Act.

*Act* means the Mushroom Promotion, Research, and Consumer Information Act of 1990, subtitle B of title XIX of the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101–624, 7 U.S.C. 6101–6112, and any amendments thereto.

### § 1209.2 Commerce.

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

### § 1209.3 Consumer information.

*Consumer information* means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms.

### § 1209.4 Council.

*Council* means the administrative body referred to as the Mushroom Council established under § 1209.30 of this subpart.

**§ 1209.5 Department.**

*Department* means the United States Department of Agriculture.

**§ 1209.6 First handler.**

*First handler* means any person who receives or otherwise acquires mushrooms from a producer and prepares for marketing or markets such mushrooms, or who prepares for marketing or markets mushrooms of that person's own production.

**§ 1209.7 Fiscal year.**

*Fiscal year* means the 12-month period from January 1 to December 31 each year, or such other period as recommended by the Council and approved by the Secretary.

**§ 1209.8 Importer.**

*Importer* means any person who imports, on average, over 500,000 pounds of mushrooms annually from outside the United States.

**§ 1209.9 Industry information.**

*Industry information* means information and programs that will lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry.

**§ 1209.10 Marketing.**

(a) *Marketing* means the sale or other disposition of mushrooms in any channel of commerce.

(b) *To market* means to sell or otherwise dispose of mushrooms in any channel of commerce.

**§ 1209.11 Mushrooms.**

*Mushrooms* means all varieties of cultivated mushrooms grown within the United States and marketed for the fresh market, or imported into the United States and marketed for the fresh market, except such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed in such manner as the Council, with the approval of the Secretary, may determine.

**§ 1209.12 On average.**

*On average* means a rolling average of production or imports during the last two fiscal years, or such other period as may be determined by the Secretary.

**§ 1209.13 Part and subpart.**

*Part* means this mushroom promotion and research order and all rules and regulations and supplemental orders issued thereunder, and the term *subpart* means the mushroom promotion and research order.

**§ 1209.14 Person.**

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

**§ 1209.15 Producer.**

*Producer* means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

**§ 1209.16 Programs, plans, and projects.**

*Programs, plans, and projects* means promotion, research, consumer information, and industry information plans, studies, projects, or programs conducted pursuant to this part.

**§ 1209.17 Promotion.**

*Promotion* means any action determined by the Secretary to enhance the image or desirability of mushrooms, including paid advertising.

**§ 1209.18 Region.**

*Region* means one of the described geographic subdivisions of the production areas described in § 1209.30 (b) or as later realigned or reapportioned pursuant thereto, or the import region described in § 1209.30(c).

**§ 1209.19 Research.**

*Research* means any type of study to advance the image, desirability, safety, marketability, production, product development, quality, or nutritional value of mushrooms.

**§ 1209.20 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States 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.

**§ 1209.21 State and United States.**

(a) *State* means any of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b) *United States* means collectively the several States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.

MUSHROOM COUNCIL

**§ 1209.30 Establishment and membership.**

(a) There is hereby established a Mushroom Council of not less than four or more than nine members. The Council shall be composed of producers appointed by the Secretary under § 1209.33, except that, as provided in paragraph (c) of this section, importers shall be appointed by the Secretary to the Council under § 1209.33 once imports, on average, reach at least 50,000,000 pounds of mushrooms annually.

(b) For purposes of nominating and appointing producers to the Council, the United States shall be divided into three geographic regions and the number of Council members from each region shall be as follows:

(1) *Region 1:* All other States including the District of Columbia and the Commonwealth of Puerto Rico except for Pennsylvania and California—2 Members.

(2) *Region 2:* The State of Pennsylvania—4 Members.

(3) *Region 3:* The State of California—2 Members.

(c) Importers shall be represented by a single, separate region, referred to as Region 4, consisting of the United States when imports, on average, equal or exceed 50,000,000 pounds of mushrooms annually.

(d) At least every five years, and not more than every three years, the Council shall review changes in the geographic distribution of mushroom production volume throughout the United States and import volume, using the average annual mushroom production and imports over the preceding four years, and, based on such review, shall recommend to the Secretary reapportionment of the regions established in paragraph (b) of this section, or modification of the number of members from such regions, as determined under the rules established in paragraph (e), of this section or both, as necessary to best reflect the geographic distribution of mushroom production volume in the United States and representation of imports, if applicable.

(e) Subject to the nine-member maximum limitation, the following procedure will be used to determine the number of members for each region to serve on the Council under paragraph (d) of this section:

(1) Each region that produces, on average, at least 50,000,000 pounds of mushrooms annually shall be entitled to one representative on the Council.

(2) As provided in paragraph (c) of this section, importers shall be represented by a single, separate region, which shall be entitled to one representative, if such region imports, on average, at least 50,000,000 pounds of mushrooms annually.

(3) If the annual production of a region is greater than 110,000,000 pounds, but less than or equal to 180,000,000 pounds, the region shall be represented by 1 additional member.

(4) If the annual production of a region is greater than 180,000,000 pounds, but less than or equal to 260,000,000 pounds, the region shall be represented by 2 additional members.

(5) If the annual production of a region is greater than 260,000,000 pounds, the region shall be represented by 3 additional members.

(6) Should, in the aggregate, regions be entitled to levels of representation under paragraphs (e)(1), (2), (3), (4) and (5) of this section that would exceed the nine-member limit on the Council under the Act, the seat or seats assigned shall be assigned to that region or those regions with greater on-average production or import volume than the other regions otherwise eligible at that increment level.

(f) In determining the volume of mushrooms produced in the United States or imported into the United States for purposes of this section, the Council and the Secretary shall:

(1) Only consider mushrooms produced or imported by producers and importers, respectively, as those terms are defined in §§ 1209.8 and 1209.15; and

(2) Use the information received by the Council under § 1209.60, and data published by the Department.

(g) For purposes of the provisions of this section relating to the appointment of producers and importers to serve on the Council, the term *producer* or *importer* refers to any individual who is a producer or importer, respectively, or if the producer or importer is an entity other than an individual, an individual who is an officer or employee of such producer or importer.

[58 FR 3449, Jan. 8, 1993, as amended at 74 FR 50919, Oct. 2, 2009]

**§ 1209.31 Nominations.**

All nominations for appointments to the Council under § 1209.33 shall be made as follows:

(a) As soon as practicable after this subpart becomes effective, nominations for appointment to the initial Council shall be obtained from producers by the Secretary. In any subsequent year in which an appointment to the Council is to be made, nominations for positions whose terms will expire at the end of that year shall be obtained from producers, and as appropriate, importers, and certified by the Council and submitted to the Secretary by August 1 of such year, or such other date as approved by the Secretary.

(b) Nominations shall be made at regional caucuses of producers or importers, or by mail ballot as provided in paragraph (e), in accordance with procedures prescribed in this section.

(c) Except for initial Council members, whose nomination process will be initiated by the Secretary, the Council shall issue a call for nominations by February 1 of each year in which nominations for an appointment to the Council is to be made. The call shall include, at a minimum, the following information:

(1) A list by region of the vacancies for which nominees may be submitted and qualifications as to producers and importers.

(2) The date by which the names of nominees shall be submitted to the Secretary for consideration to be in compliance with paragraph (a) of this section.

(3) A list of those States, by region, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Council, and national and State producer or importer associations, if known, and of the regional caucuses, if any.

(d)(1) Except as provided in paragraph (e), nominations for each position shall be made by regional caucus in the region entitled to nominate for such position. Notice of such caucus shall be publicized to all producers or importers within the region, and to the Secretary, at least 30 days prior to the caucus. The notice shall have attached to it the call for nominations from the Council and the Department's equal opportunity policy. Except with respect to nominations for the initial appointments to the Council, the responsibility for convening and publicizing the regional caucus shall be that of the Council.

(2) All producers or importers within the region may participate in the caucus. However, if a producer is engaged in the production of mushrooms in more than one region or is also an importer, such person's participation within a region shall be limited to one vote and shall only reflect the volume of such person's production or imports within the applicable region.

(3) The regional caucus shall conduct the selection process for the nominees in accordance with procedures to be adopted at the caucus subject to the following requirements:

(i) There shall be two individuals nominated for each open position.

(ii) Each nominee shall meet the qualifications set forth in the call.

(iii) If a producer nominee is engaged in the production of mushrooms in

more than one region or is also an importer, such individual shall participate within the region that such individual so elects in writing to the Council and such election shall remain controlling until revoked in writing to the Council.

(e) After the regional caucuses for the initial Council, the Council may conduct the selection of nominees by mail ballot in lieu of a regional caucus.

(f) When producers or importers are voting for nominees to the Council, whether through a regional caucus or a mail ballot, the following conditions shall apply:

(1) Voting for any open position shall be on the basis of:

(i) One vote per eligible voter; and

(ii) Volume of on-average production or imports of the eligible voter within that region.

(2) Whenever the producers or importers in a region are choosing nominees for one open position on the Council, the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or importers voted shall be the nominees submitted to the Secretary. If a proposed nominee receives both the highest number of votes cast and the highest volume of production or imports voted, then the proposed nominee with the second highest number of votes cast shall be a nominee submitted to the Secretary along with such proposed nominee receiving both the highest number of votes cast and the highest volume of production or imports voted.

(3) Whenever the producers or importers in a region are choosing nominees for more than one open position on the Council at the same time, the number of the nominations submitted to the Secretary shall equal twice the number of such open positions, and for each open position shall consist of the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or imports voted with respect to that position, subject to the rule set out in paragraph (f)(2). An individual shall only be nominated for one such open position.

(4) Voters shall certify on their ballots as to their on-average production or import volume within the region involved. Such certification may be subject to verification.

(g)(1) The Secretary may reject any nominee submitted. If there are insufficient nominees from which to appoint members to the Council as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary under the procedures set out in this section.

(2) Whenever producers or importers in a region cannot agree on nominees for an open position on the Council under the preceding provisions of this section, or whenever they fail to nominate individuals for appointment to the Council, the Secretary may appoint members in such manner as the Secretary, by regulation, determines appropriate.

### § 1209.32 Acceptance.

Each individual nominated for membership on the Council shall qualify by filing a written acceptance with the Secretary at the time of nomination.

### § 1209.33 Appointment.

From the nominations made pursuant to § 1209.31, the Secretary shall appoint the members of the Council on the basis of representation provided for in § 1209.30, except that no more than one member may be appointed to the Council from nominations submitted by any one producer or importer.

### § 1209.34 Term of office.

(a) The members of the Council shall serve for terms of three years, except that the members appointed to the initial Council shall serve, proportionately, for terms of one, two, and three years.

(b) Members of the initial Council shall be designated for, and shall serve, terms as follows: One producer member each from regions 1, 2 and 3 shall be appointed for an initial term of one year; one producer member each from regions 1, 2, and 3 shall be appointed for an initial term of two years; and one producer member each from regions 2, 3, and 4 shall be appointed for an initial term of three years. Because current imports of fresh mushrooms are less than 35,000,000 pounds, the minimum established for representation on the

Council, importers will not initially have a member appointed to the Council.

(c)(1) Except with respect to terms of office of the initial Council, the term of office for each member of the Council shall begin on January 1 or such other date that may be approved by the Secretary.

(2) The term of office for the initial Council shall begin immediately following appointment by the Secretary, except that time in the interim period from appointment until the following January 1, or such other date that is the generally applicable beginning date for terms under paragraph (c)(1) approved by the Secretary, shall not count toward the initial term of office.

(d) Council members shall serve during the term of office for which they are appointed and have qualified, and until their successors are appointed and have qualified.

(e)(1) No member shall serve more than two successive three-year terms, except as provided in paragraph (e)(2)(ii).

(2)(i) Those members serving initial terms of two or three years may serve one successive three-year term.

(ii) Those members serving initial terms of one year may serve two successive three-year terms.

**§ 1209.35 Vacancies.**

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Council, the Secretary may appoint a successor from the most recent nominations submitted for open positions on the Council assigned to the region that the vacant position represents, or the Secretary may obtain nominees to fill such vacancy in such manner as the Secretary, by regulation, deems appropriate. Each such successor appointment shall be for the remainder of the term vacated. A vacancy will not be required to be filled if the unexpired term is less than six months.

(b)(1) No successor appointed to a vacated term of office shall serve more than two successive three-year terms on the Council, except as provided in paragraph (b)(2)(ii).

(2)(i) Any successor serving longer than one year may serve one successive three-year term.

(ii) Any successor serving one year or less may serve two successive three-year terms.

(c) If a member of the Council consistently refuses to perform the duties of a member of the Council, or if a member of the Council is known to be engaged in acts of dishonesty or willful misconduct, the Council may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Council shows adequate cause, the Secretary shall remove such member from office. Further, without recommendation of the Council, 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.

**§ 1209.36 Procedure.**

(a) At a properly convened meeting of the Council, a majority of the members shall constitute a quorum.

(b) Each member of the Council will be entitled to one vote on any matter put to the Council, and the motion will carry if supported by a simple majority of those voting. At assembled meetings of the Council, all votes will be cast in person.

(c) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Council such action is considered necessary, the Council may take action upon the concurring votes of a majority of its members by mail, telephone, telegraph, or any other means of communication, but any such action shall be confirmed promptly in writing. In that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Council. All votes shall be recorded in Council minutes.

(d) Meetings of the Council may be conducted by electronic communications, provided that each member is

given prior notice of the meeting and has an opportunity to be present either physically or by electronic connection.

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

### § 1209.37 Compensation and reimbursement.

The members of the Council shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a reasonable per diem allowance, as approved by the Council and the Secretary, incurred by such members in the performance of their responsibilities under this subpart.

### § 1209.38 Powers.

The Council shall have the following powers:

(a) To receive and evaluate or, on its own initiative, develop and budget for proposed programs, plans, or projects to promote the use of mushrooms, as well as proposed programs, plans, or projects for research, consumer information, or industry information, and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals;

(d) To make rules and regulations to effectuate the terms and provisions of this subpart;

(e) To receive, investigate, and report to the Secretary for action complaints of violations of the provisions of this subpart;

(f) To disseminate information to producers, importers, first handlers, or industry organizations through programs or by direct contact using the public postal system or other systems;

(g) To select committees and subcommittees of Council members, including an executive committee whose powers and membership shall be determined by the Council, subject to the approval of the Secretary, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(h) To establish committees which may include individuals other than Council members, and pay the necessary and reasonable expenses and fees for the members of such committees;

(i) To recommend to the Secretary amendments to this subpart;

(j) With the approval of the Secretary, to enter into contracts or agreements with national, regional, or State mushroom producer organizations, or other organizations or entities, for the development and conduct of programs, plans, or projects authorized under § 1209.40 and with such producer organizations for other services necessary for the implementation of this subpart, and for the payment of the cost thereof with funds collected and received pursuant to this subpart. The Council shall not contract with any producer or importer for the purpose of mushroom promotion or research. The Council may lease physical facilities from a producer or importer for such promotion or research, if such an arrangement is determined to be cost effective by the Council and approved by the Secretary. Any contract or agreement shall provide that:

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

(2) Any such program, plan, or project shall become effective upon approval of the Secretary;

(3) The contracting or agreeing party shall keep accurate records of all of its transactions and make periodic reports to the Council of activities conducted, submit accountings for funds received and expended, and make such other reports as the Secretary or the Council may require; and the Secretary may audit the records of the contracting or agreeing party periodically; and

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

(k) With the approval of the Secretary, to invest, pending disbursement pursuant to a program, plan, or project, funds collected through assessments provided for in § 1209.51, and any other funds received by the Council in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States;

(l) To develop and propose to the Secretary programs for good agricultural and good handling practices and related activities for mushrooms.

(m) Such other powers as may be approved by the Secretary; and

(n) To develop and propose to the Secretary voluntary quality and grade standards for mushrooms, if the Council determines that such quality and grade standards would benefit the promotion of mushrooms.

[58 FR 3449, Jan. 8, 1993, as amended at 74 FR 50920, Oct. 2, 2009]

### § 1209.39 Duties.

The Council shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, consumer information, and industry information programs, plans, or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart, as provided in § 2109.50.

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles and to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Council as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books, and records that clearly reflect all the acts and transactions of the Council. Minutes of each Council meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any producer or importer;

(k) To follow the Department's equal opportunity/civil rights policies; and

(l) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, develop new markets and uses for mushrooms, and to carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry.

PROMOTION, RESEARCH, CONSUMER INFORMATION, AND INDUSTRY INFORMATION

### § 1209.40 Programs, plans, and projects.

(a) The Council shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, consumer information, and industry information with respect to mushrooms; and

(2) The establishment and conduct of research with respect to the sale, distribution, marketing, and use of mushrooms and mushroom products, and the creation of new products thereof, to the end that marketing and use of mushrooms may be encouraged, expanded, improved or made more acceptable. However, as prescribed by the Act, nothing in this subpart may be construed to authorize mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production or otherwise limit the right of individual producers to produce mushrooms.

(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 Council shall take appropriate steps to implement it.

(c) Each programs, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Council to ensure that it contributes to an effective program of promotion, research, consumer information, or industry information. If it is found by the Council that any such program, plan, or project does not contribute to an effective program of promotion, research, consumer information, or industry information, then the Council shall terminate such program, plan, or project.

(d) In carrying out any program, plan, or project, no reference to a brand name, trade name, or State or regional identification of any mushrooms or mushroom product shall be made. In addition, no program, plan, or project shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

EXPENSES AND ASSESSMENTS

### § 1209.50 Budget and expenses.

(a)(1) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

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

(ii) A summary of anticipated revenue, with comparative data for at least one preceding year;

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

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

Each budget shall include a rate of assessment for such fiscal year calculated, subject to § 1209.51(b), to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (f). The Council may change such rate at any time, as provided in § 1209.51(b)(5).

(2)(i) Subject to paragraph (a)(2)(ii), any amendment or addition to an approved budget must be approved by the Secretary, including shifting of funds from one program, plan, or project to another.

(ii) Shifts of funds which do not cause an increase in the Council's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(b) The Council is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Council 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 Council.

(c) The Council shall not use funds collected or received under this subpart to reimburse, defray, or make payment of expenditures incurred in developing, drafting, studying, lobbying on or promoting the legislation authorizing this subpart. Such prohibition includes reimbursement, defrayment, or payment to mushroom industry associations or organizations, producers or importers, lawyers, law firms, or consultants.

(d) The Council may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Council shall retain complete control of their use. The donor may recommend that the whole or a portion of the contribution be applied to an ongoing program, plan, or project.

(e) The Council shall reimburse the Secretary, from funds received by the Council, for administrative costs incurred by the Secretary in implementing and administering this subpart, except for the salaries of Department employees incurred in conducting referenda.

(f) The Council may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, except that the funds in the reserve shall not exceed approximately one fiscal year's expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

(g) With the approval of the Secretary, the Council may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Council.

**§ 1209.51 Assessments.**

(a) Any first handler initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States shall, in the manner as prescribed by the Council and approved by the Secretary, collect an assessment based upon the number of pounds of mushrooms marketed in the United States for the account of the producer, and remit the assessment to the Council.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment during the first year this subpart is in effect shall be one-quarter of one cent per pound of mushrooms marketed, or the equivalent thereof.

(2) The rate of assessment during the second year this subpart is in effect shall not exceed one-third of one cent per pound of mushrooms marketed, or the equivalent thereof.

(3) The rate of assessment during the third year this subpart is in effect shall not exceed one-half of one cent per pound of mushrooms marketed, or the equivalent thereof.

(4) The rate of assessment during each of the fourth and following years this subpart is in effect shall not exceed one cent per pound of mushrooms marketed, or the equivalent thereof.

(5) The Council may change the rate of assessment for a fiscal year at any time with the approval of the Secretary as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraphs (b)(1), (2), (3), or (4), whichever is applicable.

(c) Any person marketing mushrooms of that person's own production to consumers in the United States, either directly or through retail or wholesale outlets, shall be considered a first handler and shall remit to the Council an assessment on such mushrooms at the rate per-pound then in effect, and in such form and manner prescribed by the Council.

(d) Only one assessment shall be paid on each unit of mushrooms marketed.

(e)(1) Each importer of mushrooms shall pay an assessment to the Council on mushrooms imported for marketing in the United States, through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(2) The per-pound assessment rate for imported mushrooms shall be the same as the rate provided for mushrooms produced in the United States.

(3) The import assessment shall be uniformly applied to imported mushrooms that are identified by the numbers, 0709.51.01 and 0709.59 in the Harmonized Tariff Schedule of the United States or any other number used to identify fresh mushrooms.

(4) The assessments due on imported mushrooms shall be paid when the mushrooms are entered or withdrawn for consumption in the United States,

or at such other time as may be established by rules and regulations prescribed by the Council and approved by the Secretary and under such procedures as are provided in such rules and regulations.

(5) Only one assessment shall be paid on each unit of mushrooms imported.

(f) The collection of assessments under this section shall commence on all mushrooms marketed in or imported into the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments until the Council is constituted, then remit such assessments to the Council.

(g)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (e) shall remit the amounts due from assessments to the Council on a monthly basis no later than the fifteenth day of the month following the month in which the mushrooms were marketed, in such manner as prescribed by the Council.

(2)(i) A late payment charge shall be imposed on any person that fails to remit to the Council the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(ii) An additional charge shall be imposed on any person subject to a late payment charge, in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in rules and regulations as approved by the Secretary.

(3) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Council by the payment due date, shall be considered to have been payable on the payment due date. Under such a situation, paragraphs (g)(2)(i) and (g)(2)(ii) of this section shall be applicable.

(h) The Council, with the approval of the Secretary, may enter into agreements authorizing other organizations to collect assessments in its behalf. Any such organization shall be required to maintain the confidentiality of such information as is required by the Council for collection purposes. Any reimbursement by the Council for such services shall be based on reasonable charges for services rendered.

(i) The Council is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Council shall not be obligated to pay interest on any advance payment.

[58 FR 3449, Jan. 8, 1993, as amended at 72 FR 41427, July 30, 2007]

### § 1209.52 Exemption from assessment.

(a) The following persons shall be exempt from assessments under this part:

(1) A person who produces or imports, on average, 500,000 pounds or less of mushrooms annually; and

(2) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in § 1209.252(a)(2)(vi); and is not a split operation; and

(3) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation.

(b) To claim such exemption, such persons shall apply to the Council, in the form and manner prescribed in the rules and regulations.

(c) Mushrooms produced in the United States that are exported are exempt from assessment and are subject to such safeguards as prescribed in rules and regulations to prevent improper use of this exemption.

(d) Domestic and imported mushrooms used for processing are exempt from assessment and are subject to such safeguards as prescribed in rules

and regulations to prevent improper use of this exemption.

[58 FR 3449, Jan. 8, 1993, as amended at 70 FR 2756, Jan. 14, 2005]

### § 1209.53 Influencing governmental action.

No funds received by the Council under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart, and to submit to the Secretary proposed voluntary grade and quality standards for mushrooms.

REPORTS, BOOKS AND RECORDS

### § 1209.60 Reports.

(a) Each producer marketing mushrooms of that person's own production directly to consumers, and each first handler responsible for the collection of assessments under § 1209.51(a) shall be required to report monthly to the Council, on a form provided by the Council, such information as may be required under this subpart or any rules and regulations issued thereunder. Such information shall include, but not be limited to, the following:

(1) The first handler's name, address, and telephone number;

(2) Date of report, which is also the date of payment to the Council;

(3) Period covered by the report;

(4) The number of pounds of mushrooms purchased, initially transferred, or that in any other manner are subject to the collection of assessments, and a copy of a certificate of exemption, claiming exemption under § 1209.52 from those who claim such exemptions;

(5) The amount of assessments remitted; and

(6) The basis, if necessary, to show why the remittance is less than the number of pounds of mushrooms determined under paragraph (a)(4) multiplied by the applicable assessment rate.

(b) If determined necessary by the Council and approved by the Secretary, each importer shall file with the Council periodic reports, on a form provided by the Council, containing at least the following information:

(1) The importer's name, address, and telephone number;

(2) The quantity of mushrooms entered or withdrawn for consumption in the United States during the period covered by the report; and

(3) The amount of assessments paid to the U.S. Customs Service at the time of such entry or withdrawal.

(c) The words *final report* shall be shown on the last report at the end of each fiscal year.

### § 1209.61 Books and records.

Each persons who is subject to this subpart shall maintain and make available for inspection by the Council or the Secretary such books and records as are deemed necessary by the Council, with the approval of the Secretary, to carry out the provisions of this subpart and any rules and regulations issued hereunder, including such books and records as are necessary to verify any reports required. Such books and records shall be retained for at least two years beyond the fiscal year of their applicability.

### § 1209.62 Confidential treatment.

All information obtained from books, records, or reports under the Act, this subpart, and the rules and regulations issued thereunder shall be kept confidential by all persons, including all employees and former employees of the Council, all officers and employees and former officers and employees of the Department, and 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 Council members, producers, importers, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart.

Nothing in this section shall be deemed to prohibit:

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

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

MISCELLANEOUS

### § 1209.70 Right of the Secretary.

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

### § 1209.71 Suspension or termination.

(a) Whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(b)(1) Five years after the date on which this subpart becomes effective, the Secretary shall conduct a referendum among producers and importers to determine whether they favor continuation, termination, or suspension of this subpart.

(2) Effective beginning three years after the date on which this subpart becomes effective, the Secretary, on request of a representative group comprising 30 percent or more of the number of mushroom producers and importers, may conduct a referendum to determine whether producers and importers favor termination or suspension of this subpart.

(3) Whenever the Secretary determines that suspension or termination of this subpart is favored by a majority of the mushroom producers and importers voting in a referendum under paragraphs (b) (1) or (2) who, during a representative period determined by the Secretary, have been engaged in producing and importing mushrooms and who, on average, annually produced and imported more than 50 percent of the volume of mushrooms produced and imported by all those producers and importers voting in the referendum, the Secretary shall:

(i) Suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

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

(4) Referenda conducted under this subsection shall be conducted in such manner as the Secretary may prescribe.

### § 1209.72 Proceedings after termination.

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

(b) The trustees shall:

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

(2) Carry out the obligations of the Council under any contract or agreement entered into by it under this subpart;

(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 Council and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Council or the trustees under this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered under this subpart shall be

subject to the same obligations imposed upon the Council 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 used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information, or industry information programs, plans, or projects authorized under this subpart.

### § 1209.73 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any rule and regulation issued under this subpart, or the issuance of any amendment to such provisions, shall not:

(a) Affect or waive any right, duty, obligation, or liability that shall have arisen or may hereafter arise in connection with any provision of this subpart or any such rules or regulations;

(b) Release or extinguish any violation of this subpart or any such rules or regulations; or

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

### § 1209.74 Personal liability.

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

### § 1209.75 Patents, copyrights, inventions, publications, and product formulations.

Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Council under this subpart shall be the property of the United States Government as represented by the Council and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, publications, or product formulations inure to the benefit of the Council and be considered income subject to the same fiscal, budget, and audit controls as other funds of the Council. Upon termination of this subpart, § 1209.72 shall apply to determine disposition of all such property.

### § 1209.76 Amendments.

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

### § 1209.77 Separability.

If any provision of this subpart is declared invalid, or the applicability thereof 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.

## Subpart B—Rules and Regulations

SOURCE: 58 FR 8197, Feb. 11, 1993, unless otherwise noted.

DEFINITIONS

### § 1209.200 Terms defined.

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions in Subpart A—Mushroom Promotion, Research, and Consumer Information Order of this part.

NOMINATION PROCEDURES

### § 1209.230 [Reserved]

### § 1209.231 Nominations.

Nominations shall be made at regional caucuses of producers or importers, or by mail ballot in accordance with the procedures prescribed in § 1209.31 of this part. Proxy voting by producers and importers shall not be permitted at a regional caucus or in a mail ballot. Each regional caucus and mail ballot shall be scheduled so as to ensure that the nominations for each position that will be open at the beginning of the following year are received

by the Secretary by August 1, or such other date approved by the Secretary.

**§ 1209.233 Regional caucus chairpersons.**

(a) Regional caucus chairpersons shall be elected by a simple majority vote of eligible voters in attendance. Such elections shall be coordinated by the Council, except for the initial elections, which shall be coordinated by a representative of the Secretary.

(b) Regional caucus chairpersons will coordinate the entire nomination process. In conducting the nominations process, each regional caucus chairperson shall ensure that:

(1) Voting for producer nominees is limited to producers, and voting for importer nominees is limited to importers; and

(2) Producer candidates for nomination are producers, and importer candidates for nomination are importers.

(c) Within 14 days after completion of each regional caucus, each chairperson shall provide the Secretary with the following information:

(1) The identification of that region's two nominees for each open position on the Council; and

(2) A typed copy of the regional caucus's minutes.

(d) The chairperson of each regional caucus shall provide nominees with qualification statements and other specified information. Each nominee will be contacted by the chairperson and asked to forward such completed documentation to the Council within 14 days after completion of the regional caucus, except for the initial nominees, which shall be asked to forward such completed documentation to the Secretary.

(e) The tenure of the chairperson shall only be for the duration of the regional caucus and the preparation of required documentation.

**§ 1209.235 Mail balloting.**

(a) After the initial regional caucuses, the Council may conduct nominations of individuals as candidates for appointment to the Council by mail ballot in lieu of a regional caucus.

(b)(1) In the event of a mail ballot, all qualified individuals in a region interested in serving as a member on the Council or persons who are interested in nominating an individual to serve on the Council shall submit to the Council in writing such information as name, mailing address, number of pounds of mushrooms produced or imported, or such other information as may be required, in order to place such individual on the ballot.

(2) Notice of mail balloting to nominate candidates for a position on the Council shall be publicized by the Council to producers or importers in the region involved, and to the Secretary, at least 120 days before the region's nominee ballot is issued.

(3) In proposing nominees for inclusion on a mail ballot, proposed nominations must be received by the Council at least 30 days before the region's nominee ballot is issued.

(c) Once proposed nominations have been submitted from the applicable region, the Council shall cause each proposed nomination, if the individual qualifies, to be placed on the region's nominee ballot. The Council then shall mail a ballot to each known producer or importer within the region.

(d) Distribution of ballots shall be announced by press releases, furnishing pertinent information on balloting, issued by the Council through newspapers and other publications having general circulation among producers in the mushroom producing areas involved or among mushroom importers.

(e) Each producer or importer shall cast a ballot for each open position on the Council assigned to the region in accordance with the procedures prescribed in § 1209.31 of this part. The completed ballot must be returned to the Council or its designee within 30 days after the ballot is issued.

(f) Within 45 days after a mail ballot is issued, the Council shall validate the ballots cast, tabulate the votes, and provide the Secretary with the results of the vote and the identification of the region's two nominees for each open position on the Council.

(g) The Council shall provide nominees with qualification statements and other specified information. Each nominee selected in the mail ballot will be contacted by the Council and

asked to forward such completed documentation to the Council within 14 days of such notification.

**§ 1209.237 Appointment.**

If an employee, partner, officer, or shareholder of a producer or importer is a current member of the Council, no nominee who is also an employee, partner, officer, or shareholder of such producer or importer shall be appointed to the Council. A Council member shall be disqualified from serving on the Council if such individual ceases to be affiliated with a producer or importer within the region the Council member represents.

GENERAL

**§ 1209.239 Financial statements.**

(a) As requested by the Secretary, the Council shall prepare and submit financial statements to the Secretary on a periodic basis. 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 Secretary within 30 days after the end of the time period to which it applies.

(c) The Council shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal year to which it applies.

ASSESSMENTS

**§ 1209.251 Payment of assessments.**

(a) Each first handler responsible for collecting assessments on domestic mushrooms shall collect the amounts assessed and remit such amounts to the Council on a monthly basis not later than the fifteenth day of the month following the month in which the mushrooms were marketed to or through the first handler.

(b) Each producer responsible for paying any assessment amount on the producer's own mushrooms shall remit such amount to the Council on a monthly basis not later than the fifteenth day of the month following the month in which the mushrooms were marketed by the producer.

(c) Each importer shall be responsible for remittance to the Council of any assessment amount not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. Any such assessment amount shall be remitted to the Council on a monthly basis not later than the fifteenth day of the month following the month of entry or withdrawal for consumption into the United States. Any person who imports mushrooms, as principal or as an agent, broker, or consignee for any person who produces mushrooms outside the United States for marketing in the United States shall be considered an importer.

(d) Remittance shall be by check, draft, or money order payable to the Mushroom Council, and shall be accompanied by a report, on a form provided by the Council.

(e) A late payment charge shall be imposed on any first handler or importer who fails to make timely remittance to the Council of the total assessment amount for which the person is liable. Such late payment charge shall be imposed on any assessments not received by the last day of the month following the month in which the mushrooms involved were marketed or, in the case of imports, not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. This one-time late payment charge shall be 10 percent of the assessments due before interest charges have accrued. The late payment charge will not be applied to any late payments postmarked within 15 days after the end of the month such assessments are due.

(f) In addition to the late payment charge, interest shall be charged at a rate of one and one-half percent per month on the outstanding balance, including the late payment charge and any accrued interest, of any account that remains delinquent beyond the last day of the second month following the month the mushrooms involved were marketed. However, first handlers

paying their assessments, in accordance with paragraph (h)(2) of this section, will not be subject to the one and one-half percent per month interest under this paragraph until the last day of the second month after such assessments are due under paragraph (h)(2) of this section. In the case of imports, such a rate of interest will be charged to any account that remains delinquent on any assessments not collected by the U.S. Customs Service at the time of entry or withdrawal for consumption into the United States. Such a rate of interest will continue to be charged monthly until the outstanding balance is paid to the Council.

(g) Any assessment determined by the Council at a date later than prescribed by this section, because of a person's failure to submit a report to the Council when due, shall be considered to have been payable by the date it would have been due if the report had been filed on time. A late payment charge and monthly interest charges on the outstanding balance shall be applicable to such unpaid assessment in accordance with paragraphs (e) and (f) of this section.

(h) In lieu of the monthly assessment payment and reporting requirements of § 1209.260 of this subpart and § 1209.60 of this part, the Council may permit a first handler to make advance payment of the total estimated assessment amount due to the Council for the ensuing fiscal year, or portion thereof, prior to the actual determination of assessable mushrooms.

(1) Each person shall provide an initial report estimating assessable mushrooms. The Council may request additional information on such estimate.

(2) Each person shall provide a final report of actual marketings during the period involved and remit any unpaid assessments not later than the fifteenth day of the month following the end of the period covered.

(3) Any person whose prepayment exceeds the amount paid shall be reimbursed for the amount of overpayment. The Council shall not, in any case, be obligated to pay interest on any advance payment.

**§ 1209.252 Exemption procedures.**

(a) *Types of exemptions and requirements.* (1) Any person who produces or imports, on average, 500,000 pounds or less of mushrooms annually and who desires to claim an exemption from assessments during a fiscal year shall apply to the Council, on a form provided by the Council, for a Certificate of Exemption. The producer or importer shall certify that the person's production or importation of mushrooms shall not exceed 500,000 pounds, on average, for the fiscal year for which the exemption is claimed. An average shall be calculated by averaging a person's estimated production or importation for the fiscal year for which an exemption is claimed with the person's production or importation in the preceding fiscal year.

(2) To apply for an exemption for organic mushrooms:

(i) An eligible mushroom producer shall submit a request for exemption to the Council—on a form provided by the Council—at any time initially and annually thereafter on or before January 1 as long as the producer continues to be eligible for the exemption.

(ii) The request shall include the following: The producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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 Council and with the approval of the Secretary.

(iii) If the producer complies with the requirements of § 1209.52 (a)(2), the Council will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Council will have 60 days to approve the exemption request; after August 15, 2005, the Council will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(iv) An eligible importer may submit documentation to the Council and request an exemption from assessment on 100 percent organic mushrooms—on a form provided by the Council—at any time initially and annually thereafter on or before January 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers. If the importer complies with the requirements of this section, the Council will grant the exemption and issue a Certificate of Exemption to the importer. The Council will also issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic mushrooms bearing this HTS classification assigned by the Council will not be subject to assessments.

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

(vi) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

(b) On receipt of an application, the Council shall determine whether an exemption may be granted. The Council then will issue, if deemed appropriate, a certificate of exemption to each person that is eligible to receive one. Each person who is exempt from assessment must provide an exemption number to the first handler in order not to be subject to collection of an assessment on mushrooms. First handlers and importers, except as otherwise authorized by the Council, shall maintain records showing the exemptee's name and address along with the exemption number assigned by the Council. Importers who are exempt from assessment shall be eligible for reimbursement of assessments collected by the U.S. Customs Service and shall apply to the Council for reimbursement of such assessments paid.

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

(d) The Council may require persons receiving an exemption from assessments to provide to the Council reports on the disposition of exempt mushrooms.

[58 FR 3449, Jan. 8, 1993, as amended at 70 FR 2756, Jan. 14, 2005]

REPORTS

### § 1209.260 Reports.

Each first handler shall be required to report monthly to the Council such information as may be required under § 1209.60(a) of this part. In addition, each first handler shall be required to provide the tax identification number or social security number of each producer the first handler has dealt with during the time period covered by the report.

[58 FR 8197, Feb. 11, 1993, as amended at 60 FR 13614, Mar. 14, 1995]

MISCELLANEOUS

### § 1209.280 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* is OMB control number 0581–0093, except for the Council nominee background statement form which is assigned OMB control number 0505–0001.

## Subpart C—Procedure for the Conduct of Referenda in Connection With the Mushroom Promotion, Research, and Consumer Information Order

SOURCE: 62 FR 66975, Dec. 23, 1997, unless otherwise noted.

### § 1209.300 General.

A referendum to determine whether eligible producers and importers favor the amendment, continuation, suspension, or termination of the Mushroom Promotion, Research, and Consumer Information Order shall be conducted in accordance with these procedures.

[74 FR 18464, Apr. 23, 2009]

### § 1209.301 Definitions.

Unless otherwise defined below, the definition of terms used in these procedures shall have the same meaning as the definitions in the Order.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Order* means the Mushroom Promotion, Research, and Consumer Information Order, including an amendment to the Order.

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

(d) *Representative period* means the period designated by the Secretary.

(e) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and wife who have title to, or leasehold interest in, mushroom production facilities and equipment as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property, and

(2) So-called "joint ventures", wherein one or more parties to the agreement, informal or otherwise, contributed capital and others contributed labor, management, equipment, or other services, or any variation of such contributions by two or more parties so that it results in the production or importation of fresh mushrooms and the authority to transfer title to the mushrooms so produced or imported.

(f) *Eligible producer* means any person or entity defined as a producer who produces, on average, over 500,000 pounds annually of fresh mushrooms during the representative period and who:

(1) Owns or shares in the ownership of mushroom production facilities and equipment resulting in the ownership of the mushrooms produced;

(2) Rents mushroom production facilities and equipment resulting in the ownership of all or a portion of the mushrooms produced;

(3) Owns mushroom production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the mushrooms produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce mushrooms who share the risk of loss and receive a share of the mushrooms produced. No other acquisition of legal title to mushrooms shall be deemed to result in persons becoming eligible producers.

(g) *Eligible importer* means any person or entity defined as an importer who imports, on average, over 500,000 pounds annually of fresh mushrooms during the representative period. Importation occurs when commodities originating outside the United States are entered or withdrawn from the U.S. Customs Service for consumption in the United States. Included are persons who hold title to foreign-produced mushrooms immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of mushrooms from the U.S. Customs Service when such mushrooms are entered or withdrawn for consumption in the United States.

### § 1209.302 Voting.

(a) Each person who is an eligible producer or importer, as defined in this

subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce mushrooms, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

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

(c) Ballots are to be cast by mail or fax.

**§ 1209.303 Instructions.**

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

(a) Determine the time of commencement and termination of the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information including that needed for ascertaining:

(1) Whether the person voting, or on whose behalf the vote is cast, is an eligible voter;

(2) The total volume of mushrooms produced by the voting producer during the representative period; and

(3) The total volume of mushrooms imported by the voting importer during the representative period.

(c) Give reasonable advance public notice of the referendum:

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

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

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

(e) Collect and safeguard ballots received by fax.

(f) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results.

(g) Prepare a report on the referendum.

(h) Prepare an announcement of the results for the public.

**§ 1209.304 Subagents.**

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

**§ 1209.305 Ballots.**

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

### § 1209.306 Referendum report.

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

### § 1209.307 Confidential information.

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

# PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN

## Subpart A—Watermelon Research and Promotion Plan

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AUTHORITY: 7 U.S.C. 4901–4916 and 7 U.S.C. 7401.

SOURCE: 53 FR 51091, Dec. 20, 1988, unless otherwise noted.

## Subpart A—Watermelon Research and Promotion Plan

SOURCE: 54 FR 24545, June 8, 1989, unless otherwise noted.

DEFINITIONS

### § 1210.301 Secretary.

*Secretary* means the Secretary of Agriculture of the United States 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.

### § 1210.302 Act.

*Act* means the Watermelon Research and Promotion Act of 1985 (Title XVI, Subtitle C of Pub. L. 99–198, 99th Congress, effective January 1, 1986, 99 Stat. 1622), as amended.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10797, Feb. 28, 1995]

### § 1210.303 Plan.

*Plan* means this watermelon research and promotion Plan issued by the Secretary pursuant to the Act.

### § 1210.304 Board.

*Board* means the National Watermelon Promotion Board, hereinafter established pursuant to § 1210.320.

### § 1210.305 Watermelon.

*Watermelon* means all varieties of the Family Curcubitaceae; Genus and Species; Citrullus Lanatus, popularly referred to as watermelon grown by producers in the United States or imported into the United States.

[60 FR 10797, Feb. 28, 1995]

### § 1210.306 Producer.

*Producer* means any person engaged in the growing of 10 acres or more of watermelons including any person who owns or shares the ownership and risk of loss of such watermelon crop.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10797, Feb. 28, 1995]

### § 1210.307 Handle.

*Handle* means to grade, pack, process, sell, transport, purchase, or in any other way to place or cause watermelons to which one has title or possession to be placed in the current of commerce. Such term shall not include the transportation or delivery of field run watermelons by the producer thereof to a handler for grading, sizing or processing.

### § 1210.308 Handler.

*Handler* means any person (except a common or contract carrier of watermelons owned by another person) who handles watermelons, including a producer who handles watermelons of the producer's own production. For the purposes of this subpart, the term "handler" means the "first" person who performs the handling functions.

### § 1210.309 Person.

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

### § 1210.310 Fiscal period and marketing year.

*Fiscal period* and *marketing year* mean the 12 month period from January 1 to December 31 or such other period which may be approved by the Secretary.

### § 1210.311 Programs and projects.

*Programs* and *projects* mean those research, development, advertising, or promotion programs or projects developed by the Board pursuant to § 1210.331.

### § 1210.312 Promotion.

*Promotion* means any action taken by the Board, pursuant to the Act, to present a favorable image for watermelons to the public with the express intent of improving the competitive

position of watermelons in the marketplace and stimulating sales of watermelons, and shall include, but not be limited to, paid advertising.

### § 1210.313 Research.

*Research* means any type of systematic study or investigation, and/or the evaluation of any study or investigation designed to advance the image, desirability, usage, marketability, production, or quality of watermelons.

### § 1210.314 Importer.

*Importer* means any person who imports watermelons into the United States as a principal or as an agent, broker, or consignee for any person who produces watermelons outside of the United States for sale in the United States.

[60 FR 10797, Feb. 28, 1995]

### § 1210.315 United States.

*United States* means each of the several States and the District of Columbia.

[60 FR 10797, Feb. 28, 1995]

## NATIONAL WATERMELON PROMOTION BOARD

### § 1210.320 Establishment and membership.

(a) There is hereby established a National Watermelon Promotion Board, hereinafter called the "Board." The Board shall be composed of producers, handlers, importers, and one public representative appointed by the Secretary. An equal number of producer and handler representatives shall be nominated by producers and handlers pursuant to § 1210.321. The Board shall also include one or more representatives of importers, who shall be nominated in such manner as may be prescribed by the Secretary. The public representative shall be nominated by the Board members in such manner as may be prescribed by the Secretary. If producers, handlers, and importers fail to select nominees for appointment to the Board, the Secretary may appoint persons on the basis of representation as provided in § 1210.324. If the Board fails to adhere to procedures prescribed by the Secretary for nominating a public representative, the Secretary shall appoint such representative.

(b) Membership on the Board shall be determined on the basis of two handler and two producer representatives for each of seven districts in the contiguous States of the United States. Such districts as hereby established have approximately equal production volume according to the three-year average production as set forth in the USDA Crop Production Annual Summary Reports for 1979, 1980, and 1981. They are:

*District #1*—South Florida including all areas south of State Highway 50.

*District #2*—North Florida including all areas north of State Highway 50.

*District #3*—The States of Alabama and Georgia.

*District #4*—The States of South Carolina, North Carolina, Virginia, Delaware, Maryland, West Virginia, Pennsylvania, New Jersey, New York, Ohio, Michigan, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine.

*District #5*—The States of Mississippi, Kentucky, Tennessee, Louisiana, Arkansas, Missouri, Illinois, Indiana, Iowa, Kansas, Nebraska, Oklahoma, Wisconsin, Minnesota, North Dakota, South Dakota, Colorado, and New Mexico.

*District #6*—The State of Texas.

*District #7*—The States of Arizona, California, Nevada, Utah, Oregon, Idaho, Wyoming, Washington, and Montana.

(c) After two years, the Board shall review the districts to determine whether realignment of the districts is necessary and at least every five years thereafter the Board shall make such a review. In making such review, it shall give consideration to:

(1) The most recent three years USDA production reports or Board assessment reports if USDA production reports are unavailable;

(2) Shifts and trends in quantities of watermelon produced, and

(3) Other relevant factors.

As a result of this review, the Board may realign the districts subject to the approval of the Secretary. Any such realignment shall be recommended by the Board to the Secretary at least six months prior to the date of the call for nominations and shall become effective at least 30 days prior to such date.

(d) Importer representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at

least one representative of importers shall serve on the Board.

(e) Not later than 5 years after the date that importers are subject to the Plan, and every 5 years thereafter, the Secretary shall evaluate the average annual percentage of assessments paid by importers during the 3-year period preceding the date of the evaluation and adjust, to the extent practicable, the number of importer representatives on the Board.

(f) The Board consists of 14 producers, 14 handlers, at least one importer, and one public member appointed by the Secretary.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10797, Feb. 28, 1995]

**§ 1210.321 Nominations and selection.**

The Secretary shall appoint the members of the Board from nominations to be made in the following manner:

(a) There shall be two individuals nominated for each vacant position.

(b) The Board shall issue a call for nominations by February first of each year in which an election is to be held. The call shall include at a minimum, the following information:

(1) A list of the vacancies and qualifications as to producers and handlers by district and to importers nationally for which nominees may be submitted.

(2) The date by which the nominees shall be submitted to the Secretary for consideration to be in compliance with § 1210.323 of this subpart.

(3) A list of those States, by district, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Board, national and State producer or handler associations, importers, and district conventions, if any.

(c) Nominations for producer and handler positions that will become vacant shall be made by district convention in the district entitled to nominate. Notice of such convention shall be publicized to all producers and handlers within such district, and the Secretary at least ten days prior to said event. The notice shall have attached to it the call for nominations from the Board. The responsibility for convening and publicizing the district convention shall be that of the then members of the Board from that district.

(d) Nominations for importers positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process: *Provided,* That a person who both imports and handles watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

(e) All producers and handlers within the district may participate in the convention: *Provided,* That a person that produces and handles watermelons may vote for handler members only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production; and *provided further,* That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board.

(f) The district convention chairperson shall conduct the selection process for the nominees in accordance with procedures to be adopted at each such convention, subject to requirements set in § 1210.321(e).

(1) No State in Districts 3, 4, 5, and 7 as currently constituted shall have more than three producers and handlers representatives concurrently on the Board.

(2) Each State represented at the district convention shall have one vote for each producer position and one vote for

each handler position from the District on the Board, which vote shall be determined by the producers and handlers from that State by majority vote. Each State shall further have an additional vote for each five hundred thousand hundredweight volume as determined by the three year average annual crop production summary reports of the USDA, or if such reports are not published, then the three year average of the Board assessment reports; *Provided*, That for the first two calls for nominees, the USDA Crop Production Annual Summary Reports for 1979, 1980, and 1981 will be controlling as to any additional production volume votes.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995]

### § 1210.322 Term of office.

(a) The term of office of Board members shall be three years.

(b) Except in the case of mid-term vacancies, the term of office shall begin on January 1, or such other date as may be recommended by the Board and approved by the Secretary.

(c) Board members shall serve during the term of office for which they are selected and have qualified, and until their successors are selected and have qualified.

(d) No person shall serve more than two successive terms of office.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995; 60 FR 13515, Mar. 13, 1995]

### § 1210.323 Acceptance.

Each person nominated for membership on the Board shall qualify by filing a written acceptance with the Secretary. Such written acceptance shall accompany the nominations list required by § 1210.321.

### § 1210.324 Vacancies.

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

(b) If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Board shows adequate cause, the Secretary shall remove such member from office. Further, without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, if the Secretary determines that the person's continual services would be detrimental to the purposes of the Act.

(c) To fill any vacancy caused by the failure of any person selected as a member of the Board to qualify, or in the event of the death, removal, resignation, or disqualification of any member, a successor shall be nominated and selected in the manner specified in § 1210.321, except that said nomination and replacement shall not be required if the unexpired term of office is less than six months. In the event of failure to provide nominees for such vacancies, the Secretary may appoint other eligible persons.

### § 1210.325 Procedure.

(a) A simple majority of Board members shall constitute a quorum and any action of the Board shall require the concurring votes of a majority of those present and voting. At assembled meetings all votes shall be cast in person.

(b) For routine and noncontroversial matters which do not require deliberation and the exchange of views, and for matters of an emergency nature when there is not enough time to call an assembled meeting, the Board may act upon a majority of concurring votes of its members cast by mail, telegraph, telephone, or by other means of communication; *Provided*, That each member receives an accurate, full, and substantially identical explanation of each proposition. Telephone votes shall be promptly confirmed in writing. All votes shall be recorded in the Board minutes.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995]

### § 1210.326 Compensation and reimbursement.

Board members shall serve without compensation but shall be reimbursed for reasonable expenses incurred by

them in the performance of their duties as Board members.

**§ 1210.327 Powers.**

The Board shall have the following powers subject to § 1210.363:

(a) To administer the provisions of this Plan in accordance with its terms and conditions;

(b) To make rules and regulations to effectuate the terms and conditions of this Plan;

(c) To require its employees to receive, investigate, and report to the Secretary complaints of violations of this Plan; and

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

**§ 1210.328 Duties.**

The Board shall, among other things, have the following duties:

(a) To meet, organize, and select from among its members a president and such other officers as may be necessary; to select committees and subcommittees of board members; to adopt such rules for the conduct of its business as it may deem advisable; and it may establish working committees of persons other than Board members.

(b) To employ such persons as it may deem necessary and to determine the compensation and define the duties of each; and to protect the handling of Board funds through fidelity bonds;

(c) To prepare and submit for the Secretary's approval, prior to the beginning of each fiscal period, a recommended rate of assessment and a fiscal period budget of the anticipated expenses in the administration of this Plan, including the probable costs of all programs and projects;

(d) To develop programs and projects, which must be approved by the Secretary before becoming effective, and enter into contracts or agreements, with the approval of the Secretary, for the development and carrying out of programs or projects of research, development, advertising or promotion, and the payment of the costs thereof with funds received pursuant to this Plan;

(e) To keep minutes, books, and records which clearly reflect all of the acts and transactions of the Board. Minutes of each Board meeting shall be promptly reported to the Secretary;

(f) To prepare and submit to the Secretary such reports from time to time as may be prescribed for appropriate accounting with respect to the receipt and disbursement of funds entrusted to the Board;

(g) To cause the books of the Board to be audited by a certified public accountant at least once each fiscal period, and at such other time as the Board may deem necessary. The report of such audit shall show the receipt and expenditure of funds received pursuant to this part. Two copies of each such report shall be furnished to the Secretary and a copy of each such report shall be made available at the principal office of the Board for inspection by producers, handlers, and importers;

(h) To investigate violations of the Plan and report the results of such investigations to the Secretary for appropriate action to enforce the provisions of the Plan;

(i) To periodically prepare, make public, and make available to producers, handlers, and importers reports of its activities carried out.

(j) To give the Secretary the same notice of meetings of the Board and its subcommittees as is given to its members;

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

(l) To furnish the Secretary such information as the Secretary may request;

(m) To notify watermelon producers, handlers, and importers of all Board meetings through press releases or other means;

(n) To appoint and convene, from time to time, working committees drawn from producers, handlers, importers, and the public to assist in the development of research and promotion programs for watermelons; and

(o) To develop and recommend such rules and regulations to the Secretary for approval as may be necessary for the development and execution of programs or projects to effectuate the declared purpose of the Act.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995]

RESEARCH AND PROMOTION

**§ 1210.330 Policy and objective.**

It shall be the policy of the Board to carry out an effective, continuous, and coordinated program of research, development, advertising, and promotion in order to:

(a) Strengthen watermelons' competitive position in the marketplace,

(b) Maintain and expand existing domestic and foreign markets, and

(c) Develop new or improved markets.

It shall be the objective of the Board to carry out programs and projects which will provide maximum benefit to the watermelon industry.

**§ 1210.331 Programs and projects.**

The Board shall develop and submit to the Secretary for approval any programs or projects authorized in this section. Such programs or projects shall provide for:

(a) The establishment, issuance, effectuation and administration of appropriate programs or projects for advertising and other sales promotion of watermelons designed to strengthen the position of the watermelon industry in the marketplace and to maintain, develop, and expand markets for watermelon;

(b) Establishing and carrying out research and development projects and studies to the end that the acquisition of knowledge pertaining to watermelons or their consumption and use may be encouraged or expanded, or to the end that the marketing and use of watermelons may be encouraged, expanded, improved, or made more efficient: *Provided*, That quality control, grade standards, supply management programs or other programs that would otherwise limit the right of the individual watermelon producer to produce watermelons shall not be conducted under, or as a part of, this Plan;

(c) The development and expansion of watermelon sales in foreign markets;

(d) A prohibition on advertising or other promotion programs that make any reference to private brand names or use false or unwarranted claims on behalf of watermelons or false or unwarranted statements with respect to the attributes or use of any competing product;

(e) Periodic evaluation by the Board of each program or project authorized under this Plan to insure that each program or project contributes to an effective and coordinated program of research and promotion and submission of such evaluation to the Secretary. If the Board or the Secretary finds that a program or project does not further the purposes of the Act, then the Board or the Secretary shall terminate such program or project; and

(f) The Board to enter into contracts or make agreements for the development and carrying out of research and promotion and pay for the costs of such contracts or agreements with funds collected pursuant to § 1210.341.

EXPENSES AND ASSESSMENTS

**§ 1210.340 Budget and expenses.**

(a) Prior to the beginning of each fiscal period, or as may be necessary thereafter, the Board shall prepare and recommend a budget on a fiscal period basis of its anticipated expenses and disbursements in the administration of this Plan, including probable costs of research, development, advertising, and promotion. The Board shall also recommend a rate of assessment calculated to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in § 1210.344.

(b) The Board is authorized to incur such expenses for research, development, advertising, or promotion of watermelons, such other expenses for the administration, maintenance, and functioning of the Board as may be authorized by the Secretary, and any referendum and administrative costs incurred by the Department of Agriculture. The funds to cover such expenses shall be paid from assessments received pursuant to § 1210.341.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995]

**§ 1210.341 Assessments.**

(a) During the effective period of this subpart, assessments shall be levied on all watermelons produced and first handled in the United States and all watermelons imported into the United

States for consumption as human food. No more than one assessment on a producer, handler, or importer shall be made on any lot of watermelons. The handler shall be assessed an equal amount on a per unit basis as the producer. If a person performs both producing and handling functions on any same lot of watermelons, both assessments shall be paid by such person. In the case of an importer, the assessment shall be equal to the combined rate for domestic producers and handlers and shall be paid by the importer at the time of entry of the watermelons into the United States.

(b) Assessment rates shall be fixed by the Secretary in accordance with section 1647(f) of the Act. No assessments shall be levied on watermelons grown by producers of less than 10 acres of watermelons.

(c) Each handler, as defined, is responsible for payment to the Board of both the producer's and the handler's assessment pursuant to regulations issued hereunder. The handler may collect producer assessments from the producer or deduct such assessments from the proceeds paid to the producer on whose watermelons the assessments are made. The handler shall maintain separate records for each producer's watermelons handled, including watermelons produced by said handler. In addition, the handler shall indicate the total quantity of watermelons handled by the handler, including those that are exempt under this Plan, and such other information as may be prescribed by the Board.

(d) Each importer shall be responsible for payment of the assessment to the Board on watermelons imported into the United States through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(e) Producer-handlers and handlers shall pay assessments to the Board at such time and in such manner as the Board, with the Secretary's approval, directs, pursuant to regulations issued under this part. Such regulations may provide for different handlers or classes of handlers and different handler payment and reporting schedules to recognize differences in marketing practices or procedures used in any State or production area.

(f) There shall be a late payment charge imposed on any handler or importer who fails to remit to the Board the total amount for which any such handler or importer is liable on or before the payment due date established by the Board under paragraph (e) of this section. The amount of the late payment charge shall be set by the Board subject to approval by the Secretary.

(g) There shall also be imposed on any handler or importer subject to a late payment charge, an additional charge in the form of interest on the outstanding portion of any amount for which the handler or importer is liable. The rate of such interest shall be prescribed by the Board subject to approval by the Secretary.

(h) The Board is hereby authorized to accept advance payment of assessments by handlers and importers that shall be credited toward any amount for which the handlers and importers may become liable. The Board shall not be obligated to pay interest on any advance payment.

(i) The Board is hereby authorized to borrow money for the payment of administrative expenses subject to the same fiscal, budget, and audit controls as other funds of the Board.

(j) The Board may authorize other organizations to collect assessments in its behalf with the approval of the Secretary. Any reimbursement by the Board for such services shall be based on reasonable charges for services rendered.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10798, Feb. 28, 1995]

### § 1210.342 Exemption from assessment.

(a) The Board may exempt watermelons used for nonfood purposes from the provisions of this Plan and shall establish adequate safeguards against improper use of such exemptions.

(b) Importers of less than 150,000 pounds of watermelons per year shall be entitled to apply for a refund that is equal to the rate of assessment paid by domestic producers.

(c) The Secretary may adjust the quantity of the weight exemption specified in paragraph (b) of this section on

the recommendation of the Board after an opportunity for public notice and comment to reflect significant changes in the 5-year average yield per acre of watermelons produced in the United States.

(d) The Board shall have the authority to establish rules, with the approval of the Secretary, for certifying whether a person meets the definition of a producer under section 1210.306.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.343 [Reserved]

### § 1210.344 Operating reserve.

The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in a reserve so established; *Provided*, That funds in the reserve shall not exceed approximately two fiscal periods' expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

REPORTS, BOOKS, AND RECORDS

### § 1210.350 Reports.

(a) Each handler shall maintain a record with respect to each producer for whom watermelons were handled and for watermelons produced and handled by the handler. Handlers shall report to the Board at such times and in such manner as the Board may prescribe by regulations whatever information as may be necessary in order for the Board to perform its duties. Such reports may include, but shall not be limited to, the following information:

(1) Total quantity of watermelons handled for each producer and by the handler, including those which are exempt under this Plan;

(2) Total quantity of watermelons handled for each producer and by the handler, on which the producer assessment was collected;

(3) Name and address of each person from whom an assessment was collected, the amount collected from each person, and the date such collection was made; and

(4) Name and address of each person claiming exemption from assessment and a copy of each such person's claim of exemption.

(b) Each importer of watermelons shall maintain a separate record that includes a record of:

(1) The total quantity of watermelons imported into the United States that are included under the terms of this Plan;

(2) The total quantity of watermelons that are exempt from the Plan; and

(3) Such other information as may be prescribed by the Board.

(c) Each importer shall report to the Board at such times and in such manner as it may prescribe such information as may be necessary for the Board to perform its duties under this part.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.351 Books and records.

Each handler and importer subject to this Plan shall maintain, and during normal business hours make available for inspection by employees of the Board or Secretary, such books and records as are necessary to carry out the provisions of this Plan and the regulations issued thereunder, including such records as are necessary to verify any required reports. Such records shall be maintained for 2 years beyond the fiscal period of their applicability.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.352 Confidential treatment.

(a) All information obtained from the books, records, or reports required to be maintained under §§ 1210.350 and 1210.351 shall be kept confidential and shall not be disclosed to the public by any person. Only such information as the Secretary deems relevant shall be disclosed to the public and then only in a suit or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this Plan: Except that nothing in this subpart shall be deemed to prohibit:

(1) The issuance of general statements based on the reports of a number of handlers or importers subject to this Plan if such statements do not identify

the information furnished by any person; or

(2) The publication by direction of the Secretary of the name of any person violating this Plan together with a statement of the particular provisions of this Plan violated by such person.

(b) Any disclosure of confidential information by any employee of the Board, except as required by law, shall be considered willful misconduct.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

MISCELLANEOUS

### § 1210.360 Right of the Secretary.

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

### § 1210.361 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.

### § 1210.362 Influencing government action.

No funds received by the Board under this Plan shall in any manner be used for the purpose of influencing governmental policy or action, except for making recommendations to the Secretary as provided in this subpart.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.363 Suspension or termination.

(a) Whenever the Secretary finds that this Plan or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this Plan or such provision thereof.

(b) The Secretary may conduct a referendum at any time and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers to determine if watermelon producers, handlers, and importers favor termination or suspension of this Plan. The Secretary shall suspend or terminate this Plan at the end of the marketing year whenever the Secretary determines that the suspension or termination is favored by a majority of the watermelon producers, handlers, and importers voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production, handling, or importing of watermelons and who produced, handled, or imported more than 50 percent of the combined total of the volume of watermelons produced, handled, or imported by those producers, handlers, and importers voting in the referendum. For purposes of this section, the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production. *Provided*, That the vote of a person who both imports and handles watermelons will be counted as an importer vote if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. Any such referendum shall be conducted by mail ballot.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.364 Proceedings after termination.

(a) Upon the termination of this Plan, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all funds and property then in possession or under control of the Board, including claims for any funds unpaid or property not delivered or any other

claim existing at the time of such termination.

(b) The said trustees shall:

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

(2) Carry out the obligations of the Board under any contracts or agreements entered into by it pursuant to § 1210.328(d);

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

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

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

(d) A reasonable effort shall be made by the Board or its trustees to return to producers, handlers and importers any residual funds not required to defray the necessary expenses of liquidation. If it is found impractical to return such remaining funds to producers, handlers and importers such funds shall be disposed of in such manner as the Secretary may determine to be appropriate.

[54 FR 24545, June 8, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.365 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this Plan or 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 Plan or any regulation issued thereunder; or

(b) Release or extinguish any violation of this Plan 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 person with respect to any such violation.

### § 1210.366 Separability.

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

### § 1210.367 Patents, copyrights, inventions, and publications.

Any patents, copyrights, inventions, product formulations, or publications developed through the use of funds collected under the provisions of this Plan shall be the property of the United States government as represented by the Board. Funds generated by such patents, copyrights, inventions, product formulations, or publications shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this part, § 1210.364 shall apply to determine the disposition of all such property.

## Subpart B—Nominating Procedures

SOURCE: 54 FR 38205, Sept. 15, 1989, unless otherwise noted.

PRODUCER AND HANDLER MEMBERS

### § 1210.400 Terms defined.

Unless otherwise defined in this subpart, definitions of terms used in this subpart shall have the same meaning as the definitions of such terms which appear in Subpart—Watermelon Research and Promotion Plan.

### § 1210.401 District conventions.

(a) Except for the initial district convention in each district, which will be called and opened by a representative of the Secretary, the Board shall call and open all district conventions.

(b) District conventions are to be held to nominate producers and handlers as candidates for membership on the National Watermelon Promotion

Board. Each district, as defined in § 1210.501, is entitled to two producer and two handler members on the Board.

(c) There shall be two individuals nominated for each vacant position. In multi-State districts, no one State shall have nominees for more than three of the four district positions on the Board.

(d) All producers and handlers within each district may participate in that district's convention: *Provided,* That they meet the eligibility provisions set forth in § 1210.402 of this subpart.

(e) The convention chairperson shall be elected as provided in § 1210.403(b) of this subpart.

(f) The Board member nomination process shall be conducted by the chairperson in conformance with the provisions of § 1210.321 of the Plan and § 1210.403 of this subpart. At the conclusion of the district convention for the initial term of office, the chairperson will provide the Secretary with:

(1) The identification of that district's two nominees for each producer and handler position on the Board, and

(2) A typed copy of the district convention's minutes.

This information must be provided by the chairperson to the Board staff in a manner that will ensure receipt, at the address specified in the call for the district convention, within 14 calendar days of the district convention's completion, but not later than July 8 for appointments to become effective on the following January 1. The Board staff must forward such information to the Secretary, in a manner that will ensure receipt, within 21 calendar days of completion of the district convention, but not later than July 15 for appointments to become effective on the following January 1. Further, the chairperson will immediately arrange for completion of qualification statements and other specified information by each nominee, and each nominee shall qualify by forwarding such information to the Board's office within 14 calendar days of completion of the district convention, but not later than July 8 for appointments to become effective on the following January 1. The Board staff must forward the completed qualification statements and other specified information to the Secretary, in a manner that will ensure receipt within 21 calendar days of completion of the district convention, but not later than July 15 for appointments to become effective on the following January 1.

[54 FR 38205, Sept. 15, 1989, as amended at 58 FR 3355, Jan. 8, 1993; 59 FR 18948, Apr. 21, 1994; 60 FR 10799, Feb. 28, 1995]

### § 1210.402 Voter and board member nominee eligibility.

(a) All producers and handlers within a district may participate in their district convention for the purpose of nominating candidates for appointment to the Board: *Provided,* That a producer who both produces and handles watermelons may vote for handler member nominees and serve as a handler member nominee only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production or the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production; and *Provided further,* That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board. For the purpose of participation in initial nominating conventions, such election shall be made in writing, at the address provided, to the Department official identified in the call for a district convention.

(b) Any individual, group of individuals, partnership, corporation, association, cooperative or any other entity which is engaged in the production, first handling or importing of watermelons is considered a person and as such is entitled to only one vote, except that such person may cast proxy votes as provided in § 1210.403 and § 1210.404 of this subpart.

(c) All producers and handlers attending their district conventions may

be candidates for one or more of the positions of State spokesperson, district convention chairperson, and producer or handler nominee.

[54 FR 38205, Sept. 15, 1989, as amended at 60 FR 10799, Feb. 28, 1995]

### § 1210.403 Voting procedures.

(a) Proxy voting by producers and handlers for producer and handler nominees shall be permitted at all district conventions: *Provided*, That producers may cast proxy votes for producers only, and handlers may cast proxy votes for handlers only. In non-multi-State districts, proxy voting shall be permitted for all producer and handler nominee balloting to determine the districts' nominees. In multi-State districts, proxy voting shall be permitted for all producers and handlers participating in a State's balloting to determine the State's nominees. No other proxy voting, such as for district convention chairperson, shall be allowed. Any person wanting to cast proxy votes must demonstrate authorization to do so. Authority to cast a proxy vote on behalf of another person shall be demonstrated through documentation containing:

(1) The proxy voter's name, address, and telephone number;

(2) Signature and date signed;

(3) A certification identifying the proxy voter as a producer or a handler; and

(4) A statement identifying the person being given authority by the proxy voter to cast the proxy vote.

All proxy documentation must be received by the Board at its headquarters address at least two weeks before the district convention is scheduled to convene. For the purpose of the initial district convention, all proxy documentation must be forwarded to the Department representative identified in the call for the district convention in a manner that will ensure receipt, at the address specified in the call, at least 72 hours before the district convention is scheduled to convene. The Board, or in the case of the initial conventions the Department representative identified in the call or other representative of the Department, may challenge any proxy vote and disqualify any challenged vote for cause. In the case of duplicate proxy authorizations by any person, only the first authorization, determined by date will be allowed. In the case of duplicate dates, the proxy which is received first will be allowed.

(b) In non-multi-State districts, convention chairpersons shall be elected by a majority vote of the eligible voters in attendance. In multi-State districts, the election shall be by majority vote of all States present with each State's vote(s) determined by a majority vote of the eligible voters of that State in attendance. Each such State is entitled to one vote, plus one additional vote for each 500,000 hundredweight volume of production in the State as determined by the three-year average annual crop production summary reports of the Department or, if such reports are not published, then the three-year average of the Board's assessment reports: *Provided*, That for the first two conventions, the Department's Crop Production Annual Summary Reports for 1979, 1980, and 1981 will be controlling as to any additional production volume votes.

(c) In multi-State districts 3, 4, 5 and 7, the convention chairperson will direct the eligible producer voters and handler voters from each State to caucus separately for the purpose of electing a State spokesperson for each group. Election of each State spokesperson shall be by simple majority of all individual voters in attendance. In lieu of written ballots, a State spokesperson may be elected by voice vote or a show of hands. The role of the State spokesperson is to coordinate State voting and to cast all State votes.

(d) Convention chairpersons will coordinate the entire producer and handler nomination process. In conducting the nomination process, each convention chairperson will ensure that:

(1) Voting for producer nominees is limited to producers, and voting for handler nominees is limited to handlers; and

(2) Producer candidates for nomination are producers, and handler candidates for nomination are handlers.

(e) Voting, for producer and handler nominees, in non-multi-State districts shall be on the basis of one vote per person, except that persons authorized to cast proxy votes shall be allowed to

cast all proxy votes not disallowed by the Board or the Department. Election of nominees shall be on the basis of a simple majority of all eligible votes cast.

(f) Voting for producer and handler nominees in multi-State districts shall be on a State by State basis. Producers and handlers from each State shall caucus separately, at the district convention, for the purpose of determining which nominees shall receive their State's vote(s) for membership on the Board. Each State's vote(s) shall be based on a simple majority of all votes (including proxy votes) cast by producers or handlers voting in their State's caucus. Each State represented at a multi-State district convention shall have one vote for each producer position and one vote for each handler position from the district on the Board. Each State shall further have an additional vote toward each position for each 500,000 hundredweight volume of production in the State as determined by the three-year average annual crop production summary reports of the Department or, if such reports are not published, then the three-year average of the Board's assessment reports: *Provided*, That for the first two calls for nominees, the Department's Crop Production Annual Summary Reports for 1979, 1980, and 1981 will be controlling as to any additional production volume votes. Each State spokesperson will cast the State's vote(s) for each nominee position. Election of nominees shall be on the basis of a simple majority of all State votes cast.

(g) During the voting for convention chairperson, State spokesperson, and Board member nominee, should no candidate receive the required simple majority on the first ballot, the number of candidates may be reduced by dropping one or more of the lowest vote recipients from the list of candidates. The balloting will be repeated until the position is filled.

(h) Two nominees shall be elected for each of the producer and handler positions from each district on the Board. The two nominees for each position shall be elected simultaneously. The convention chairperson will open the floor to the nomination of candidates for possible election as a Board member nominee for each available position. Each position will be dealt with separately (*i.e.*, candidates for one position will be nominated and then elected before the convention moves on to the next available position). Each eligible voter may vote for two of the nominees on one ballot. The two nominees receiving the greatest number of votes and at least a simple majority of the votes cast will be elected as the district's Board member nominees for the position. No individual elected as a nominee for Board membership may be a candidate on subsequent Board member nominee ballots (*i.e.*, two different producer names and two different handler names must be submitted as nominees for each producer and handler position from each district to the Secretary of Agriculture). There shall be no designation of first and second choice nominees.

[54 FR 38205, Sept. 15, 1989, as amended at 58 FR 3355, Jan. 8, 1993]

IMPORTER MEMBERS

### § 1210.404 Importer member nomination and selection.

(a) The Board shall include one or more representatives of importers, who shall be appointed by the Secretary from nominations submitted by watermelon importers. Importers' representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at least one representative of importers shall serve on the Board if importers are subject to the Plan. Nominations for importer positions that become vacant shall be made by importers at nomination conventions or by mail ballot.

(b) The initial nomination of importer members shall be made not later than 90 days after the Plan is amended.

(c) There shall be two individuals nominated for each vacant position. The importer receiving the highest number of votes for a vacancy shall be the first choice nominee, and the importer receiving the second highest number of votes shall be the second choice nominee submitted to the Secretary.

(d) Any individual, group of individuals, partnership, corporation, association, cooperative or any other entity which is engaged in the production, first handling or importing of watermelons is considered a person and as such is entitled to only one vote, except that such person may cast proxy votes as provided in paragraph (e)(1) of this section.

(e) *Nomination Conventions*. If nominations are made by nomination conventions, the Board shall widely publicize such conventions and provide importers and the Secretary at least 10 days notice prior to each convention.

(1) Proxy voting by importers shall be permitted at all conventions. Any person wanting to cast proxy votes must demonstrate authorization to do so. Authority to cast a proxy vote on behalf of another person shall be demonstrated through documentation containing:

(i) The proxy voter's name, address, and telephone number;

(ii) Signature and date signed;

(iii) A certification identifying the proxy voter as an importer; and

(iv) A statement identifying the person being given authority by the proxy voter to cast the proxy vote.

(2) The Board shall provide to the Secretary a typed copy of each convention's minutes and shall arrange for completion of qualification statements and other specified information by each nominee and forward such to the Secretary within 14 calendar days of completion of a convention.

(f) *Mail balloting*. If nominations are conducted by mail ballot, the Board shall request importers to submit nominations of eligible importers. It is the importer's responsibility to prove the individual's eligibility. After the names of nominees are received, the Board shall print ballots and ask eligible importers to vote to nominate their candidates. After the vote is received, the Board shall tabulate the results and shall send to the Department the nominees in order of preference. The Board shall provide the Secretary with a report on the results, number of importers participating in the vote, and the volume of imports, and shall arrange for completion of qualification statements and other specified information by each nominee and forward such to the Secretary within 14 calendar days of receiving the ballots.

(g) Any individual who both imports and handles watermelons will be considered an importer if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

[60 FR 10800, Feb. 28, 1995]

PUBLIC MEMBER

### § 1210.405 Public member nominations and selection.

(a) The public member shall be nominated by the other members of the Board. The public member shall have no direct financial interest in the commercial production or marketing of watermelons except as a consumer and shall not be a director, stockholder, officer or employee of any firm so engaged. The Board shall nominate two individuals for the public member position. Voting for public member nominees shall require a quorum of the Board and shall be on the basis of one vote per Board member. Election of nominees shall be on the basis of a simple majority of those present and voting. Such election shall be held prior to August 1, 1990, and every third August first thereafter. The Board may prescribe such additional qualifications, administrative rules and procedures for selection and voting for public member nominees as it deems necessary and the Secretary approves.

(b) Each person nominated for the position of public member on the Board shall qualify by filing a written acceptance with the Secretary within 14 calendar days of completion of the Board meeting at which public member nominees were selected.

[55 FR 13256, Apr. 10, 1990. Redesignated and amended at 60 FR 10800, Feb. 28, 1995]

## Subpart C—Rules and Regulations

SOURCE: 55 FR 13256, Apr. 10, 1990, unless otherwise noted.

DEFINITIONS

**§ 1210.500 Terms defined.**

Unless otherwise defined in this subpart, definitions of terms used in this subpart shall have the same meaning as the definitions of such terms which appear in subpart—Watermelon Research and Promotion Plan.

GENERAL

**§ 1210.501 Realignment of districts.**

Pursuant to § 1210.320(c) of the Plan, the districts shall be as follows:

*District 1*—The Florida counties of Brevard, Broward, Charlotte, Citrus, Collier, Dade, DeSoto, Flagler, Glades, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Lake, Lee, Manatee, Martin, Marion, Monroe, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, Sarasota, Seminole, St. Johns, St. Lucie, Sumter, and Volusia.

*District 2*—The Florida counties of Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, Washington, and the Georgia counties Early, Baker, Miller, Mitchell, Colquitt, Thomas, Grady, Decatur, Seminole, and the states of Alabama, Arkansas, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, and Virginia.

*District 3*—The Georgia counties not included in District two and the state of South Carolina.

*District 4*—The States of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Illinois, Missouri, Michigan, Indiana, Ohio, Kentucky, West Virginia, Maryland, New Hampshire, Maine, New Jersey, New York, Pennsylvania, Massachusetts, Rhode Island, Delaware, Vermont, Wisconsin, Connecticut, and Washington, DC.

*District 5*—The States of Alaska, Hawaii, Nevada, Oregon, and Washington and all of the counties in the state of California except for those California counties included in District Seven.

*District 6*—The counties in the state of Texas, except for those counties in Texas included in District Seven.

*District 7*—The counties in the state of Texas; Dallam, Sherman, Hanaford, Ochiltree, Lipscomb, Hartely, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Gray, Wheeler, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Parmer, Castro, Swisher, Briscoe, Hall, Childness, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Cochran, Hockely, Lubbock, Crosby, Dickens, King, Yoakum, Terry, Lynn, Garza, Kent, Stonewall, the states of New Mexico, Arizona, Utah, Colorado, Idaho, Montana, and Wyoming, and the following counties in California; San Bernardino, Riverside, San Diego, and Imperial.

[71 FR 34234, June 14, 2006]

**§ 1210.502 [Reserved]**

**§ 1210.504 Contracts.**

The Board, with the approval of the Secretary, may enter into contracts or make agreements with persons for the development and submission to it of programs or projects authorized by the Plan and for carrying out such programs or projects. Contractors shall agree to comply with the provisions of this part. Subcontractors who enter into contracts or agreements with a Board contractor and who receive or otherwise utilize funds allocated by the Board shall be subject to the provisions of this part. All records of contractors and subcontractors applicable to contracts entered into by the Board are subject to audit by the Secretary.

**§ 1210.505 Department of Agriculture costs.**

Pursuant to § 1210.340, the Board shall reimburse the Department of Agriculture for referendum and administrative costs incurred by the Department with respect to the Plan. The Board shall pay those costs incurred by the Department for the conduct of Department duties under the Plan as determined periodically by the Secretary. The Department will bill the Board monthly and payment shall be due promptly after the billing of such costs. Funds to cover such expenses

shall be paid from assessments collected pursuant to § 1210.341.

[55 FR 13256, Apr. 10, 1990, as amended at 60 FR 10800 Feb. 28, 1995]

ASSESSMENTS

### § 1210.515 Levy of assessments.

(a) An assessment of three cents per hundredweight shall be levied on all watermelons produced for ultimate consumption as human food, and an assessment of three cents per hundredweight shall be levied on all watermelons first handled for ultimate consumption as human food. An assessment of six cents per hundredweight shall be levied on all watermelons imported into the United States for ultimate consumption as human food at the time of entry in the United States.

(b) The import assessment shall be uniformly applied to imported watermelons that are identified by the numbers 0807.11.30 and 0807.11.40 in the Harmonized Tariff Scheudle of the United States of any other number used to identify fresh watermelons for consumption as human food. The U.S. Customs Service (USCS) will collect assessments on such watermelons at the time of entry and will forward such assessment as per the agreement between USCS and USDA. Any importer or agent who is exempt from payment of assessments may submit the Board adequate proof of the volume handled by such importer for the exemption to be granted.

(c) Watermelons used for non-human food purposes are exempt from assessment requirements but are subject to the safeguard provisions of § 1210.521.

[55 FR 13256, Apr. 10, 1990, as amended at 60 FR 10800, Feb. 28, 1995; 72 FR 41428, July 30, 2007; 72 FR 61051, Oct. 29, 2007]

### § 1210.516 Exemption for organic watermelons.

(a) A producer who produces only products that are eligible to be labeled as 100 percent organic under the National Organic Program (NOP) (7 CFR part 205), except as provided for in paragraph (h) of this section, or a handler who handles only products that are eligible to be labeled as 100 percent organic under the NOP; and who operates under an approved NOP system plan, and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for this exemption, the producer or handler shall submit the request to the Board—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the producer or handler continues to be eligible for the exemption.

(c) The request shall include the following: The applicant's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the producer or handler complies with the requirements of this section, the Board will approve the exemption and issue a Certificate of Exemption to the producer or handler. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each handler to whom the producer sells watermelons. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) An importer imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic watermelons. The importer may request the exemption—on a form provided by the Board—at any time initially and

annually thereafter on or before January 1, as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers and handlers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic watermelons bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2756, Jan. 14, 2005]

### § 1210.517 Determination of handler.

The producer and handler assessments on each lot of watermelons handled shall be paid by the handler. Unless otherwise provided in this section, the handler responsible for payment of assessments shall be the first handler of such watermelons. The first handler is the person who initially performs a handling function as heretofore defined. Such person may be a fresh shipper, processor, or other person who first places the watermelons in the current of commerce.

(a) The following examples are provided to aid in the identification of first handlers:

(1) Producer grades, packs, and sells watermelons of own production to a handler. In this instance, it is the handler, not the producer, who places the watermelons in the current of commerce. The handler is responsible for payment of the assessments.

(2) Producer packs and sells watermelons of that producer's own production from the field, roadside stand, or storage to a consumer, trucker, retail or wholesales outlet, or other buyer who is not a handler of watermelons. The producer places the watermelons in the current of commerce and is the first handler.

(3) Producer purchases watermelons from another producer. The producer purchasing the watermelons is the first handler.

(4) Producer delivers field-run watermelons of own production to a handler for preparation for market and entry into the current of commerce. The handler, in this instance, is the first handler, regardless of whether the handler subsequently handles such watermelons for the account of the handler or for the account of the producer.

(5) Producer delivers field-run watermelons of own production to a handler for preparation for market and return to the producer for sale. The producer in this instance, is the first handler, except when the producer subsequently sells such watermelons to a handler.

(6) Producer delivers watermelons of own production to a handler who takes title to such watermelons. The handler who purchases such watermelons from the producer is the first handler.

(7) Producer supplies watermelons to a cooperative marketing association which sells or markets the watermelons and makes an accounting to the producer, or pays the proceeds of the sale to the producer. In this instance, the cooperative marketing association becomes the first handler upon physical delivery to such cooperative.

(8) Handler purchases watermelons from a producer's field for the purpose

of preparing such watermelons for market or for transporting such watermelons to storage for subsequent handling. The handler who purchases such watermelons from the producer is the first handler.

(9) Broker/Commission House receives watermelons from a producer and sells such watermelons in the Broker's/Commission House's name. In this instance, the Broker/Commission House is the first handler, regardless of whether the Broker/ Commission House took title to such watermelons.

(10) Broker/Commission House, without taking title or possession of watermelons, sells such watermelons in the name of the producer. In this instance, the producer is the first handler.

(11) Processor utilizes watermelons of own production in the manufacture of rind pickles, frozen, dehydrated, extracted, or canned products for human consumption. In so handling watermelons the processor is the first handler.

(12) Processor purchases watermelons from the producer thereof. In this instance, the processor is the first handler even though the producer may have graded, packed, or otherwise handled such watermelons.

(b) In the event of a handler's death, bankruptcy, receivership, or incapacity to act, the representative of the handler or the handler's estate shall be considered the handler of the watermelons for the purpose of this subpart.

[55 FR 13256, Apr. 10, 1990, as amended at 58 FR 3356, Jan. 8, 1993]

### § 1210.518 Payment of assessments.

(a) *Time of payment.* The assessment on domestically produced watermelons shall become due at the time the first handler handles the watermelons for non-exempt purposes. The assessment on imported watermelons shall become due at the time of entry, or withdrawal, into the United States.

(b) *Responsibility for payment.* (1) The first handler is responsible for payment of both the producer's and the handler's assessment. The handler may collect the producer's assessment from the producer or deduct such producer's assessment from the proceeds paid to the producer on whose watermelons the producer assessment is made. Any such collection or deduction of producer assessment shall be made not later than the time when the first handler handles the watermelons.

(2) The U.S. Customs Service shall collect assessments on imported watermelons from importers and forward such assessments under an agreement between the U.S. Customs Service and the U.S. Department of Agriculture. Importers shall be responsible for payment of assessments directly to the Board of any assessments due but not collected by the U.S. Customs Service at the time of entry, or withdrawal, on watermelons imported into the United States for human consumption.

(c) *Payment direct to the Board.* (1) Except as provided in paragraph (b) and (e) of this section, each handler and importer shall remit the required producer and handler assessments, pursuant to § 1210.341 of the Plan, directly to the Board not later than 30 days after the end of the month such assessments are due. Remittance shall be by check, draft, or money order payable to the National Watermelon Promotion Board, or NWPB, and shall be accompanied by a report, preferably on Board forms, pursuant to § 1210.350. To avoid late payment charges, the assessments must be mailed to the Board and postmarked within 30 days after the end of the month such assessments are due.

(2) Pursuant to § 1210.350 of the Plan, each handler shall file with the Board a report for each month that assessable watermelons were handled. All handler reports shall contain at least the following information:

(i) The handler's name, address, and telephone number;

(ii) Date of report (which is also the date of payment to the Board);

(iii) Period covered by the report;

(iv) Total quantity of watermelons handled during the reporting period;

(v) Date of last report remitting assessments to the Board; and

(vi) Listing of all persons for whom the handler handled watermelons, their addresses, hundredweight handled, and total assessments remitted for each producer. In lieu of such a list, the handler may substitute copies of settlement sheets given to each person or computer generated reports, provided

such settlement sheets or computer reports contain all the information listed above.

(vii) Name, address, and hundredweight handled for each person claiming exemption for assessment.

(viii) If the handler handled watermelons for persons engaged in the growing of less than 10 acres of watermelons, the report shall indicate the name and address of such person and the quantity of watermelons handled for such person.

(3) The words "final report" shall be shown on the last report at the close of the handler's marketing season or at the end of each fiscal period if such handler markets assessable watermelons on a year-round basis.

(4) *Prepayment of assessments.* (i) In lieu of the monthly assessment and reporting requirements of paragraph (b) of this section, the Board may permit handlers to make an advance payment of their total estimated assessments for the crop year to the Board prior to their actual determination of assessable watermelons. The Board shall not be obligated to pay interest on any advance payment.

(ii) Handlers using such procedures shall provide a final annual report of actual handling and remit any unpaid assessments not later than 30 days after the end of the last month of the designated handler's marketing season or at the end of each fiscal period if such handler markets assessable watermelons on a year-round basis.

(iii) Handlers using such procedures shall, after filing a final annual report, receive a reimbursement of any overpayment of assessments.

(iv) Handlers using such procedures shall, at the request of the Board to verify a producer's refund claim, provide the Board with a handling report on any and all producers for whom the handler has provided handling services but has not yet filed a handling report with the Board.

(v) Specific requirements, instructions, and forms for making such advance payments shall be provided by the Board on request.

(d) *Late payment charges and interest.* (1) A late payment charge shall be imposed on any handler and importer who fails to make timely remittance to the Board of the total producer and handler and importer assessments for which any such handler and importer is liable. Such late payment shall be imposed on any assessments not received before the fortieth day after the end of the month such assessments are due. This one-time late payment charge shall be 10 percent of the assessments due before interest charges have accrued. The late payment charge will not be applied to any late payments postmarked within 30 days after the end of the month such assessments are due.

(2) In addition to the late payment charge, one and one-half percent per month interest on the outstanding balance, including the late payment charge and any accrued interest, will be added to any accounts for which payment has not been received by the last day of the second month following the month of handling; *Provided,* that, handlers paying their assessments in accordance with paragraph (c)(4)(ii), will not be subject to the one and one-half percent per month interest under this paragraph until the last day of the second month after such assessments are due under paragraph (c)(4)(ii). Such interest will continue monthly until the outstanding balance is paid to the Board.

(e) *Payment through cooperating agency.* The Board may enter into agreements, subject to approval of the Secretary, authorizing other organizations, such as a regional watermelon association or State watermelon board, to collect assessments in its behalf. In any State or area in which the Board has entered into such an agreement, the designated handler shall pay the assessment to such agency in the time and manner, and with such identifying information as specified in such agreement. Such an agreement shall not provide any cooperating agency with authority to collect confidential information from handlers or producers. To qualify, the cooperating agency must on its own accord have access to all information required by the Board for collection purposes. If the Board requires further evidence of payment than provided by the cooperating agency, it may acquire such evidence from

individual handlers. All such agreements are subject to the requirements of the Act, Plan, and all applicable rules and regulations under the Act and the Plan.

[55 FR 13256, Apr. 10, 1990; 55 FR 20443, May 17, 1990, as amended at 56 FR 15808, Apr. 18, 1991; 60 FR 10801, Feb. 28, 1995]

### § 1210.519 Failure to report and remit.

Any handler and importer who fails to submit reports and remittances according to the provisions of § 1210.518 shall be subject to appropriate action by the Board which may include one or more of the following actions:

(a) Audit of the handler's and importer's books and records to determine the amount owed the Board.

(b) Establishment of an escrow account for the deposit of assessments collected. Frequency and schedule of deposits and withdrawals from the escrow account shall be determined by the Board with the approval of the Secretary.

(c) Referral to the Secretary for appropriate enforcement action.

[55 FR 13256, Apr. 10, 1990, as amended at 60 FR 10801, Feb. 28, 1995]

### § 1210.520 Refunds.

Each importer of less than 150,000 pounds of watermelons during any calendar year shall be entitled to apply for a refund of the assessments paid in an amount equal to the amount paid by domestic producers.

(a) *Application form.* The Board shall make available to all importers a refund application form.

(b) *Submission of refund application to the Board.* The refund application form shall be submitted to the Board within 90 days of the last day of the year the watermelons were actually imported. The refund application form shall contain the following information:

(1) Importer's name and address;

(2) Number of hundredweight of watermelon on which refund is requested;

(3) Total amount to be refunded;

(4) Proof of payment as described below; and

(5) Importer's signature.

(c) *Proof of payment of assessment.* Evidence of payment of assessments satisfactory to the Board shall accompany the importer's refund application. An importer must submit a copy of the importer's report or a cancelled check. Evidence submitted with a refund application shall not be returned to the applicant.

(d) *Payment of refund.* Immediately after receiving the properly executed application for refund, the Board shall make remittance to the applicant.

[60 FR 10801, Feb. 28, 1995]

### § 1210.521 Reports of disposition of exempted watermelons.

The Board may require reports by handlers or importers on the handling/importing and disposition of exempted watermelons and/or on the handling of watermelons for persons engaged in growing less than 10 acres of watermelons or in the case of importers, the importing of less than 150,000 pounds per year. Authorized employees of the Board or the Secretary may inspect such books and records as are appropriate and necessary to verify the reports on such disposition.

[60 FR 10801, Feb. 28, 1995]

## RECORDS

### § 1210.530 Retention period for records.

Each handler and importer required to make reports pursuant to this subpart shall maintain and retain for at least 2 years beyond the marketing year of their applicability:

(a) One copy of each report made to the Board; and

(b) Such records as are necessary to verify such reports.

[55 FR 13256, Apr. 10, 1990, as amended at 60 FR 10801, Feb. 28, 1995]

### § 1210.531 Availability of records.

Each handler and importer required to make reports pursuant to this subpart shall make available for inspection and copying by authorized employees of the Board or the Secretary during regular business hours, such records as are appropriate and necessary to verify reports required under this subpart.

[55 FR 13256, Apr. 10, 1990, as amended at 60 FR 10801, Feb. 28, 1995]

### § 1210.532 Confidential books, records, and reports.

All information obtained from the books, records, and reports of handlers and importers and all information with respect to refunds of assessments made to importers shall be kept confidential in the manner and to the extent provided for in § 1210.352.

[60 FR 10801, Feb. 28, 1995]

MISCELLANEOUS

### § 1210.540 OMB assigned numbers.

The information collection and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB Control Number 0581–0093, except that Board member nominee background information sheets are assigned OMB Control Number 0505–0001.

[58 FR 3356, Jan. 8, 1993]

## Subpart D—Referendum Procedures

SOURCE: 66 FR 56388, Nov. 7, 2001; 67 FR 17907, Apr. 12, 2002, unless otherwise noted.

### § 1210.600 General.

Referenda to determine whether eligible producers, handlers, and importers favor the continuation, suspension, termination, or amendment of the Watermelon Research and Promotion Plan shall be conducted in accordance with this subpart.

### § 1210.601 Definitions.

Unless otherwise defined in this section, the definition of terms used in these procedures shall have the same meaning as the definitions in the Plan.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Department* means the United States Department of Agriculture.

(c) *Eligible handler* means any person (except a common contract carrier of watermelons owned by another person) who handles watermelons, including a producer who handles watermelons of the producer's own production, subject to the provisions of § 1210.602(a) of this chapter, who handles watermelons as a person performing a handling function and either:

(1) Takes title or possession of watermelons from a producer and directs the grading, packing, transporting, and selling of the watermelons in the current of commerce;

(2) Purchases watermelons from producers;

(3) Purchases watermelons from handlers;

(4) Purchases watermelons from importers; or

(5) Arranges the sale or transfer of watermelons from one party to another and takes title or possesssion of the watermelons: *Provided*, That harvest crews and common carriers who collect and transport watermelons from the field to a handler are not handlers and that retailers, wholesale retailers, foodservice distributors, and foodservice operators are not handlers.

(d) *Eligible importer* means any person who imports 150,000 pounds or more watermelons annually into the United States as principal or as an agent, broker, or consignee for any person who produces watermelons outside the United States for sale in the United States. An importer who imports less than 150,000 pounds of watermelons annually and did not apply for and receive reimbursement of assessments is also an eligible importer.

(e) *Eligible producer* means any person who is engaged in the growing of 10 or more acres of watermelons, including any person who owns or shares the ownership and risk of loss of such watermelon crop. A person who shares the ownership and risk of loss includes a person who:

(1) Owns and farms land, resulting in ownership, by said producer, of the watermelons produced thereon;

(2) Rents and farms land, resulting in ownership, by said producer, of all or a portion of the watermelons produced thereon; or

(3) Owns land which said producer does not farm and, as rental for such

land, obtains the ownership of a portion of the watermelons produced thereon. Ownership of, or leasehold interest in land, and the acquisition, in any manner other than set forth in this subpart, of legal title to the watermelons grown on said land, shall not be deemed to result in such owners or lessees becoming producers. Persons who produce watermelons for non-food uses are not producers for the purposes of this subpart.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity. For the purpose of this definition, the term partnership includes, but is not limited to:

(1) A husband and wife who have title to, or leasehold interest in, land as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property, and

(2) So-called *joint ventures* wherein one or more parties to the agreement, informal or otherwise, contributed land and others contributed capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the production, handling, or importation of watermelons for market and the authority to transfer title to the watermelons so produced, handled, or imported.

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

(h) *Representative period* means the period designated by the Secretary pursuant to the Act.

**§ 1210.602 Voting.**

(a) Each person who is an eligible producer, handler, or importer as defined in this subpart, at the time of the referendum and who also was a producer, handler, or importer during the representative period, shall be entitled to one vote in the referendum: *Provided,* That each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce watermelons in which more than one of the parties is a producer, shall be entitled to one vote in the referendum covering only that producer's share of the ownership: *Provided further,* That the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchased from other producer's production is more than 50 percent of the producer's own production: *Provided further,* That the vote of a person who both imports and handles watermelons will be counted as an importer vote if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

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

(c) *Casting of ballots.* All ballots are to be cast as instructed by the Secretary.

**§ 1210.603 Instructions.**

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

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

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that

needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

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

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

(d) Mail to eligible producers; importers; and in the case of an order assessing handlers, handlers whose names and addresses are known to the referendum agent; the instructions on voting; a ballot; and a summary of the terms and conditions to be voted upon. No person who claims to be eligible to vote shall be refused a ballot. However, such persons may be required to submit evidence of their eligibility.

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

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

### § 1210.604 Subagents.

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

### § 1210.605 Ballots.

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

### § 1210.606 Referendum report.

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

### § 1210.607 Confidential information.

All ballots cast and their contents and all other information or reports furnished to, compiled by, or in possession of, the referendum agent or subagents that reveal, or tend to reveal, the identity or vote of any producer, handler, or importer of watermelons shall be held strictly confidential and shall not be disclosed.

# PART 1212—HONEY PACKERS AND IMPORTERS RESEARCH, PROMOTION, CONSUMER EDUCATION AND INDUSTRY INFORMATION ORDER

## Subpart A—Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order

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

SOURCE: 73 FR 11472, Mar. 3, 2008.

## Subpart A—Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order

SOURCE: 73 FR 29397, May 21, 2008, unless otherwise noted.

DEFINITIONS

### § 1212.1 Act.

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

### § 1212.2 Board.

"Board" or "Honey Packers and Importers Board" means the administrative body established pursuant to § 1212.40, or such other name as recommended by the Board and approved by the Department.

### § 1212.3 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.

### § 1212.4 Department.

"Department" means the United States 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.

### § 1212.5 Exporter.

"Exporter" means any person who exports honey or honey products from the United States.

### § 1212.6 First handler.

"First handler" means the first person who buys or takes possession of honey or honey products from a producer for marketing. If a producer markets

honey or honey products directly to consumers, that producer shall be considered to be the first handler with respect to the honey produced by the producer.

**§ 1212.7 Fiscal period.**

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

**§ 1212.8 Handle.**

"Handle" means to process, package, sell, transport, purchase or in any other way place honey or honey products, or causes them to be placed, in commerce. This term includes selling unprocessed honey that will be consumed without further processing or packaging. This term does not include the transportation of unprocessed honey by the producer to a handler or transportation by a commercial carrier of honey, whether processed or unprocessed for the account of the first handler or producer.

**§ 1212.9 Honey.**

"Honey" means the nectar and saccharine exudations of plants that are gathered, modified, and stored in the comb by honeybees, including comb honey.

**§ 1212.10 Honey products.**

"Honey products" mean products where honey is a principal ingredient. For purposes of this subpart, a product shall be considered to have honey as a principal ingredient if the product contains at least 50% honey by weight.

**§ 1212.11 Importer.**

"Importer" means any person who imports for sale honey or honey products into the United States as a principal or as an agent, broker, or consignee of any person who produces honey or honey products 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 honey or honey products.

**§ 1212.12 Importer-Handler Representative.**

"Importer-Handler Representative" means any person who is an importer and first handler, who must import at least 75 percent of the honey they market in the United States and must handle at least 250,000 pounds annually.

**§ 1212.13 Information.**

"Information" means activities or programs designed to develop new and existing markets, new and existing marketing strategies and increased efficiency and activities to enhance the image of honey and honey products. These include:

(a) Consumer education, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of honey and honey products; and

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the honey industry, and activities to enhance the image of the honey industry.

**§ 1212.14 Market or marketing.**

(a) "Marketing" means the sale or other disposition of honey or honey products in any channel of commerce.

(b) "Market" means to sell or otherwise dispose of honey or honey products in interstate, foreign, or intrastate commerce.

**§ 1212.15 Order.**

"Order" means the Honey Packers and Importers Research, Promotion, Consumer Education and Industry Information Order.

**§ 1212.16 Part and subpart.**

"Part" means the Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order (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.

**§ 1212.17 Person.**

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

**§ 1212.18 Plans and programs.**

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

**§ 1212.19 Producer.**

"Producer" means any person who is engaged in the production and sale of honey in any State and who owns, or shares the ownership and risk of loss of the production of honey or a person who is engaged in the business of producing, or causing to be produced, honey beyond personal use and having value at first point of sale.

**§ 1212.20 Promotion.**

"Promotion" means any action, including paid advertising and public relations that presents a favorable image for honey or honey products to the public and food industry with the intent of improving the perception and competitive position of honey and stimulating sales of honey or honey products.

**§ 1212.21 Qualified national organization representing first handler interests.**

"Qualified national organization representing first handler interests" means an organization that the Secretary certifies as being eligible to nominate first handler and alternate first handler members of the Board under § 1212.42.

**§ 1212.22 Qualified national organization representing importer interests.**

"Qualified national organization representing importer interests" means an organization that the Secretary certifies as being eligible to nominate importer, importer-handler, and alternate importer and importer-handler members of the Board under § 1212.42.

**§ 1212.23 Qualified national organization representing producer interests.**

"Qualified national organization representing producer interests" means an organization that the Secretary certifies as being eligible to nominate producer and alternate producer members of the Board under § 1212.42.

**§ 1212.24 Qualified national organization representing cooperative interests.**

"Qualified national organization representing cooperative interests" means an organization that the Secretary certifies as being eligible to nominate cooperative and alternate cooperative members of the Board under § 1212.42.

**§ 1212.25 Referendum.**

"Referendum" means a referendum to be conducted by the Secretary pursuant to the Act whereby first handlers and importers shall be given the opportunity to vote to determine whether the implementation of or continuance of this part is favored by a majority of eligible persons voting in the referendum and a majority of volume voted in the referendum.

**§ 1212.26 Research.**

"Research" means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of honey and honey products, including research relating to nutritional value, cost of production, new product development, testing the effectiveness of market development and promotion efforts. Such term shall also include studies on bees to advance the cost effectiveness, competitiveness, efficiency, pest and disease control, and other management aspects of beekeeping, honey production, and honey bees.

**§ 1212.27 Secretary.**

"Secretary" means the Secretary of Agriculture of the United States, or any other officer or employee of the Department to whom authority the Secretary delegated the authority to act on his or her behalf.

**§ 1212.28 Suspend.**

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

**§ 1212.29 State.**

"State" means any of the fifty States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States.

**§ 1212.30 Terminate.**

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

**§ 1212.31 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.

**§ 1212.32 United States Customs Service.**

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

HONEY PACKERS AND IMPORTERS BOARD

**§ 1212.40 Establishment and membership.**

The Honey Packers and Importers Board is established to administer the terms and provisions of this part. The Board shall have ten members, composed of three first handler representatives, two importer representatives, one importer-handler representative, three producer representatives, and one marketing cooperative representative. The importer-handler representative must import at least 75 percent of the honey or honey products they market in the United States and handle at least 250,000 pounds annually. In addition, the producer representatives must produce a minimum of 150,000 pounds of honey in the United States annually based on the best three-year average of the most recent five calendar years, as certified by producers. The Secretary will appoint members to the Board from nominees submitted in accordance with § 1212.42. The Secretary shall also appoint an alternate for each member.

**§ 1212.41 Term of office.**

With the exception of the initial Board, each Board member and alternate will serve a three-year term or until the Secretary selects his or her successor. No member or alternate may serve more than two consecutive terms, excluding any initial two-year term of office. The terms of the initial Board members shall be staggered for two-, three-, and four-year terms. For the initial Board, one producer, one first handler, one importer, and the representative of a national honey cooperative will serve a two-year term of office. One producer, one first handler, and the importer-handler representative, will serve a three-year term of office. One producer, one first handler, and one importer will serve a four-year term of office. Determination of which of the initial members and their alternates shall serve two-year, three-year or four-year terms, shall be designated by the Secretary. Thereafter, each of these positions will carry a full three-year term. Members serving initial terms of two or four years will be eligible to serve a second term of three years. Each term of office will end on December 31, with new terms of office beginning on January 1. If this part becomes effective on a date such that the initial period is less than six months in duration, then the tolling of time for purposes of this subsection shall not begin until the beginning of the first 12-month fiscal period.

**§ 1212.42 Nominations and appointments.**

All nominations to the Board will be made as follows:

(a) All qualified national organizations representing first handler interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for the first handler positions and the alternate positions

on the Board. If the Secretary determines that there are no qualified national organizations representing first handler interests, individual first handlers who have paid assessments to the Board in the most recent fiscal period may submit nominations. For the initial Board, persons that meet the definition of first handlers as defined in this subpart will certify their qualification and upon certification, if qualified, may submit nominations.

(b) All qualified national organizations representing importer interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for importer positions, for the importer-handler position and for the alternate positions on the Board. If the Secretary determines that there are no qualified national organizations representing importer interests, individual importers who have paid assessments to the Board in the most recent fiscal period may submit nominations. For the initial Board, persons that meet the definition of importer as defined in this subpart will certify such qualification and upon certification, if qualified, may submit nominations.

(c) All qualified national organizations representing producer interests will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary for the producer positions and the producer alternate positions on the Board. If the Secretary determines that there are no qualified national organizations representing producer interests, individual producers may submit nominations to the Secretary. For the initial Board, persons that meet the definition of producer as defined in this subpart will certify such qualification and upon certification, if qualified, may submit nominations.

(d) For the purposes of this subpart, a national honey-marketing cooperative means any entity that is organized under the Capper-Volstead Act (7 U.S.C. 291) or state law as a cooperative and markets honey or honey products in at least 20 states. All national honey-marketing cooperatives that are first handlers will have the opportunity to participate in a nomination caucus and will, to the extent practical, submit as a group a single slate of nominations to the Secretary of persons who serve as an officer, director, or employee of a national honey marketing cooperative for the cooperative position and the alternate position on the Board.

(e) Eligible organizations, cooperatives, producers, first handlers or importers must submit nominations to the Secretary six months before the new Board term begins. At least two nominees for each position to be filled must be submitted.

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

(1) The organization's voting membership must be comprised primarily of first handlers of honey or honey products;

(2) The organization must represent a substantial number of first handlers who market a substantial volume of honey or honey products in at least 20 states;

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

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

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

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

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

(1) The organization's importer membership must represent at least a majority of the volume of honey or honey

products imported into the United States;

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

(3) The organization must have as a primary purpose promoting honey importers' economic welfare;

(4) The organization must derive a portion of its operating funds from importers; and

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

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

(1) The organization's membership must be comprised primarily of honey producers;

(2) The organization must represent a substantial number of producers who produce a substantial volume of honey in at least 20 states;

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

(4) The organization must have as one of its primary purposes promoting honey producers' economic welfare;

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

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

(i) To be certified by the Secretary as a qualified national organization representing first handler, producer or importer interests, an organization must agree to:

(1) Take reasonable steps to publicize to non-members the availability of open Board first handler, producer or importer positions; and

(2) Consider nominating a non-member first handler, producer or importer, if he or she expresses an interest in serving on the Board.

(j) National honey-marketing cooperative. The Secretary can certify that an entity qualifies as a national honey-marketing cooperative, as defined in § 1212.42(d). Such an entity shall not be eligible for certification as a qualified national organization representing producer interests.

### § 1212.43 Removal and vacancies.

(a) In the event that any member or alternate of the Board ceases to be a member of the category of members from which the member was appointed to the Board, such 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.

(c) A vacancy for any reason will be filled as follows:

(1) If a member position becomes vacant, the alternate for that position will serve the remainder of the member's term. In accordance with § 1212.42, the Secretary will request nominations for a replacement alternate and will appoint a nominee to serve the remainder of the term. The Secretary does not have to appoint a replacement if the unexpired term is less than six months.

(2) If both a member position and an alternate position become vacant, in accordance with § 1212.42, the Secretary will request nominations for replacements and appoint a member and alternate to serve the remainder of the term. The Secretary does not have to appoint a new member or alternate if the unexpired term for the position is less than six months.

(3) No successor appointed to a vacated term of office shall serve more than two successive three-year terms on the Board.

### § 1212.44 Procedure.

(a) A majority of the Board members will constitute a quorum so long as at least one of the members present is an importer member and one of the members present is a first handler member. An alternate will be counted for the purpose of determining a quorum only if a member from his or her membership class is absent or disqualified from participating. Any Board action will

require the concurring votes of a majority of those present and voting; with the exception of the two-thirds vote requirement in § 1212.52(f). All votes at meetings will be cast in person. The Board must give timely notice of all Board and committee meetings to members and alternates.

(b) The Board may take action by any means of communication when, in the opinion of the Board chairperson, an emergency requires that action must be taken before a meeting can be called. 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) Each proposition is explained accurately, fully, and substantially identically to each member;

(3) With the exception of the two-thirds vote requirement in § 1212.52(f), a majority of the members vote in favor of the action; and

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

### § 1212.45 Reimbursement and attendance.

Board members and alternates, when acting as members, will serve without compensation but will be reimbursed for reasonable travel expenses, as approved by the Board, that they incur when performing Board business. The Board may request that alternates attend any meeting even if their respective members are expected to attend or actually attend the meeting.

### § 1212.46 Powers.

The Board shall have the following powers subject to § 1212.80:

(a) Administer this subpart in accordance with its terms and provisions of the Act;

(b) Require its employees to receive, investigate, and report to the Secretary complaints of violations of this part;

(c) Recommend adjustments to the assessments as provided in this part;

(d) Recommend to the Secretary amendments to this part;

(e) Establish, issue, and administer appropriate programs and enter into contracts or agreements with the approval of the Secretary for promotion, research, and information programs and plans including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products; and

(f) 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.

### § 1212.47 Duties.

The Board shall have, among other things, the following duties:

(a) To meet and organize, and to select from among its members a chairperson and such other officers as may be necessary; to select committees and subcommittees from its membership and other industry representatives; and to develop and recommend such rules, regulations, and by-laws to the Secretary for approval to conduct its business as it may deem advisable;

(b) To employ or contract with such persons as it may deem necessary and to determine the compensation and define the duties of each; and to protect the handling of Board funds through fidelity bonds;

(c) To prepare and submit to the Secretary for approval 60 days in advance of the beginning of a fiscal period, a budget of anticipated expenses in the administration of this part including the probable costs of all programs and plans and to recommend a rate of assessment with respect thereto.

(d) To investigate violations of this part and report the results of such investigations to the Secretary for appropriate action to enforce the provisions of this part.

(e) To establish, issue, and administer appropriate programs and enter into contracts or agreements with the approval of the Secretary for promotion, research, and information including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products.

(f) 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.

(g) To periodically prepare and make public and to make available to first handlers, producers, and importers reports of its activities and, at least once each fiscal period, to make public an accounting of funds received and expended.

(h) To cause its books to be audited by a certified public accountant at the end of each fiscal period and to submit a copy of each audit to the Secretary.

(i) To submit to the Secretary such information pertaining to this part or subpart as he or she may request.

(j) To give the Secretary the same notice of Board meetings and committee 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.

(k) To notify first handlers, importers, and producers of all Board meetings through press releases or other means.

(l) To appoint and convene, from time to time, working committees or subcommittees that may include first handlers, importers, exporters, producers, members of the wholesale or retail outlets for honey, or other members of the honey industry and the public to assist in the development of research, promotion, advertising, and information programs for honey and honey products.

(m) 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 declared purpose of the Act.

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

### § 1212.48 Reapportionment of Board membership.

At least once in each 5-year period, but not more frequently than once in each 3-year period, the Board shall:

(a) Review, based on a three-year average, the geographical distribution in the United States of the production of honey and the quantity or value of the honey and honey products imported into the United States; and

(b) If warranted, recommend to the Secretary the reapportionment of the Board membership to reflect changes in the geographical distribution of the production of honey and the quantity or value of the honey and honey products imported into the United States.

EXPENSES AND ASSESSMENTS

### § 1212.50 Budget and expenses.

(a) At least 60 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 subpart. The budget shall allocate five percent (5%) of the Board's anticipated revenue from assessments each fiscal period for production research and research relating to the production of honey.

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 or at least one preceding year (except for the initial budget);

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

(4) Staff and administrative expense breakdowns, with comparative data for

at least one preceding year (except for the initial budget).

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

(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. Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Department.

(d) The Board is authorized to incur such expenses, including provision for a reserve, as the Department 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 administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for start-up costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Voluntary contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

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

(h) The Board may not expend for administration, maintenance, and functioning of the Board in any calendar year an amount that exceeds 15 percent of the assessments and other income received by the Board for that calendar year. Reimbursements to the Department required under paragraph (g) of this section, are excluded from this limitation on spending.

(i) The Board may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, with the approval of the Secretary, for authorized activities.

### § 1212.51 Financial statements.

(a) The Board shall prepare and submit financial statements to the Department on a periodic basis. 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 days after the end of the time period to which it applies.

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

### § 1212.52 Assessments.

(a) The Board will cover its expenses by levying in a manner prescribed by the Secretary an assessment on first handlers and importers.

(b) Each first handler shall pay an assessment to the Board at the rate of $0.01 per pound of domestically produced honey or honey products the first handler handles. A producer shall pay the Board the assessment on all honey or honey products for which the producer is the first handler.

(c) Each first handler responsible for remitting assessments under paragraph (b) of this section shall remit the amounts due to the Board's office on a monthly basis no later than the fifteenth day of the month following the month in which the honey or honey products were marketed.

(d) Each importer shall pay an assessment to the Board at the rate of $0.01 per pound of honey or honey products the importer imports into the United States. An importer shall pay the assessment to the Board through the United States Customs Service (Customs) when the honey or honey products being assessed enters the

United States. If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment to the Board.

(e) The import assessment recommended by the Board and approved by the Secretary shall be uniformly applied to imported honey or honey products that are identified as HTS heading numbers 0409.00.00 and 2106.90.9988 by the Harmonized Tariff Schedule of the United States.

(f) The Board may recommend to the Secretary an increase or decrease in the assessment as it deems appropriate by at least a two-thirds vote of members present at a meeting of the Board. The Board may not recommend an increase in the assessment of more than $0.02 per pound of honey or honey products and may not increase the assessment by more than $0.0025 in any single fiscal year.

(g) In situations of late payment:

(1) The Board shall impose a late payment charge on any first handler or importer who fails to remit to the Board the total amount for which the first handler or importer is liable on or before the payment due date the Board recommends. The amount of the late payment charge shall be prescribed by the Department.

(2) The Board shall require any first handler or importer subject to a late payment charge to pay interest on the unpaid assessments for which the first handler or importer is liable. The rate of interest shall be prescribed by the Department.

(3) First handlers or importers who fail to remit total assessments in a timely manner may also be subject to actions under federal debt collection procedures.

(h) Advance payment. The Board may accept advance payment of assessments from first handlers or importers that will be credited toward any amount for which the first handlers or importers may become liable. The Board does not have to pay interest on any advance payment.

(i) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments and invest them on behalf of the Board, and shall pay such assessments and any interest earned to the Board when it is formed.

**§ 1212.53 Exemption from assessment.**

(a) A first handler who handles less than 250,000 pounds of honey or honey products per calendar year or an importer who imports less than 250,000 pounds of honey or honey products per calendar year is exempt from paying assessments.

(b) A first handler who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan, handles only products that are 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. An importer who imports only products that are 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.

(c) A first handler or importer desiring an exemption shall apply to the Board, on a form provided by the Board, for a certificate of exemption. A first handler shall certify that the first handler will handle less than 250,000 of honey and honey products for the calendar year for which the exemption is claimed. An importer shall certify that the importer will import less than 250,000 pounds of honey and honey products during the calendar year for which the exemption is claimed.

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

(e) Exempt importers shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessment paid. No interest will be paid on the assessment collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the honey or honey products were imported.

(f) If a person has been exempt from paying assessments for any calendar

year under this section and no longer meets the requirements for an exemption, the person shall file a report with the Board in the form and manner prescribed by the Board and begin to pay the assessment on all honey or honey products handled or imported.

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

(h) The Board may recommend to the Secretary that honey and honey products exported from the United States be exempt from this subpart and recommend procedures for refunding assessments paid on exported honey and honey products and any necessary safeguards to prevent improper use of this exemption.

### § 1212.54 Operating reserve.

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. Subject to approval by the Department, such reserve funds may be used to defray any expenses authorized under this part.

### § 1212.55 Prohibition on use of funds.

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

(1) Any action that is a conflict of interest;

(2) Except as otherwise provided in paragraph (b) of this section, 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, other than recommending to the Secretary amendments to the Order.

(3) A program, plan or project conducted pursuant to this subpart that includes false or misleading claims on behalf of honey or honey products.

(4) Any advertising, including promotion, research and information activities authorized that may be false or misleading or disparaging to another agricultural commodity.

(b) The prohibition in paragraph (a)(2) of this section shall not apply:

(1) To the development and recommendation of amendments to this subpart; or

(2) To the communication to appropriate government officials, in response to a request made by the officials, of information relating to the conduct, implementation, or results of promotion, research, consumer information, education, industry information, or producer information activities authorized under this subpart.

## PROMOTION, RESEARCH, AND INFORMATION

### § 1212.60 Programs, plans and projects.

(a) Scope of activities. The Board must develop and submit to the Secretary for approval plans and programs authorized by this section. The plans and programs may provide for:

(1) Establishing, issuing, and administering appropriate programs for promotion, research, and information including consumer and industry information, and advertising designed to strengthen the honey industry's position in the marketplace and to maintain, develop, and expand domestic and foreign markets for honey and honey products;

(2) Establishing and conducting research and development activities to encourage and expand the acquisition of knowledge about honey and honey products, their consumption and use, or to encourage, expand or improve the quality, marketing, and utilization of honey and honey products;

(3) Conducting activities that may lead to developing new markets or marketing strategies for honey and honey products;

(4) Conducting activities related to production issues or bee research activities; and

(5) Conducting activities designed to make the honey industry more efficient, to improve the quality of honey or to enhance the image of honey and honey products and the honey industry.

(b) No program, plan, or project shall be implemented prior to its approval by the Department. Once a program,

plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) The Board must periodically evaluate each plan and program authorized under this part 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 and the Secretary find that a plan or program does not further the purposes of the Act, then such plan or program should be terminated.

### § 1212.61 Independent evaluation.

The Board must authorize and fund not less than once every five years an independent evaluation of the effectiveness of this subpart and the plans and programs conducted by the Board under the Act. The Board must submit this independent evaluation to the Secretary and make the results available to the public.

### § 1212.62 Patents, copyrights, inventions, product formulations, and publications.

Except for a reasonable royalty paid by the Board to the inventor of a patented invention, any patents, copyrights, inventions, product formulations, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government, as represented by the Board, and shall along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Department. Upon termination of this Order, § 1212.83 shall apply to determine disposition of all such property.

## REPORTS, BOOKS, AND RECORDS

### § 1212.70 Reports.

(a) Each first handler or importer subject to this part must report to the Board, at the time and in the manner it prescribes, and subject to the approval of the Secretary, the information the Board deems necessary to perform its duties.

(b) First handlers must report:

(1) The total quantity of honey and honey products acquired during the reporting period;

(2) The total quantity of honey and honey products handled during the period;

(3) The quantity of honey processed for sale from the first handler's own production;

(4) The quantity of honey and honey products purchased from a first handler or importer responsible for paying the assessment due pursuant to this Order;

(5) The date that assessment payments were made on honey and honey products handled; and

(6) The first handler's tax identification number.

(c) Unless provided by Customs, importers must report:

(1) The total quantity of honey and honey products imported during the reporting period;

(2) A record of each lot of honey or honey products imported during such period, including the quantity, date, country of origin, and port of entry; and

(3) The importer of record's tax identification number.

(d) The Board may request any other information from first handlers and importers that it deems necessary to perform its duties under this subpart, subject to the approval of the Secretary.

(e) The Board, with the Secretary's approval, may request that persons claiming an exemption from assessments under § 1212.52(b) or (d) must provide it with any information it deems necessary about the exemption, including, without limitation, the disposition of exempted honey or honey products.

### § 1212.71 Books and records.

Each first handler and importer, including those who are exempt under

this subpart, must maintain any books and records necessary to carry out the provisions of this part, and any regulations issued under this part, including the books and records necessary to verify any required reports. Books and records must be made available during normal business hours for inspection by the Board's or Secretary's employees or agents. A first handler or importer must maintain the books and records for two years beyond the fiscal period to which they apply.

### § 1212.72 Confidential treatment.

All information obtained from books, records, or reports under the Act and this part 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, first handlers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on 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 thereof, 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

### § 1212.80 Right of the Secretary.

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

### § 1212.81 Referenda.

(a) After the initial referendum, the Secretary shall conduct subsequent referenda;

(1) Every seven years, to determine whether first handlers and importers of honey or honey products favor the continuation, suspension, or termination of the Order. The Order shall continue if it is favored by a majority of first handlers and importers voting in the referendum and a majority of volume voting in the referendum who, during a representative period determined by the Secretary, have been engaged in the handling or importation of honey or honey products;

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

(3) At the request of ten (10) percent or more of the number of persons eligible to vote under the Order; or

(4) Whenever the Department deems that a referendum is necessary.

(b) *Approval of order*. Approval in a referendum shall be established by a majority of eligible persons voting in the referendum and a majority of volume voting in the referendum who are first handlers or importers during the representative period by those voting as established by the Secretary.

(c) *Manner of conducting referenda*. A referendum conducted under this section shall be conducted in the manner determined by the Secretary to be appropriate.

### § 1212.82 Suspension or termination.

The Secretary shall suspend or terminate the operation of this part or subpart or any provision thereof, if the Secretary finds that this part or subpart or the provision obstructs or does not tend to effectuate the declared policy of the Act.

**§ 1212.83 Proceedings after termination.**

(a) If this subpart terminates, the Board shall recommend to the Secretary up to five of its members to serve as trustees for the purpose of liquidating the Board's affairs. Such persons, upon designation by the Secretary, will become trustees of any funds and property the Board possesses or controls at that time and any existing claims it has, including, without limitation, claims for any unpaid or undelivered funds or property.

(b) The trustees will:

(1) Serve until discharged by the Secretary;

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

(3) Account from time to time for all receipts and disbursements and deliver all property on hand, together with all the Board's and trustees' books and records to any person the Secretary directs; and

(4) Execute at the Secretary's direction any assignments or other instruments necessary or appropriate to vest in any person full title and right to all of the funds, property, and claims owned by the Board or the trustees under this subpart.

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Department to be disposed of, to the extent practical, to one or more honey industry organizations in the interest of continuing honey promotion, research, and information programs.

**§ 1212.84 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, terminating or amending this subpart or any regulation issued under it will not:

(a) Affect or waive any right, duty, obligation, or liability that arose or may arise in connection with any provision of this part;

(b) Release or extinguish any violation of this part; or

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

**§ 1212.85 Personal liability.**

No member, alternate member, or employee of the Board may 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 a member, alternate member, or employee, except for acts of dishonesty or willful misconduct.

**§ 1212.86 Separability.**

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

**§ 1212.87 Amendments.**

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

**§ 1212.88 OMB control number.**

The control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0505–0001, and OMB control number 0581–[NEW, to be assigned by OMB].

## Subpart B—Referendum Procedures

**§ 1212.100 General.**

Referenda to determine whether eligible first handlers and importers of honey and honey products favor the issuance, continuance, amendment, suspension, or termination of the Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order shall be conducted in accordance with this subpart.

**§ 1212.101 Definitions.**

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to re-delegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Department* 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.

(c) *Eligible first handler* means any person (excluding a common or contract carrier) who handled 250,000 or more pounds of domestic honey and honey products during the representative period, who first buys or takes possession of honey or honey products from a producer for marketing. If a producer markets the honey directly to consumers, the producer shall be considered the first handler with respect to the honey produced by the producer.

(d) *Eligible importer* means any person who imports 250,000 or more pounds of honey and honey products into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles honey or honey products outside of the United States for sale in the United States, and who is listed as the importer of record for such honey or honey products that are identified in the Harmonized Tariff Schedule of the United States by the numbers 0409.00.00 and 2106.90.9988, during the representative period. Importation occurs when honey or honey products originating outside of the United States are released from custody by the United States Customs and Border Protection, referred to as the U.S. Customs Service, and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign produced honey or honey products immediately upon release by the U.S. Customs Service, as well as any persons who acts on behalf of others, as agents or brokers, to secure the release of honey or honey products from the U.S. Customs Service when such honey or honey products are entered or withdrawn for consumption in the United States.

(e) *Handle* means to process, package, sell, transport, purchase or in any other way place honey or honey products, or cause them to be placed, in commerce. This term includes selling unprocessed honey that will be consumed without further processing or packaging. This term does not include the transportation of unprocessed honey by the producer to a handler or transportation by a commercial carrier of honey, whether processed or unprocessed for the account of the first handler or producer.

(f) *Honey* means the nectar and saccharine exudations of plants that are gathered, modified, and stored in the comb by honeybees, including comb honey.

(g) *Honey products* mean products where honey is a principal ingredient. For purposes of this subpart, a product shall be considered to have honey as a principal ingredient, if the product contains at least 50 percent honey by weight.

(h) *Order* means the Honey Packers and Importers Research, Promotion, Consumer Education and Industry Information Order.

(i) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, honey bee colonies or beekeeping equipment as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the production, handling, or importation of honey or honey products for market and the authority to transfer title to the honey or honey products so produced, handled or imported.

(j) *Referendum agent* or *agent* means the individual or individuals designated by the Department to conduct the referendum.

(k) *Representative period* means the period designated by the Department.

(l) *United States or U.S.* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

**§ 1212.102 Voting.**

(a) Each eligible first handler and eligible importer of honey or honey products shall be entitled to cast only one ballot in the referendum.

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

(c) All ballots are to be cast by mail, as instructed by the Department.

**§ 1212.103 Instructions.**

(a) *Referenda*. The Order shall not become effective unless the Department determines that the Order is consistent with and will effectuate the purposes of the Act; and for initial and subsequent referenda the Order is favored by a majority of eligible persons voting in the referendum and a majority of volume voting in the referendum who, during a representative period determined by the Department, have been engaged in the handling or importation of honey or honey products and are subject to assessments under this Order and excluding those exempt from assessment under the Order.

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

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

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

(3) Give reasonable public notice of the referendum:

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

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

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

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

(6) Prepare a report on the referendum.

(7) Announce the results to the public.

**§ 1212.104 Subagents.**

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

**§ 1212.105 Ballots.**

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a

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

### § 1212.106 Referendum report.

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

### § 1212.107 Confidential information.

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

### § 1212.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0505–0001, OMB control number 0581–0217, and OMB control number 0581-[NEW, to be assigned by OMB].

# PART 1215—POPCORN PROMOTION, RESEARCH, AND CONSUMER INFORMATION

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AUTHORITY: 7 U.S.C. 7481–7491 and 7 U.S.C. 7401.

SOURCE: 62 FR 39389, July 22, 1997, unless otherwise noted.

## Subpart A—Popcorn Promotion, Research, and Consumer Information Order

DEFINITIONS

### § 1215.1 Act.

*Act* means the Popcorn Promotion, Research, and Consumer Information Act of 1995, Subtitle E of Title V of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. 104–127, 7 U.S.C. 7481–7491, and any amendments thereto.

### § 1215.2 Board.

*Board* means the Popcorn Board established under section 575(b) of the Act.

### § 1215.3 Board member.

*Board member* means an officer or employee of a processor appointed by the Secretary to serve on the Popcorn Board as a representative of that processor.

### § 1215.4 Commerce.

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

### § 1215.5 Consumer information.

*Consumer information* means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of popcorn.

### § 1215.6 Department.

*Department* means the United States Department of Agriculture.

### § 1215.7 Fiscal year.

*Fiscal year* means the 12-month period from January 1 through December 31 each year, or such other period as recommended by the Board and approved by the Secretary.

### § 1215.8 Industry information.

*Industry information* means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the popcorn industry, or activities to enhance the image of the popcorn industry.

### § 1215.9 Marketing.

*Marketing* means the sale or other disposition of unpopped popcorn for human consumption in a channel of commerce but shall not include sales or disposition to or between processors.

### § 1215.10 Part and subpart.

*Part* means the Popcorn Promotion, Research, and Consumer Information Order and all rules and regulations and supplemental orders issued thereunder, and the term *subpart* means the Popcorn Promotion, Research, and Consumer Information Order.

### § 1215.11 Person.

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

### § 1215.12 Popcorn.

*Popcorn* means unpopped popcorn (Zea Mays L) that is commercially grown, processed in the United States by shelling, cleaning, or drying, and introduced into a channel of commerce.

### § 1215.13 Process.

*Process* means to shell, clean, dry, and prepare popcorn for the market, but does not include packaging popcorn for the market without also engaging in another activity described in this paragraph.

### § 1215.14 Processor.

*Processor* means a person engaged in the preparation of unpopped popcorn for the market who owns or who shares the ownership and risk of loss of such popcorn and who processes and distributes over 4 million pounds of popcorn in the market per year.

### § 1215.15 Programs, plans, and projects.

*Programs, plans, and projects* means promotion, research, consumer information, and industry information plans, studies, projects, or programs conducted pursuant to this part.

### § 1215.16 Promotion.

*Promotion* means any action, including paid advertising, to enhance the image or desirability of popcorn.

**§ 1215.17 Research.**

*Research* means any type of study to advance the image, desirability, marketability, production, product development, quality, or nutritional value of popcorn.

**§ 1215.18 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States 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.

**§ 1215.19 State.**

*State* means each of the 50 States and the District of Columbia.

**§ 1215.20 United States.**

*United States* means all of the States.

POPCORN BOARD

**§ 1215.21 Establishment and membership.**

(a) There is hereby established a Popcorn Board of five members. The number of members on the board may be changed by rulemaking: *Provided*, that the Board consist of not fewer than four members and not more than nine members. The Board shall be composed of popcorn processors appointed by the Secretary under § 1215.24.

(b) For purposes of nominating and appointing processors to the Board, the Secretary shall, to the extent practicable, take into account the geographic distribution of popcorn production.

(c) No more than one officer or employee of a processor may serve as a Board member at the same time.

[62 FR 39389, July 22, 1997, as amended at 75 FR 67610, Nov. 3, 2010]

**§ 1215.22 Nominations and appointment.**

(a) All nominations for appointments to the Board established under § 1215.21 shall be made as follows:

(1) As soon as practicable after the effective date of this subpart, nominations for appointment to the initial Board shall be obtained from processors by the Secretary. In any subsequent year in which an appointment to the Board is to be made, nominations for positions for which the term will expire at the end of that year shall be obtained from processors at least six months prior to the expiration of terms.

(2) Except for initial Board members, whose nomination process will be initiated by the Secretary, the Board shall issue a call for nominations in each year for which an appointment to the Board is to be made. The call shall include, at a minimum, the following information:

(i) A list of the vacancies for which nominees may be submitted and qualifications for nomination; and

(ii) The date by which the names of nominees shall be submitted to the Secretary for consideration to be in compliance with paragraph (a) of this section.

(3)(i) Nominations for each position shall be made by processors. Notice shall be publicized to all processors.

(ii) All processors may participate in submitting nominations.

(4) Two nominees must be submitted for each vacancy. If processors fail to nominate a sufficient number of nominees, additional nominees shall be obtained in a manner prescribed by the Secretary.

(b) The Secretary shall appoint the members of the Board from nominations made in accordance with paragraph (a).

(1) The Secretary may reject any nominee submitted. If there is an insufficient number of nominees from whom to appoint members to the Board as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary in a manner prescribed by the Secretary.

(2) Whenever processors cannot agree on nominees for a position on the Board under the preceding provisions of this section, or whenever they fail to nominate individuals for appointment to the Board, the Secretary may appoint members in such a manner as the Secretary determines appropriate.

(3) If a processor nominates more than one officer or employee, only one may be appointed to the Board by the Secretary.

**§ 1215.23 Acceptance.**

Each individual nominated for membership of the Board shall qualify by filing a written acceptance with the Secretary at the time of nomination.

**§ 1215.24 Term of office.**

(a) The members of the Board shall serve for terms of three years, except that members appointed to the initial Board shall serve, to the extent practicable, proportionately for terms of two, three, and four years.

(b)(1) Except with respect to terms of office of the initial Board, the term of office for each Board member shall begin on the date the member is seated at the Board's annual meeting or such other date that may be approved by the Secretary.

(2) The term of office for the initial Board member shall begin immediately following the appointment by the Secretary.

(c) Board members shall serve during the term of office for which they are appointed and have qualified, and until their successors are appointed and have qualified.

(d) No Board member may serve more than two consecutive three-year terms, except as provided in § 1215.25(d). Initial members serving two- or four-year terms may serve one successive three-year term.

**§ 1215.25 Vacancies.**

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary may appoint a successor from the most recent nominations submitted for positions on the Board or the Secretary may obtain nominees to fill such vacancy in such a manner as the Secretary deems appropriate.

(b) Each such successor appointment shall be for the remainder of the term vacated.

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

(d) If an unexpired term is less than 1.5 years, serving the term shall not prevent the appointee from serving two successive three-year terms.

(e) A Board member shall be disqualified from serving on the Board if such individual ceases to be affiliated with the processor the member represents.

**§ 1215.26 Removal.**

If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board is known to be engaged in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. 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 will be detrimental to the achievement of the purposes of the Act.

**§ 1215.27 Procedure.**

(a) At a properly convened meeting of the Board, a majority of the members shall constitute a quorum.

(b) 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 a simple majority of those voting. At assembled meetings of the Board, all votes will be cast in person.

(c) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action upon the concurring votes by a majority of its members by mail, telephone, facsimile, or any other means of communication. If appropriate, any such action shall be confirmed promptly in writing. In that event, all members must be given prior notice and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All votes shall be recorded in Board minutes.

(d) Meetings of the Board may be conducted by electronic communications, provided that each member is given prior notice of the meeting and has the opportunity to be present either physically or by electronic connection.

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

**§ 1215.28 Compensation and reimbursement.**

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses incurred by such members in the performance of their responsibilities under this subpart.

**§ 1215.29 Powers.**

The Board shall have the following powers:

(a) To administer the Order in accordance with its terms and provisions;

(b) To make rules and regulations to effectuate the terms and provisions of the Order;

(c) To select committees and subcommittees of Board members, including an executive committee, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(d) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals;

(e) To disseminate information to processors or industry organizations through programs or by direct contact using the public postal system or other systems;

(f) To propose, receive, evaluate and approve budgets, plans and projects of popcorn promotion, research, consumer information and industry information, as well as to contract with the approval of the Secretary with appropriate persons to implement plans and projects;

(g) To receive, investigate, and report to the Secretary for action any complaints of violations of the Order;

(h) To recommend to the Secretary amendments to the order;

(i) To accept or receive voluntary contributions;

(j) To invest, pending disbursement pursuant to a program, plan or project, funds collected through assessments authorized under this Act provided for in § 1215.51, and any other funds received by the Board in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest bearing account or certificate of deposit or a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States;

(k) With the approval of the Secretary, to enter into contracts or agreements with national, regional, or State popcorn processor organizations, or other organizations or entities, for the development and conduct of programs, plans or projects authorized under § 1215.40 and for the payment of the cost of such programs with assessments received pursuant to this subpart; and

(l) Such other powers as may be approved by the Secretary.

**§ 1215.30 Duties.**

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, consumer information, and industry information programs, plans or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart, as provided in § 1215.50;

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles

and to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books and records that clearly reflect all the acts and transactions of the Board. Minutes of each Board meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any processor;

(k) To investigate violations of the Act, order, and regulations issued under the order, conduct audits, and report the results of such investigations and audits to the Secretary for appropriate action to enforce the provisions of the Act, order, and regulations; and

(l) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the popcorn industry's position in the marketplace, maintain and expand existing markets and uses for popcorn, develop new markets and uses for popcorn, and to carry out programs, plans, and projects designed to provide maximum benefits to the popcorn industry.

PROMOTION, RESEARCH, CONSUMER INFORMATION, AND INDUSTRY INFORMATION

### § 1215.40 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan or project authorized under this subpart. Such programs, plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, consumer information, and industry information with respect to popcorn; and

(2) The establishment and conduct of research with respect to the sale, distribution, marketing, and use of popcorn, and the creation of new uses thereof, to the end that the marketing and use of popcorn may be encouraged, expanded, improved, or made more acceptable.

(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 may take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, consumer information, or industry information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, consumer information, or industry information, then the Board shall terminate such program, plan, or project.

(d) In carrying out any program, plan, or project, no reference to a brand name, trade name, or State or regional identification of any popcorn will be made. In addition, no program, plan, or project shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

### § 1215.41 Contracts.

The Board shall not contract with any processor for the purpose of promotion or research. The Board may lease physical facilities from a processor for such promotion or research, if such an arrangement is determined to be cost effective by the Board and approved by the Secretary. Any contract or agreement shall provide that:

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

(b) Any such program, plan, or project shall become effective upon approval by the Secretary;

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

(d) 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.

EXPENSES AND ASSESSMENTS

### § 1215.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart.

(b) Each budget shall include:

(1) A rate of assessment for such fiscal year calculated, subject to § 1215.51(b), to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (g) of this section;

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

(3) A summary of anticipated revenue, with comparative data for at least one preceding year;

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

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

(c) In budgeting plans and projects of promotion, research, consumer information, and industry information, the Board shall expend assessment and contribution funds on:

(1) Plans and projects for popcorn marketed in the United States or Canada in proportion to the amount of assessments projected to be collected on domestically marketed popcorn (including Canada); and

(2) Plans and projects for exported popcorn in proportion to the amount of assessments projected to be collected on exported popcorn (excluding Canada).

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

(e) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects approved by the Secretary. Such contributions shall be free from any encumbrances by the donor and the Board shall retain complete control of their use. The Board may also receive funds provided through the Foreign Agricultural Service of the United States Department of Agriculture for foreign marketing activities.

(f) As stated in section 75(f)(4)(A)(ii) of the Act, the Board shall reimburse the Secretary, from funds received by the Board, for costs incurred by the Secretary in implementing and administering this subpart: *Provided*, That the costs incurred by the Secretary to be reimbursed by the Board, excluding legal costs to defend and enforce the order, shall not exceed 15 percent of the projected annual revenues of the Board.

(g) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, except that the funds in this reserve shall not exceed approximately one fiscal year's expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

(h) With the approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board during its first year of operation only.

**§ 1215.51 Assessments.**

(a) Any processor marketing popcorn in the United States or for export shall pay an assessment on such popcorn at the time of introduction to market at a rate as established in § 1215.51(c) and shall remit such assessment to the Board in such form and manner as prescribed by the Board.

(b) Any person marketing popcorn of that person's own production to consumers in the United States either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such popcorn at the rate set forth in paragraph § 1215.51(c), and in such form and manner as prescribed by the Board.

(c) Except as otherwise provided, the rate of assessment shall be 5 cents per hundredweight of popcorn. The rate of assessment may be raised or lowered as recommended by the Board and approved by the Secretary, but shall not exceed 8 cents per hundredweight in any fiscal year.

(d) The collection of assessments under this section shall commence on all popcorn processed in the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Board is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Board and may hold such assessments until the Board is constituted, then remit such assessments to the Board.

(e) Each person responsible for remitting assessments under paragraphs (a) and (b) of this section shall remit the amounts due from assessments to the Board on a quarterly basis no later than the last day of the month following the last month in the previous quarter in which the popcorn was marketed, in such manner as prescribed by the Board.

(f) The Board shall impose a late payment charge on any person who fails to remit to the Board the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(g) The Board shall impose an additional charge on any person subject to a late payment charge, in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in rules and regulations as approved by the Secretary.

(h) In addition, persons failing to remit total assessments due in a timely manner may also be subject to penalties and actions under federal debt collection procedures as set forth in 7 CFR 3.1 through 3.36.

(i) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Board by the payment due date, shall be considered to have been payable on the payment due date. Under such a situation, paragraphs (f), (g), and (h) of this section shall be applicable.

(j) The Board, with the approval of the Secretary, may enter into agreements authorizing other organizations or entities to collect assessments on its behalf. Any such organization or entity shall be required to maintain the confidentiality of such information as is required by the Board for collection purposes. Any reimbursement by the Board for such services shall be based on reasonable charges for services rendered.

(k) The Board is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Board shall not be obligated to pay interest on any advance payment.

**§ 1215.52 Exemption from assessment.**

(a) Persons that process and distribute 4 million pounds or less of popcorn annually, based on the previous year, shall be exempted from assessment.

(b) Persons that operate under an approved National Organic Program (NOP) (7 CFR part 205) system plan; process only products that are eligible to be labeled as 100 percent organic under the NOP; and are not split operations shall be exempt from the payment of assessments.

(c) To claim an exemption, persons shall apply to the Board, in the form and manner prescribed in the rules and regulations.

[70 FR 2757, Jan. 14, 2005]

### § 1215.53 Influencing governmental action.

No funds received by the Board under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart.

REPORTS, BOOKS, AND RECORDS

### § 1215.60 Reports.

(a) Each processor marketing popcorn directly to consumers, and each processor responsible for the remittance of assessments under § 1215.51, shall be required to report quarterly to the Board, on a form provided by the Board, such information as may be required under this subpart or any rule and regulations issued thereunder. Such information shall be subject to § 1215.62 and include, but not be limited to, the following:

(1) The processor's name, address, telephone number, and Social Security Number or Employer Identification Number;

(2) The date of report, which is also the date of payment to the Board;

(3) The period covered by the report;

(4) The number of pounds of popcorn marketed or in any other manner are subject to the collection of assessments;

(5) The amount of assessments remitted;

(6) The basis, if necessary, to show why the remittance is less than the number of pounds of popcorn divided by 100 and multiplied by the applicable assessment rate; and

(7) The amount of assessments remitted on exports (not including Canada).

(b) The words "final report" shall be shown on the last report at the end of each fiscal year.

### § 1215.61 Books and records.

Each person who is subject to this subpart shall maintain and make available for inspection by the Board or the Secretary such books and records as are deemed necessary by the Board, with the approval of the Secretary, to carry out the provisions of this subpart and any rules and regulations issued hereunder, including such books and records as are necessary to verify any reports required. Such books and records shall be retained for at least two years beyond the fiscal year of their applicability.

### § 1215.62 Confidential treatment.

(a) All information obtained from books, records, or reports under the Act, this subpart, and the rule and regulations issued thereunder shall be kept confidential by all persons, including all employees, agents, and former employees and agents of the Board; all officers, employees, agents, and former officers, employees, and agents of the Department; and all officers, employees, agents, and former officers, employees, and agents of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members or processors. Only those persons having a specific need for such information to administer effectively the provisions of this part 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 suit or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this part.

(b) No information obtained under the authority of this part may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of the Act and any investigatory or enforcement action necessary for the implementation of the Act.

(c) Nothing in paragraph (a) of this section may be deemed to prohibit:

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

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

(d) Any person who knowingly violated the provisions of this section, on conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for not more than 1 year, or both, or if the person is an officer, employee, or agent of the Board or the Department, that person shall be removed from office or terminated from employment as applicable.

MISCELLANEOUS

**§ 1215.70 Right of the Secretary.**

All fiscal matters, programs, plans, 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.

**§ 1215.71 Suspension or termination.**

(a) Whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(b) The Secretary may conduct additional referenda to determine whether processors favor termination or suspension of this subpart three years after the effective date, on the request of a representative group comprising 30 percent or more of the number of processors who have been engaged in processing during a representative period as determined by the Secretary.

(c) Whenever the Secretary determines that suspension or termination of this subpart is favored by two-thirds or more of the popcorn processors voting in a referendum under paragraph (b) of this section who, during a representative period determined by the Secretary, have been engaged in the processing, the Secretary shall:

(1) Suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

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

(d) Referenda conducted under this subsection shall be conducted in such manner as the Secretary may prescribe.

**§ 1215.72 Proceedings after termination.**

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

(b) The trustees shall:

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

(2) Carry out the obligations of the Board under any contract or agreement entered into by it under this subpart;

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

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

(c) Any person to whom funds, property, or claims have been transferred or delivered under this subpart 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 used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information or industry information programs, plans, or projects authorized under this subpart.

**§ 1215.73 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any rule and regulation issued under this subpart, or the issuance of any amendment to such provisions, shall not:

(a) Affect or waive any right, duty, obligation, or liability that shall have arisen or may hereafter arise in connection with any provision of this subpart or any such rules or regulations;

(b) Release or extinguish any violation of this subpart or any such rules or regulations; or

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

**§ 1215.74 Personal liability.**

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

**§ 1215.75 Patents, copyrights, inventions, publications, and product formulations.**

Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Board under this subpart shall be the property of the United States Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, publications, or product formulations inure to the benefit of the Board and be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this subpart, § 1215.72 shall apply to determine disposition of all such property.

**§ 1215.76 Amendments.**

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

**§ 1215.77 Separability.**

If any provision of this subpart is declared invalid, or the applicability thereof 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.

## Subpart B—Rules and Regulations

DEFINITIONS

**§ 1215.100 Terms defined.**

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions in Subpart A—Popcorn Promotion, Research, and Consumer Information Order of this part.

EXEMPTION PROCEDURES

**§ 1215.300 Exemption procedures.**

(a) Any processor who markets 4 million pounds or less of popcorn annually and who desires to claim an exemption from assessments during a fiscal year as provided in § 1214.52 of this part shall apply to the Board, on a form provided by the Board, for a certificate of exemption. Such processor shall certify that the processor's marketing of popcorn during the previous fiscal year was 4 million pounds or less.

(b) Persons that process solely 100 percent organic products and that do not process any conventional or nonorganic products as provided in § 1215.52 paragraph (b) of this part may apply for an exemption by submitting a request for exemption to the Board on a form provided by the Board at any time initially. The request shall include the following: The applicant's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(c) Upon receipt of an application, the Board shall determine whether an exemption may be granted and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(d) Any person who desires to renew the exemption from assessments for a subsequent fiscal year shall reapply to the Board by January 1 of that year.

(e) The exemption will apply at the first reporting period following the issuance of the Certificate of Exemption.

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

[62 FR 39389, July 22, 1997, as amended at 70 FR 2757, Jan. 14, 2005]

MISCELLANEOUS

**§ 1215.400 OMB control numbers.**

The control number 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, is OMB control number 0581–0093, except for the Promotion Board nominee background statement form which is assigned OMB control number 0505–0001.

# PART 1216—PEANUT PROMOTION, RESEARCH, AND INFORMATION ORDER

## Subpart A—Peanut Promotion, Research, and Information Order

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AUTHORITY: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

SOURCE: 64 FR 20105, Apr. 23, 1999, unless otherwise noted.

# Subpart A—Peanut Promotion, Research, and Information Order

SOURCE: 64 FR 41256, July 29, 1999, unless otherwise noted.

DEFINITIONS

### § 1216.1 Act.

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7401–7425; Public Law 104–127, 110 Stat. 1029), or any amendments thereto.

### §§ 1216.2–1216.3 [Reserved]

### § 1216.4 Board.

*Board* means the administrative body referred to as the National Peanut Board established pursuant to § 1216.40.

### § 1216.5 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.

### § 1216.6 [Reserved]

### § 1216.7 Department.

*Department* means the U.S. Department of Agriculture.

### § 1216.8 Farm Service Agency.

*Farm Service Agency or FSA* means the U.S. Department of Agriculture's Farm Service Agency.

### § 1216.9 Farmers stock peanuts.

*Farmers stock peanuts* means picked or threshed peanuts produced in the United States which have not been changed (except for removal of foreign material, loose shelled kernels and excess moisture) from the condition in which picked or threshed peanuts are customarily marketed by producers, plus any loose shelled kernels that are removed from farmers stock peanuts before such farmers stock peanuts are marketed.

### § 1216.10 First handler.

*First handler* means any person who handles peanuts in a capacity other than that of a custom cleaner or dryer, an assembler, a warehouseman, or other intermediary between the producer and the person handling.

### § 1216.11 Fiscal year.

*Fiscal year* is synonymous with crop year and means the 12-month period beginning with August 1 of any year and ending with July 31 of the following year, or such other period as determined by the Board and approved by the Secretary.

### § 1216.12 Handle.

*Handle* means to engage in the receiving or acquiring, cleaning and shelling, cleaning in-shell, or crushing of peanuts and in the shipment (except as a common or contract carrier of peanuts owned by another) or sale of cleaned in-shell or shelled peanuts, or other activity causing peanuts to enter the current of commerce: *Provided*, that this term does not include sales or deliveries of peanuts by a producer to a handler or to an intermediary person engaged in delivering peanuts to handler(s) and: *Provided further*, that this term does not include sales or deliveries of peanuts by such intermediary person(s) to a handler.

### § 1216.13 Information.

*Information* means information and programs that are designed to increase

efficiency in processing and to develop new markets, marketing strategies, increased market efficiency, and activities that are designed to enhance the image of peanuts on a national or international basis. These include:

(a) *Consumer information,* which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of peanuts; and

(b) *Producer information,* which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the peanut industry, and activities to enhance the image of the peanut industry.

**§ 1216.14 Market.**

*Market* means to sell or otherwise dispose of peanuts into interstate, foreign, or intrastate commerce by buying, marketing, distributing, or otherwise placing peanuts into commerce.

**§ 1216.15 Minor peanut-producing states.**

*Minor peanut-producing states* means all peanut-producing states with the exception of Alabama, Florida, Georgia, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, and Virginia.

[73 FR 14921, Mar. 20, 2008]

**§ 1216.16 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.

**§ 1216.17 Part and subpart.**

*Part* means the Peanut Promotion, Research, and 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.

**§ 1216.18 Peanuts.**

*Peanuts* means the seeds of the legume *arachis hypogaea* and includes both in-shell and shelled peanuts other than those marketed by the producer in green form for consumption as boiled peanuts.

**§ 1216.19 Peanut producer organization.**

*Peanut producer organization* means a state-legislated peanut promotion, research, and education commission or organization. For states without a state-legislated peanut promotion, research, and education commission or organization, "peanut producer organization" means any organization which has the primary purpose of representing peanut producers and has peanut producers as members.

**§ 1216.20 Person.**

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

**§ 1216.21 Primary peanut-producing states.**

*Primary peanut-producing states* means Alabama, Florida, Georgia, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, and Virginia, *Provided,* these states maintain three-year average production of at least 10,000 tons of peanuts.

[73 FR 14921, Mar. 20, 2008]

**§ 1216.22 Producer.**

*Producer* means any person engaged in the production and sale of peanuts and who owns, or shares the ownership and risk of loss of the crop. This does not include quota holders who do not share in the risk of loss of the crop.

**§ 1216.23 Promotion.**

*Promotion* means any action taken by the Board under this Order, including paid advertising, to present a favorable image of peanuts to the public to improve the competitive position of peanuts in the marketplace, including domestic and international markets, and to stimulate sales of peanuts.

**§ 1216.24 [Reserved]**

**§ 1216.25 Research.**

*Research* means any type of test, study, or analysis designed to advance

the image, desirability, use, marketability, production, product development, or quality of peanuts, including research relating to nutritional value and cost of production.

**§ 1216.26 Secretary.**

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

**§ 1216.27 Suspend.**

*Suspend* means to issue a rule under section 553 of title 5, United States Code, to temporarily prevent the operation of an Order, or part thereof, during a particular period of time specified in the rule.

**§ 1216.28 State.**

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

**§ 1216.29 Terminate.**

*Terminate* means to issue a rule under section 553 of title 5, United States Code, to cancel permanently the operation of an Order, or part thereof, beginning on a date certain specified in the rule.

**§ 1216.30 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.

NATIONAL PEANUT BOARD

**§ 1216.40 Establishment and membership.**

(a) *Establishment of a National Peanut Board.* There is hereby established a National Peanut Board, hereinafter called the Board, composed of no more than 11 peanut producers and alternates, appointed by the Secretary from nominations as follows:

(1) *Ten members and alternates.* One member and one alternate shall be appointed from each primary peanut-producing state, who are producers and whose nominations have been submitted by certified peanut producer organizations within a primary peanut-producing state.

(2) The minor peanut-producing states shall collectively have one at-large member and one alternate, who are producers, to be appointed by the Secretary from nominations submitted by certified peanut producer organizations within minor peanut-producing states or from other certified farm organizations that include peanut producers as part of their membership.

(b) *Adjustment of membership.* At least once in each five-year period, but not more frequently than once in each three-year period, the Board, or a person or agency designated by the Board, shall review the geographical distribution of peanuts in the United States and make recommendation(s) to the Secretary to continue without change, or whether changes should be made in the number of representatives on the Board to reflect changes in the geographical distribution of the production of peanuts.

[64 FR 41256, July 29, 1999, as amended at 73 FR 14921, Mar. 20, 2008]

**§ 1216.41 Nominations.**

(a) All nominations authorized under § 1216.40 shall be made within such a period of time as the Secretary shall prescribe. Eligible peanut producer organizations within each state as certified pursuant to § 1216.70 shall nominate two qualified persons for each member and each alternate member. The nominees shall be elected at an open meeting among peanut producers eligible to serve on the Board. Any certified peanut producer organization representing a minor peanut-producing state may nominate two eligible persons for each member and two eligible persons for each alternate member.

(b) As soon as practicable after this subpart becomes effective, the Secretary shall obtain nominations for appointment to the initial promotion Board from certified nominating organizations. In any subsequent year in which an appointment to the Board is to be made, nominations for positions

whose terms will expire shall be obtained from certified nominating organizations by the Board's staff and submitted to the Secretary by May 1 of such year, or other such date as approved by the Secretary.

(c) Except for initial Board members, whose nomination process will be initiated by the Secretary, the Board shall issue the call for nominations by March 1 of each year.

(d) The nomination meeting shall be announced 30 days in advance:

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

(2) By such other means as deemed advisable.

(e) At nominations meetings, Department personnel will be present to oversee and to verify eligibility and count ballots.

**§ 1216.42 Selection.**

From the nominations, the Secretary shall select the members of the Board and alternates for each primary peanut-producing state. The Secretary shall select one member and one alternate from all nominations submitted by certified peanut producer organizations representing minor peanut-producing states.

**§ 1216.43 Term of office.**

All members and alternates of the Board shall each serve for terms of three years, except that the members and alternates appointed to the initial Board shall serve proportionately for two-, three-, and four-year terms, with the length of the terms determined at random. No member or alternate may serve more than two consecutive three-year terms. An alternate, after serving two consecutive three-year terms, may serve as a member for an additional two consecutive three-year terms. A member, after serving two consecutive three-year terms, may serve as an alternate for an additional two consecutive three-year terms. Each member and alternate shall continue to serve until a successor is selected and has qualified.

(a) Those members serving initial terms of two or four years may serve one successive three-year term.

(b) Any successor serving one year or less may serve two consecutive three-year terms.

**§ 1216.44 Vacancies.**

To fill any vacancy resulting from the failure to qualify of any person selected as a member or as an alternate member of the Board, or in the event of death, removal, resignation, or disqualification of any member or alternate member of the Board, a successor for the unexpired term of such member or alternate member of the Board shall be nominated and selected in the manner specified in § 1216.40.

**§ 1216.45 Alternate members.**

An alternate member of the Board, during the absence of the member for the primary peanut-producing state or at-large member for whom the person is the alternate, shall act in the place and stead of such member and perform such duties as assigned. In the event of death, removal, resignation, or disqualification of any member, the alternate for that state or at-large member shall act for the member until a successor for such member is selected and qualified. In the event that both a producer member of the Board and the alternate are unable to attend a meeting, the Board may not designate any other alternate to serve in such member's or alternate's place and stead for such a meeting.

**§ 1216.46 Procedure.**

(a) A majority of the members of the Board, including alternate members acting for members, shall constitute a quorum.

(b) At assembled meetings, all votes shall be cast in person. Board actions shall be weighted by value of production as determined by a primary peanut-producing state's three-year running average of total gross farm income derived from all peanut sales. The at-large Board member's vote shall be weighted by the collective value of

production from all minor peanut-producing states' three-year running average of total gross farm income derived from all peanut sales. Any Board action shall require the concurring votes of members or alternates from states representing more than 50 percent of total U.S. gross farm income derived from all peanut sales, plus an additional two votes from any other Board members, provided a minimum of five votes concur.

(c) For routine and noncontroversial matters which do not require deliberation and the exchange of views, and in matters of an emergency nature when there is not time to call an assembled meeting of the Board, the Board may also take action as prescribed in this section by mail, facsimile, telephone, or any telecommunication method appropriate for the conduct of business, but any such action shall be confirmed in writing within 30 days.

(d) There shall be no voting by proxy.

(e) The chairperson shall be a voting member.

### § 1216.47 Compensation and reimbursement.

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

### § 1216.48 Powers and duties.

The Board shall have the following powers and duties:

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

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines to be appropriate;

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

(e) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and make such other reports available as the Board or the Secretary considers relevant. Any 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 or budgets that show the estimated cost to be incurred for such program, plan, or project;

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

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

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

(f) To prepare and submit for approval of the Secretary fiscal year budgets in accordance with § 1216.50;

(g) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may

prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(h) To cause its books to be audited by a competent auditor at the end of each fiscal year and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(i) To give the Secretary the same notice of meetings of the Board as 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 of the Board to the Secretary;

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

(k) To furnish to the Secretary any information or records that the Secretary may request;

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

(m) To recommend to the Secretary such amendments to the Order as the Board considers appropriate; and

(n) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the peanut industry's position in the marketplace; maintain and expand existing markets and uses for peanuts; and to carry out programs, plans, and projects designed to provide maximum benefits to the peanut industry.

### § 1216.49 Prohibited activities.

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

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

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

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

## EXPENSES AND ASSESSMENTS

### § 1216.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

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

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

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

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

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

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

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

(e) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and

audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for start-up costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

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

(h) The Board may not expend for administration, maintenance, and functioning of the Board in any fiscal year an amount that exceeds 10 percent of the assessments and other income received by the Board for that fiscal year. Reimbursements to the Secretary required under paragraph (g) of this section are excluded from this limitation on spending.

(i) The Board shall allocate, to the extent practicable, no less than 80 percent of the assessments collected on all peanuts available for any fiscal year on national and regional promotion, research, and information activities. The Board shall allocate, to the extent practicable, no more than 20 percent of assessments collected on all peanuts available for any fiscal year for use in state or regional research programs. Specific percentages and amounts shall be determined annually by the Board, with the approval of the Secretary.

(j) Certified peanut producer organizations may submit requests for funding for research and/or generic promotion projects. Amounts approved for each state shall not exceed the pro rata Share of funds available for that State as determined by the Board and approved by the Secretary. Amounts allocated by the Board for state research or promotion activities will be based on requests submitted to the Board when it is determined that they meet the goals and objectives stated in the Order.

(k) Assessments collected, less pro rata administrative expenses, from the gross sales of contract export additional peanuts shall be allocated by the Board for the promotion and related research of export peanuts.

(l) The Board shall determine annually how total funds shall be allocated pursuant to paragraphs (i), (j), and (k) of this section, with the approval of the Secretary.

**§ 1216.51 Assessments.**

(a) The funds necessary to pay for programs and other costs authorized by this part shall be acquired by the levying of assessments upon producers in a manner prescribed by the Secretary.

(b) Each first handler, at such times and in such manner as prescribed by the Secretary, shall collect from each producer or first purchaser/handler and pay assessments to the Board on all peanuts handled, including peanuts produced by the first handler, no later than 60 days after the last day of the month in which the peanuts were marketed.

(c) Such assessments shall be levied at a rate of one (1%) percent of the price paid for all farmers stock peanuts sold. Price paid is one (1%) percent of loan value.

(d) For peanuts placed under a marketing assistance loan with the Department's Commodity Credit Corporation, the Commodity Credit Corporation, or any entity determined by the Commodity Credit Corporation shall deduct and remit to the Board, from the proceeds of the loan paid to the producer, one (1%) percent of the loan value of the peanuts as determined by the warehouse receipt accompanying such peanuts, no more than 60 days after the last day of the month in which the peanuts were placed under a marketing assistance loan.

(e) If a producer places peanuts under a marketing assistance loan and subsequently redeems and sells such peanuts at a price greater than the loan amount, the producer shall pay the difference between the sales price and the loan value of the peanuts multiplied by one (1%) percent to the Board within sixty (60) days after the final day of the loan availability period.

(f) All assessments collected under this section are to be used for expenses and expenditures pursuant to this Order and for the establishment of an operating reserve as prescribed in the Order.

(g) The Board shall impose a late payment charge on any person who fails to remit to the Board the total amount for which the person is liable on or before the payment due date established under this section. The late payment charge will be in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

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

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

(j) The assessment rate may not be increased unless the new rate is approved by a referendum among eligible producers.

[70 FR 55226, Sept. 21, 2005]

### § 1216.52 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to peanuts; and

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing of peanuts and peanut products, and the creation of new products thereof, to the end that marketing and use of peanuts may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of peanuts.

(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) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or consumer information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or consumer information, then the Board shall terminate such program, plan, or project.

(d) No program, plan, or project shall make any false claims on behalf of peanuts or use unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product. Peanuts of all domestic origins shall be treated equally.

### § 1216.53 Independent evaluation.

The Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other 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 section.

### § 1216.54 Operating reserve.

The Board shall establish an operating monetary reserve and may carry over to subsequent fiscal years excess funds in a reserve so established; *Provided*, that funds in the reserve shall not exceed any fiscal year's anticipated expenses.

### § 1216.55 Investment of funds.

The Board may invest, pending disbursement, funds it receives under this subpart, only in obligations of the United States or any agency of the United States; general obligations of any state or any political subdivision of a state; interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve system; or obligations that are fully guaranteed as to principal and interest by the United States.

**§ 1216.56 Exemption for organic peanuts.**

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (g) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) In order to apply for this exemption, an eligible peanut producer 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 August 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: The producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the producer complies with the requirements of this section, the Board will approve the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for approval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each handler to whom the producer sells peanuts. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) The exemption will apply at the first reporting period following the issuance of the Certificate of Exemption.

(g) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2757, Jan. 14, 2005]

REPORTS, BOOKS, AND RECORDS

**§ 1216.60 Reports.**

(a) Each producer and first handler subject to this part shall be required to report to the employees of the Board, at such times and in such manner as it may prescribe, such information as may be necessary for the Board to perform its duties. Such reports shall include, but shall not be limited to the following:

(1) Number of pounds of peanuts produced or handled;

(2) Price paid to producers (entry in value of segment section on the FSA 1007 form); and

(3) Total assessments collected.

(b) First Handlers shall submit monthly reports to the Board. These reports shall accompany the payment of the collected assessments and shall be due 60 days after the last day of the month in which the peanuts were marketed.

**§ 1216.61 Books and records.**

Each first handler and producer subject to this subpart shall maintain and make available for inspection by the Secretary and employees and agents of the Board such books and records as are necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall include but are not limited to the following: copies of FSA 1007 forms, the names and address of producers, and

the date the assessments were collected. Such records shall be retained for at least two years beyond the marketing year of their applicability.

**§ 1216.62 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, producers, importers, exporters, or handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

CERTIFICATION OF PEANUT PRODUCER ORGANIZATIONS

**§ 1216.70 Certification.**

(a) Organizations receiving certification from the Secretary will be entitled to submit nominations for Board membership to the Secretary for appointment and to submit requests for funding to the Board.

(b) For major peanut-producing states, state-legislated peanut promotion, research, and information organizations may request certification, provided the state-legislated promotion program submits a factual report that shall contain information deemed relevant and specified by the Secretary for the making of such determination pursuant to paragraph (e) of this section.

(c) If a state-legislated peanut promotion, research and information organization in a major peanut-producing state does not elect to seek certification from the Secretary within a specified time period as determined by the Secretary, or does not meet eligibility requirements as specified by the Secretary, then any peanut producer organization whose primary purpose is to represent peanut producers within a primary peanut-producing state, or any other organization which has peanut producers as part of its membership, may request certification. Certification shall be based, in addition to other available information, upon a factual report submitted by the organization that shall contain information deemed relevant and specified by the Secretary for the making of such determination pursuant to paragraph (e) of this section.

(d) For minor peanut-producing states, any organization that has peanut producers as part of its membership may request certification.

(e) The information required for certification by the Secretary may include, but is not limited to, the following:

(1) The geographic distribution within the state covered by the organization's active membership;

(2) The nature and size of the organization's active membership in the state, proportion of the organization's active membership accounted for by producers, a map showing the peanut-producing counties in the state in which the organization has members, the volume of peanuts produced in each county, the number of peanut producers in each county, and the size of the organization's active peanut producer membership in each county;

(3) The extent to which the peanut producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organization's operating funds are derived;

(6) Functions of the organization;

(7) The organization's ability and willingness to further the aims and objectives of the Act and Order; and,

(8) Demonstrated experience administering generic state promotion and research programs.

(f) The Secretary's determination as to eligibility or certification of an organization shall be final.

MISCELLANEOUS

### § 1216.80 Right of the Secretary.

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

### § 1216.81 Implementation of the Order.

The Order shall not become effective unless:

(a) The Secretary determines that the Order is consistent with and will effectuate the purposes of the Act; and

(b) The Order is approved by a simple majority of the peanut producers as defined in § 1216.21 voting in a referendum who, during a representative period determined by the Secretary, have been engaged in the production of peanuts.

### § 1216.82 Suspension and termination.

(a) The Secretary shall suspend or terminate this subpart or a provision thereof if the Secretary finds that this 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) Every five years, the Secretary shall hold a referendum to determine whether peanut producers favor the continuation of the Order. The Secretary will also conduct a referendum if 10 percent or more of all eligible peanut producers request the Secretary to hold a referendum. In addition, the Secretary may hold a referendum at any time.

(c) The Secretary shall suspend or terminate this subpart at the end of the marketing year whenever the Secretary determines that its suspension or termination is approved or favored by a simple majority of the producers voting in a referendum who, during a representative period determined by the Secretary, have been engaged in the production of peanuts.

(d) If, as a result of the referendum conducted under paragraph (b) of this section, the Secretary determines that this subpart is not approved, the Secretary shall:

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

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

### § 1216.83 Proceedings after termination.

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

(b) The said trustees shall:

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

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

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

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

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

(d) Any residual funds 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 the peanut producer organizations, certified pursuant to § 1216.70, in the interest of continuing peanut promotion, research, and information programs.

### § 1216.84 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; or

(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.

### § 1216.85 Personal liability.

No member or alternate member 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 alternate, except for acts of dishonesty or willful misconduct.

### § 1216.86 Separability.

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

### § 1216.87 Amendments.

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

### § 1216.88 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1216.82 shall apply to determine disposition of all such property.

## Subpart B—Procedure for the Conduct of Referenda in Connection With the Peanut Promotion, Research, and Information Order

### § 1216.100 General.

Referenda to determine whether eligible peanut producers favor the issuance, amendment, suspension, or termination of a Peanut Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

### § 1216.101 Definitions.

The following definitions apply to this subpart:

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Order* means the Peanut Promotion, Research, and Information Order.

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

(d) *Representative period* means the period designated by the Secretary.

(e) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a peanut farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(f) *Eligible producer* means any person who is engaged in the production and sale of peanuts in the United States and who:

(1) Owns, or shares the ownership and risk of loss of, the crop. This does not include quota holders who do not share in the risk of loss of the crop;

(2) Rents peanut production facilities and equipment resulting in the ownership of all or a portion of the peanuts produced;

(3) Owns peanut production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the peanuts produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce peanuts who share the risk of loss and receive a share of the peanuts produced. No other acquisition of legal title to peanuts shall be deemed to result in persons becoming eligible producers.

### § 1216.102 Voting.

(a) Each person who is an eligible producer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce peanuts, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

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

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

### § 1216.103 Instructions.

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

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

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

(c) Give reasonable public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of

publicity may include, but are not limited to, print and radio; and

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

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

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

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

### § 1216.104 Subagents.

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

### § 1216.105 Ballots.

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

### § 1216.106 Referendum report.

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

### § 1216.107 Confidential information.

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

# PART 1218—BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

## Subpart A—Blueberry Promotion, Research, and Information Order

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AUTHORITY: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

SOURCE: 65 FR 7654, Feb. 15, 2000, unless otherwise noted.

## Subpart A—Blueberry Promotion, Research, and Information Order

SOURCE: 65 FR 43963, July 17, 2000, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 1218 appear at 66 FR 37118, 37119, July 17, 2001.

EDITORIAL NOTE: Nomenclature changes to part 1218 appear at 71 FR 77245, Dec. 26, 2006.

DEFINITIONS

### § 1218.1 Act.

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7401–7425; Pub. L. 104–127; 110 Stat. 1029), or any amendments thereto.

### § 1218.2 Blueberries.

*Blueberries* means cultivated blueberries grown in or imported into the United States of the genus Vaccinium *Corymbosum* and *Ashei*, including the northern highbush, southern highbush, rabbit eye varieties, and any hybrid, and excluding the lowbush (native) blueberry Vaccinium *Angustifolium*.

### § 1218.3 Conflict of interest.

*Conflict of interest* means a situation in which a member or employee of the U.S. Highbush Blueberry Council has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Council for anything of economic value.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37118, July 17, 2001; 71 FR 44554, Aug. 7, 2006]

### § 1218.4 Crop year.

*Crop year* means the 12-month period from November 1 through October 31 of the following year or such other period approved by the Secretary.

### § 1218.5 Department.

*Department* means the U.S. Department of Agriculture.

### § 1218.6 Exporter.

*Exporter* means a person involved in exporting blueberries from another country to the United States.

### § 1218.7 First handler.

*First handler* means any person, (excluding a common or contract carrier), receiving blueberries from producers and who as owner, agent, or otherwise ships or causes blueberries to be shipped as specified in the Order. This definition includes those engaged in the business of buying, selling and/or offering for sale; receiving; packing; grading; marketing; or distributing blueberries in commercial quantities. This definition includes a retailer, except a retailer who purchases or acquires from, or handles on behalf of any producer, blueberries. The term first handler includes a producer who handles or markets blueberries of the producer's own production.

### § 1218.8 Fiscal period.

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

**§ 1218.9 Importer.**

*Importer* means any person who imports fresh or processed blueberries into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles fresh or processed blueberries outside of the United States for sale in the United States, and who is listed in the import records as the importer of record for such blueberries.

**§ 1218.10 Information.**

*Information* means information and programs that are designed to increase efficiency in processing and to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of blueberries on a national or international basis. These include:

(a) *Consumer information,* which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of blueberries; and

(b) *Industry information,* which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the blueberry industry, and activities to enhance the image of the blueberry industry.

**§ 1218.11 Market or marketing.**

(a) *Marketing* means the sale or other disposition of blueberries in any channel of commerce.

(b) To *market* means to sell or otherwise dispose of blueberries in interstate, foreign, or intrastate commerce.

**§ 1218.12 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.

**§ 1218.13 Part and subpart.**

*Part* means the Blueberry Promotion, Research, and 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.

**§ 1218.14 Person.**

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

**§ 1218.15 Processed blueberries.**

*Processed blueberries* means blueberries which have been frozen, dried, pureed, or made into juice.

**§ 1218.16 Producer.**

*Producer* means any person who grows blueberries in the United States for sale in commerce, or a person who is engaged in the business of producing, or causing to be produced for any market, blueberries beyond the person's own family use and having value at first point of sale.

**§ 1218.17 Promotion.**

*Promotion* means any action taken to present a favorable image of blueberries to the general public and the food industry for the purpose of improving the competitive position of blueberries both in the United States and abroad and stimulating the sale of blueberries. This includes paid advertising and public relations.

**§ 1218.18 Research.**

*Research* means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of blueberries, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value, health research, and marketing of blueberries.

**§ 1218.19 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States, 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.

**§ 1218.20 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.

### § 1218.21 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.

### § 1218.22 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.

### § 1218.23 U.S. Highbush Blueberry Council.

*U.S. Highbush Blueberry Council* or the *Council* means the administrative body established pursuant to § 1218.40.

[71 FR 44554, Aug. 7, 2006]

## U.S. HIGHBUSH BLUEBERRY COUNCIL

### § 1218.40 Establishment and membership.

(a) *Establishment of the U.S. Highbush Blueberry Council.* There is hereby established a U.S. Highbush Blueberry Council, hereinafter called the Council, composed of no more than 16 members and alternates, appointed by the Secretary from nominations as follows:

(1) One producer member and alternate from each of the following regions:

(i) Region #1 Western Region (all states from the Pacific east to the Rockies): Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

(ii) Region #2 Midwest Region (all states east of the Rockies to the Great Lakes and south to the Kansas/Missouri/Kentucky state line): Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

(iii) Region #3 Northeast Region (all states east of the Great Lakes and North of the North Carolina/Tennessee state line): Connecticut, Delaware, New York, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, D.C., and West Virginia.

(iv) Region #4 Southern Region (all states south of the Virginia/Kentucky/Missouri/Kansas state line and east of the Rockies): Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, and Texas.

(2) One producer member and alternate from each of the top six blueberry producing states, based upon the average of the total tons produced over the previous three years. Average tonnage will be based upon production and assessment figures generated by the Council.

(3) Three importers and alternates.

(4) One exporter and alternate shall be filled by foreign blueberry producers currently shipping blueberries into the United States from the largest foreign blueberry production area, based on a three-year average.

(5) One first handler member and alternate shall be filled by a United States based independent or cooperative organization which is a producer/shipper of domestic blueberries.

(6) One public member and alternate.

(b) *Adjustment of membership.* At least once every five years, the Council will review the geographical distribution of United States production of blueberries and the quantity of imports. The review will be conducted through an audit of state crop production figures and Council assessment records. If warranted, the Council will recommend to the Secretary that the membership on the Council be altered to reflect any changes in the geographical distribution of domestic blueberry production and the quantity of imports. If the level of imports increases, importer members and alternates may be added to the Council.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001; 71 FR 44554, Aug. 7, 2006; 75 FR 31282, June 3, 2010]

### § 1218.41 Nominations and appointments.

(a) Voting for regional and state representatives will be made by mail ballot.

(b) When a state has a state blueberry commission or marketing order

in place, the state commission or committee will nominate members to serve on the Council. At least two nominees shall be submitted to the Secretary for each member and each alternate.

(c) Nomination and election of regional and state representatives where no commission or order is in place will be handled by the Council staff. The Council staff will seek nominations for members and alternates from the specific states and/or regions. Nominations will be returned to the Council office and placed on a ballot which will then be sent to producers in the state and/or region for a vote. The final nominee for member will have received the highest number of votes cast. The person with the second highest number of votes cast will be the final nominee for alternate. The persons with the third and fourth highest number of votes cast will be designated as additional nominees for consideration by the Secretary.

(d) Nominations for the importer, exporter, first handler, and public member positions will be made by the Council. Two nominees for each member and each alternate position will be submitted to the Secretary for consideration.

(e) From the nominations, the Secretary shall select the members and alternate members of the Council.

[71 FR 44555, Aug. 7, 2006]

### § 1218.42 Term of office.

Council members and alternates will serve for a term of three years and be able to serve a maximum of two consecutive terms. A Council member may serve as an alternate during the years the member is ineligible for a member position. When the Council is first established, the state representatives, first handler member, and their respected alternates will be assigned initial terms of three years. Regional representatives, the importer member, the exporter member, public member, and their alternates will serve an initial term of two years. Thereafter, each of these positions will carry a full three-year term. Council nominations and appointments will take place in two out of every three years. Each term of office will end on December 31, with new terms of office beginning on January 1.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.43 Vacancies.

(a) In the event that any member of the Council ceases to be a member of the category of members from which the member was appointed to the Council, such position shall automatically become vacant.

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

(c) Should any member position become vacant, the alternate of that member shall automatically assume the position of said member. Should the positions of both a member and such member's alternate become vacant, successors for the unexpired terms of such member and alternate shall be appointed in the manner specified in § 1218.40 and § 1218.41, except that said nomination and replacement shall not be required if said unexpired terms are less than six months.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.44 Alternate members.

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

**§ 1218.45 Procedure.**

(a) At a Council meeting, it will be considered a quorum when a minimum of nine members, or their alternates serving in the absence, are present.

(b) At the start of each fiscal period, the Council will select a chairperson and vice chairperson who will conduct meetings throughout that period.

(c) All Council members and alternates will receive a minimum of 10 days advance notice of all Council and committee meetings.

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

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Alternates may also be assigned to committees as necessary. Committees may also consist of individuals other than Council members and such individuals may vote in committee meetings. These committee members shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Council.

(f) In lieu of voting at a properly convened meeting and, when in the opinion of the chairperson of the Council such action is considered necessary, the Council may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or any other means of communication, and all telephone votes shall be confirmed promptly in writing. In that event, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Council. All votes shall be recorded in Council minutes.

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting member.

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001; 75 FR 31282, June 3, 2010]

**§ 1218.46 Compensation and reimbursement.**

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

**§ 1218.47 Powers and duties.**

The Council shall have the following powers and duties:

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

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Council, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Council a chairperson, other officers, committees, and subcommittees, as the Council determines to be appropriate;

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

(e) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Council shall develop and submit to the Council a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended

in connection with the contract or agreement; make periodic reports to the Council of activities conducted under the contract or agreement; and make such other reports available as the Council or the Secretary considers relevant. Any contract or agreement shall provide that:

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

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Council of activities conducted, submit accounting for funds received and expended, and make such other reports as the Secretary or the Council 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 Council contractor and who receives or otherwise uses funds allocated by the Council shall be subject to the same provisions as the contractor.

(f) To prepare and submit for approval of the Secretary fiscal year budgets in accordance with § 1218.50;

(g) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Council;

(h) To cause its books to be audited by a competent auditor at the end of each fiscal year and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(i) To give the Secretary the same notice of meetings of the Council as 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 of the Council to the Secretary;

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

(k) To furnish to the Secretary any information or records that the Secretary may request;

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

(m) To recommend to the Secretary such amendments to the Order as the Council considers appropriate; and

(n) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the blueberry industry's position in the marketplace; maintain and expand existing markets and uses for blueberries; and to carry out programs, plans, and projects designed to provide maximum benefits to the blueberry industry.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.48 Prohibited activities.

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

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

(b) Using funds collected by the Council 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, other than recommending to the Secretary amendments to the Order.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

## EXPENSES AND ASSESSMENTS

### § 1218.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. 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 or at least

one preceding year (except for the initial budget);

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

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

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

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

(d) The Council is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Council 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 Council.

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

(f) The Council may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Council shall retain complete control of their use.

(g) The Council may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, with the approval of the Secretary, for authorized activities.

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

(i) The Council may not expend for administration, maintenance, and functioning of the Council in any fiscal year an amount that exceeds 15 percent of the assessments and other income received by the Council for that fiscal year. Reimbursements to the Secretary required under paragraph (h) are excluded from this limitation on spending.

(j) The Council 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. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this part.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.51 Financial statements.

(a) As requested by the Secretary, the Council shall prepare and submit financial statements to the Secretary on a periodic basis. 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 Secretary within 30 days after the end of the time period to which it applies.

(c) The Council shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal year to which it applies.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.52 Assessments.

(a) The funds to cover the Council's expenses shall be paid from assessments on producers and importers, donations from any person not subject to assessments under this Order, and

other funds available to the Board including those collected pursuant to § 1218.56 and subject to the limitations contained therein.

(b) The collection of assessments on domestic blueberries will be the responsibility of the first handler receiving the blueberries. In the case of the producer acting as its own first handler, the producer will be required to collect and remit its individual assessments.

(c) Such assessments shall be levied at a rate of $12 per ton on all blueberries. The assessment rate will be reviewed, and may be modified with the approval of the Secretary, after the first referendum is conducted as stated in § 1218.71(b).

(d) Each importer of fresh and processed blueberries shall pay an assessment to the Council on blueberries imported for marketing in the United States, through the U.S. Customs Service.

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

(2) The import assessment shall be uniformly applied to imported fresh and frozen blueberries that are identified by the numbers 0810.40.0028 and 0811.90.2028, respectively, in the Harmonized Tariff Schedule of the United States or any other numbers used to identify fresh and frozen blueberries. Assessments on other types of imported processed blueberries, such as dried blueberries, puree, and juice, may be added at the recommendation of the Council with the approval of the Secretary.

(3) The assessments due on imported fresh and processed blueberries shall be paid when they enter or are withdrawn for consumption in the United States.

(e) All assessment payments and reports will be submitted to the office of the Council. All final payments for a crop year are to be received no later than November 30 of that year. A late payment charge shall be imposed on any handler who fails to remit to the Council, the total amount for which any such handler is liable on or before the due date established by the Council. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the handler is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

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

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.53 Exemption procedures.

(a) Any producer who produces less than 2,000 pounds of blueberries annually shall be exempt from the payment of assessments. Such producer may apply to the Council—on a form provided by the Council—for a certificate of exemption. Such producer shall certify that the producer's production of blueberries shall be less than 2,000 pounds for the fiscal year for which the exemption is claimed.

(b) Any importer who imports less than 2,000 pounds of fresh and frozen blueberries annually shall be exempt from the payment of assessments. Such importer may apply to the Council—on a form provided by the Council—for a certificate of exemption. Such importer shall certify that the importer's importation of fresh and frozen blueberries shall not exceed 2,000 pounds for the fiscal year for which the exemption is claimed.

(c) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (g) of this section; and is not a split operation shall be exempt from the payment of assessments.

(d) To apply for this exemption, a producer shall submit a request for exemption to the Council—on a form provided by the Council—at any time initially and annually thereafter on or before January 1 as long as the producer continues to be eligible for the exemption. The request shall include the following: The producer's name and address, with a copy of the organic farm

or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 CFR part 205), 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. If a producer complies with the requirements in paragraph (c) of this section, the Council will grant an assessment exemption and issue a certification of exemption to the producer. For exemption requests received on or before August 15, 2005, the Council will have 60 days to approve the exemption request; after August 15, 2005, the Council will have 30 days to approve the exemption request. If the application is disapproved, the Council will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic fresh and frozen blueberries—on a form provided by the Council—at any time initially and annually thereafter on or before January 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (d) of this section. If the importer complies with the requirements of this section, the Council will grant the exemption and issue a Certificate of Exemption to the importer. The Council will also issue the importer a 9-digit alphanumeric Harmonized Tariff Schedule (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic fresh and frozen blueberries bearing this HTS classification assigned by the Council will not be subject to assessments.

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

(g) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

(h) On receipt of an application, the Council shall determine whether an exemption may be granted. The Council then will issue, if deemed appropriate, a certificate of exemption to each person who is eligible to receive one. Each producer who is exempt from assessment must provide an exemption number to the first handler in order to be exempt from the collection of an assessment on blueberries. First handlers and importers, except as otherwise authorized by the Council, shall maintain records showing the exemptee's name and address along with the exemption number assigned by the Council.

(i) Importers who are exempt from assessment shall be eligible for reimbursement of assessments collected by the U.S. Customs Service and shall apply to the Council for reimbursement of such assessments paid. No interest will be paid on assessments collected by the U.S. Customs Service. Requests for reimbursement shall be submitted to the Council within 90 days of the last day of the year the blueberries were actually imported.

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

(k) The Council may require persons receiving an exemption from assessments to provide to the Council reports

on the disposition of exempt blueberries and, in the case of importers, proof of payment of assessments.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001; 70 FR 2758, Jan. 14, 2005]

### § 1218.54 Programs, plans, and projects.

(a) The Council shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to fresh and processed blueberries; and

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing of fresh and processed blueberries, and the creation of new products thereof, to the end that the marketing and use of blueberries may be encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of fresh and processed blueberries.

(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 Council shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Council to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Council that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Council shall terminate such program, plan, or project.

(d) No program, plan, or project including advertising shall be false or misleading or disparaging another agricultural commodity. Blueberries of all origins shall be treated equally.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.55 Independent evaluation.

The Council shall, not less often than every five years, authorize and fund, from funds otherwise available to the Council, an independent evaluation of the effectiveness of the Order and other programs conducted by the Council pursuant to the Act. The Council shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.56 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Council under this subpart shall be the property of the U.S. Government as represented by the Council and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Council; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Council; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1218.73 shall apply to determine disposition of all such property.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

## REPORTS, BOOKS, AND RECORDS

### § 1218.60 Reports.

(a) Each first handler subject to this subpart may be required to provide to the Council periodically such information as may be required by the Council, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of pounds handled;

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

(3) Name and address of person from whom the first handler has collected

the assessments on each pound handled; and

(4) Date collection was made on each pound handled. All reports are due to the Council 30 days after the end of the crop year.

(b) Each producer and importer subject to this subpart may be required to provide to the Council periodically such information as may be required by the Council, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of pounds produced;

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

(3) Name and address of the producer;

(4) Date collection was made on each pound produced. All reports are due to the Council 30 days after the end of the crop year.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.61 Books and records.

Each first handler, producer, and importer subject to this subpart shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued thereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least 2 years beyond the fiscal period of their applicability.

### § 1218.62 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 Council, 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 Council members, producers, importers, exporters, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

## MISCELLANEOUS

### § 1218.70 Right of the Secretary.

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.71 Referenda.

(a) *Initial referendum.* The Order shall not become effective unless:

(1) The Secretary determines that the Order is consistent with and will effectuate the purposes of the Act; and

(2) The Order is approved by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries.

(b) *Subsequent referenda.* Every five years, the Secretary shall hold a referendum to determine whether blueberry producers and importers favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval who also represent

a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries. The Secretary will also conduct a referendum if 10 percent or more of all eligible blueberry producers and importers request the Secretary to hold a referendum. In addition, the Secretary may hold a referendum at any time.

**§ 1218.72 Suspension and termination.**

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

(b) The Secretary shall suspend or terminate this subpart at the end of the marketing year whenever the Secretary determines that its suspension or termination is approved or favored by a majority of producers and importers voting for approval who also represent a majority of the volume of blueberries represented in the referendum who, during a representative period determined by the Secretary, have been engaged in the production or importation of blueberries.

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

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

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

**§ 1218.73 Proceedings after termination.**

(a) Upon the termination of this subpart, the Council shall recommend not more than three of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Council. 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 Council, including claims for any funds unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The said trustees shall:

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

(2) Carry out the obligations of the Council 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 Council and the trustees, to such person or persons as the Secretary may direct; and

(4) Upon request of the Secretary execute such assignments or other instruments necessary and appropriate to vest in such persons title and right to all funds, property and claims vested in the Council 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 Council 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 the blueberry producer organizations in the interest of continuing blueberry promotion, research, and information programs.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

**§ 1218.74 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; or

(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.

### § 1218.75 Personal liability.

No member, alternate member, or employee of the Council 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, alternate, or employee, except for acts of dishonesty or willful misconduct.

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.76 Separability.

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

### § 1218.77 Amendments.

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

[65 FR 43963, July 17, 2000, as amended at 66 FR 37119, July 17, 2001]

### § 1218.78 OMB control numbers.

The control number 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, is OMB control number 0581–0093, except for the Council nominee background statement form which is assigned OMB control number 0505–001.

## Subpart B—Procedure for the Conduct of Referenda in Connection with the Blueberry Promotion, Research, and Information Order

### § 1218.100 General.

Referenda to determine whether eligible blueberry producers and importers favor the issuance, amendment, suspension, or termination of the Blueberry Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

### § 1218.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Blueberries* means cultivated blueberries grown in or imported into the United States of the genus Vaccinium *Corymbosum* and *Ashei*, including the northern highbush, southern highbush, rabbit eye varieties, and any hybrid, and excluding the lowbush (native) blueberry Vaccinium *Angustifolium*.

(c) *Eligible importer* means any person who imported 2,000 pounds or more of fresh or processed blueberries, that are identified by the numbers 0810.40.0028 and 0811.90.2028, respectively, in the Harmonized Tariff Schedule of the United States or any other numbers used to identify fresh and frozen blueberries. Importation occurs when commodities originating outside the United States are entered or withdrawn from the U.S. Customs Service for consumption in the United States. Included are persons who hold title to foreign-produced blueberries immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of blueberries from the U.S. Customs Service when such blueberries are entered or withdrawn for consumption in the United States.

(d) *Eligible producer* means any person who produced 2,000 pounds or more of

blueberries in the United States during the representative period who:

(1) Owns, or shares the ownership and risk of loss of, the crop;

(2) Rents blueberry production facilities and equipment resulting in the ownership of all or a portion of the blueberries produced;

(3) Owns blueberry production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the blueberries produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce blueberries who share the risk of loss and receive a share of the blueberries produced. No other acquisition of legal title to blueberries shall be deemed to result in persons becoming eligible producers.

(e) *Order* means the Blueberry Promotion, Research, and Information Order.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a blueberry farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(g) *Processed blueberries* means blueberries which have been frozen, dried, pureed, or made into juice.

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

(i) *Representative period* means the period designated by the Secretary.

(j) *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.

**§ 1218.102 Voting.**

(a) Each person who is an eligible producer or an eligible importer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce blueberries, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

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

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

**§ 1218.103 Instructions.**

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

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

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

(c) Give reasonable public notice of the referendum:

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

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

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

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

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

### § 1218.104 Subagents.

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

### § 1218.105 Ballots.

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

### § 1218.106 Referendum report.

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

### § 1218.107 Confidential information.

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

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

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

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AUTHORITY: 7 U.S.C. 7801–7813 and 7 U.S.C. 7401.

SOURCE: 67 FR 7264, Feb. 19, 2002, unless otherwise noted.

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

SOURCE: 67 FR 56897, Sept. 6, 2002, unless otherwise noted.

DEFINITIONS

### § 1219.1 Act.

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

### § 1219.2 Association.

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

### § 1219.3 Conflict of interest.

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

### § 1219.4 Consumer information.

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

### § 1219.5 Crop year.

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

### § 1219.6 Customs.

*Customs* means the United States Customs Service.

### § 1219.7 Department.

*Department* means the United States Department of Agriculture.

**§ 1219.8 Exempt handler.**

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

**§ 1219.9 First handler.**

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

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

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

**§ 1219.11 Handle.**

*Handle* means to pack, process, transport, purchase, or in any other way to place or cause Hass avocados to which one has title or possession to be placed in the current of commerce. Such term shall not include the transportation or delivery of Hass avocados by the producer thereof to a handler.

**§ 1219.12 Hass avocado.**

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

**§ 1219.13 Hass Avocado Board.**

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

**§ 1219.14 Importer.**

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

**§ 1219.15 Industry information.**

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

**§ 1219.16 Marketing.**

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

**§ 1219.17 Order.**

*Order* means this subpart.

**§ 1219.18 Part and subpart.**

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

**§ 1219.19 Person.**

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

**§ 1219.20 Producer.**

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

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

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

**§ 1219.22 Promotion.**

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

**§ 1219.23 Research.**

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

**§ 1219.24 Secretary.**

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

**§ 1219.25 State.**

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

**§ 1219.26 United States.**

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

THE HASS AVOCADO BOARD

**§ 1219.30 Establishment and membership.**

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

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

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

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

(3) Three members shall be producers of Hass avocados that are subject to assessments under this subpart or importers of Hass avocados that are subject to assessments under this subpart. Producers and importers shall be allocated to these positions so as to assure as nearly as possible that the composition of the 12-member Board reflects the proportion of domestic production and imports supplying the United States market. Such proportion shall

be based on the Secretary's determination of the average volume of domestic production and the average volume of imports into the United States market over the previous three years, based on all information available to the Secretary.

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

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

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

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

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

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

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

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

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

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

(1) The Department shall notify all known importers and importer organizations that they may nominate persons to serve as importer members and alternates on the Board.

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

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

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

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

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

**§ 1219.34 Failure to nominate.**

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

**§ 1219.35 Term of office.**

The members and alternate members of the Board shall serve for terms of three years, except the members of the initial Board shall serve terms as follows: Four members and four alternates shall serve for two-year terms; four members and four alternates shall serve for three-year terms; and four members and four alternates shall serve for four-year terms. No member shall serve more than two consecutive three-year terms. Members and alternates serving initial two-year or four-year terms may serve for one additional three-year term. A Board member may serve as an alternate during the years the member is ineligible for a member position. Each term of office will end on October 31, with new terms of office beginning on November 1.

**§ 1219.36 Vacancies.**

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

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

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

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

**§ 1219.37 Alternate members.**

An alternate member of the Board, during the absence of the member for whom the person is the alternate, shall

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

**§ 1219.38 Powers and duties.**

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

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

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, at the start of each fiscal period, and at such other times as the Board determines to be appropriate;

(d) To recommend to the Secretary rules and regulations to effectuate the terms and conditions of this subpart;

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

(f) To appoint from its members an executive committee and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board and approved by the Secretary;

(g) To develop budgets for the implementation of this subpart and submit the budgets to the Secretary for approval and to propose and develop (or receive and evaluate), approve, and submit to the Secretary for approval programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research;

(h) To develop and implement after the approval by the Secretary programs, plans, and projects for Hass avocado promotion, industry information, consumer information, or related research, to contract or enter into agreements with appropriate persons to implement the programs, plans, and projects, and to pay the costs of the implementation of contracts and agreements with funds collected under this subpart.

(i) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

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

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

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

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

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

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

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

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

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

(q) To give the Secretary the same notice of meetings and teleconferences of the Board and its committees as is given to members in order that the Secretary's representative(s) may attend or participate in the meetings;

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

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

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

**§ 1219.39 Board procedure.**

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

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

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

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

(e) There shall be no voting by proxy.

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

**§ 1219.40 Committee procedure.**

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

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

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

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

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

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

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

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

### § 1219.41 Compensation and expenses.

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

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

### § 1219.42 Prohibited activities.

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

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

(b) Using funds collected under this subpart for the purpose of influencing legislation or governmental action or policy, by local, national, and foreign governments, except to develop and make recommendations to the Secretary as provided for in this subpart.

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

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

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

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

## BUDGETS, EXPENSES, AND ASSESSMENTS

### § 1219.50 Budgets, programs, plans, and projects.

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

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

(1) The establishment, implementation, issuance, effectuation, administration, and evaluation of appropriate programs, plans, or projects for advertising, sales promotion, other promotion, and consumer information with respect to Hass avocados directed toward increasing the general demand for Hass avocados in the United States. Funds shall be available as necessary to carry out this section;

(2) The establishment, implementation, issuance, effectuation, administration, and evaluation of appropriate programs, plans, and projects designed

to strengthen the position of the Hass avocado industry in the domestic marketplace; to maintain, develop, and expand markets for Hass avocados in the United States; to lead to the development of new marketing strategies; to advance the image and desirability of, increase the efficiency of, and encourage further development of the Hass avocado industry; and to provide for the disbursement of necessary funds for the purposes described in this section;

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

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

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

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

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

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

**§ 1219.51 Contracts and agreements.**

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

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

(1) Keep accurate records of all transactions of the party;

(2) Account for funds received and expended;

(3) Make periodic reports to the Board of activities conducted; and

(4) Make such other reports as the Board or the Secretary shall require.

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

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

(e) The Board may enter into contracts or agreements for administrative services, including contracts for employment, as may be required to

conduct its business. To the extent appropriate to the contract involved, contracts or agreements entered into by the Board under the authority of this section shall conform to the provisions described in paragraph (b) of this section.

### § 1219.52 Control of administrative costs.

(a) As soon as practicable after September 9, 2002, and after consultation with the Secretary and other appropriate persons, the Board shall implement a system of cost controls based on normally accepted business practices to:

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

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

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

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

### § 1219.53 Budget and expenses.

(a) The Board is authorized to incur such expenses, including provision for a reasonable reserve for operating contingencies, as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board, including assessments, contributions from any person not subject to assessments under this subpart, and other funds available to the Board.

(b) The Board shall reimburse the Department:

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

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

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

(c) The Board shall establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs authorized by the Act. The Board shall include its annual administrative expenses as a separate item in its annual report. The Board shall adhere to its fiduciary responsibilities and ensure that all monies are spent in accordance with the Act and the Order.

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

(e) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. The contributions shall be free from any encumbrance by the donor, and the Board shall retain complete control of their use.

### § 1219.54 Assessments.

(a) Except as provided in § 1219.55, the initial rate of assessment shall be 2.5 cents per pound on fresh Hass avocados produced and handled in the United States and on fresh Hass avocados imported into the United States. An equivalent rate shall be assessed on processed and frozen Hass avocados on which an assessment has not been paid. Such equivalent rate will be assessed on processed or frozen Hass avocados

upon the recommendation of the Board with the approval of the Secretary. The rate of assessment may be increased or decreased as recommended by the Board and approved by the Secretary. Such an increase or decrease may occur not more than once annually. Any change in the assessment rate shall be announced by the Board at least 30 days prior to going into effect and shall not be subject to a vote in a referendum. The maximum assessment rate authorized is 5 cents per pound. No more than one assessment shall be made on any Hass avocados.

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

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

(2) Each first handler shall collect from the producer and pay to the Board an assessment of 2.5 cents per pound in accordance with this subpart. Assessments shall be remitted by each first handler to the Board or its agent within 30 days after the end of the month in which the sale or non-sale transfer subject to assessment under this subpart took place.

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

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

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

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

(2) The import assessment shall be uniformly applied to imported fresh Hass avocados that are identified by the number 0804.40.00.10 in the Harmonized Tariff Schedule of the United States or any other numbers to identify fresh Hass avocados. Assessments on other types of imported fresh avocados or on processed Hass avocados, such as prepared, preserved, or frozen Hass avocados or Hass avocado paste, puree, and oil will be added at the recommendation of the Board with the approval of the Secretary.

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

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

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

(f) Regulations issued by the Secretary may provide for different first handler payment schedules of assessments on domestic Hass avocados, so as to recognize differences in marketing or purchasing practices and procedures.

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

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

(i) The collection of assessments shall commence on or after a date established by the Secretary and shall continue until terminated by the Secretary. If the Board is not constituted on the date the first assessments are to

be remitted, the Secretary shall have the authority to receive assessments on behalf of the Board and may hold such assessments in an interest-bearing account until the Board is constituted and the funds are transferred to the Board.

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

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

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

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

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

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

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

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

### § 1219.55 Exemption from assessment.

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

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

### § 1219.56 Adjustment of accounts.

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

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

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

income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval of the Secretary. Section 1219.72 describes the procedures for termination.

(b) Should patents, copyrights, trademarks, inventions, publications, or product formulations be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, trademarks, inventions, publications, or product formulations shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, trademark, invention, publication, or product formulation in a manner consistent with paragraph (a) of this section.

**§ 1219.58 Importer associations.**

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

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

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

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

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

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

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

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

(4) Evidence of stability and permanency; and

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

BOOKS, RECORDS, AND REPORTS

**§ 1219.60 Reports.**

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

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

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

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

(3) Assessments collected during the reporting period;

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

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

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

(7) Number of pounds exported.

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

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

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

(3) Name and address of the importer;

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

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

### § 1219.61 Books and records.

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

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

(a) The Board shall maintain such books and records as the Secretary may require. Such books and records shall be made available upon request by the Secretary for inspection and audit.

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

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

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

### § 1219.63 Confidential treatment.

(a) All information obtained from the books, records, or reports under the Act, this subpart, and the regulations issued thereunder shall be kept confidential and shall not be disclosed to the public by any person, including all current and former officers, employees, staff and agents of the Department, the Board, and contracting and subcontracting agencies or agreeing parties having access to such information. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed, and then only in a judicial proceeding or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this subpart shall be deemed to prohibit:

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

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

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

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

### § 1219.64 List of importers.

The administrative staff of the Board shall periodically review the list of importers of Hass avocados to determine whether persons on the list are subject to this subpart.

### § 1219.65 List of producers.

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

MISCELLANEOUS

### § 1219.70 Right of the Secretary.

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

### § 1219.71 Suspension or termination.

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

(b) The Secretary shall suspend or terminate this subpart at the end of the marketing year whenever the Secretary determines that its suspension or termination is approved or favored by a majority of the producers and importers voting who, during a representative period determined by the Secretary, have been engaged in the production or importation of Hass avocados.

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

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

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

### § 1219.72 Proceedings after termination.

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

(b) The said trustees shall:

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

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

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

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

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

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

### § 1219.73 Effect of termination or amendment.

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

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

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

(c) Affect or impair any rights or remedies of the United States, or of the

Secretary or of any person, with respect to any such violation.

### § 1219.74 Personal liability.

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

### § 1219.75 Separability.

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

### § 1219.76 Amendments.

Amendments to this subpart may be proposed, from time to time, by the Board or by any interested persons affected by the provisions of the Act, including the Secretary. Except for changes in the assessment rate, the provisions of the Act applicable to the Order are applicable to any amendment of the Order.

### § 1219.77 OMB control numbers.

The control numbers assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, are OMB control numbers 0581–0197 and 0505–0001.

## Subpart B—Referendum Procedures

### § 1219.100 General.

Referenda to determine whether eligible producers and importers of Hass avocados favor the issuance, amendment, suspension, or termination of the Hass Avocado Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

### § 1219.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Eligible importer* means any person who imported Hass avocados that are identified by the number 0804.40.00.10 in the Harmonized Tariff Schedule of the United States for at least one year prior to the referendum. Importation occurs when Hass avocados originating outside of the United States are released from custody by the U.S. Customs Service and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-produced Hass avocados immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of Hass avocados from the U.S. Customs Service when such Hass avocados are entered or withdrawn for consumption in the United States.

(c) *Eligible producer* means any person who produced Hass avocados in the United States for at least one year prior to the referendum who:

(1) Owns, or shares the ownership and risk of loss of, the crop;

(2) Rents Hass avocado production facilities and equipment resulting in the ownership of all or a portion of the Hass avocados produced;

(3) Owns Hass avocado production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the Hass avocados produced; or

(4) Is a party in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce Hass avocados who share the risk of loss and receive a share of the Hass avocados produced. No other acquisition of legal title to Hass avocados shall be deemed to result in persons becoming eligible producers.

(d) *Hass avocados* means the fruit grown in or imported into the United States of the species *Persea americana*

Mill. For the purposes of the initial referendum, the term shall include fresh fruit only.

(e) *Order* means the Hass Avocado Promotion, Research, and Information Order.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a Hass avocado farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(g) *Referendum agent* or *agent* means the individual or individuals designated by the Administrator to conduct the referendum.

(h) *Representative period* means the period designated by the Administrator.

(i) *United States*. The term "United States" means collectively of the several 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the Republic of the Marshall Islands, and the Federated States of Micronesia.

[67 FR 7264, Feb. 19, 2002; 67 FR 13563, Mar. 25, 2002]

### § 1219.102 Registration.

An eligible producer or importer of Hass avocados, as defined in this subpart, at the time of the referendum and during a representative period, who chooses to vote in any referendum conducted under this subpart, shall register with the referendum agent prior to the voting period, after receiving notice from the referendum agent concerning the referendum under § 1219.104(b). Registration information shall be confidential under § 1219.108.

### § 1219.103 Voting.

(a) Each eligible producer and eligible importer who registers to vote in the referendum shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce Hass avocados, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

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

(c) All ballots are to be cast by mail or fax, as instructed by the referendum agent.

### § 1219.104 Instructions.

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

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

(b) Notify producers and importers of the voting period for the referendum and the requirement to register to vote in the referendum at least 30 days in advance by utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio.

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

(d) Develop a list of producers and importers who register to vote.

(e) Mail to registered voters the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order.

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

(g) Prepare a report on the referendum.

(h) Announce the results to the public.

### § 1219.105 Subagents.

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

### § 1219.106 Ballots.

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

### § 1219.107 Referendum report.

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

### § 1219.108 Confidential information.

The list of registered voters, ballots, and all other information or reports that reveal, or tend to reveal, the identity or vote of voters in the referendum shall be strictly confidential and shall not be disclosed.

### § 1219.109 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581–0197.

## Subpart C—Rules and Regulations

SOURCE: 70 FR 2758, Jan. 14, 2005, unless otherwise noted.

### § 1219.200 Terms defined.

Unless otherwise defined in this subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions of such terms which appear in Subpart A—Hass Avocado Promotion, Research, and Information Order of this part.

### § 1219.201 Definitions.

*Organic Act* means section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

### § 1219.202 Exemption for organic Hass avocados.

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; only produces products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (h) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To obtain this exemption, an eligible Hass avocado producer 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 November 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling 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.

(d) If the producer complies with the requirements of paragraph (a) of this section, the Board will grant an assessment exemption and shall issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each handler to whom the producer sells Hass avocados. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic Hass avocados—on a form provided by the Board—at any time initially and annually thereafter on or before November 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic Hass avocados bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

### § 1219.203 Reapportionment of membership.

Pursuant to §1219.30(c), the positions authorized in §1219.30(b)(3) are reapportioned as follows: 3 importer members and their alternates.

[71 FR 26823, May 9, 2006]

# PART 1220—SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION

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AUTHORITY: 7 U.S.C. 6301–6311 and 7 U.S.C. 7401.

## Subpart A—Soybean Promotion and Research Order

SOURCE: 56 FR 31049, July 9, 1991, unless otherwise noted.

DEFINITIONS

### § 1220.101 Act.

The term *Act* means the Soybean Promotion, Research, and Consumer Information Act, subtitle E of title XIX, of the Food, Agriculture, Conservation and Trade Act of 1990, Public Law No. 101–624, and any amendments thereto.

### § 1220.102 Board.

The term *Board* means the United Soybean Board established under § 1220.201 of this subpart.

### § 1220.103 Commerce.

The term *commerce* means interstate, foreign, or intrastate commerce.

### § 1220.104 Committee.

The term *Committee* means the Soybean Program Coordinating Committee established under § 1220.213 of this subpart.

### § 1220.105 Consumer information.

The term *consumer information* means information that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of soybeans or soybean products.

### § 1220.106 [Reserved]

### § 1220.107 Cooperator organization.

The term *Cooperator Organization* means the American Soybean Association, or any successor organization to the American Soybean Association, which conducts foreign market development activities on behalf of soybean producers.

### § 1220.108 Department.

*Department* means the United States Department of Agriculture.

### § 1220.109 Eligible organization.

The term *eligible organization* means any organization which has been certified by the Secretary pursuant to § 1220.203 of this subpart as being eligible to submit nominations for initial membership on the Board.

### § 1220.110 First purchaser.

The term *first purchaser* means—

(a) except as provided in paragraph (b) of this section, any person buying or otherwise acquiring from a producer soybeans produced by such producer; or

(b) In any case in which soybeans are pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program and the soybeans are forfeited by the producer in lieu of loan repayment, the Commodity Credit Corporation.

[56 FR 31049, July 9, 1991, as amended at 56 FR 42923, Aug. 30, 1991; 57 FR 31095, July 14, 1992]

### § 1220.111 Fiscal period.

The term *fiscal period* means the calendar year or such other annual period as the Board may determine with the approval of the Secretary.

### § 1220.112 Industry information.

The term *industry information* means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the soybean industry, and activities to enhance the image of the soybean industry.

### § 1220.113 Marketing.

The term *marketing* means the sale or other disposition of soybeans or soybean products in any channel of commerce.

### § 1220.114 National nonprofit producer-governed organization.

The term *national nonprofit producer-governed organization* means an organization that—

(a) Is a nonprofit organization pursuant to section 501(c) (3), (5) or (6) of the Internal Revenue Code (26 U.S.C. 501(c) (3), (5) and (6)); and

(b) Is governed by a Board of directors of agricultural producers representing soybean producers on a national basis;

**§ 1220.115 Net market price.**

The term *net market price* means—

(a) except as provided in paragraph (b) of this section, the sales price, or other value received by a producer for soybeans after adjustments for any premium or discount based on grading or quality factors, as determined by the Secretary; or

(b) For soybeans pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program, and where the soybeans are forfeited by the producer in lieu of loan repayment, the principal amount of the loan.

[56 FR 31049, July 9, 1991, as amended at 56 FR 42923, Aug. 30, 1991; 57 FR 31095, July 14, 1992]

**§ 1220.116 Part and subpart.**

*Part* means the Soybean Promotion and Research Order and all rules and regulations issued pursuant to the Act and the Order, and the Order itself shall be a "Subpart" of such part.

**§ 1220.117 Plans and projects.**

*Plans and Projects* means promotion, research, consumer information, and industry information plans, studies, or projects pursuant to § 1220.230.

**§ 1220.118 Person.**

The term *person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

**§ 1220.119 Producer.**

The term *producer* means any person engaged in the growing of soybeans in the United States who owns, or who shares the ownership and risk of loss of, such soybeans.

**§ 1220.120 [Reserved]**

**§ 1220.121 Promotion.**

The term *promotion* means any action, including paid advertising, technical assistance, and trade servicing activities, to enhance the image or desirability of soybeans or soybean products in domestic and foreign markets, and any activity designed to communicate to consumers, importers, processors, wholesalers, retailers, government officials, or other information relating to the positive attributes of soybeans or soybean products or the benefits of importation, use, or distribution of soybeans and soybean products.

**§ 1220.122 Qualified State Soybean Board.**

The term *Qualified State Soybean Board* means a State soybean promotion entity that is authorized by State law and elects to be the Qualified State Soybean Board for the State in which it operates pursuant to § 1220.228(a)(1). If no such entity exists in a State, the term *Qualified State Soybean Board* means a soybean producer-governed entity—

(a) That is organized and operating within a State;

(b) That receives voluntary contributions and conducts soybean promotion, research, consumer information, or industry information programs; and

(c) That meets the criteria, established by the Board and approved by the Secretary, relating to the qualifications of such entity to perform its duties under this part as determined by the Board, and is certified by the Board under § 1220.228(a)(2), with the approval of the Secretary.

**§ 1220.123 Referendum.**

The term *Referendum* means a referendum, other than referenda defined in § 1220.106 and § 1220.124, to be conducted by the Secretary pursuant to the Act whereby producers shall be given the opportunity to vote to determine whether the continuance of this subpart is favored by a majority of producers voting.

**§ 1220.124 [Reserved]**

**§ 1220.125 Research.**

The term *research* means any type of study to advance the image, desirability, marketability, production, product development, quality, or functional or nutritional value of soybeans or soybean products, including any research activity designed to identify

and analyze barriers to export sales of soybeans and soybean products.

**§ 1220.126 Secretary.**

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

**§ 1220.127 Soybean products.**

The term *soybean products* means products produced in whole or in part from soybeans or soybean byproducts.

**§ 1220.128 Soybeans.**

The term *soybeans* means all varieties of Glycine max or Glycine soja.

**§ 1220.129 State and United States.**

The terms *State* and *United States* include the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.

**§ 1220.130 Unit.**

The term *unit* shall mean each State, or group of States, which is represented on the Board.

UNITED SOYBEAN BOARD

**§ 1220.201 Membership of board.**

(a) For the purposes of nominating and appointing producers to the Board, the United States shall be divided into 30 geographic units and the number of Board members from each unit, subject to paragraphs (d) and (e) of this section shall be as follows:

| Unit | Number of members |
|---|---|
| Illinois | 4 |
| Iowa | 4 |
| Minnesota | 4 |
| Indiana | 4 |
| Nebraska | 4 |
| Ohio | 4 |
| Missouri | 3 |
| Arkansas | 3 |
| South Dakota | 3 |
| Kansas | 3 |
| Michigan | 3 |
| North Dakota | 3 |
| Mississippi | 2 |
| Louisiana | 2 |
| Tennessee | 2 |
| North Carolina | 2 |
| Kentucky | 2 |
| Pennsylvania | 2 |
| Virginia | 2 |
| Maryland | 2 |
| Wisconsin | 2 |
| Georgia | 1 |
| South Carolina | 1 |
| Alabama | 1 |
| Delaware | 1 |
| Texas | 1 |
| Oklahoma | 1 |
| New York | 1 |
| Eastern Region (Massachusetts, New Jersey, Connecticut, Florida, Rhode Island, Vermont, New Hampshire, Maine, West Virginia, District of Columbia, and Puerto Rico) | 1 |
| Western Region (Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Arizona, Washington, Oregon, Nevada, California, Hawaii, and Alaska) | 1 |

(b) The Board shall be composed of soybean producers appointed by the Secretary from nominations submitted pursuant to § 1220.203. A soybean producer may only be nominated by the unit in which that soybean producer is a resident or producer.

(c) At the end of each three (3) year period, the Board shall review the geographic distribution of soybean production volume throughout the United States and may recommend to the Secretary a modification of paragraph (e) of this section, to best reflect the geographic distribution of soybean production volume in the United States. The Secretary may amend this subpart to make the changes recommended by the Board in levels of productions used to determine per unit representation. A unit may not, as a result of any modifications under this subsection, lose Board seats to which it is entitled at the time this subpart is initially issued unless its average annual production, as determined under paragraph (e)(6) of this section, declines below the levels required for representation, as specified in paragraphs (e) (1) through (5) of this section.

(d) At the end of each three (3) year period, the Secretary shall review the volume of production (minus the volume of production for which refunds have been paid) of each unit provided representation under paragraph (a) of this section, and shall adjust the boundaries of any unit and the number of Board members from each such unit to conform with the criteria set out in paragraphs (e) (1) through (5) of this section.

(e) The following formula will be used to determine the number of directors for each unit who shall serve on the Board:

(1)(i) Except as provided in paragraph (e)(1)(ii) of this section, each State will be considered as a separate unit.

(ii) States which do not have annual average soybean production equal to or greater than three million (3,000,000) bushels shall be grouped, to the extent practicable, into geographically contiguous units each of which, to the extent practicable, have a combined annual soybean production level which is equal to or greater than three million (3,000,000) bushels and each such unit shall be entitled to at least one representative on the Board.

(2) Each unit that has an annual average soybean production of less than fifteen million (15,000,000) bushels shall be entitled to one representative on the Board.

(3) Each unit which has an annual average soybean production of fifteen million (15,000,000) or more bushels but less than seventy million (70,000,000) bushels shall be entitled to two (2) representatives on the Board.

(4) Each unit which has an annual average soybean production of seventy million (70,000,000) or more bushels but less than two hundred million (200,000,000) bushels shall be entitled to three (3) representatives on the Board.

(5) Each unit which has an annual average soybean production of two hundred million (200,000,000) bushels or more shall be entitled to four (4) representatives on the Board.

(6) For the purposes of this section, average annual soybean production shall be determined by using the average of the production for the State or unit over the five previous years, excluding the year in which production was the highest and the year in which production was the lowest.

(f) [Reserved]

[56 FR 31049, July 9, 1991, as amended at 60 FR 29962, June 7, 1995; 60 FR 58500, Nov. 28, 1995; 62 FR 37489, July 14, 1997; 62 FR 41485, Aug. 1, 1997; 65 FR 63768, Oct. 25, 2000; 68 FR 57327, Oct. 3, 2003; 71 FR 69430, Dec. 1, 2006; 74 FR 62676, Dec. 1, 2009]

### § 1220.202 Term of office.

(a) The members of the Board shall serve for terms of 3 years, except that the members appointed to the initial Board shall serve, proportionately, for terms of 1, 2, and 3 years.

(b) Each member shall continue to serve until a successor is appointed by the Secretary and has accepted the position.

(c) No member shall serve more than three consecutive 3-year terms in such capacity.

### § 1220.203 Nominations.

All nominations for appointments to the Board under § 1220.204 shall be made in the following manner:

(a) After the issuance of this subpart by the Secretary, nominations shall be obtained by the Secretary as specified in paragraphs (a), (b), and (c) of this section from Qualified State Soybean Boards or for initial Board nominations, eligible organizations deemed qualified to nominate pursuant to paragraph (f) of the section. A Qualified State Soybean Board, or for initial Board nominations, an eligible organization shall only submit nominations for positions on the Board representing the unit, as established under § 1220.201, in which such Qualified State Soybean Board operates.

(b) If the Secretary determines that a unit is not represented by a Qualified State Soybean Board or for initial Board nominations, an eligible organization, then the Secretary may solicit nominations from organizations which represent producers in that unit and from producers residing in that unit. A caucus may be held in such units for the purpose of collectively submitting nominations to the Secretary.

(c) Where there is more than one State comprising a unit, the Secretary shall take into consideration the nominations submitted by Qualified State Soybean Boards or for initial Board nominations, eligible organizations, within the unit. A caucus may be held in such units for the purpose of collectively submitting nominations to the Secretary. The Secretary shall consider the proportional levels of production in each State comprising the unit when appointing members to the Board representing that unit.

(d) At least two nominations shall be submitted for each position to be filled.

(e) Nominations may be submitted in order of preference and for the initial Board, in order of preference for staggered terms. Should the Secretary reject any nomination submitted and there are insufficient nominations submitted from which appointments can be made, the Secretary may request additional nominations under paragraph (a) or (b) of this section, whichever provision is applicable for such unit.

(f) Any organization authorized pursuant to State law to collect assessments from producers may notify the Secretary of the organization's intent to nominate members to the initial Board for the State or unit, as established under § 1220.201, in which such organization operates and is authorized by State law. Such eligibility shall be based only upon the criteria established pursuant to § 1220.228(a)(1). There shall only be one organization authorized per State pursuant to this section to submit nominations to the initial Board. If no such entity exists in a State, any organization meeting those requirements of § 1220.228(a)(2) may request eligibility to submit nominations.

**§ 1220.204 Appointment.**

From the nominations made pursuant to § 1220.203, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1220.201.

**§ 1220.205 Nominee's agreement to serve.**

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

(a) Serve on the Board if appointed; and

(b) Agree to disclose any relationship with any soybean promotion entity or with any organization that has or is being considered for a contractual relationship with the Board.

**§ 1220.206 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall request nominations for a successor pursuant to § 1220.203, and such successor shall be appointed pursuant to § 1220.204.

**§ 1220.207 Alternate members.**

(a) The Secretary shall solicit, pursuant to the procedures of § 1220.203, nominations for alternate members of the Board.

(b) The Secretary shall appoint one alternate member of the Board for each unit which has only one member pursuant to § 1220.204 and § 1220.205.

(c) Alternate members of the Board may attend meetings of the Board as a voting member upon the following circumstances:

(1) A member of the Board for the unit which the alternate member represents is absent; and

(2) Such member, or in the case of incapacitation or death of the member, a relative, has contacted the appropriate officer of the Board to inform such officer of such absence;

(d) An alternate member of the Board, when attending Board meetings in an official capacity, shall have the rights, duties and obligations of a Board member.

**§ 1220.208 Removal.**

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

**§ 1220.209 Procedure.**

(a) At a properly convened meeting of the Board, a majority of the members shall constitute a quorum.

(b)(1) Except for roll call votes, 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 a simple majority of those voting.

(2)(i) If a member requests a roll call vote, except as provided in paragraph

(b)(2)(ii) of this section, each unit as established under § 1220.201, shall cast one vote for each percent, or portion of a percent, of the average total amount of assessments remitted to the Board that was remitted from the unit (minus refunds) during each of the three previous fiscal years of the Board under § 1220.223.

(ii)(A) During the first fiscal year of the Board, the percentage used to determine the votes given to a unit will be based on annual average soybean production of the three previous years. If a unit is represented by more than one member, each member representing the unit shall receive an equal percentage of the votes allocated to the unit.

(B) During the second and third year this subpart is in effect, the percentage used to determine the votes given to a unit will be based upon averaging the unit's percentage of annual assessments remitted to the Board (minus refunds).

(iii) Should a member representing a unit not be present, then the other members representing such unit shall vote, on an equal basis if there is more than one member representing the unit present, the number of votes which the absent member would have been entitled to vote.

(iv) A motion will carry on a roll call vote if approved by both a simple majority of all votes cast and a simple majority of all units voting (with the vote of each unit determined by a simple majority of all votes cast by members in that unit).

(3) A member may not cast votes by proxy.

(c) In lieu of a properly convened meeting and, when in the opinion of the chairperson of the Board such action is considered necessary, the Board may take action upon the concurring votes of a majority of its members, or if a roll call vote is requested, a simple majority of all votes cast and a simple majority of all units voting by mail, telephone, facsimile, or telegraph, but any such action by telephone shall be confirmed promptly in writing. In the event that such action is taken, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a regular or special meeting of the Board.

(d) On or after the end of the three-year period beginning on the effective date of this subpart, the Board may recommend to the Secretary changes in the voting procedures of the Board described in paragraph (b) of this section.

### § 1220.210 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses incurred by them in the performance of their responsibilities under this subpart.

### § 1220.211 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects for promotion, research, consumer information, and industry information and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or producer organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To assign responsibilities relating to budget and program development to the Committee as provided in § 1220.219.

(g) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(h) To contract with Qualified State Soybean Boards to implement plans or projects;

(i) To recommend to the Secretary amendments to this subpart; and

(j) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds

collected through assessments authorized under § 1220.223 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank which is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

**§ 1220.212 Duties.**

The Board shall have the following duties:

(a) To meet not less than three times annually, or more often if required for the Board to carry out its responsibilities pursuant to this subpart.

(b) To organize and select from among its members a chairperson, vice chairperson, a treasurer and such other officers as may be necessary.

(c) To appoint from its members an executive committee and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board.

(d) To employ or contract for such persons to perform administrative functions as it may deem necessary and define the duties and determine the compensation of each.

(e) To develop and submit to the Secretary for approval, promotion, research, consumer information, and industry information plans or projects.

(f) To prepare, and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research, consumer information, and industry information plans or projects, and also including a description of the proposed promotion, research, consumer information, and industry information programs contemplated therein.

(g) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it.

(h) With the approval of the Secretary, to enter into contracts or agreements with appropriate parties, including national nonprofit producer-governed organizations, for the development and conduct of activities authorized under § 1220.230 of this subpart and for the payment of the cost thereof with funds collected through assessments pursuant to § 1220.223. Provided, that the Board shall contract with only one national nonprofit producer-governed organization to administer all projects within a program area.

Any such contract or agreement shall provide that:

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

(2) Any such plan or project shall become effective only upon approval of the Secretary; and

(3) The contracting party shall keep complete and accurate records of all of its transactions and make periodic reports to the Board of activities conducted pursuant to a contract and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Board and Secretary may audit the records of the contracting party periodically.

(i) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended.

(j) [Reserved]

(k) To cause its books to be audited by a certified public accountant at least once each fiscal period and at such other times as the Secretary may require and to submit a copy of each such audit to the Secretary.

(l) To give the Secretary the same notice of meetings of the Board and committees as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings.

(m) To submit to the Secretary such information pursuant to this subpart as may be requested.

(n) To encourage the coordination of programs of promotion, research, consumer information, and industry information designed to strengthen the soybean industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for soybean and soybean products produced in the United States.

[56 FR 31049, July 9, 1991, as amended at 60 FR 29962, June 7, 1995; 60 FR 58500, Nov. 28, 1995]

SOYBEAN PROGRAM COORDINATING COMMITTEE

**§ 1220.213 Establishment and membership.**

(a) The Board may establish, with the approval of the Secretary, a Soybean Program Coordinating Committee to assist in the administration of this subpart. The Committee shall consist of 15 members. The Committee shall be composed of 10 Board members elected by the Board and 5 producers elected by the Cooperator Organization.

(b) Board representation on the Committee shall consist of the Chairperson and Treasurer of the Board, and eight additional members duly elected by the Board to serve on the Committee. The eight representatives to the Committee elected by the Board shall, to the extent practicable, reflect the geographic and unit distribution of soybean production.

(c) Cooperator Organization representation on the Committee shall consist of five members elected by the Cooperator Organization Board of Directors. The Cooperator Organization shall submit to the Secretary the names of the representatives elected by the Cooperator Organization to serve on the Committee, the manner in which such election was held, and verify that such representatives are producers. The prospective Cooperator Organization representatives shall file with the Secretary a written agreement to serve on the Committee and to disclose any relationship with any soybean entity or with any organization that has or is being considered for a contractual relationship with the Board. When the Secretary is satisfied that the above conditions are met, the Secretary shall certify such representatives as eligible to serve on the Committee.

**§ 1220.214 Term of office.**

(a) The members of the Committee shall serve for a term of 1 year.

(b) No member shall serve more than six consecutive terms.

**§ 1220.215 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Committee, the Board or the Cooperator Organization, depending upon which organization is represented by the vacancy, shall submit the name of a successor for the position in the manner utilized to appoint representatives pursuant to § 1220.213 above.

**§ 1220.216 Procedure.**

(a) Attendance of at least 12 members of the Committee shall constitute a quorum at a properly convened meeting of the Committee. Any action of the Committee shall require the concurring votes of at least two-thirds (⅔) of the members present. The Committee shall establish rules concerning timely notice of meetings.

(b) When in the opinion of the chairperson of the Committee emergency action must be taken before a meeting can be called, the Committee may take action upon the concurring votes of no less than twelve of its members by mail, telephone, facsimile, or telegraph. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Committee.

(c) A member may not cast votes by proxy.

**§ 1220.217 Compensation and reimbursement.**

The members of the Committee shall serve without compensation but shall be reimbursed by the Board for necessary and reasonable expenses incurred by them in the performance of their responsibilities under this subpart.

**§ 1220.218 Officers of the Committee.**

The following persons shall serve as officers of the Committee:

(a) The Chairperson of the Board shall be Chairperson of the Committee.

(b) The Committee shall elect or appoint such other officers as it may deem necessary.

**§ 1220.219 Powers of the Committee.**

If established by the Board, the Committee may have the following powers:

(a) To receive and evaluate, or on its own initiative, develop and budget for plans or projects to promote the use of soybeans and soybean products as well as plans or projects for promotion, research, consumer information, and industry information and to make recommendations to the Board regarding such proposals; and

(b) To select committees and subcommittees of Committee members, and to adopt such rules for the conduct of its business as it may deem advisable.

**§ 1220.220 Duties of the Committee.**

If established by the Board, the Committee may have the following duties:

(a) To meet and to organize;

(b) To prepare and submit to the Board for approval, budgets on a fiscal period basis of proposed costs of promotion, research, consumer information, and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information, and industry information programs contemplated therein;

(c) To give the Secretary the same notice of meetings of the Committee and its subcommittees as is given to members in order that the Secretary, or the Secretary's representative, may attend such meetings;

(d) To submit to the Board and to the Secretary such information pursuant to this subpart as may be requested; and

(e) To encourage the coordination of programs of promotion, research, consumer information, and industry information designed to strengthen the soybean industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for soybeans and soybean products.

EXPENSES AND ASSESSMENTS

**§ 1220.222 Expenses.**

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. However, during any fiscal year, expenses incurred by the Board for administrative staff costs and their benefits shall not exceed 1 percent of the projected level of assessments, net of projected refunds, of the Board for that fiscal year. Such expenses shall be paid from assessments received pursuant to § 1220.223. The administrative expenses of the Board, including the cost of administrative staff, shall not exceed 5 percent of the projected level of assessments, net of projected refunds, of the Board for that fiscal year.

(b) The Board shall reimburse the Secretary, from assessments received pursuant to § 1220.223, for administrative costs incurred after an Order has been submitted to the Department pursuant to section 1968(b) of the Act; Provided, that the Board shall only be required to reimburse the Secretary for one-half (50%) of the costs incurred by the Secretary to conduct the refund referendum relating to continuation of authority to pay refunds.

(c)(1) The Board may, with the approval of the Secretary, authorize a credit to Qualified State Soybean Boards of up to 5 percent of the amount to be remitted to the Board pursuant to § 1220.223 and § 1220.228 of this subpart to offset collection and compliance costs relating to such assessments and for fees paid to State governmental agencies or first purchasers for collection of the assessments where the payment of such fees by the Qualified State Soybean Board is required by State law enacted prior to November 28, 1990.

(2) The portion of the credit authorized in paragraph (c)(1) of this section which compensates Qualified State Soybean Boards for fees paid to State

governmental agencies or first purchasers for collection of the assessments where the payment of such fees by the Qualified State Soybean Board is required by State law enacted prior to November 28, 1990:

(i) Shall not exceed one-half of such fees paid to State governmental agencies or first purchasers, and;

(ii) Shall not exceed 2.5 percent of the amount of assessments collected and remitted to the Board.

(3) Except for that portion of the credit issued pursuant to paragraph (c)(2) of this section, credits authorized by paragraph (c)(1) of this section will be included as part of the Board's administrative expenses.

**§ 1220.223 Assessments.**

(a)(1) Except as prescribed by regulations approved by the Secretary or as otherwise provided in this section, each first purchaser of soybeans shall collect an assessment from the producer, and each producer shall pay such assessment to the first purchaser, at the rate of one-half of one percent (0.5%) of the net market price of the soybeans purchased. Each first purchaser shall remit such assessment to the Board or to a Qualified State Soybean Board, as provided in paragraph (a)(5) of this section.

(2) Any producer marketing processed soybeans or soybean products of that producer's own production, shall remit to a Qualified State Soybean Board or to the Board, as provided in paragraph (a)(5) of this section, an assessment on such soybeans or soybean products at a rate of one-half of one percent (0.5%) of the net market price of the soybeans involved or the equivalent thereof.

(3) In determining the assessment due from each producer under paragraph (a)(1) or (a)(2) of this section, a producer who is contributing to a Qualified State Soybean Board shall receive a credit from the Board for contributions to such Qualified State Soybean Board on any soybeans assessed under this section in an amount not to exceed one-quarter of one percent of the net market price of the soybeans assessed.

(4) In order for a producer to receive the credit provided for in paragraph (a)(3) of this section, the Qualified State Soybean Board or the first purchaser must establish to the satisfaction of the Board that the producer has contributed to a Qualified State Soybean Board.

(5)(i) If the soybeans, for which an assessment is paid, were grown in a State other than the State which is the situs of the first purchaser, the first purchaser that collects the assessment shall remit the assessment and information as to the State of origin of the soybeans to the Qualified State Soybean Board operating in the State in which the first purchaser is located. The Qualified State Soybean Board operating in the State in which the first purchaser is located shall remit such assessments to the Qualified State Soybean Board operating in the State in which the soybeans were grown. If no such Qualified State Soybean Board exists in such State, then the assessments shall be remitted to the Board. The Board, with the approval of the Secretary, may authorize Qualified State Soybean Boards to propose modifications to the foregoing "State of Origin" rule to ensure effective coordination of assessment collections between Qualified State Soybean Boards.

(ii)(A) If a producer pledges soybeans grown by that producer as collateral for a loan issued by the Commodity Credit Corporation and if that producer forfeits said soybeans in lieu of loan repayment, the Commodity Credit Corporation shall at the time of the loan settlement, collect from the producer the assessments due based on 0.5 percent of the principal loan amount received by the producer and remit the assessment to the Qualified State Soybean Board in the State in which the soybeans were pledged, or if no Qualified State Soybean Board exists in such State, the Board.

(B) If a producer redeems and subsequently markets soybeans which have been pledged as collateral for a loan issued by the Commodity Credit Corporation, the first purchaser shall collect and remit the assessments due pursuant to paragraph (a)(1) of this section; or if a producer markets such soybeans as processed soybeans or as soybean products, the producer shall remit

the assessment pursuant to paragraph (a)(2) of this section.

(iii) Qualified State Soybean Boards and the Board shall coordinate assessment collection procedures to ensure that producers marketing soybeans are required to pay only one assessment per bushel of soybeans and collections are adjusted among States on a mutually agreeable basis.

(b) The collection of assessments pursuant to paragraph (a) of this section, shall commence on and after the date assessments are required to be paid and shall continue until terminated by the Secretary. If the Board is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board, and to hold such assessments until the Board is constituted, then remit such assessments to the Board.

(c)(1) Each person responsible for the collection of assessments under paragraph (a) of this section, shall collect and remit the assessments to the Board or a Qualified State Soybean Board on a monthly basis or as required by State law, but no less than quarterly, unless the Board, with the approval of the Secretary, has specifically authorized otherwise.

(2) Any unpaid assessments due the Board or a Qualified State Soybean Board from a person responsible for remitting assessments to the Board or a Qualified State Soybean Board pursuant to paragraph (a) of this section, shall be increased two percent (2%) each month beginning with the day following the date such assessments were due under this subpart. Any remaining amount due shall be increased at the same rate on the corresponding day of each month thereafter until paid.

(3) The amounts payable pursuant to this section shall be computed monthly on unpaid assessments and shall include any unpaid late charges previously applied pursuant to this section.

(4) For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board or a Qualified State Soybean Board when due, shall be considered to have been payable by the date it would have been due if the report had been filed when due.

(d) Prior to the continuance referendum, the Board, pursuant to procedures approved by the Secretary, shall ensure that each Qualified State Soybean Board is provided credit in accordance with the provisions of section 1969(n)(1) and subject to section 1969(n)(3) of the Act.

(e) Following the continuance referendum, the Board, pursuant to procedures approved by the Secretary, shall ensure annually that each Qualified State Soybean Board is provided credit in accordance with the provisions of section 1969(n)(2) and subject to section 1969(n)(3) of the Act.

[56 FR 31049, July 9, 1991, as amended at 56 FR 42923, Aug. 30, 1991; 57 FR 31096, July 14, 1992]

### §§ 1220.224–1220.227 [Reserved]

### § 1220.228 Qualified State Soybean Boards.

(a)(1) Any soybean promotion entity that is authorized by State statute to collect assessments required by State law from soybean producers may notify the Board of its election to be the Qualified State Soybean Board for the State in which it operates so that producers may receive credit pursuant to § 1220.223(a)(3) for contributions to such organization. Only one such entity may make such election or be qualified pursuant to paragraph (a)(2) of this section. Such entity, upon making such election, agrees to the following:

(i) To conduct activities as defined in § 1220.230 that are intended to strengthen the soybean industry's position in the marketplace;

(ii) Provide a report describing the manner in which assessments are collected and the procedure utilized to ensure that assessments due are paid;

(iii) Collect assessments paid on soybeans marketed within the State and establish procedures for ensuring compliance with this subpart with regard to the payment of such assessments;

(iv) Remit to the Board each assessment paid and remitted to it, minus authorized credits issued pursuant to § 1220.222(c) and credits issued to producers pursuant to § 1220.223(a)(3), and

other required deductions by the last day of the month following the month in which the assessment was remitted to it unless the Board determines a different date for remittance of assessments;

(v) If the entity is authorized or required to pay refunds to producers, any requests from producers for refunds for contributions to it by the producer following the termination of authority to pay refunds, will be honored by forwarding to the Board that portion of such refunds equal to the amount of credit received by the producer for contributions to it pursuant to §1220.223(a)(3);

(vi) [Reserved]

(vii) Furnish the Board with an annual report by a certified public accountant or an authorized State agency of all funds remitted to such Board pursuant to this subpart; and

(viii) Not use funds it collects pursuant to this subpart to fund plans or projects which make use of any unfair or deceptive acts or practices with respect to the quality, value or use of any product that competes with soybeans or soybean products; and

(ix)(A) Except as otherwise provided in paragraph (a)(1)(ix)(B) of this section, funds collected or received by the Qualified State Soybean Board under this subpart shall not be used in any manner for the purpose of influencing any action or policy of the United States Government, any foreign or State government, or any political subdivision thereof.

(B) The prohibition in paragraph (a)(1)(ix)(A) of this section, shall not apply to—

(*1*) The communication to appropriate government officials of information relating to the conduct, implementation, or results of promotion, research, consumer information, and industry information under the Order;

(*2*) Any action designed to market soybeans or soybean products directly to a foreign government or political subdivision thereof; or

(*3*) The development and recommendation of amendments to this subpart.

(2) If no entity elects to serve as a Qualified State Soybean Board within a State pursuant to paragraph (a)(1) of this section, any State soybean promotion entity that is organized and operating within a State, and receives assessments or contributions from producers and conducts soybean or soybean product promotion, research, consumer information, or industry information programs, may apply for certification as the Qualified State Soybean Board for such State so that producers may receive credit pursuant to §1220.223(a)(3) for contributions to such organizations. All provisions of this subpart applicable to Qualified State Soybean Boards will be applicable to such entity. The Board shall review such applications for certification and shall make a determination as to the certification of each applicant.

(b) In order for the State soybean entity to be certified by the Board pursuant to paragraph (a)(2) of this section, as a Qualified State Soybean Board, the entity must:

(1) Conduct activities as defined in §1220.230 that are intended to strengthen the soybean industry's position in the marketplace;

(2) Submit to the Board a report describing the manner in which assessments are collected and the procedure utilized to ensure that assessments due are paid;

(3) Certify to the Board that such State entity will collect assessments paid on soybeans marketed within the State and establish procedures for ensuring compliance with this subpart with regard to the payment of such assessments;

(4) Certify to the Board that such organization will remit to the Board each assessment paid and remitted to it, minus credits issued pursuant to §1220.222(c) and authorized credits issued to producers pursuant to §1220.223(a)(3), and other required deductions by the last day of the month following the month in which the assessment was remitted to it unless the Board determines a different date for remittance of assessments;

(5)–(6) [Reserved]

(7) Certify to the Board that it will furnish the Board with an annual report by a certified public accountant or an authorized State agency of all funds remitted to such Board pursuant to this subpart; and

(8) Not use funds it collects pursuant to this subpart to fund plans or projects which make use of any unfair or deceptive acts or practices with respect to the quality, value or use of any product that competes with soybeans or soybean products; and

(9)(i) Except as otherwise provided in paragraph (b)(9)(ii) of this section, funds collected or received by the Qualified State Soybean Board under this subpart shall not be used in any manner for the purpose of influencing any action or policy of the United States Government, any foreign or State government, or any political subdivision thereof.

(ii) The prohibition in paragraph (b)(9)(i) of this section, shall not apply to—

(A) The communication to appropriate government officials of information relating to the conduct, implementation, or results of promotion, research, consumer information, and industry information under this subpart;

(B) Any action designed to market soybeans or soybean products directly to a foreign government or political subdivision thereof; or

(C) The development and recommendation of amendments to this subpart.

(c) Notwithstanding any other provisions of this subpart, and provided that activities of a Qualified State Soybean Board are authorized under the Act and this subpart, the Board shall not have the authority to:

(1) Establish guidelines, regulations, or rules which would restrict or infringe upon a Qualified State Soybean Board's authority to determine administrative or program expenditure allocations or administrative or program implementation; and

(2) Direct Qualified State Soybean Boards to participate or not participate in program activities or implementation.

(d) The Board shall establish procedures, after an opportunity for public comment and subject to approval of the Secretary, which provide Qualified State Soybean Boards with a right to present information to the Board prior to any determinations relating to nonparticipation as a Qualified State Soybean Board following initial election or determination as a Qualified State Soybean Board.

[56 FR 31049, July 9, 1991, as amended at 60 FR 58500, Nov. 28, 1995; 61 FR 50694, Sept. 27, 1996; 72 FR 2769, Jan. 23, 2007]

### § 1220.229 Influencing governmental action.

(a) Except as otherwise provided in paragraph (b) of this section, funds collected or received by the Board under this subpart shall not be used in any manner for the purpose of influencing any action or policy of the United States Government, any foreign or State government, or any political subdivision thereof.

(b) The prohibition in paragraph (a) of this section shall not apply to—

(1) The development and recommendation of amendments to this subpart;

(2) The communication to appropriate government officials of information relating to the conduct, implementation, or results of promotion, research, consumer information, and industry information under this subpart; or

(3) Any action designed to market soybeans or soybean products directly to a foreign government or political subdivision thereof.

### § 1220.230 Promotion, research, consumer information, and industry information.

(a) The Board shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any plans or projects authorized in this subpart. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate promotion, research, consumer information, and industry information activities with respect to soybean and soybean products;

(2) The establishment and conduct of research, and studies with respect to the sale, distribution, marketing and utilization of soybean and soybean products and the creation of new products thereof, to the end that marketing and utilization of soybean and soybean products may be encouraged, expanded, improved or made more acceptable; and

(3) Such other activities as are authorized by the Act and this subpart.

(b) Each plan or project described in paragraph (a) of this section, shall be periodically reviewed or evaluated by the Board to ensure that each such plan or project contributes to an effective program of promotion, research, consumer information, and industry information. If it is found by the Board that any such plan or project does not further the purposes of the Act, then the Board shall terminate such plan or project.

(c) No such plans or projects shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product. In carrying out any plan or project funded by the Board described in paragraph (a) of this section, no preference shall be given to a brand or trade name of any soybean product without the approval of the Board and the Secretary.

REPORTS, BOOKS, AND RECORDS

### § 1220.241 Reports.

Each producer marketing processed soybeans or soybean products of that producer's own production and each first purchaser responsible for the collection of assessments under § 1220.223 shall be required to report to the Board periodically such information as may be required by the regulations recommended by the Board and approved by the Secretary. Such information may include but not be limited to the following:

(a) The number of bushels of soybeans purchased, initially transferred, or which, in any other manner, is subject to the collection of assessment;

(b) The amount of assessments remitted;

(c) The basis, if necessary, to show why the remittance is less than one-half percent (0.5%) of the net market price per bushel of soybeans purchased multiplied by the number of bushels purchased; and

(d) The date any assessment was paid.

### § 1220.242 Books and records.

(a) Except as provided in paragraph (b) of this section, each person who is subject to this subpart shall maintain and make available for inspection by the Board or Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued under this part, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

(b) Any producer who plants less than 25 acres of soybeans annually and does not market such soybeans shall not be required to maintain books or records pursuant to this subpart.

### § 1220.243 Confidential treatment.

Except as otherwise provided in the Act, financial or commercial information that is obtained under the Act and this subpart and that is privileged and confidential shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members or any other producers. Only those persons having a specific need for such information in order to effectively administer the provisions of this part shall have access to such information.

MISCELLANEOUS

### § 1220.251 Proceedings after termination.

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

(b) The trustees shall:

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

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to § 1220.212(h);

(3) From time to time account for all receipts and disbursements; and

(4) Deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct, and upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation 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 used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information, or industry information plans or projects authorized pursuant to this subpart.

**§ 1220.252 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any rule issued pursuant hereto, 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 hereafter 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 person, with respect to any such violation.

**§ 1220.253 Personal liability.**

No member, employee or agent of the Board, including employees, agents or board members of Qualified State Soybean Boards, acting pursuant to authority provided in this subpart, shall be held personally responsible, either individually or jointly, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts of either commission or omission, of such member or employee, except for acts of dishonesty or willful misconduct.

**§ 1220.254 Patents, copyrights, inventions, and publications.**

(a) Any patents, copyrights, inventions, or publications developed through the use of funds remitted to the Board under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, § 1220.251 shall apply to determine disposition of all such property.

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

**§ 1220.255 Amendments.**

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

**§ 1220.256 Separability.**

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

is held invalid, the validity of the remainder of this subpart of the applicability thereof to other persons or circumstances shall not be affected thereby.

### § 1220.257 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act, Public Law 96–511, is OMB number 0581–0093, except Board member nominee information sheets are assigned OMB number 0505–0001.

[56 FR 31049, July 9, 1991, as amended at 61 FR 50694, Sept. 27, 1996]

## Subpart B—Rules and Regulations

SOURCE: 57 FR 29439, July 2, 1992, unless otherwise noted.

DEFINITIONS

### § 1220.301 Terms defined.

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms as appears in subpart A of this part.

### § 1220.302 Exemption.

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (g) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for an exemption under this section, the producer shall submit the request to the Board or other party as designated by the Board—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the producer complies with the requirements of this section, the Board or designee will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each first purchaser. The first purchaser shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(f) The exemption will apply at the first reporting period following the issuance of the exemption.

(g) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2759, Jan. 14, 2005]

ASSESSMENTS

### § 1220.310 Assessments.

(a) A 0.5 percent of the net market price per bushel assessment on soybeans marketed shall be paid by the

producer of the soybeans in the manner designated in § 1220.311.

(b) If more than one producer shares the proceeds received for the soybeans marketed, each such producer is obligated to pay that portion of the assessments which is equivalent to each producer's proportionate share of the proceeds.

(c) Failure of the first purchaser to collect the assessment on each bushel of soybeans marketed as designated in § 1220.311 shall not relieve the producer of the producer's obligation to pay the assessment to the appropriate Qualified State Soybean Board or the United Soybean Board as required in § 1220.312.

**§ 1220.311 Collection and remittance of assessments.**

(a) Except as otherwise provided in this section, each first purchaser making payment to a producer for soybeans marketed by a producer shall collect from that producer at the time of settlement of that producer's account an assessment at the rate of 0.5 percent of the net market price per bushel of soybeans marketed and shall be responsible for remitting the assessment to the Qualified State Soybean Board or the United Soybean Board as provided in § 1220.312. The first purchaser shall give to the producer a receipt indicating payment of the assessment. The receipt shall be any document issued by the first purchaser that contains the information requested in § 1220.314(a).

(b) A first purchaser who purchases soybeans pursuant to a contract with a producer, either on a volume basis or on a per acre basis, shall be responsible for remitting the assessment due on soybeans purchased as required in § 1220.312. Such assessment shall be based upon 0.5 percent of the net market price specified or established in the contract and shall be collected at the time of payment to the producer. If the net market price is not specified or established in the contract the assessment shall be based on fair market value as specified in paragraph (c) of this section below.

(c) Any producer marketing processed soybeans or soybean products of that producer's own production either directly or through retail or wholesale outlets shall be responsible for remitting to the Qualified State Soybean Board or the United Soybean Board pursuant to § 1220.312, an assessment on the number of bushels of soybeans processed or manufactured into soybean products at the rate 0.5 percent of the net market price of the soybeans involved or the equivalent thereof. The assessment shall attach upon date of sale of the processed soybeans or soybean products and shall be based upon the posted county price for soybeans on the date of the sale as posted at the local ASCS office for the county in which the soybeans are grown. The producer shall remit the assessment in the manner provided in § 1220.312.

(d) Any producer marketing processed soybeans or soybean products of that producer's own production shall be responsible for remitting to the Qualified State Soybean Board or the United Soybean Board pursuant to § 1220.312, an assessment on the number of bushels of soybeans processed or manufactured into soybean products at the rate of 0.5 percent of the net market price of the soybeans involved or the equivalent thereof. The assessment shall attach upon the date of final settlement for such processed soybeans or soybean products and shall be based upon the posted county price for soybeans on the date of final settlement as posted at the local ASCS office for the county in which the soybeans are grown. The producer shall remit the assessment in the manner provided in § 1220.312.

(e) A producer delivering soybeans of the producer's own production against a soybean futures contract shall be responsible for remitting an assessment at the rate of 0.5 percent of net market price as specified in settlement documents. The assessment shall attach at the time of delivery and the producer shall remit the assessment due in accordance with § 1220.312.

(f) A producer who forfeits soybeans of that producer's own production which were pledged as collateral on a loan issued by Commodity Credit Corporation shall pay an assessment. The assessment shall attach upon the date the settlement statement is prepared and issued to the producer by the Commodity Credit Corporation and shall be

0.5 percent of the principal amount of the loan for the soybeans as specified by Commodity Credit Corporation in the settlement statement. The Commodity Credit Corporation shall collect the assessment and then remit the assessment due in accordance with § 1220.312.

### § 1220.312 Remittance of assessments and submission of reports to United Soybean Board or Qualified State Soybean Board.

(a) Each first purchaser and each producer responsible for the remittance of assessments shall remit assessments and submit a report of assessments to the Qualified State Soybean Board in the State in which each first purchaser or each producer responsible for the remittance of assessments is located or if there is no Qualified State Soybean Board in such State, then to the United Soybean Board as provided in this section.

(b) First purchasers and producers responsible for remitting assessments shall remit assessments and reports on a monthly or quarterly basis depending on the State or region in which the first purchasers or producers are located. The reporting period for each State and region shall be as follows:

| Monthly | Quarterly |
|---|---|
| Arkansas | Alabama |
| Iowa | Delaware |
| Kansas | Florida |
| Kentucky | Georgia |
| Michigan | Illinois |
| Minnesota | Indiana |
| Missouri | Louisiana |
| Mississippi | Maryland |
| North Carolina | North Dakota |
| Tennessee | Nebraska |
| Wisconsin | New Jersey |
| | Ohio |
| | Oklahoma |
| | Pennsylvania |
| | South Carolina |
| | South Dakota |
| | Texas |
| | Virginia |
| | Eastern Region |
| | Western Region |

(c) *Reports*. Each first purchaser or producer responsible for remitting assessments shall make reports on forms made available by the United Soybean Board or on Qualified State Soybean Board forms which contain the information required in § 1220.241 and are approved by the Board. A first purchaser with multiple facilities or purchasing locations within a State shall have the option to submit a single, consolidated report specifying the combined volume of soybeans purchased or the net market value of all soybeans purchased from the producers in the State. Reports shall be submitted with assessments due in accordance with the provisions of paragraph (d) of this section.

(d) *Remittances*. Each first purchaser or producer responsible for remitting assessments shall remit all assessments to the Qualified State Soybean Board, its designee, or the United Soybean Board. All assessments shall be remitted in the form of a check or money order payable to the order of the applicable Qualified State Soybean Board or the United Soybean Board and shall be sent to the designated address not later than the last day of the month following the month or quarter in which the soybeans, processed soybeans, or soybean products were marketed and shall be accompanied by the reports required by paragraph (c) of this section. All remittances shall be received subject to collection and payment at par.

(e) *Receipt of Reports and Remittances*. The timeliness of receipt of reports and assessments by the Board or Qualified State Soybean Board shall be based on the applicable postmark date or the date actually received by the Board or the Qualified State Soybean Board whichever is earlier.

[57 FR 29439, July 2, 1992, as amended at 58 FR 40732, July 30, 1993; 60 FR 58500, Nov. 28, 1995; 68 FR 69954, Dec. 16, 2003]

### § 1220.313 Qualified State Soybean Boards.

The following State soybean promotion organizations shall be Qualified State Soybean Boards. First purchasers and producers responsible for remitting assessments located in States which have a Qualified State Soybean Board shall remit assessments accompanied by the required reports to the Qualified State Soybean Board in the State in which the first purchaser or producer responsible for remitting assessments is located.

(1) Alabama Soybean Producers Board

(2) Arkansas Soybean Promotion Board
(3) Delaware Soybean Board
(4) Florida Soybean Advisory Council
(5) Georgia Agricultural Commodity Commission for Soybeans
(6) Illinois Soybean Program Operating Board
(7) Iowa Soybean Promotion Board
(8) Indiana Soybean Development Council, Inc.
(9) Kansas Soybean Commission
(10) Kentucky Soybean Promotion Board
(11) Louisiana Soybean Promotion Board
(12) Maryland Soybean Board
(13) Soybean promotion Committee of Michigan
(14) Minnesota Soybean Research and Promotion Council
(15) Mississippi Soybean Promotion Board
(16) Missouri Soybean Merchandising Council
(17) Nebraska Soybean Development, Utilization, and Marketing Board
(18) New Jersey Soybean Board
(19) North Carolina Soybean Producers Association
(20) North Dakota Soybean Council
(21) Ohio Soybean Council Board of Trustees
(22) Oklahoma Soybean Commission
(23) Pennsylvania Soybean Board
(24) South Carolina Soybean Board
(25) South Dakota Soybean Research and Promotion Council
(26) Tennessee Soybean Promotion Board
(27) Texas Soybean Producers Board
(28) Virginia Soybean Board
(29) Wisconsin Soybean Marketing Board, Inc.

### § 1220.314 Document evidencing payment of assessments.

(a) Each first purchaser responsible for remitting an assessment to a Qualified State Soybean Board or the United Soybean Board is required to give to the producer from whom the first purchaser collected an assessment written evidence of payment of the assessment containing the following information:
(1) Name and address of the first purchaser.
(2) Name of producer who paid assessment.
(3) Number of bushels sold.
(4) Net market price.
(5) Total assessments paid by the producer.
(6) Date.
(7) State in which soybeans were grown.
(b) [Reserved]

### §§ 1220.330–1220.332 [Reserved]

## Subparts C–E [Reserved]

## Subpart F—Procedures To Request a Referendum

SOURCE: 69 FR 13461, Mar. 23, 2004, unless otherwise noted.

DEFINITIONS

### § 1220.600 Act.

*Act* means the Soybean, Promotion, Research, and Consumer Information Act set forth in title XIX, subtitle E, of the Food, Agriculture, Conservation, and Trade Act of 1990 (Pub. L. 101–624), and any amendments thereto.

### § 1220.601 Administrator, AMS.

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

### § 1220.602 Administrator, FSA.

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

### § 1220.603 Farm Service Agency.

*Farm Service Agency* also referred to as "FSA" means the Farm Service Agency of USDA.

### § 1220.604 Farm Service Agency County Committee.

*Farm Service Agency County Committee*, also referred to as "FSA County Committee or COC," means the group of persons within a county who are elected to act as the Farm Service Agency County Committee.

**§ 1220.605 Farm Service Agency County Executive Director.**

*Farm Service Agency County Executive Director*, also referred to as "CED," means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and to be responsible for the day-to-day operation of the FSA county office, or the person acting in such capacity.

**§ 1220.606 Farm Service Agency State Committee.**

*Farm Service Agency State Committee*, also referred to as "FSA State Committee," means the group of persons within a State who are appointed by the Secretary to act as the Farm Service Agency State Committee.

**§ 1220.607 Farm Service Agency State Executive Director.**

*Farm Service Agency State Executive Director*, also referred to as "SED," means the person employed by the FSA State Committee to execute the policies of the FSA State Committee and to be responsible for the day-to-day operation of the FSA State office, or the person acting in such capacity.

**§ 1220.608 Order.**

*Order* means the Soybean Promotion and Research Order.

**§ 1220.609 Person.**

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

**§ 1220.610 Producer.**

*Producer* means any person engaged in the growing of soybeans in the United States who owns or who shares the ownership and risk of loss of such soybeans.

**§ 1220.611 Public notice.**

*Public notice* means a notice published in the FEDERAL REGISTER, not later than 60 days prior to the last day of the Request for Referendum period, that provides information regarding the Request for Referendum period. Such notification shall include, but not be limited to explanation of producers' rights, procedures to request a referendum, the purpose, dates of the Request for Referendum period, location for conducting the Request for Referendum, and eligibility requirements. Additionally, the United Soybean Board is required to provide producers, in writing, this same information during the same time period. Other pertinent information shall also be provided, without advertising expense, through press releases by State and county FSA offices and other appropriate Government offices, by means of newspapers, electronic media, county newsletters, and the like.

**§ 1220.612 Representative period.**

*Representative period* means the period designated by the Secretary pursuant to section 1970 of the Act.

**§ 1220.613 Secretary.**

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

**§ 1220.614 Soybeans.**

*Soybeans* means all varieties of glycine max or glycine soja.

**§ 1220.615 State and United States.**

*State and United States* include the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.

PROCEDURES

**§ 1220.616 General.**

An opportunity to request a referendum shall be provided to U.S. soybean producers to determine whether eligible producers favor the conduct of a referendum and the Request for Referendum shall be carried out in accordance with this subpart.

(a) The opportunity to request a referendum shall be provided at the county FSA offices.

(b) If the Secretary determines, based on results of the Request for Referendum that no less than 10 percent (not in excess of one-fifth of which may be producers in any one State) of all producers have requested a referendum

on the Order, a referendum will be held within 1 year of that determination.

(c) If the Secretary determines, based on the results of the Request for Referendum, that the requirements in paragraph (b) of this section are not met, a referendum will not be conducted.

(d) For purposes of paragraphs (b) and (c) of this section, the number of soybean producers in the United States is determined to be 589,182.

[69 FR 13461, Mar. 23, 2004, as amended at 74 FR 9049, Mar. 2, 2009]

### § 1220.617 Supervision of the process for requesting a referendum.

The Administrator, AMS, shall be responsible for supervising the process of permitting producers to request a referendum in accordance with this subpart.

### § 1220.618 Eligibility.

(a) *Eligible producers.* Each person who was a producer and provides evidence that they or the producer entity they represent has paid an assessment on soybeans during the representative period is provided the opportunity to request a referendum. Each producer entity is entitled to only one request.

(b) *Proxy Registration.* Proxy registration is not authorized, except that an officer or employee of a corporate producer, or any guardian, administrator, executor, or trustee of a producer's estate, or an authorized representative of any eligible producer entity (other than an individual producer), such as a corporation or partnership, may request a referendum on behalf of that entity. Any individual who requests a referendum on behalf of any producer entity, shall certify that he or she is authorized by such entity to take such action.

(c) *Joint and group interest.* A group of individuals, such as members of a family, joint tenants, tenants in common, a partnership, owners of community property, or a corporation engaged in the production of soybeans as a producer entity shall be entitled to make only one request for a referendum; provided, however, that any individual member of a group who is an eligible producer separate from the group may request a referendum separately.

### § 1220.619 Time and Place for Requesting a Referendum.

(a) The opportunity to request a referendum shall be provided during a 4-week period beginning and ending on a date determined by the Secretary. Eligible persons shall have the opportunity to request a referendum by following the procedures in § 1220.622 during the normal business hours of each county FSA office.

(b) Producers can determine the location of county FSA offices by contacting the nearest county FSA office, the State FSA office or through an online search of FSA's web site at *www.fsa.usda.gov/pas/default.asp.*

(c) Each eligible person shall request a referendum in the county FSA office where FSA maintains and processes the producer's, corporation's, or other entities administrative farm records. For the producer, corporation, or other entity not participating in FSA programs, the opportunity to request a referendum would be provided at the county FSA office serving the county where the producer, corporation, or other legal entity owns or rents land. An individual or authorized representative of a corporation who grows soybeans in more than one county would request a referendum in the county FSA office where the individual or corporation or other entity does most of its business.

### § 1220.620 Facilities.

Each county FSA office will provide:

(a) A polling place that is well known and readily accessible to producers in the county and that is equipped and arranged so that each person can complete and submit their request in secret without coercion, duress, or interference of any sort whatsoever, and

(b) A holding container of sufficient size so arranged that no request can be read or removed without breaking seals on the container.

### § 1220.621 Certification and request form.

Form LS–51–1 shall be used to request a referendum and certify producer eligibility. The form does not require a "yes" or "no" vote. Individual producers and representatives of other producer entities should read the form

carefully. By completing and signing the form, the individual simultaneously certifies eligibility and requests that a referendum be conducted.

### § 1220.622 Certification and request procedures.

(a) To request that a referendum be conducted, each eligible producer shall, during the Request for Referendum period, be provided the opportunity to request a referendum during a specified period announced by the Secretary.

(1) Each eligible producer shall be required to complete form LS–51–1 in its entirety and sign it. The producer must legibly print his/her name and, if applicable, the producer entity represented, address, county, and telephone number. The producer must read the certification statement on form LS–51–1 and sign it certifying that:

(i) The person or the producer entity they represent was a producer of soybeans during the representative period;

(ii) The individual requesting a referendum on behalf of a corporation or other entity is authorized to do so; and

(iii) The individual has submitted only one request for a referendum unless they are also an authorized representative for another eligible corporation or other entity.

(2) The producer, corporation, or other entity must also provide documentation, such as a sales receipt, showing that the producer, corporation, or other entity has paid an assessment on soybeans during the representative period.

(3) Only a completed and signed form LS–51–1 accompanied by documentation showing that soybean assessments were paid during the representative period shall be considered a valid request for a referendum.

(b) To request a referendum, eligible producers may obtain form LS–51–1 in-person, by mail, or by facsimile during the request for referendum period from the county FSA office where FSA maintains and processes the producer's, corporation's, or other entity's administrative farm records. For the producer, corporation, or other entity not participating in FSA programs, the opportunity to request a referendum would be provided at the county FSA office serving the county where the producer, corporation, or other entity owns or rents land. Eligible producers may also obtain form LS–51–1 via the Internet at *http://www.ams.usda.gov/lsmarketing programs*. For those persons who chose to obtain form LS–51–1 via the Internet, the completed form and required documentation must be submitted to the county FSA office where FSA maintains and process the producer's, corporation's, or other entity's administrative farm records. For producer, corporation, or other entity not participating in FSA programs, the opportunity to request a referendum would be provided at the county FSA office serving the county where the producer, corporation, or other entity owns or rents land.

(c) Producers or producer entities may return form LS–51–1 and the accompanying documentation in-person, by mail, or facsimile to the appropriate county FSA office. Form LS–51–1 returned in-person or by facsimile, must be received in the appropriate county FSA office prior to the close of the work day on the final day of the Request for Referendum period to be considered a valid request. Form LS–51–1 and the accompanying documentation returned by mail must be postmarked no later than midnight of the final day of the Request for Referendum period and must be received in the county FSA office prior to the start of canvassing Form LS 51–1.

(d) Producers who obtain form LS–51–1 in-person at the appropriate FSA county office may complete and return the form the same day, accompanied by documentation, such as a sales receipt, showing that soybean assessments were paid during the representative period.

[69 FR 13461, Mar. 23, 2004, as amended at 74 FR 9049, Mar. 2, 2009]

### § 1220.623 Canvassing requests.

(a) Canvassing of Form LS–51–1 shall take place at the opening of county FSA offices on the 5th business day following the Request for Referendum period. Such canvassing, acting on behalf of the Administrator, AMS, shall be in the presence of at least two members of the county committee. If two or more of the counties have been combined and are served by one county office, the

canvassing of the requests shall be conducted by at least one member of the county committee from each county served by the county office. The FSA State committee or the State Executive Director if authorized by the State Committee, may designate the County Executive Director (CED) and a county or State FSA office employee to canvass the requests and report the results instead of two members of the county committee when it is determined that the number of eligible voters is so limited that having two members of the county committee present for this function is impractical, and designate the CED and/or another county or State FSA office employee to canvass requests in any emergency situation precluding at least two members of the county committee from being present to carry out the functions required in this section.

(b) The request for referendum should be canvassed as follows:

(1) *Number of eligible requests for a referendum.* Each person who was a producer during the representative period and provides documentation to prove that they paid an assessment will be considered eligible to request a referendum.

(2) *Number of ineligible requests for a referendum.* If FSA cannot determine that a producer is eligible based on the submitted documentation or if the producer fails to submit the required documentation, the producer shall be determined to be ineligible. FSA shall notify ineligible producers in writing as soon as practicable but no later than the 8th business day following the final day of the Request for Referendum period.

(c) *Appeal.* A person declared to be ineligible by FSA can appeal such decision and provide additional documentation to the FSA county office within 5 business days after the postmark date of the letter of notification of ineligibility. FSA will then make a final decision on the producer's eligibility and notify the producer of the decision.

(d) *Number of valid requests for referendum.* A person has been declared eligible and has provided and completed all of the required information on form LS–51–1.

(e) *Number of invalid requests for a referendum.* An invalid request for referendum includes, but is not limited to the following:

(1) Form LS–51–1 is not signed or all required information has not been provided;

(2) Form LS–51–1 and supporting documentation returned in-person or by facsimile was not received by the last business day of the Request for Referendum period;

(3) Form LS–51–1 and supporting documentation returned by mail was not postmarked by midnight of the final day of the Request for Referendum period;

(4) Form LS–51–1 and supporting documentation returned by mail was not received in the county FSA office prior to canvassing of the ballots;

(5) Form LS–51–1 or supporting documentation is mutilated or marked in such a way that any required information on the form is illegible; or

(6) Form LS–51–1 and supporting documentation not returned to the appropriate county FSA office.

### § 1220.624 Confidentiality.

The names of persons requesting a referendum shall be confidential and may not be divulged except as the Secretary may direct.

### § 1220.625 Counting requests.

(a) The requests for a referendum shall be counted by county FSA offices on the same day as the requests are canvassed if there are no ineligibility determinations to resolve. For those county FSA offices that do have ineligibility determinations, the requests shall be counted no later than the 14th business day following the final day of the Request for Referendum period.

(b) Requests for a referendum shall be counted as follows:

(1) Total number of producers who returned a Request for Referendum form LS–51–1;

(2) Number of ineligible producers requesting a referendum;

(3) Number of eligible producers requesting a referendum;

(4) Number of valid requests for a referendum; and

(5) Number of invalid requests for a referendum.

### § 1220.626 FSA county office report.

The county FSA office report shall be certified as accurate and complete by the CED or designee, acting on behalf of the Administrator, AMS, as soon as may be reasonably possible, but in no event later than 18th business day following the final day of the specified period, have prepared and certified the county summary of requests on a form provided by the Administrator, FSA. Each county FSA office shall transmit the results in its county to the FSA State office. The results in each county may be made available to the public upon notification by the Administrator, FSA, that the final results have been released by the Secretary. A copy of the report shall be posted for 30 days following the date of notification by the Administrator, FSA, in the county FSA office in a conspicuous place accessible to the public. One copy shall be kept on file in the county FSA office for a period of at least 12 months after notification by FSA that the final results have been released by the Secretary.

### § 1220.627 FSA State office report.

Each FSA State office shall transmit to the Administrator, FSA, as soon as possible, but in no event later than the 20th business day following the final day of the Request for Referendum period, a report summarizing the data contained in each of the reports from the county FSA offices. One copy of the State summary shall be filed for a period of not less than 12 months after the results have been released and available for public inspection after the results have been released.

### § 1220.628 Results of the request for referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, the reports from all State FSA offices. The Administrator, AMS shall tabulate the results of the Request for Referendum. USDA will issue an official press release announcing the results of the Request for Referendum and publish the same results in the FEDERAL REGISTER. In addition, USDA will post the official results at the following Web site: "*http://www.ams.usda.gov/lsmarketingprograms*".

Subsequently, State reports and related papers shall be available for public inspection upon request during normal business hours in the Marketing Programs Branch office, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems necessary, a State report or county report shall be reexamined and checked by such persons who may be designated by the Secretary.

[69 FR 13461, Mar. 23, 2004, as amended at 74 FR 9049, Mar. 2, 2009]

### § 1220.629 Disposition of records.

Each FSA CED will place in sealed containers marked with the identification of the "Request for Soybean Referendum," all of the form LS–51–1's along with the accompanying documentation and county summaries. Such records will be placed in a secure location under the custody of the FSA CED for a period of not less than 12 months after the date of notification by the Administrator, FSA, that the final results have been announced by the Secretary. If the county FSA office receives no notice to the contrary from the Administrator, FSA, by the end of the 12 month period as described above, the CED or designee shall destroy the records.

### § 1220.630 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart.

## PART 1221—SORGHUM PROMOTION, RESEARCH, AND INFORMATION ORDER

### Subpart A—Sorghum Promotion, Research, and Information Order

DEFINITIONS

Sec.
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## Subparts C–E [Reserved]

AUTHORITY: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

SOURCE: 73 FR 25407, May 6, 2008, unless otherwise noted.

## Subpart A—Sorghum Promotion, Research, and Information Order

DEFINITIONS

### § 1221.1 Act.

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

### § 1221.2 Board.

*Board* or *Sorghum Promotion, Research, and Information Board* means the administrative body established pursuant to § 1221.100, or such other name as recommended by the Board and approved by the Secretary.

### § 1221.3 Calendar year.

*Calendar year* means the 12-month period from January 1 through December 31.

### § 1221.4 Certified organization.

*Certified organization* means any organization that has been certified by the Secretary pursuant to this part as eligible to submit nominations for membership on the Board.

### § 1221.5 Conflict of interest.

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

### § 1221.6 Crop year.

*Crop year* means the time period by which the USDA reports crop production for sorghum and is indicated by the calendar year in which sorghum is normally harvested.

### § 1221.7 Customs.

*Customs* means the U.S. Customs and Border Protection of the U.S. Department of Homeland Security.

### § 1221.8 Department.

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

### § 1221.9 First handler.

*First handler* means the first person who buys or takes possession (excluding a common or contract carrier of sorghum owned by another) of more than 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage from producers in a calendar year for marketing. The term first handler includes a producer who markets sorghum of the producer's own production directly to consumers. In any case in which sorghum is pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program and the sorghum is forfeited by the producer in lieu of loan repayment, the Commodity Credit Corporation will be considered a first handler.

### § 1221.10 Fiscal period.

*Fiscal period* means the 12-month period ending on December 31 or such other consecutive 12-month period as shall be recommended by the Board and approved by the Secretary.

### § 1221.11 Handle.

*Handle* means to engage in the receiving or acquiring of sorghum and in the shipment (except as a common or contract carrier of sorghum owned by another) or sale of sorghum, or other activity causing sorghum to enter the current of commerce.

### § 1221.12 Harvest.

*Harvest* means combining or threshing sorghum for grain and/or severing the stalks from the land with mechanized equipment.

### § 1221.13 Importer.

*Importer* means any person importing more than 1,000 bushels of grain sorghum; or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage into the United States in a calendar year as a principal or as an agent, broker, or consignee of any person who produces or purchases sorghum outside of the United States for sale in the United

States, and who is listed as the importer of record for such sorghum.

**§ 1221.14 Information.**

*Information* means information and programs that are designed to develop new markets and marketing strategies; increase market efficiency; enhance the image of sorghum on a national or international basis; and assist producers in meeting their conservation objectives. These include, but are not exclusive to:

(a) Consumer information, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of sorghum;

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the sorghum industry, and activities to enhance the image of the sorghum industry.

**§ 1221.15 Market.**

*Market* means to sell or otherwise dispose of sorghum into intrastate, interstate, or foreign commerce by buying, distributing, or otherwise placing sorghum into commerce.

**§ 1221.16 Net market price.**

*Net market price* means the sales price, or other value, per volumetric unit, received by a producer for sorghum after adjustments for any premium or discount.

**§ 1221.17 Net market value.**

*Net market value* means:

(a) Except as provided in paragraph (b)and (c) of this section, the value found by multiplying the net market price by the appropriate quantity of the volumetric units or the minimum value in a production contract received by a producer for sorghum after adjustments for any premium or discount.

(b) For imported sorghum, the total value paid by the importer for the sorghum as reported on the appropriate Customs form; or

(c) For sorghum pledged as collateral for a loan issued under any Commodity Credit Corporation price support loan program, the principal amount of the loan.

**§ 1221.18 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.

**§ 1221.19 Part and subpart.**

*Part* means the Sorghum Promotion, Research, and 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.

**§ 1221.20 Person.**

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

**§ 1221.21 Producer.**

*Producer* means any person who is engaged in the production and sale of sorghum in the United States and who owns, or shares the ownership and risk of loss of, the sorghum.

**§ 1221.22 Production.**

*Production,* as used in § 1221.100, means:

(a) for the purpose of establishing the initial Board in paragraphs (a), (b), (c), (d), and (e) of § 1221.100, the volume of grain sorghum produced during the last 5 crop years, excluding the high and low years, and

(b) For the purpose of reapportionment in paragraphs (e) and (f) of § 1221.100, the total assessments collected by the Board during the last 5 crop years, excluding the high and low years.

**§ 1221.23 Promotion.**

*Promotion* means any action taken to present a favorable image of sorghum to the public and the end-user industry for the purpose of improving the competitive position of sorghum and stimulating the sale of sorghum. This includes paid advertising and public relations.

**§ 1221.24 Qualified sorghum producer organization.**

*Qualified sorghum producer organization* means a qualified State-legislated sorghum promotion, research, and education commission or organization, approved by the Secretary. For States without a qualified State-legislated sorghum promotion, research, and education commission or organization, qualified sorghum producer organization means any qualified organization that has the primary purpose of representing sorghum producers, has sorghum producers as members, and that is approved by the Secretary.

**§ 1221.25 Referendum.**

*Referendum* means a referendum conducted by the Secretary pursuant to the Act whereby producers and importers are provided the opportunity to vote to determine whether the continuance of this subpart is favored by a majority of eligible persons voting.

**§ 1221.26 Research.**

*Research* means any type of test, study, or analysis designed to advance the knowledge, image, desirability, use, marketability, production, product development, or quality of sorghum, including, but not limited to, research relating to yield, nutritional value, cost of production, new product development, inbred and hybrid development, nutritional value, health research, and marketing of sorghum.

**§ 1221.27 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States, 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.

**§ 1221.28 Sorghum.**

*Sorghum* means any harvested portion of *Sorghum bicolor* (L.) Moench or any related species of the genus Sorghum of the family Poaceae. This includes, but is not limited to, grain sorghum (including hybrid sorghum seeds, inbred sorghum line seed, and sorghum cultivar seed), sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage.

**§ 1221.29 State.**

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

**§ 1221.30 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.

**§ 1221.31 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 certain date specified in the rule.

**§ 1221.32 United States.**

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

SORGHUM PROMOTION, RESEARCH, AND INFORMATION BOARD

**§ 1221.100 Establishment and representation.**

There is hereby established a Sorghum Promotion, Research, and Information Board, hereinafter called the Board. Representation includes, but is not limited to, fixed State seats determined by total production with at-large seats to allow representation from a broad geographical area. The Board shall initially be composed of 13 representatives, with the maximum number of producers from one State limited to 6, appointed by the Secretary from nominations as follows:

(a) The largest production State based on total production shall have 5 sorghum producers to serve as representatives.

(b) The second largest production State based on total production shall have 3 sorghum producers to serve as representatives.

(c) The third largest production State based on total production shall

have one sorghum producer to serve as a representative.

(d) There shall be 4 sorghum producers to serve as at-large national representatives with at least two representatives appointed from States not described in paragraphs (a), (b), and (c) of this section.

(e) If the value of assessments on imported sorghum reaches or exceeds the production of the third largest sorghum production State, there shall be one importer to serve as a representative plus an additional at-large national representative, with the maximum number of producers from one State being increased from six to seven.

(f) At least once every 5 years, the Board will review the geographical distribution of production of sorghum in the United States, the production of sorghum in the United States, and the value of assessments on sorghum imported into the United States. The review will be based on Board assessment records and statistics from the USDA. If warranted, the Board may recommend to the Secretary that representation on the Board be altered to reflect any changes in geographical distribution of domestic sorghum production. If, in the review, the Board determines that the value of assessments on sorghum imported into the United States exceeds 15 percent of the production of sorghum, the Board shall recommend to the Secretary that the nomination procedures and appointments to the Board be altered as necessary or appropriate to facilitate the equitable representation of importers on the Board.

**§ 1221.101 Nominations.**

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

(a) Nominations for State-specific and at-large national seats shall be obtained by the Secretary from eligible organizations certified under § 1221.107. Certified eligible organizations representing producers in a State, or when making nominations for at-large seats, shall submit to the Secretary at least two nominees for each vacant seat. If the Secretary determines that a State is not represented by a certified eligible organization, then the Secretary may solicit nominations from other organizations or other persons residing in the State.

(b) If so required pursuant to § 1221.100(f), at least two nominations for the importer representative shall be submitted by the Board to the Secretary.

(c) After the establishment of the initial Board, the Secretary shall announce when a vacancy does or will exist. Nominations for subsequent Board representatives shall be submitted to the Secretary not less than 90 days prior to the expiration of the terms of the representatives whose terms are expiring, in the manner as described in this section. In the case of vacancies due to reasons other than the expiration of a term of office, successor Board members shall be appointed pursuant to section 1221.105.

(d) When there is more than one certified eligible organization representing a State or when the Secretary solicits nominations from organizations and persons residing in that State, or when eligible certified organizations are nominating persons for at-large positions, eligible certified organizations may caucus and jointly nominate two qualified producers for each position on the Board for which a representative is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary two nominees for each appointment to be made to represent that State, or to fill an at-large position.

**§ 1221.102 Nominee's agreement to serve.**

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

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any sorghum promotion entity or with any organization that has or is being considered for a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters that concern the relationship disclosed under paragraph (b) of this section.

**§ 1221.103 Appointment.**

From the nominations made pursuant to § 1221.101, the Secretary shall appoint the representatives of the Board on the basis of representation provided in § 1221.100.

**§ 1221.104 Term of office.**

(a) The term of office for the representatives of the Board shall be three years, except for the initial term, pursuant to paragraph (c) of this section.

(b) Representatives may serve a maximum of 2 consecutive 3-year terms.

(c) When the Board is first established, the Secretary shall establish staggered terms as follows:

(1) Largest Production State—2 representatives shall serve a 2-year term, 1 representative shall serve a 3-year term, and 2 representatives shall serve a 4-year term.

(2) Second Largest Production State—1 representative shall serve a 2-year term, 1 representative shall serve a 3-year term, and 1 representative shall serve a 4-year term.

(3) Third Largest Production State—The representative shall serve a 3-year term.

(4) At-large national—1 representative shall serve a 2-year term, 2 representatives shall serve a 3-year term, and 1 representative shall serve a 4-year term.

(5) States with multiple representatives shall have their staggered terms assigned by the Secretary. At-large national representatives shall also have their staggered terms assigned by the Secretary.

(6) Representatives serving initial terms of 2 or 4 years shall be eligible to serve a single term of 3 years after their initial 2- or 4-year term.

(d) Each representative shall continue to serve until a successor is appointed by the Secretary and has accepted the position.

(e) Any successor appointed pursuant to § 1221.105 serving 1 year or less may serve two consecutive 3-year terms.

**§ 1221.105 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, a successor for the unexpired term of such representative shall be appointed by the Secretary pursuant to § 1221.103 from the most recent list of nominations for the position pursuant to § 1221.101 or the Secretary shall request nominations for a successor pursuant to § 1221.101, except that said nomination and replacement shall not be required if an unexpired term is less than 6 months.

**§ 1221.106 Removal.**

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

**§ 1221.107 Certification of organizations.**

(a) The eligibility of State, regional, or national organizations to participate in making nominations for membership on the Board shall be certified by the Secretary. Those organizations that may seek certification include:

(1) State-legislated sorghum promotion, research, and information organizations;

(2) Organizations whose primary purpose is to represent sorghum producers within a State, region, or at the national level; or,

(3) Organizations that have sorghum producers as members.

(b) Such eligibility shall be based, in addition to other information, upon a report submitted by the organization that shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) The geographic territory covered by the organization's active membership;

(2) The nature and size of the organization's active membership, proportion

of active membership accounted for by producers, a map showing the sorghum producing counties in which the organization has active members, the volume of sorghum produced in each such county, the number of sorghum producers in each such county, and the size of the organization's active sorghum producer membership in each such county;

(3) The extent to which the sorghum producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organization's operating funds are derived;

(6) The functions of the organization; and

(7) The ability and willingness of the organization to further the purpose and objectives of the Act.

(c) The primary consideration in determining the eligibility of an organization shall be whether its sorghum producer membership consists of a sufficiently large number of sorghum producers who produce a relatively significant volume of sorghum to reasonably warrant its participation in the nomination of State specific and national at-large members to the Board. Any sorghum producer organization found eligible by the Secretary under this section shall be certified by the Secretary, and the Secretary's determination as to eligibility shall be final.

### § 1221.108 Procedure.

(a) At a Board meeting, it will be considered a quorum when a simple majority of the voting representatives are present.

(b) At the start of each fiscal period, the Board will approve a chairperson, vice chairperson, and secretary/treasurer who will conduct meetings throughout that period.

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

(d) Each voting representative of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by a simple majority of the total votes of the Board representatives present at the meeting.

(e) It will be considered a quorum at a committee meeting when a simple majority of those assigned to the committee are present at the meeting. Committees may consist of individuals other than Board representatives, and such individuals may vote in committee meetings. Committee members shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

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

(g) There shall be no voting by proxy.

(h) The chairperson shall be a voting representative.

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

### § 1221.109 Compensation and reimbursement.

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

### § 1221.110 Powers and duties.

The Board shall have the following powers and duties:

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

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet not less than annually, and organize, and select from among the representatives of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines appropriate;

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

(e) To develop programs, plans, and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs, plans, or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that: Any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and, make such other reports available as the Board or the Secretary considers relevant. Furthermore, any 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 or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

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

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

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

(f) To prepare and submit for approval of the Secretary fiscal period budgets in accordance with § 1221.112;

(g) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

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

(i) To give the Secretary the same notice of Board and committee meetings as is given to representatives in order that the Secretary's representative(s) may attend such meetings;

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

(k) To furnish to the Secretary any information or records that the Secretary may request;

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

(m) To recommend to the Secretary such amendments to the Order as the Board considers appropriate; and with the approval of the Secretary, to make rules and regulations to effectuate the terms and provisions of this subpart;

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

(o) To provide not less than annually a report to producers and importers accounting for the funds expended by the Board, and describing programs implemented under the Act; and to make such report available to the public upon request; and

(p) To invest funds in accordance with § 1221.115.

### § 1221.111 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 is a conflict of interest;

(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, other than recommending to the Secretary amendments to this part; and

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

EXPENSES AND ASSESSMENTS

### § 1221.112 Budget and expenses.

(a) Prior to the beginning of each fiscal period, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal period covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

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

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

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

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

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

(c) Subject to this section, any amendment or addition to an approved budget that increases the budget must be approved by the Secretary. Shifts of funds that do not result in an increase in the Board's approved budget and that are consistent with this subpart and the Board's governing bylaws need not have prior approval by the Secretary.

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

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

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects in accordance with the Order. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

(g) In accordance with § 1221.118(a), the Board shall deposit funds in a refund escrow account and refrain from allocating this amount for expenditure until the Order is approved by the required referendum except as provided for in § 1221.118.

(h) The Board shall allocate an appropriate amount each year to allow for payment of future referendums.

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

(j) The Board shall determine annually an allocation amount no less than 15 percent but no more than 25 percent of the total assessments collected on all sorghum available for any fiscal period, less the expenses pursuant to paragraph (i), for use by qualified sorghum producer organizations pursuant to §1221.128 for State programs of generic promotion, research, and information. Amounts allocated by the Board for State generic promotion, research, and information programs will be based on requests submitted to the Board by qualified sorghum producer organizations when it is determined that these requests meet the goals and objectives stated in the Act and Order. The request shall include detailed programs, plans, or projects with budgets. Qualified sorghum producer organizations shall not submit requests for State generic promotion, research, and information programs that exceed the annual allocation amount determined by the Board which shall be the product of:

(1) The State's proportional contribution based on reports submitted by first handlers pursuant to §1221.124(a) to total assessments remitted on all sorghum for the previous fiscal period; multiplied by

(2) The total assessments collected on all sorghum for the previous fiscal period less expenses pursuant to paragraph (i) of this section.

(k) The Board may not expend for administration, maintenance, and functioning of the Board in any fiscal period an amount that exceeds 10 percent of the assessments and other income received by the Board for that fiscal period except for the initial fiscal period. Reimbursements to the Secretary required under paragraph (i) of this section are excluded from this limitation on spending.

(l) The Board shall allocate all other funds available for any fiscal period, to the extent practicable, subject to paragraphs (g), (h), (i), (j), and (k) of this section on programs, plans, or projects, as provided for in §1221.121.

(m) The Board shall determine annually the allocation of total funds pursuant to this section, with the approval of the Secretary.

**§ 1221.113 Financial statements.**

(a) As requested by the Secretary, the Board shall prepare and submit financial statements to the Secretary on a monthly basis. 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, fiscal period-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Secretary within 30 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal period to which it applies.

**§ 1221.114 Operating reserve.**

The Board may establish an operating monetary reserve and may carry over to subsequent fiscal period excess funds in a reserve so established, *provided* that funds in the reserve shall not exceed one fiscal period's anticipated expenses.

**§ 1221.115 Investment of funds.**

The Board may invest, pending disbursement, funds it receives under this subpart, only in obligations of the United States or any agency of the United States; general obligations of any State or any political subdivision of a State; interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve system; or obligations that are fully guaranteed as to principal and interest by the United States.

**§ 1221.116 Assessments.**

(a) The funds to cover the Board's expenses shall be paid from assessments on producers and importers, donations from any person not subject to assessments under this Order, and other funds available to the Board and subject to the limitations contained therein.

(b) First handlers of domestic sorghum shall be responsible for collecting assessments from producers on all domestically handled sorghum. This includes sorghum of the first handler's

own production. Grain pledged as collateral for a Commodity Credit Corporation price support loan program shall be considered handled sorghum. A first handler shall not collect an assessment on sorghum from a producer when said producer presents documentation demonstrating that an assessment has previously been collected on said sorghum.

(c) The following assessment rates for sorghum shall apply:

(1) Grain sorghum shall be initially assessed at a rate of 0.6 percent of net market value received by the producer pursuant to paragraph (e) of this section; and

(2) Sorghum forage, sorghum hay, sorghum haylage, sorghum billets, and sorghum silage shall be initially assessed at a rate of 0.35 percent of net market value received by the producer pursuant to paragraph (e) of this section.

(d) Importers of sorghum shall pay an assessment to the Board through Customs on sorghum imported into the United States. The following apply to imported sorghum:

(1) The assessment rates for imported sorghum shall be the same or equivalent to the rates for sorghum produced in the United States.

(2) The import assessment shall be uniformly applied to imported sorghum that is identified by the numbers 1007.00.0020 and 1007.00.0040 in the Harmonized Tariff Schedule of the United States.

(3) The assessments due on imported sorghum shall be paid when the sorghum enters the United States.

(4) If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment to the Board.

(e) The Board will review the assessment rates and may make recommendations to modify the assessment rates to the Secretary. Assessment rates may be raised or lowered no more than 0.2 percent of net market value received by producers and importers in any one calendar year. The maximum assessment rate cannot exceed 1 percent of the net market value received by producers and importers.

(f) Each person responsible for collecting assessments under paragraph (b) of this section shall remit the amount due to the Board in such a manner as required by regulations recommended by the Board and prescribed by the Secretary.

(g) Any unpaid assessment due to the Board pursuant to this section shall be increased 2 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this paragraph, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this paragraph, any assessment determined at a later date than the date prescribed by this subpart because of a person's failure to timely submit a report to the Board shall be considered to have been payable by the date it would have been due if the report had been filed timely. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board.

(h) An additional charge shall be imposed on any person subject to a late payment charge in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed by the Secretary.

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

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

(k) The collection of assessments pursuant to this section shall begin with respect to sorghum handled on or after the effective date established by the Secretary and shall continue until terminated or suspended by the Secretary.

(l) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments and invest them on behalf of the Board, and shall pay such assessments and any interest earned to the Board when it is formed. The Secretary shall have the authority to promulgate rules and regulations concerning assessments and

the collection of assessments, if the Board is not in place or is otherwise unable to develop such rules and regulations.

(m) Payment remitted pursuant to this subpart shall be in the form of a negotiable instrument made payable to the Board. Such remittances and the reports specified in §§1221.124 and 1221.125 shall be mailed to the location designated by the Board.

**§ 1221.117 Exemptions.**

(a) Any importer of less than and including 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage per calendar year may claim an exemption from the assessment required under § 1221.116.

(b) An importer desiring an exemption shall apply to the Board, on a form provided by the Board, for a certificate of exemption. An importer shall certify that the importer will import less than and including 1,000 bushels of grain sorghum or 5,000 tons of sorghum forage, sorghum hay, sorghum haylage, sorghum billets, or sorghum silage.

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

(d) Importers who receive a certificate of exemption shall be eligible for reimbursement of assessments collected by Customs. These importers shall apply to the Board for reimbursement of any assessments paid. No interest will be paid on the assessments collected by Customs. Requests for reimbursement shall be submitted to the Board within 90 days of the last day of the calendar year the sorghum was actually imported.

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

(f) The Board may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt sorghum and, in the case of importers, proof of payment of assessments.

(g) A producer or importer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces or imports only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (m) of this section; and is not, or does not import products from, a split operation shall be exempt from the payment of assessments.

(h) To apply for an exemption under this section, the applicant shall submit the request to the Board or other party as designated by the Board, on a form provided by the Board, at any time initially and annually thereafter on or before January 1 as long as the applicant continues to be eligible for the exemption.

(i) The request shall include the following: The applicant's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(j) If the applicant complies with the requirements of this section, the Board or designee will grant the exemption and issue a Certificate of Exemption to the applicant. The Board will have 30 days from the date of receiving the request to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(k) The producer or importer shall provide a copy of the Certificate of Exemption to each first handler. The first handler shall maintain records showing the name and address of the exempt producer or importer and the exemption number assigned by the Board.

(l) The exemption will apply at the first reporting period following the issuance of the exemption.

(m) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer or importer from exemption under this section, except that producers or importers who produce or import both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR Part 205, provided all other criteria are met.

**§ 1221.118 Refund escrow accounts.**

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

(b) Upon failure of the required referendum, the Board shall pay refunds of assessments to eligible persons requesting refunds during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in paragraph (c) of this section.

(c) If the amount deposited in the escrow account is less than the amount of refunds requested, the Board shall prorate the amount deposited in such account among all eligible persons who request a refund of assessments paid no later than 90 days after the required referendum results are announced by the Secretary.

(d) If the Order is approved by the required referendum conducted under § 1221.130 then:

(1) The escrow account shall be closed; and

(2) The funds shall be available to the Board for disbursement under § 1221.112.

**§ 1221.119 Refunds.**

Any producer or importer from whom an assessment is collected and remitted to the Board, or who pays an assessment directly to the Board, under authority of the Act and this subpart through the announcement of the results of the required referendum, upon failure of the required referendum shall have the right to receive from the Board a refund of such assessment, or a prorated share thereof, upon submission of proof satisfactory to the Board that the producer or importer paid the assessment for which refund is sought. Any such demand shall be made by such producer or importer in accordance with the provisions of this subpart and in a manner consistent with regulations recommended by the Board and prescribed by the Secretary.

**§ 1221.120 Procedure for obtaining a refund.**

Upon failure of the required referendum, each producer or importer who paid an assessment pursuant to this subpart during the period beginning on the effective date of the Order and ending on the date the required referendum results are announced may obtain a refund of such assessment only by following the procedures prescribed in this section and any regulations recommended by the Board and prescribed by the Secretary:

(a) A producer or importer shall obtain a Board-approved refund application form from the Board. Such forms may be obtained by written request to the Board and the request shall bear the producer's or importer's signature or properly witnessed mark.

(b) Any producer or importer requesting a refund shall submit an application on the prescribed form to the Board within 60 days from the date the assessments were paid by such producer or importer but no later than the date the results of the required referendum are announced by the Secretary. The refund application shall show:

(1) Producer's or importer's name and address;

(2) Name and address of the person who collected applicant's assessment;

(3) Number of bushels or tons of sorghum on which a refund is requested;

(4) Total amount of refund requested;

(5) Date or inclusive dates on which assessments were paid; and

(6) The producer's or importer's signature or properly witnessed mark.

(c) The documentation provided pursuant to § 1221.125(b) to the producer by the first handler responsible for collecting an assessment pursuant to this subpart, or a copy thereof, or such other evidence deemed satisfactory to the Board, shall accompany the producer's refund application. An importer must submit documentation showing that the assessment was paid along with a copy of the appropriate Customs form stating the net market value of the sorghum.

(d) The Board shall initiate payment of refund requests, or pay a prorated share thereof, within 90 days of the date the results of the required referendum are released by the Secretary. Refunds shall be paid in a manner consistent with § 1221.119.

PROMOTION, RESEARCH, AND INFORMATION

### § 1221.121 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including consumer and industry information, with respect to sorghum; and

(2) The establishment and conduct of research with respect, but not limited to: The yield, use, nutritional value and benefits, sale, distribution, and marketing of sorghum, and the creation of new products thereof, to the end that the marketing and use of sorghum may be encouraged, expanded, improved, or made more acceptable; and to advance the image, desirability, or quality of sorghum.

(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) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

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

### § 1221.122 Independent evaluation.

Pursuant to the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), the Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other 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.

### § 1221.123 Patents, copyrights, inventions, trademarks, information, publications, and product formulations.

(a) Any patents, copyrights, inventions, trademarks, information, publications, or product formulations developed through the use of funds collected by the Board under the provisions of 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, inventions, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal,

budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1221.132 shall apply to determine disposition of all such property.

(b) Should patents, copyrights, inventions, trademarks, information, publications, or product formulations be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions, trademarks, information, publications, or product formulations shall be determined by agreement between the Board and the party contributing funds towards the development of such patents, copyrights, inventions, trademarks, information, publications, or product formulations in a manner consistent with paragraph (a) of this section.

REPORTS, BOOKS, AND RECORDS

**§ 1221.124 Reports.**

(a) Each first handler, on a State-by-State basis, will be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of bushels or tons of domestic sorghum within the State that were marketed to the first handler;

(2) Number of bushels or tons of domestic sorghum within the State on which an assessment was paid;

(3) The amount of assessments remitted on sorghum within the State;

(4) Date that any assessments were paid within the State;

(5) The explanation, if necessary, to show why the remittance is less than the applicable assessment rate multiplied by the net market price multiplied by the number of bushels or tons within the State that were marketed to the first handler; and

(6) The first handler's tax identification number.

(b) Each importer will be required to provide to the Board periodically such information as may be required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) Number of bushels or tons of sorghum imported;

(2) Number of bushels or tons of imported sorghum on which an assessment was paid;

(3) The amount of assessments remitted;

(4) Date that any assessments were paid;

(5) The explanation, if necessary, to show why the remittance is less than the applicable assessment rate multiplied by the net market value; and

(6) The importer's tax identification number.

**§ 1221.125 Books and records.**

(a) Each first handler, producer, or importer subject to this subpart shall maintain and make available during normal business hours for inspection By employees or agents of the Board or the Secretary such books and records as are necessary to carry out the provisions of this part, including records necessary to verify any required reports. Such records shall be maintained for at least 2 years beyond the fiscal period of their applicability.

(b) Each first handler responsible for collecting assessments pursuant to this subpart is required to give the producer from whom the assessment was collected, written evidence of payment of the assessment paid pursuant to this subpart. Such written evidence serving as a receipt shall include, but not be limited to, the following information:

(1) Name and address of the first handler,

(2) Name of producer who paid the assessment,

(3) Total number of bushels or tons of sorghum on which the assessment was paid,

(4) Total assessment paid by the producer,

(5) Date on which assessments were paid, and

(6) Such other information as the Board, with the approval of the Secretary, may require.

**§ 1221.126 Use of information.**

Information from records or reports required pursuant to this subpart shall be made available to the Secretary as

is appropriate to the administration or enforcement of the Act, subpart, or any regulation issued under the Act. In addition, the Secretary may authorize the use, under this part, of information regarding producers, first handlers, or importers, that is accumulated under laws or regulations other than the Act or regulations issued under the Act.

### § 1221.127 Confidential treatment.

All information obtained from books, records, or reports under the Act and this part 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 representatives, first handlers, producers, or importers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on 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 there from, 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.

## QUALIFICATION OF SORGHUM PRODUCER ORGANIZATIONS

### § 1221.128 Qualification.

(a) Organizations receiving qualification from the Secretary will be entitled to submit requests for funding to the Board pursuant to § 1221.112(j). Only one sorghum producer organization per State may be qualified.

(b) State-legislated sorghum promotion, research, and information organizations may request qualification and will be considered first for qualification by the Secretary.

(c) If a State-legislated sorghum promotion, research, and information organization does not elect to seek qualification from the Secretary within a specified time period as determined by the Secretary, or does not meet eligibility requirements as specified by the Secretary, then any State sorghum producer organization whose primary purpose is to represent sorghum producers within a State, or any other State organization that has sorghum producers as part of its membership, may request qualification.

(d) Qualification shall be based, in addition to other available information, upon a factual report submitted by the organization that shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

(1) The geographic territory covered by the organization's active membership;

(2) The nature and size of the organization's active membership, proportion of active membership accounted for by producers, a map showing the sorghum-producing counties in which the organization has active members, the volume of sorghum produced in each such county, the number of sorghum producers in each such county, and the size of the organization's active sorghum producer membership in each such county;

(3) The extent to which the sorghum producer membership of such organization is represented in setting the organization's policies;

(4) Evidence of stability and permanency of the organization;

(5) Sources from which the organizations operating funds are derived;

(6) The functions of the organization; and

(7) The ability and willingness of the organization to further the purpose and objectives of the Act.

(e) The primary consideration in determining the eligibility of an organization shall be whether its sorghum producer membership consists of a sufficiently large number of sorghum producers who produce a relatively significant volume of sorghum to reasonably warrant its qualification to submit requests for funding to the Board. Any sorghum producer organization found eligible by the Secretary under this section will be qualified by the Secretary, and the Secretary's determination as to eligibility shall be final.

MISCELLANEOUS

**§ 1221.129 Right of the Secretary.**

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

**§ 1221.130 Referenda.**

(a) For the purpose of ascertaining whether the persons subject to this part favor the continuation, suspension, or termination of this part, the Secretary shall conduct a referendum among persons subject to assessments under § 1221.116 who, during a representative period determined by the Secretary, have engaged in the production or importation of sorghum.

(1) The referendum shall be conducted not later than 3 years after assessments first begin under this part.

(2) This part will be approved in a referendum if a majority of those persons voting vote for approval.

(b) The Secretary shall conduct a subsequent referendum:

(1) Not later than 7 years after assessments first begin under this part;

(2) At the request of the Board; or

(3) At the request of 10 percent or more of the sorghum producers and importers eligible to vote to determine if the persons favor the continuation, suspension, or termination of this part.

(c) The Secretary may conduct a referendum at any time to determine whether the continuation, suspension or termination of this part or a provision of this part is favored by sorghum producers and importers eligible to vote.

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

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

**§ 1221.131 Suspension or termination.**

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

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal period whenever the Secretary determines that its suspension or termination is approved or favored by a majority of the producers and importers voting who, during a representative period determined by the Secretary, have been engaged in the production or importation of sorghum.

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

(1) No later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under this subpart; and

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

**§ 1221.132 Proceedings after termination.**

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

(b) The said trustees shall:

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

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

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

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

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, by qualified organizations pursuant to § 1221.128 in the interest of continuing sorghum promotion, research, and information programs.

### § 1221.133 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination or amendment of this part or any subpart 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 part; or

(b) Release or extinguish any violation of this part; 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.

### § 1221.134 Personal liability.

No representative 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 representative or employee, except for acts of dishonesty or willful misconduct.

### § 1221.135 Separability.

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

### § 1221.136 Amendments.

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

### § 1221.137 Rules and regulations.

The Secretary may prescribe such rules and regulations as may be necessary to effectively carry out the provisions of this subpart.

### § 1221.138 OMB control number.

The control number assigned to the information collection requirements of this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581–0246.

## Subpart B—Procedures for the Conduct of Referenda

SOURCE: 75 FR 70575, November 18, 2010, unless otherwise noted.

DEFINITIONS

### § 1221.200 Terms defined.

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms in subpart A of this part.

### § 1221.201 Administrator, AMS.

*Administrator, AMS,* means the Administrator of the Agricultural Marketing Service, or any officer or employee of USDA to whom there has been delegated or may be delegated the

authority to act in the Administrator's stead.

**§ 1221.202 Administrator, FSA.**

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

**§ 1221.203 Eligible person.**

*Eligible person* is defined as any person subject to the assessment who during the representative period determined by the Secretary has engaged in the production or importation of sorghum. Such persons are eligible to participate in the referendum.

**§ 1221.204 Farm Service Agency.**

*Farm Service Agency*, also referred to as "FSA," means the Farm Service Agency of USDA.

**§ 1221.205 Farm Service Agency County Committee.**

*Farm Service Agency County Committee*, also referred to as "FSA County Committee or COC," means the group of persons within a county who are elected to act as the Farm Service Agency County Committee.

**§ 1221.206 Farm Service Agency County Executive Director.**

*Farm Service Agency County Executive Director*, also referred to as "CED," means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and to be responsible for the day-to-day operation of the FSA county office, or the person acting in such capacity.

**§ 1221.207 Farm Service Agency State Committee.**

*Farm Service Agency State Committee*, also referred to as "FSA State Committee," means the group of persons within a State who are appointed by the Secretary to act as the Farm Service Agency State Committee.

**§ 1221.208 Farm Service Agency State Executive Director.**

*Farm Service Agency State Executive Director*, also referred to as "SED," means the person within a State who is appointed by the Secretary to be responsible for the day-to-day operation of the FSA State Office, or the person acting in such capacity.

**§ 1221.209 Public notice.**

*Public notice* means not later than 30 days before the referendum is conducted, the Secretary shall notify the eligible voters in such manner as determined by the Secretary, of the voting period during which voting in the referendum will occur. The notice shall explain any registration and voting procedures established under section 518 of the Act.

**§ 1221.210 Representative period.**

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

**§ 1221.211 Voting period.**

The term *voting period* means a 4-week period to be announced by the Secretary for voting in the referendum.

PROCEDURES

**§ 1221.220 General.**

A referendum to determine whether eligible persons favor the continuance of this part shall be carried out in accordance with this subpart.

(a) The referendum will be conducted at county FSA offices for producers and through AMS headquarters offices for importers.

(b) The Secretary shall determine if at least a majority of those persons voting favor the continuance of this part.

**§ 1221.221 Supervision of the process for conducting referenda.**

The Administrator, AMS, shall be responsible for supervising the process of permitting persons to vote in a referendum in accordance with this subpart.

**§ 1221.222 Eligibility.**

(a) Any person subject to the assessment who during the representative period determined by the Secretary has engaged in the production or importation of sorghum is eligible to participate in the referendum. An eligible person at the time of the referendum and

during the representative period, shall be entitled to cast only one vote in the referendum.

(b) *Proxy registration*. Proxy registration is not authorized, except that an officer or employee of a corporate producer or importer, or any guardian, administrator, executor, or trustee of a person's estate, or an authorized representative of any eligible producer or importer entity (other than an individual person), such as a corporation or partnership, may vote on behalf of that entity. Further, an individual cannot vote on behalf of another individual (*i.e.*, spouse, family members, sharecrop lease, joint tenants, tenants in common, owners of community property, a partnership, or a corporation).

(c) Any individual, who votes on behalf of any producer or importer entity, shall certify that he or she is authorized by such entity to take such action. Upon request of the county FSA or AMS office, the person voting may be required to submit adequate evidence of such authority.

(d) *Joint and group interest*. A group of individuals, such as members of a family, joint tenants, tenants in common, a partnership, owners of community property, or a corporation who engaged in the production or importation of sorghum during the representative period as a producer or importer entity shall be entitled to cast only one vote; provided, however, that any individual member of a group who is an eligible person separate from the group may vote separately.

### § 1221.223 Time and place of the referendum.

(a) The opportunity to vote in the referendum shall be provided during a 4-week period beginning and ending on a date determined by the Secretary. Eligible persons shall have the opportunity to vote following the procedures established in this subpart during the normal business hours of each county FSA or AMS office.

(b) Persons can determine the location of county FSA offices by contacting the nearest county FSA office, the State FSA office, or through an online search of FSA's Web site.

(c) Each eligible producer shall cast a ballot in the county FSA office where FSA maintains the person's administrative farm records. For eligible persons not participating in FSA programs, the opportunity to vote will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production of sorghum in more than one county will vote in the county FSA office where the person does most of his or her business.

(d) Each eligible importer will cast a ballot in the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; Telephone: (202) 720–1115; Fax: (202) 720–1125.

### § 1221.224 Facilities.

Each county FSA office will provide:

(a) A voting place that is well known and readily accessible to persons in the county and that is equipped and arranged so that each person can complete and submit a ballot in secret without coercion, duress, or interference of any sort whatsoever, and

(b) A holding container of sufficient size so arranged that no ballot or supporting documentation can be read or removed without breaking seals on the container.

### § 1221.225 Certification and referendum ballot form.

Form LS–379 shall be used to vote in the referendum and certify eligibility. Eligible persons will be required to complete a ballot in its entirety, vote "yes" or "no" to continue the program and provide documentation such as a sales receipt or remittance form showing that the person voting was engaged in the production of sorghum during the representative period. The person or authorized representative shall sign the ballot certifying that they or the entity they represent were engaged in the production of sorghum during the representative period.

### § 1221.226 Certification and voting procedures.

(a) Each eligible person shall be provided the opportunity to cast a ballot

during the voting period announced by the Secretary.

(1) Each eligible person shall be required to complete Form LS–379 in its entirety, sign it and, provide evidence that they were engaged in the production or importation of sorghum during the representative period. The person must legibly place his or her name and, if applicable, the entity represented, address, county and, telephone number. The person shall sign and certify on Form LS–379 that:

(i) The person was engaged in the production or importation of sorghum during the representative period;

(ii) The person voting on behalf of a corporation or other entity is authorized to do so;

(iii) The person has cast only one vote; and

(2) Only a completed and signed Form LS–379 accompanied by supporting documentation showing that the person was engaged in the production or importation of sorghum during the representative period shall be considered a valid vote.

(b) To vote, eligible producers may obtain Form LS–379 in-person, by mail, or by facsimile from county FSA offices or through the Internet during the voting period. A completed and signed Form LS–379 and supporting documentation, such as a sales receipt or remittance form, must be returned to the appropriate county FSA office where FSA maintains and processes the person's administrative farm records. For a person not participating in FSA programs, the opportunity to vote in a referendum will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production of sorghum in more than one county will vote in the county FSA office where the person does most of his or her business. A completed and signed Form LS–379 and the supporting documentation may be returned in-person, by mail, or facsimile to the appropriate county FSA office. Form LS–379 and supporting documentation returned in-person or by facsimile, must be received in the appropriate county FSA office prior to the close of the work day on the final day of the voting period to be considered a valid ballot. Form LS–379 and the accompanying documentation returned by mail must be postmarked no later than midnight of the final day of the voting period and must be received in the county FSA office on the 5th business day following the final day of the voting period. To vote, eligible importers may obtain Form LS–379 in-person, by mail or, by facsimile from AMS offices or through the Internet during the voting period. A completed and signed Form LS–379 and supporting documentation, such as a U.S. Customs and Border Protection form 7501, must be returned to the AMS headquarters office.

(c) A completed and signed Form LS–379 and the supporting documentation may be returned in-person, by mail, or facsimile to the appropriate county FSA office for producers and to AMS office for importers. Form LS–379 and supporting documentation returned in-person or by facsimile, must be received in the appropriate county FSA office for producers or the AMS office for importers prior to the close of the work day on the final day of the voting period to be considered a valid ballot. Form LS–379 and the accompanying documentation returned by mail must be postmarked no later than midnight of the final day of the voting period and must be received in the county FSA office for producers and the AMS office for importers on the 5th business day following the final day of the voting period.

(d) Persons who obtain Form LS–379 in-person at the appropriate FSA county office may complete and return it the same day along with the supporting documentation. Importers who obtain Form LS–379 in-person at the appropriate AMS office may complete and return it the same day along with the supporting documentation.

### § 1221.227 Canvassing voting ballots.

(a) Canvassing of Form LS–379 shall take place at the appropriate county FSA offices or AMS office on the 6th business day following the final day of the voting period. Canvassing of producer ballots shall be in the presence of at least two members of the county committee. If two or more of the counties have been combined and are served by one county office, the canvassing of

the requests shall be conducted by at least one member of the county committee from each county served by the county office. The FSA State committee or the State Executive Director, if authorized by the State Committee, may designate the County Executive Director (CED) and a county or State FSA office employee to canvass the ballots and report the results instead of two members of the county committee when it is determined that the number of eligible voters is so limited that having two members of the county committee present for this function is impractical, and designate the CED and/or another county or State FSA office employee to canvass requests in any emergency situation precluding at least two members of the county committee from being present to carry out the functions required in this section.

(b) Canvassing of importer ballots will be performed by AMS personnel or any other person as deemed necessary.

(c) Form LS–379 should be canvassed as follows:

(1) *Number of valid ballots.* A person has been declared eligible by FSA or AMS to vote by completing Form LS–379 in its entirety, signing it, and providing supporting documentation that shows the person who cast the ballot during the voting period was engaged in the production or importation of sorghum. Such ballot will be considered a valid ballot.

(2) *Number of ineligible ballots.* If FSA or AMS cannot determine that a person is eligible based on the submitted documentation or if the person fails to submit the required supporting documentation, the person shall be determined to be ineligible. FSA or AMS shall notify ineligible persons in writing as soon as practicable but no later than the 8th business day following the final day of the voting period.

(d) *Appeal.* A person declared to be ineligible by FSA or AMS can appeal such decision and provide additional documentation to the FSA county office or AMS within 5 business days after the postmark date of the letter of notification of ineligibility. FSA or AMS will then make a final decision on the person's eligibility and notify the person of the decision.

(e) *Invalid ballots.* An invalid ballot includes, but is not limited to the following:

(1) Form LS–379 is not signed or all required information has not been provided;

(2) Form LS–379 and supporting documentation returned in-person or by facsimile was not received by close of business on the last business day of the voting period;

(3) Form LS–379 and supporting documentation returned by mail was not postmarked by midnight of the final day of the voting period;

(4) Form LS–379 and supporting documentation returned by mail was not received in the county FSA or AMS office by the 5th business day following the final day of the voting period;

(5) Form LS–379 or supporting documentation is mutilated or marked in such a way that any required information on the Form is illegible; or

(6) Form LS–379 and supporting documentation not returned to the appropriate county FSA or AMS office.

### § 1221.228 Counting ballots.

(a) Form LS–379 shall be counted by county FSA offices or the AMS office on the same day as the ballots are canvassed if there are no ineligibility determinations to resolve. For those county FSA offices that do have ineligibility determinations, the requests shall be counted no later than the 14th business day following the final day of the voting period.

(b) Ballots shall be counted as follows:

(1) Number of valid ballots cast;

(2) Number of persons favoring the Order;

(3) Number of persons not favoring the Order;

(4) Number of invalid ballots.

### § 1221.229 FSA county office report.

The county FSA office report shall be certified as accurate and complete by the CED or designee, acting on behalf of the Administrator, AMS, as soon as may be reasonably possible, but in no event shall submit no later than the 18th business day following the final

day of the specified period. Each county FSA office shall transmit the results in its county to the FSA State office. The results in each county may be made available to the public upon notification by the Administrator, FSA, that the final results have been released by the Secretary. A copy of the report shall be posted for 30 calendar days following the date of notification by the Administrator, FSA, in the county FSA office in a conspicuous place accessible to the public. One copy shall be kept on file in the county FSA office for a period of at least 12 months after notification by FSA that the final results have been released by the Secretary.

### § 1221.230 FSA State office report.

Each FSA State office shall transmit to the Administrator, FSA, as soon as possible, but in no event later than the 20th business day following the final day of the voting period, a report summarizing the data contained in each of the reports from the county FSA offices. One copy of the State summary shall be filed for a period of not less than 12 months after the results have been released and available for public inspection after the results have been released.

### § 1221.231 Results of the referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, reports from all State FSA offices. The Administrator, AMS shall tabulate the results of the ballots. USDA will issue an official press release announcing the results of referendum and publish the same results in the FEDERAL REGISTER. In addition, USDA will post the official results on its Web site. State reports and related papers shall be available for public inspection upon request during normal business hours at the Marketing Programs Branch; Livestock and Seed Program, AMS, USDA, Room 2628–S; STOP 0251; 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems necessary, a State report or county report shall be reexamined and checked by such persons who may be designated by the Secretary.

### § 1221.232 Disposition of records.

Each FSA CED will place in sealed containers marked with the identification of the "Sorghum Checkoff Program Referendum," all of the Forms LS–379 along with the accompanying documentation and county summaries. Such records will be placed in a secure location under the custody of FSA CED for a period of not less than 12 months after the date of notification by the Administrator, FSA, that the final results have been announced by the Secretary. If the county FSA office receives no notice to the contrary from the Administrator, FSA, by the end of the 12 month period as described above, the CED or designee shall destroy the records.

### § 1221.233 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart.

### § 1221.234 Confidentiality

The names of persons voting in the referendum and ballots shall be confidential and the contents of the ballots shall not be divulged except as the Secretary may direct. The public may witness the opening of the ballot box and the counting of the votes but may not interfere with the process.

## Subparts C–E [Reserved]

# PART 1230—PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION

## Subpart A—Pork Promotion, Research, and Consumer Information Order

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AUTHORITY: 7 U.S.C. 4801–4819 and 7 U.S.C. 7401.

## Subpart A—Pork Promotion, Research, and Consumer Information Order

SOURCE: 51 FR 31903, Sept. 5, 1986, unless otherwise noted.

DEFINITIONS

### § 1230.1 Act.

*Act* means the Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801–4819) and any amendments thereto.

### § 1230.2 Department.

*Department* means the United States Department of Agriculture.

### § 1230.3 Secretary.

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

### § 1230.4 Board.

*Board* means the National Pork Board established pursuant to § 1230.50.

### § 1230.5 Consumer information.

*Consumer information* means an activity intended to broaden the understanding of the sound nutritional attributes of pork and pork products, including the role of pork and pork products in a balanced, healthy diet.

### § 1230.6 Council.

*Council* means the National Pork Producers Council, a nonprofit corporation of the type described in section 501(c)(5) of the Internal Revenue Code of 1954 and incorporated in the State of Iowa.

### § 1230.7 Customs Service.

*Customs Service* means the United States Customs Service of the United States Department of Treasury.

### § 1230.8 Delegate Body.

*Delegate Body* means the National Pork Producers Delegate Body established pursuant to § 1230.30.

### § 1230.9 Fiscal period.

*Fiscal period* means the 12-month period ending on December 31 or such other consecutive 12-month period as the Secretary or Board may determine.

### § 1230.10 Imported.

*Imported* means entered, or withdrawn from a warehouse for consumption, in the customs territory of the United States.

### § 1230.11 Imported pork and pork products.

*Imported pork and pork products* means products which are imported into the United States which the Secretary determines contain a substantial amount of pork, including those products which have been assigned one or more of the following numbers in Schedule 1 of the Tariff Schedules of the United States Annotated (1985): 106.4020; 106.4040; 106.8000; 106.8500; 107.1000; 107.1500; 107.3020; 107.3040; 107.3060; 107.3515; 107.3525; 107.3540; and 107.3560.

### § 1230.12 Importer.

*Importer* means a person who imports porcine animals, pork, or pork products into the United States.

**§ 1230.13 Market.**

*Market* means to sell, slaughter for sale, or otherwise dispose of a porcine animal in commerce.

**§ 1230.14 Market value.**

*Market value* means, with respect to porcine animals which are sold, the price at which they are sold. With respect to porcine animals slaughtered for the sale by the producer, the term means the most recent annual seven-market average for barrows and gilts, as published by the Department. With respect to imported porcine animals, the term means the declared value. With respect to imported pork and pork products, the term means an amount which represents the value of the live porcine animals from which the pork or pork products were derived, based upon the most recent annual seven-market average for barrows and gilts, as published by the Department.

**§ 1230.15 Part and subpart.**

*Part* means the Pork Promotion, Research, and Consumer Information Order and all rules, regulations, and supplemental orders issued thereunder, and the aforesaid order shall be a "subpart of such part.

**§ 1230.16 Person.**

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

**§ 1230.17 Plans and projects.**

*Plans and projects* means promotion, research, and consumer information plans, studies, or projects.

**§ 1230.18 Porcine animal.**

*Porcine animal* means a swine, that is raised as (a) a feeder pig, that is, a young pig sold to another person to be finished for slaughtering over a period of more than 1 month; (b) for breeding purposes as seed stock and included in the breeding herd; and (c) a market hog, slaughtered by the producer or sold to be slaughtered, usually within 1 month of such transfer.

**§ 1230.19 Pork.**

*Pork* means the flesh of a porcine animal.

**§ 1230.20 Pork product.**

*Pork product* means an edible product produced or processed in whole or in part from pork.

**§ 1230.21 Producer.**

*Producer* means a person who produces porcine animals in the United States for sale in commerce.

**§ 1230.22 Promotion.**

*Promotion* means any action, including but not limited to paid advertising and retail or food service merchandising, taken to present a favorable image for porcine animals, pork, or pork products to the public, or to educate producers with the intent of improving the competitive position and stimulating sales of porcine animals, pork, or pork products.

**§ 1230.23 Research.**

*Research* means any action designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products, including the dissemination of the results of such research.

**§ 1230.24 State.**

*State* means each of the 50 States.

**§ 1230.25 State association.**

*State association* means the single organization of producers in a State that is organized under the laws of that State and is recognized by the chief executive officer of such State as representing such State's producers. If no such organization exists in a State as of January 1, 1986, the Secretary may recognize an organization that represents not fewer than 50 producers who market annually an aggregate of not less than 10 percent of the pounds of porcine animals marketed in such State. The Secretary may cease to recognize a State association and instead recognize another organization of producers in a State as that State's association if the Secretary determines either that a majority of the members of

the existing State association are not producers or that a majority of the members of the other organization seeking recognition are producers and that such organization better represents the economic interests of producers.

### § 1230.26 State where produced.

*State where produced* means with respect to a porcine animal marketed as a feeder pig or as breeding stock, the State in which that porcine animal was born, and with respect to a porcine animal that is marketed as a market hog, the State in which that porcine animal was fed for market.

NATIONAL PORK PRODUCERS DELEGATE BODY

### § 1230.30 Establishment and membership.

(a) There is hereby established a National Pork Producers Delegate Body which shall consist of producers and importers appointed by the Secretary.

(b)(1) At least two producer members shall be allocated to each State, but any State that has more than 300 but less than 601 shares shall receive three producer members; each State with more than 600 but less than 1,001 shares shall receive four producer members and each State with more than 1,000 shares shall receive an additional member in excess of four for each 300 additional shares in excess of 1,000 shares, rounded to the nearest 300.

(2) [Reserved]

(3) In each fiscal period, shares shall be assigned to each State on the basis of one share for each $1,000 (rounded to the nearest $1,000) of the net amount of assessments attributable to such State.

(c)(1) The number of importer members to be appointed shall be determined by allocating three such members for the first 1,000 shares. Importers shall receive an additional member in excess of three for each 300 shares in excess of 1,000 shares, rounded to the nearest 300.

(2) [Reserved]

(3) In each fiscal period, shares shall be assigned to importers on the basis of one share for each $1,000 (rounded to the nearest $1,000) of the net amount of assessments attributable to importers.

[51 FR 31903, Sept. 5, 1986, as amended at 60 FR 58501, Nov. 28, 1995]

### § 1230.31 Nomination and appointment of producer members.

(a) [Reserved]

(b) Delegate Body nominations for appointment as producer members shall be submitted to the Secretary in the number requested by the Secretary by each State association either after an election conducted in accordance with § 1230.32 and by nominating the producers who receive the highest number of votes in such State; or pursuant to a selection process that is approved by the Secretary, is given public-notice at least one week in advance by publication in a newspaper or newspapers of general circulation in such State and in pork production and agriculture trade publications, and provides complete and equal access to every producer who has paid all assessments due under this subpart and who has not demanded any refund of an assessment paid pursuant to this subpart in the period since the selection of the previous Delegate Body;

(c) The Secretary shall appoint the producer members of each Delegate Body from the nominations submitted in accordance with this section, except that if a State association does not submit nominations in the required manner or number, or if a State has no State association, the Secretary shall select producer members from that State after consultation with representatives of the pork industry in that State.

[51 FR 31903, Sept. 5, 1986, as amended at 60 FR 58501, Nov. 28, 1995]

### § 1230.32 Conduct of election.

If a State association selects nominees for appointment to the Delegate Body through an election, it shall be conducted in the following manner:

(a) Elections shall be administered by the Board and the Board shall determine the timing of any elections.

(b) Producers who are residents of that State may be named as candidates for election to be nominees for appointment to the Delegate Body:

(1) By a nominating committee of producers in that State appointed by the Board; or

(2) The number of pork producers in a State shall be determined by the Department based on the latest available Department information, which tabulates by State the number of farming operations with porcine animals.

(c) To be eligible to vote in an election to nominate producer members from a State, a person must:

(1) Be a producer who is a resident of that State;

(2) Have paid all assessments due pursuant to this subpart; and

(3) Not have demanded any refund of an assessment paid pursuant to this subpart in the period since the selection of the previous Delegate Body.

(d) The Board shall cause notices of any election to be published at least one week prior to the election in a newspaper or newspapers of general circulation in that State, and in pork production and agricultural trade publications. The notices shall set forth the period of time and places for voting and such other information as the Board considers necessary.

(e) The identity of any person who voted and the manner in which any person voted shall be kept confidential.

[51 FR 31903, Sept. 5, 1986, as amended at 53 FR 30245, Aug. 11, 1988]

### § 1230.33 Appointment of importer members.

The Secretary shall appoint the importer members of each Delegate Body after consultation with importers.

### § 1230.34 Term of office.

(a) The members of the Delegate Body shall serve for terms of one year, except that the members of the initial Delegate Body shall serve only until the completion of the nomination and appointment process of the succeeding Delegate Body.

(b) Each member of the Delegate Body shall serve until that member's term expires, or a successor is appointed, whichever occurs later.

### § 1230.35 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Delegate Body, the Secretary shall appoint a successor for the unexpired term of such member from nominations made either by the appropriate State association or by importers, depending upon whether the vacancy is a producer or importer vacancy.

### § 1230.36 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Delegate Body, but only if that majority is also entitled to cast a majority of the shares (including fractions thereof). Any action of the Delegate Body, including any motion or nomination presented to it for a vote, shall require a majority vote, that is, the concurring votes of a majority of the shares cast on that action. The Delegate Body shall give timely notice of its meetings. The Delegate Body shall give the Secretary the same notice of its meetings as it gives to its members in order that the Secretary or a representative of the Secretary may attend meetings.

(b) The number of votes that may be cast by a producer member if present at a meeting shall be equal to the number of shares attributable to the State of such member divided by the number of producer members from such State. The number of votes that may be cast by an importer member if present at a meeting shall be equal to the number of shares allocated to importers divided by the number of importer members.

### § 1230.37 Officers.

The Delegate Body shall elect its Chairperson by a majority vote at the first annual meeting, but at each annual meeting after the first, the President of the Board shall serve as the Delegate Body's Chairperson.

### § 1230.38 Compensation and reimbursement.

The members of the Delegate Body shall serve without compensation but may be reimbursed by the Board for actual transportation expenses incurred by them in exercising their powers and duties under this subpart. Such expenses shall be paid from funds received by the Board pursuant to § 1230.72.

**§ 1230.39 Powers and duties of the Delegate Body.**

The Delegate Body shall have the following powers and duties:

(a) To meet annually;

(b) To recommend the rate of assessment prescribed by the initial order and any increase in such rate;

(c) To determine the percentage of the net assessments attributable to porcine animals produced in a State that each State association shall receive; and

(d) To nominate not less than 23 persons, including producers from a minimum of 12 States or importers, for appointment to the initial Board and not less than one and one-half persons (rounded up to the nearest person) for each vacancy on the Board that requires nominations thereafter. Each nomination shall be by a majority vote of the Delegate Body voting in person in accordance with § 1230.36.

NATIONAL PORK BOARD

**§ 1230.50 Establishment and membership.**

There is hereby established a National Pork Board of 15 members consisting of producers representing at least 12 States or importers appointed by the Secretary from nominations submitted pursuant to § 1230.39(d). The Board shall be deemed to be constituted once the Secretary makes the appointments to the Board.

**§ 1230.51 Term of office.**

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall be designated for, and shall serve terms as follows: One-third of such members shall serve for one year terms; One-third shall serve for two year terms; and the remaining One-third shall serve for three year terms.

(b) Each member of the Board shall serve until the member's term expires, or until a successor is appointed, unless the member is removed pursuant to § 1230.55(b).

(c) No member shall serve more than two consecutive terms provided that those members serving an initial term of one year are eligible to serve two additional consecutive terms, but in no event, more than seven years in total.

(d) The first year of the terms of the initial Board shall begin immediately on appointment by the Secretary and continue until July 1, 1988. In subsequent years, the term of office shall begin on July 1.

**§ 1230.52 Nominations.**

Nominations for members of the Board shall be made by the Delegate Body in accordance with § 1230.39(d).

**§ 1230.53 Nominee's agreement to serve.**

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

(a) Serve on the Board if appointed;

(b) Disclose any relationship with the Council or a State association or any organization that has a contract with the Board and thereafter disclose, at any time while serving on the Board, any relationship with any organization that applies to the Board for a contract; and

(c) Withdraw from participation in deliberations, decisionmaking, or voting on matters concerning any entity referred to in paragraph (b) of this section, if an officer or member of the executive committee of such entity.

**§ 1230.54 Appointment.**

From the nominations submitted pursuant to § 1230.39(d), the Secretary shall appoint 15 producers or importers as members of the Board, but in no event shall the Secretary appoint producer members representing fewer than 12 States.

**§ 1230.55 Vacancies.**

(a) To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor for the unexpired term of such member from the most recent list of nominations made by the Delegate Body.

(b) If a member of the Board fails or refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or

willful misconduct, the Board may recommend to the Secretary that that member be removed from office. If the Secretary finds that the recommendation of the Board demonstrates adequate cause, the Secretary shall remove such member from office. A person appointed under this part or any employee of the Board may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

**§ 1230.56 Procedure.**

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall give timely notice of its meetings. The Board shall give the Secretary the same notice of its meetings, including the meetings of its committees, as it gives to its members in order that the Secretary, or a representative of the Secretary, may attend the meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, telegraph or by other means of communication when, in the opinion of the President of the Board, such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing and recorded in the Board minutes. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

**§ 1230.57 Compensation and reimbursement.**

The members of the Board shall serve without compensation but shall be reimbursed for reasonable expenses incurred by them in the exercise of their powers and the performance of their duties under this subpart. Such expenses shall be paid from funds received by the Board pursuant to § 1230.72.

**§ 1230.58 Powers and duties of the Board.**

The Board shall have the following powers and duties:

(a) To meet not less than annually, and to organize and elect from among its members, by majority vote, a President and such other officers as may be necessary;

(b) To receive and evaluate, or, on its own initiative, develop, and budget for proposals for plans and projects and to submit such plans and projects to the Secretary for approval;

(c) To administer directly or through contract the provisions of this subpart in accordance with its terms and provisions;

(d) To develop and submit to the Secretary for the Secretary's approval, plans and projects conducted either by the Board or others;

(e) To prepare and submit to the Secretary for the Secretary's approval, which is required for the following to be implemented:

(1) Budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including the projected cost of plans and projects to be conducted by the Board directly or by way of contract or agreement; and

(2) The budget, plans, or projects for which State associations are to receive funds under § 1230.72, including a general description of the proposed plan and project contemplated therein;

(f) With the approval of the Secretary, to enter into contracts or agreements with any person for the development and conduct of activities authorized under this subpart and for the payment of the cost thereof with funds collected through assessments pursuant to § 1230.71. Any such contract or agreement shall provide that:

(1) The contracting party shall develop and submit to the Board a plan or project together with a budget or budgets which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its relevant transactions and make periodic reports

to the Board of relevant activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(g) To appoint or employ staff persons as it may deem necessary, to define the duties and determine the compensation of each, to protect the handling of Board funds through fidelity bonds, and to conduct routine business.

(h) To disseminate information to or communicate with producers or State associations through programs or by direct contact utilizing the public postage system or other systems;

(i) To select committees and subcommittees of Board members and to adopt such rules and by laws for the conduct of its business as it may deem advisable;

(j) To utilize advisory committees of persons other than Board members to assist in the development of plans or projects and pay the reasonable expenses and fees of the members of such committees;

(k) To prescribe rules and regulations necessary to effectuate the terms and provisions of this subpart;

(l) To recommend to the Secretary amendments to this subpart;

(m) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under §1230.71 in, and only in, an obligation of the United States, a general obligation of any State or any political subdivision thereof, an interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or an obligation fully guaranteed as to principal and interest by the United States.

(n) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports as the Secretary may prescribe from time to time, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(o) To prepare and make public and available to producers and importers at least annually, a report of its activities carried out and an accounting of funds received and expended;

(p) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards at the end of each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

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

(r) To submit to the Secretary such information pursuant to this subpart as the Secretary may request; and

(s) To carry out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.

[51 FR 31903, Sept. 5, 1986, as amended at 53 FR 30245, Aug. 11, 1988]

PROMOTION, RESEARCH, AND CONSUMER INFORMATION

### §1230.60 Promotion, research, and consumer information.

(a) The Board shall receive and evaluate, or, on its own initiative, develop, and submit to the Secretary for approval, any plans and projects. Such plans and projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans and projects for promotion, research, and consumer information with respect to pork and pork products designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand domestic and foreign markets for pork and pork products;

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of pork and pork products and the creation of new products thereof, to the end that marketing and utilization of pork and pork products may be encouraged, expanded, improved, or made more acceptable.

(b) Each plan and project shall be periodically reviewed or evaluated by the Board to ensure that the plan and project contributes to an effective and

coordinated program of promotion, research, and consumer information. If it is found by the Board that any such plan and project does not further the purposes of the Act, the Board shall terminate such plan and project.

(c) No plan or project shall make a false or misleading claim on behalf of pork or a pork product or a false or misleading statement with respect to an attribute or use of a competing product.

(d) No plan or project shall undertake to advertise or promote pork or pork products by private brand or trade name unless such advertisement or promotion is specifically approved by the Board, with the concurrence of the Secretary.

EXPENSES AND ASSESSMENTS

**§ 1230.70 Expenses.**

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve that would permit an effective promotion, research, and consumer information program to continue in years when the amount of assessments may be reduced) as the Secretary finds are reasonable and likely to be incurred by the Board for its administration, maintenance, and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart, including financing plans and projects. Such expenses shall be paid from assessments collected pursuant to § 1230.71 and other funds available to the Board, including donations.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1230.71, for reasonable administrative expenses incurred by the Department with respect to this subpart after January 1, 1986, including any expenses reasonably incurred for the conduct of elections of nominees for appointment to the initial Delegate Body and for the conduct of referenda.

**§ 1230.71 Assessments.**

(a)(1) Each producer producing in the United States a porcine animal raised as a feeder pig that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a feeder pig.

(2) Each producer producing in the United States a porcine animal raised for slaughter that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a market hog.

(3) Each producer producing in the United States a porcine animal raised for slaughter that such producer slaughters for sale shall pay an assessment on that animal unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid on that animal as a market hog.

(4) Each producer producing in the United States a porcine animal raised for breeding stock that is sold shall pay an assessment on that animal, unless such producer demonstrates to the Board by appropriate documentation that an assessment was previously paid by a person on that animal as breeding stock.

(5) Each importer importing a porcine animal, pork, or pork product into the United States shall pay an assessment on that porcine animal, pork, or pork product, unless such importer demonstrates to the Board by appropriate documentation that an assessment was previously paid for that porcine animal, pork, or pork product.

(b)(1) Each purchaser of a porcine animal raised by a producer as a feeder pig or market hog shall collect an assessment on such porcine animal if an assessment is due pursuant to paragraph (a) of this section, and shall remit that assessment to the Board. For the purposes of collection and remittance of assessments, any person engaged as a commission merchant, auction market, or livestock market in the business of receiving such porcine animals for sale on commission for or on behalf of a producer shall be deemed to be a purchaser.

(2) Assessments on porcine animals raised as breeding stock which are sold by a commission merchant, auction, market, or livestock market in the business of receiving such porcine animals for sale on commission for or on behalf of a producer shall be collected

and remitted by the commission merchant, auction market, or livestock market selling such porcine animals.

(3) Each producer of porcine animals slaughtered for sale by the producer or sold directly to a consumer in connection with a custom slaughter operation shall remit an assessment to the Board if an assessment is due pursuant to paragraph (a) of this section.

(4) Assessments on domestic porcine animals shall be remitted in the form of a negotiable instrument made payable to the "National Pork Board," which, together with the reports required by § 1230.80, shall be sent to the address designated by the Board.

(5) Each importer of a porcine animal, pork, or pork product shall remit an assessment to the Customs Service at the time such porcine animal, pork, or pork product is imported or in such manner as may be established by regulations prescribed by the Board and approved by the Secretary, if an assessment is due pursuant to paragraph (a) of this section.

(c) The initial rate of assessment shall be 0.25 percent of market value.

(d) The rate of assessment may, upon the recommendation of the Delegate Body, be increased by regulations prescribed by the Board and approved by the Secretary by no more than 0.1 percent of such market value per fiscal period to a total of not more than 0.5 percent of market value.

(e) Assessments on imported pork and pork products shall be expressed in an amount per pound for each type of pork or pork product subject to assessment, which shall be established by regulations prescribed by the Board and approved by the Secretary.

[51 FR 31903, Sept. 5, 1986; 51 FR 36383, Oct. 10, 1986; 53 FR 1910, Jan. 25, 1988; 53 FR 30245, Aug. 11, 1988; 56 FR 6, Jan. 2, 1991]

### § 1230.72 Distribution of assessments.

Assessments remitted to the Board shall be distributed as follows:

(a) Each State association shall receive on a monthly basis, a percentage determined by the Delegate Body or 16.5 percent, whichever is higher, of the net assessments attributable to that State. The net assessments attributable to a State is the total amount of assessments received from producers in a State.

(b) A State association which was conducting a pork promotion program in the period from July 1, 1984 to June 30, 1985, shall receive additional amounts at such times as the Board may determine, so that the total amount received on an annual basis would be equal to the amount that would have been collected in such State pursuant to the pork promotion program in existence in such State from July 1, 1984, to June 30, 1985, had the porcine animals subject to assessment, been produced from July 1, 1984, to June 30, 1985, and been subject to the rates of assessment then in effect from such State to the Council and other national entities involved in pork promotion, research, and consumer information. This paragraph shall apply to a State association only if the annual amount determined under this paragraph would be greater than the annual amount determined under paragraph (a) of this section.

(c) The Council shall receive on a monthly basis 35 percent of the net assessments until after the referendum is conducted, and 25 percent thereafter and until 12 months after the referendum.

[51 FR 31903, Sept. 5, 1986, as amended at 60 FR 58501, Nov. 28, 1995]

### § 1230.73 Uses of distributed assessments.

(a) Each State association shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from the investment of such funds pending their use, for financing plans and projects and the administrative expenses incurred in connection therewith, including the cost of administering nominations and elections of producer members of the Delegate Body.

(b) The Council shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from the investment of such funds pending their use, for financing plans and projects and the Council's administrative expenses.

(c) The Board shall use its distribution of assessments pursuant to § 1230.72, as well as any proceeds from

the investment of such funds pending their use, for:

(1) Financing plans and projects;

(2) The Board's expenses for the Board's administration, maintenance, and functioning as authorized by the Secretary;

(3) Accumulation of a reserve not to exceed one fiscal period's budget to permit continuation of an effective promotion, research, and consumer information program in years when assessment amounts may be reduced; and

(4) The Secretary's administrative costs in carrying out this part.

### § 1230.74 Prohibited use of distributed assessments.

(a) No funds collected under this subpart shall in any manner be used for the purpose of influencing legislation as that term is defined in section 4911 (d) and (e)(2) of the Internal Revenue Code of 1954, or for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this part.

(b) Organizations receiving distributions of assessments from the Board shall furnish the Board with annual financial statements audited by a certified public accountant of all funds distributed to such organizations pursuant to this subpart and any other reports as may be required by the Secretary or the Board in order to verify the use of such funds.

[51 FR 31903, Sept. 5, 1986, as amended at 53 FR 30245, Aug. 11, 1988; 60 FR 33683, June 29, 1995]

### § 1230.75 Adjustment of accounts.

Whenever the Board or the Department determines, through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. Any amount due the Board shall be remitted to the Board by the next date for remitting assessments as provided in § 1230.71(b)(3). Any overpayment to the Board shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months except that the Board shall make prompt payment when an overpayment cannot be adjusted by a credit.

### § 1230.76 Charges.

Any assessment not paid when due shall be increased 1.5 percent each month beginning with the day following the date such assessment was due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

### § 1230.77 [Reserved]

## REPORTS, BOOKS, AND RECORDS

### § 1230.80 Reports.

Each person responsible for collecting or remitting any assessment under § 1230.71(b) shall report at the time for remitting assessments to the Board the following information:

(a) The quantity and market value of the porcine animals subject to assessment;

(b) The amount of assessment collected;

(c) The month the assessment was collected;

(d) The State where the porcine animals were produced; and

(e) Such other information as may be required by regulations prescribed by the Board and approved by the Secretary.

### § 1230.81 Books and records.

Each person who is subject to this subpart shall maintain and, during normal business hours, make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provision of this subpart, including

such records as are necessary to verify any required reports. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

### § 1230.82 Confidential treatment.

All information obtained from the books, records or reports required to be maintained under §§ 1230.80 and 1230.81 of this subpart shall be kept confidential by all persons, including employees and agents and former employees and agents of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting parties having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively implement, administer, or enforce the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired shall be disclosed as the Secretary deems relevant and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

MISCELLANEOUS

### § 1230.85 Proceedings after termination.

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

(b) The said trustees shall:

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

(2) Carry out the obligations of the Board under any contract or agreement;

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

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

(c) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the plans and projects authorized pursuant to this subpart.

### § 1230.86 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant hereto, 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 hereafter 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, the Secretary, or any person with respect to any such violation.

### § 1230.87 Personal liability.

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

### § 1230.88 Patents, copyrights, inventions, and publications.

Any patents, copyrights, trademarks, inventions, or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the United States Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications inure to the benefit of the Board as income and be subject to the same fiscal, budget, and audit controls as other funds of the Board. Upon termination of this subpart, § 1230.85 shall apply to determine disposition of all such property.

### § 1230.89 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose amendments to the Secretary.

### § 1230.90 Separability.

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

### § 1230.91 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter and have been assigned OMB Control Number 0851–0151.

## Subpart B—Rules and Regulations

SOURCE: 53 FR 1911, Jan. 25, 1988, unless otherwise noted.

DEFINITIONS

### § 1230.100 Terms defined.

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms in Subpart A of this part.

### § 1230.102 Exemption.

(a) A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; produces only products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (i) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for an exemption under this section, the producer shall submit the request to the Board—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the producer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each person responsible for collecting and remitting the assessment to the Board.

(f) The person responsible for collecting and remitting the assessment to the Board shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(g) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic porcine animals or pork and pork products—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic porcine animals or pork and pork products bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(i) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2760, Jan. 14, 2005]

ASSESSMENTS

### § 1230.110 Assessments on imported pork and pork products.

(a) The following Harmonized Tariff Schedule (HTS) categories of imported live porcine animals are subject to assessment at the rate specified.

| Live porcine animals | Article description | Assessment |
|---|---|---|
| 0103.10.0000 | Purebred breeding animals | 0.40 percent Customs Entered Value. |
| 0103.91.00 | Other: Weighing less than 50 kg each. | |
| 0103.91.0010 | Weighing less than 7 kg each | 0.40 percent Customs Entered Value. |
| 0103.91.0020 | Weighing 7 kg or more but less than 23 kg each | 0.40 percent Customs Entered Value. |
| 0103.91.0030 | Weighing 23 kg or more but less than 50 kg each | 0.40 percent Customs Entered Value. |
| 0103.92.00 | Weighing 50 kg or more each. | |
| 0103.92.0010 | Imported for immediate slaughter | 0.40 percent Customs Entered Value. |
| 0103.92.0090 | Other | 0.40 percent Customs Entered Value. |

(b) The following HTS categories of imported pork and pork products are subject to assessment at the rates specified.

| Pork and pork products | Article description | Assessment | |
|---|---|---|---|
| | | Cents/lb | Cents/kg |
| 0203 | Meat of swine, fresh, chilled, or frozen: Fresh or chilled: | | |
| 0203.11.0000 | Carcasses and half-carcasses | .20 | .440920 |
| 0203.12.1010 | Processed hams and cuts thereof, with bone in | .20 | .440920 |
| 0203.12.1020 | Processed shoulders and cuts thereof, with bone in | .20 | .440920 |
| 0203.12.9010 | Other hams and cuts thereof, with bone in | .20 | .440920 |

| Pork and pork products | Article description | Assessment | |
|---|---|---|---|
| | | Cents/lb | Cents/kg |
| 0203.12.9020 | Other shoulders and cuts thereof, with bone in | .20 | .440920 |
| 0203.19.2010 | Processed spare ribs | .23 | .507058 |
| 0203.19.2090 | Processed other | .23 | .507058 |
| 0203.19.4010 | Bellies | .20 | .440920 |
| 0203.19.4090 | Other | .20 | .440920 |
| 0203.21.0000 | Frozen carcasses and half-carcasses | .20 | .440920 |
| 0203.22.1000 | Frozen-processed hams, shoulders, and cuts thereof, with bone in | .20 | .440920 |
| 0203.22.9000 | Frozen-other hams, shoulders, and cuts thereof, with bone in | .20 | .440920 |
| 0203.29.2000 | Frozen processed other | .23 | .507058 |
| 0203.29.4000 | Frozen other: Other | .20 | .440920 |
| 0206 | Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled, or frozen:. | | |
| 0206.30.0000 | Of swine, fresh or chilled | .20 | .440920 |
| 0206.41.0000 | Of swine, frozen: Livers | .20 | .440920 |
| 0206.49.0000 | Of swine, frozen: Other | .20 | .440920 |
| 0210 | Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal:. | | |
| 0210.11.0010 | Meat of swine: Hams and cuts thereof, with bone in | .20 | .440920 |
| 0210.11.0020 | Meat of swine: Shoulders and cuts thereof, with bone in | .20 | .440920 |
| 0210.12.0020 | Meat of swine: Bellies (streaky) and cuts thereof, Bacon | .20 | .440920 |
| 0210.12.0040 | Meat of swine: Bellies (streaky) and cuts thereof, Other | .20 | .440920 |
| 0210.19.0010 | Meat of swine: Canadian style bacon | .23 | .507058 |
| 0210.19.0090 | Meat of Swine: Other | .23 | .507058 |
| 1601 | Sausages and similar products, of meat, meat offal or blood; food preparations based on these products: | | |
| 1601.00.2010 | Pork canned | .28 | .617288 |
| 1601.00.2090 | Pork other | .28 | .617288 |
| 1602 | Other prepared or preserved meat, meat offal or blood. | | |
| 1602.41.2020 | Of swine: Boned and cooked and packed in airtight containers holding less than 1 kg. | .30 | .661380 |
| 1602.41.2040 | Of swine: Other boned and cooked and packed in airtight containers | .30 | .661380 |
| 1602.41.9000 | Of swine: Other | .20 | .440920 |
| 1602.42.2020 | Of swine: Shoulders and cuts thereof: Boned and cooked and packed in airtight containers holding less than 1 kg. | .30 | .661380 |
| 1602.42.2040 | Of swine: Shoulders and cuts thereof: Other boned and cooked and packed in airtight containers. | .30 | .661380 |
| 1602.42.4000 | Of swine: Other shoulders and cuts thereof | .20 | .440920 |
| 1602.49.2000 | Of swine: Other, including mixtures: Not containing cereals or vegetables: Boned and cooked and packed in air-tight containers. | .28 | .617288 |
| 1602.49.4000 | Of swine: Other, including mixtures: Not containing cereals or vegetables: Other | .23 | .507058 |
| 1602.49.9000 | Of swine: Other, including mixtures: Other | .23 | .507058 |

[69 FR 9925, Mar. 3, 2004]

### § 1230.111 Remittance of assessments on domestic porcine animals.

Assessments on domestic porcine animals shall be remitted to the National Pork Board pursuant to § 1230.71(b) in accordance with the following remittance schedule.

(a) Monthly assessments totaling $25 or more shall be remitted to the Board by the 15th day of the month following the month in which the porcine animals were marketed or by the 15th day following the end of a Board-approved, consecutive 4-week period in which the porcine animals were marketed.

(b) Assessments totaling less than $25 during each month of a quarter in which the porcine animals were marketed may be accumulated and remitted by the 15th day of the month following the end of a quarter. The quarters shall be: January through March; April through June; July through September; October through December.

(c) Assessments totaling $25 or more during any month of a quarter must be remitted by the 15th day of the month following the month of the quarter in which the assessments totaled $25 or more, together with any unremitted assessments from the previous month(s) of the quarter, if applicable.

(d) Assessments collected during any calendar quarter and not previously remitted as described in paragraphs (b) or (c) of this section must be remitted by the 15th day of the month following the end of the quarter regardless of the amount.

[56 FR 6, Jan. 2, 1991]

### § 1230.112 Rate of assessment.

In accordance with § 1230.71(d) the rate of assessment shall be 0.40 percent of market value.

[67 FR 58323, Sept. 16, 2002]

### § 1230.113 Collection and remittance of assessments for the sale of feeder pigs and market hogs.

Pursuant to the provisions of § 1230.71, purchasers of feeder pigs or market hogs shall collect assessments from producers if an assessment is due and shall remit those assessments to the Board. Failure of the purchaser to collect such assessment from a producer shall not relieve the producer of the obligation to pay the assessment. If the purchaser fails to collect the assessment when an assessment is due pursuant to § 1230.71, the producer (seller) shall remit the total amount of assessments due to the Board as set forth in § 1230.111.

[65 FR 7283, Feb. 14, 2000]

### § 1230.115 Submission of annual financial statements.

State Pork Producer Associations, as defined in § 1230.25, that receive distributions of assessments pursuant to § 1230.72 and that receive less than $30,000 in assessments annually, may satisfy the requirements of § 1230.74(b) by providing to the Board unaudited annual financial statements prepared by State association staff members or individuals who prepare annual financial statements, provided that two members of the State association attest to and certify such financial statements. Notwithstanding any provisions of the Order to the contrary, State associations that receive less than $30,000 in distributed assessments annually and submit unaudited annual financial statements to the Board shall be required to submit an annual financial statement audited by a certified public accountant at least once every 5 years, or more frequently if deemed necessary by the Board or the Secretary. The Board may elect to conduct its own audit of the annual financial statements of State Pork Producer Associations that receive less than $2,000 in distributed assessments annually, every 5 years in lieu of the required financial statements.

[60 FR 33683, June 29, 1995]

MISCELLANEOUS

### § 1230.120 OMB control number assigned pursuant to the Paperwork Reduction Act.

The information collection and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control number 0851–0151.

## Subpart C [Reserved]

## Subpart D—Procedures for Nominations and Elections of Pork Producers and Nominations of Importers for Appointment to the Initial National Pork Producers Delegate Body

### §§ 1230.501–1230.512 [Reserved]

## Subpart E—Procedures for the Conduct of Referendum

SOURCE: 65 FR 43508, July 13, 2000, unless otherwise noted.

DEFINITIONS

### § 1230.601 Act.

The term *Act* means the Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801–4819) and any amendments thereto.

### § 1230.602 Administrator, AMS.

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

### § 1230.603 Administrator, FSA.

The term *Administrator, FSA,* means the Administrator, of the Farm Service Agency, or any officer or employee of the Department to whom there has

heretofore been delegated or may hereafter be delegated the authority to act in the Administrator's stead.

**§ 1230.604 Department.**

The term *Department* means the United States Department of Agriculture.

**§ 1230.605 Farm Service Agency.**

The term *Farm Service Agency* also referred to as "FSA" means the Farm Service Agency of the Department.

**§ 1230.606 Farm Service Agency County Committee.**

The term *Farm Service Agency County Committee,* also referred to as the *FSA County Committee* or *COC*, means the group of persons within a county elected to act as the Farm Service Agency County Committee.

**§ 1230.607 Farm Service Agency County Executive Director.**

The term *Farm Service Agency County Executive Director* also referred to as the *CED,* means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and be responsible for the day-to-day operations of the FSA county office or the person acting in such capacity.

**§ 1230.608 Imported porcine animals, pork, and pork products.**

The term *Imported porcine animals, pork, and pork products* means those animals, pork, or pork products that are imported into the United States and subject to assessment under the harmonized tariff schedule numbers identified in § 1230.110 of the regulations.

**§ 1230.609 Importer.**

The term *Importer* means a person who imports porcine animals, pork, or pork products into the United States.

**§ 1230.610 Order.**

The term *Order* means the Pork Promotion, Research, and Consumer Information Order.

**§ 1230.611 Porcine animal.**

The term *Porcine animal* means a swine, that is raised:

(a) As a feeder pig, that is, a young pig sold to another person to be finished over a period of more than 1 month for slaughtering;

(b) For breeding purposes as seedstock and included in the breeding herd; and

(c) As a market hog, slaughtered by the producer or sold to be slaughtered, usually within 1 month of such transfer.

**§ 1230.612 Person.**

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

**§ 1230.613 Pork.**

The term *Pork* means the flesh of a porcine animal.

**§ 1230.614 Pork product.**

The term *Pork product* means an edible product processed in whole or in part from pork.

**§ 1230.615 Producer.**

The term *Producer* means a person who produces porcine animals in the United States for sale in commerce.

**§ 1230.616 Public notice.**

The term *Public notice* means information regarding a referendum that would be provided by the Secretary, such as press releases, newspapers, electronic media, FSA county newsletters, and the like. Such notice would contain the referendum date and location, registration and voting requirements, rules regarding absentee voting, and other pertinent information.

**§ 1230.617 Referendum.**

The term *Referendum* means any referendum to be conducted by the Secretary pursuant to the Act whereby persons who have been producers and importers during a representative period would be given the opportunity to vote to determine whether producers and importers favor continuation of the Order.

**§ 1230.618 Representative period.**

The term *Representative period* means the 12-consecutive months prior to the

first day of absentee and importer voting in the referendum. The representative period for this referendum is August 18, 1999, through August 17, 2000.

**§ 1230.619 Secretary.**

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

**§ 1230.620 State.**

The term *State* means each of the 50 States.

**§ 1230.621 Voting period.**

The term *Voting period* means the 3-consecutive business day period for in-person voting.

REFERENDUM

**§ 1230.622 General.**

(a) A referendum to determine whether eligible pork producers and importers favor continuation of the Pork Checkoff Program will be conducted in accordance with this subpart.

(b) The Pork Checkoff Program will be terminated only if a majority of producers and importers voting in the referendum favor such termination.

(c) The referendum will be conducted at the county FSA offices for producers and at FSA headquarters office in Washington, DC, for importers.

**§ 1230.623 Supervision of referendum.**

The Administrator, AMS, will be responsible for conducting the referendum in accordance with this subpart.

**§ 1230.624 Eligibility.**

(a) Eligible producers and importers. Persons eligible to register and vote in the referendum include:

(1) Individual Producers. Each individual that owns and sells at least one hog or pig during the representative period and does so in his or her own name is entitled to cast one ballot.

(2) Producers who are a corporation or other entity. Each corporation or other entity that owns and sells at least one hog or pig during the representative period is entitled to cast one ballot. A group of individuals, such as members of a family, a partnership, owners of community property, or a corporation engaged in the production of hogs and pigs will be entitled to only one vote; provided, however, that any member of a group may register to vote as a producer if he or she sells at least one hog or pig in his or her own name.

(3) Importers. Each importer who imports hogs, pigs, pork, or pork products during the representative period is entitled to cast one ballot. A group of individuals, such as members of a family, a partnership, or a corporation engaged in the importation of hogs, pigs, pork, or pork products will be entitled to only one vote; provided, however, that any member of a group may register to vote as an importer if he or she imports hogs, pigs, pork, or pork products in his or her own name.

(b) Proxy registration and voting. Proxy registration and voting is not authorized, except that an officer or employee of a corporate producer or importer, or any guardian, administrator, executor, or trustee of a producer's or importer's estate, or an authorized representative of any eligible producer or importer (other than an individual producer or importer), such as a corporation or partnership, may register and cast a ballot on behalf of that entity. Any individual who registers to vote in the referendum on behalf of any eligible producer or importer corporation or other entity must certify that he or she is authorized to take such action.

**§ 1230.625 Time and place of registration and voting.**

(a) Producers. The referendum shall be held for 3-consecutive days on September 19, 20, 21, 2000. Eligible producers shall register and vote on-site following the procedures in 1230.628. Producers shall register and vote during the normal business hours of each county FSA office or request absentee ballots from the county FSA offices by mail, telephone, or facsimile, or pick up an absentee ballot in-person. The absentee voting period shall be from August 18, 2000, through September 21, 2000.

(b) Importers. Importer voting shall take place during the same time period provided producers for in-person and absentee voting in the referendum. The referendum shall be conducted by mail ballot by the FSA headquarters office in Washington, DC, between August 18, 2000, through September 21, 2000.

### § 1230.626 Facilities for registering and voting.

(a) Producers. Each county FSA office shall provide:

(1) Adequate facilities and space to permit producers of hogs and pigs to register and to mark their ballots in secret;

(2) A sealed box or other designated receptacle for registration forms and ballots that is kept under observation during office hours and secured at all times; and

(3) Copies of the Order for review.

(b) Absentee ballots. Each FSA county office shall provide each producer an absentee ballot package upon request. Producers can pick up an absentee ballot in-person or request it by telephone, mail, or facsimile. The FSA county office will provide absentee ballots by mail for all requests received by telephone, mail, or facsimile. The FSA county office shall record date of receipt of the "Pork Referendum" envelope containing the completed absentee ballot on the Absentee Voter Request List and place it unopened in a secure ballot box.

(c) Importers. The FSA headquarters office in Washington, DC, will:

(1) Mail ballot packages to eligible importers upon request;

(2) Have a sealed box or other designated receptacle for registration forms and ballots that is kept under observation during office hours and secured at all times; and

(3) Mail copies of the Order to importers if requested by mail, telephone, or facsimile. Importers can also pickup a ballot in-person.

### § 1230.627 Registration form and ballot.

(a) *Producers*. (1) A ballot (Form LS–72) and combined registration and certification form (Form LS–72–2) will be used for voting in-person. The information required on the registration form includes name, address, and telephone number. Form LS–72–2 also contains the certification statement referenced in § 1230.628. The ballot will require producers to check a "yes" or "no."

(2) A combined registration and voting form (Form LS–73) will be used for absentee voting. The information required on this combined registration and voting form includes name, address, and telephone number. Form LS–73 also contains the certification statement referenced in § 1230.628. The ballot will require producers to check "yes" or "no."

(b) *Importers*. A combined registration and ballot form (Form LS–76) will be used for importer voting. The information required on this combined registration and ballot form includes name, address, and telephone number. Form LS–76 also contains the certification statement referenced in § 1230.629. The ballot will require importers to check "yes" or "no."

### § 1230.628 Registration and voting procedures for producers.

(a) *Registering and voting in-person*. (1) Each eligible producer who wants to vote whether as an individual or as a representative of a corporation or other entity shall register during the 3-day in-person voting period at the county FSA office where FSA maintains and processes the individual producer's or corporation's or other entities' administrative farm records. A producer voting as an individual or as a representative of a corporation or other entity not participating in FSA programs, shall register and vote in the county FSA office serving the county where the individual producer or corporation or other entity owns hogs or pigs. An individual or an authorized representative of a corporation or other entity who owns hogs or pigs in more than one county shall register and vote in the FSA county office where the individual or corporation or other entity does most of their business. Producers shall be required to record on the In-Person Voter Registration List (Form LS–75) their name and address, and if applicable, the name and address of the corporation or other entity they represent before they can receive a registration form and

ballot. To register, producers shall complete the in-person registration and certification form (Form LS–72–2) and certify that:

(i) They or the corporation or other entity they represent were producers during the specified representative period; and

(ii) The person voting on behalf of a corporation or other entity referred to in § 1230.612 is authorized to do so.

(2) Each eligible producer who has not voted by means of an absentee ballot may cast a ballot in-person at the location and time set forth in § 1230.625 and on September 19, 20, 21, 2000. Eligible producers who record their names and addresses and, if applicable, the name and address of the corporation or other entity they are authorized to represent on the In-Person Voter Registration List (Form LS–75) will receive a combined registration and certification form printed on an envelope (Form LS–72–2) and a ballot (Form LS–72). Producers will enter the information requested on the combined registration and certification form/envelope (Form LS–72–2) as indicated above. Producers will then mark their ballots to indicate "yes" or "no." Producers will place their completed ballots in an envelope marked "Pork Ballot" (Form LS–72–1), seal and place it in the completed and signed registration form/envelope marked "Pork Referendum" (Form LS–72–2), seal that envelope and personally place it in a box marked "Ballot Box" or other designated receptacle. Voting will be conducted on-site under the supervision of the county FSA County Executive Director (CED).

(b) *Absentee voting.* (1) Eligible producers who are unable to vote in-person may request an absentee voting package consisting of a combined registration and absentee ballot form (Form LS–73) and two envelopes—one marked "Pork Ballot" (Form LS–72–1) and the other marked "Pork Referendum" (Form LS–73–1) by mail, telephone, facsimile, or by picking up one in-person from the county FSA office where FSA maintains and processes the producer's administrative farm records.

(2) If a producer, whether requesting an absentee ballot as an individual or as an authorized representative of a corporation or other entity that does not participate in FSA programs, and therefore does not have administrative records at a county FSA office, he or she may request an absentee voting package by telephone, mail, facsimile, or pick it up in-person from the county FSA office serving the county where the individual or corporation or other entity owns hogs or pigs. An individual or authorized representative of a corporation or other entity, who owns hogs or pigs in more than one county can request an absentee ballot from the county FSA office where the producer or corporation or other entity does most of their business.

(3) An absentee voting package will be mailed to producers by the FSA CED to the address provided by the prospective voter. Only one absentee registration form and absentee ballot will be provided to each eligible producer. The absentee ballots and registration forms may be requested during August 1, 2000, through September 18, 2000.

(4) The county FSA office will enter on the Absentee Voter Request List (Form LS–74) the name and address of the individual or corporation or other entity requesting an absentee ballot and the date the forms were requested.

(5) To register, eligible producers shall complete and sign the combined registration and certification form and absentee ballot (Form LS–73) and certify that:

(i) They or the corporation or other entity they represent were producers during the specified representative period;

(ii) If voting on behalf of a corporation or other entity referred to in § 1230.612, they are authorized to do so.

(6) A producer, after completing the absentee voter registration form and marking the ballot, shall remove the ballot portion of the combined registration and absentee ballot form (Form LS–73) and seal the completed ballot in a separate envelope marked "Pork Ballot" (Form LS–72–1) and place the sealed "Pork Ballot" envelope in the mailing envelope marked "Pork Referendum" (Form LS–73–1) along with the signed registration form. Producers are required to print their name and address on the mailing envelope

marked "Pork Referendum" (Form LS–73–1), and mail or hand deliver it to the county FSA office from which the producer or corporation or other entity obtained the absentee voting package. Absentee ballots returned in-person must be received by close of business on the last day of the in-person voting period, which is September 21, 2000. Ballots received after that date will be counted as invalid ballots.

(7) Absentee ballots returned by mail have to be postmarked with a date not later than the last day of the in-person voting period, which is September 21, 2000, and be received in the county FSA office by the close of business on the 5th business day after the last day of the in-person voting period, which is September 28, 2000. Absentee ballots received after that date will be counted as invalid ballots. Upon receiving the "Pork Referendum" envelope (Form LS–73–1) containing the registration form and ballot, the county FSA CED will record the date the "Pork Referendum" envelope (Form LS–73–1) containing the absentee ballot was received in the FSA county office on the Absentee Voter Request List (Form LS–74) opposite the name of the producer voting absentee. The county FSA CED will place it, unopened, in a secure ballot box.

### § 1230.629 Registration and voting procedures for importers.

(a) Individual importers, corporations, or other entities can obtain the registration and certification forms, ballots, and envelopes by mail from the following address: USDA, FSA, Operations Review and Analysis Staff, Attention: William A. Brown, P.O. Box 44366, Washington, DC 20026–4366. Importers may pick up the voting materials in-person at USDA, FSA, Operations Review and Analysis Staff, Room 2741, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC. Importers may also request voting materials by facsimile or telephone. The facsimile number is 202/690–3354. The telephone number is 202/720–6833.

(b) When requesting a ballot, eligible importers will be required to submit a U.S. Customs Service Form 7501 showing that they paid the pork assessment during the representative period.

(c) Upon receipt of a request and U.S. Customs Service Form 7501, the voting materials will be mailed to importers by the FSA headquarters office in Washington, DC, to the address provided by the importer or importer corporation or other entity. Only one mail ballot and registration form will be provided to each eligible importer. The forms must be requested during August 1, 2000, through September 21, 2000.

(d) The FSA headquarters office in Washington, DC, will enter on the Importer Ballot Request List (Form LS–77) the name and address of the importer requesting a ballot and the date of the request.

(e) To register, eligible importers will complete and sign the combined registration form and ballot (Form LS–76) and certify that:

(1) To the best of their knowledge and belief the information provided on the form is true and accurate;

(2) If voting on behalf of an importer corporation or other entity referred to in § 1230.612, they are authorized to do so.

(f) Eligible importers, after completing the combined ballot and registration form, will remove the ballot portion of the combined registration and ballot form (Form LS–76) and seal the completed ballot in a separate envelope marked "Pork Ballot" (Form LS–72–1) and place the sealed "Pork Ballot" envelope in the mailing envelope marked "Pork Referendum" (Form LS–73–1) along with the signed registration form. Importers, corporations, or other entities must legibly print their name and address on the mailing envelope marked "Pork Referendum" (Form LS–73–1), and mail the envelope to the FSA headquarters office at the following address: USDA, FSA, Operations Review and Analysis Staff, Attention: William A. Brown, Post Office Box 44366, Washington, DC 20026–4366. Importers may hand deliver the "Pork Referendum" envelope to USDA, FSA, Operations Review and Analysis Staff, Room 2741, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC.

(g) The "Pork Referendum" envelope (Form LS–73–1) containing the registration form and ballot has to be postmarked with a date not later than the last day of the in-person voting period, which is September 21, 2000, and be received in the FSA headquarters office by the close of business on the 5th business day after the date of the last day of the in-person voting period, which is September 28, 2000. If delivered in-person, it has to reach headquarters office not later than the last day of the in-person voting period. Ballots received after that date will be counted as invalid ballots. Upon receiving the "Pork Referendum" envelope (Form LS–73–1) containing the registration form and ballot, an FSA employee will record the date the "Pork Referendum" envelope containing the completed ballot was received in the FSA headquarters office in Washington, DC, on the Importer Ballot Request List (Form LS–77) directly opposite the voting importer's name. The FSA employee will place the "Pork Referendum" envelope, unopened, in a secure ballot box.

**§ 1230.630 List of registered voters.**

(a) *Producers.* The In-Person Voter Registration List (Form LS–75) and the Absentee Voter Request List (Form LS–74) will be available for inspection during the 3 days of the voting period and during the 7 business days following the date of the last day of the voting period at the county FSA office. The lists will be posted during regular office hours in a conspicuous public location at the FSA county office. The Absentee and In-Person Voter Registration Lists will be updated and posted daily. The complete In-Person Voter Request List (Form LS–75) will be posted in the FSA county office on the 1st business day after the date of the last day of the voting period. The complete Absentee Voter Request List (Form LS–74) will be posted in the FSA county office on the 6th business day after the date of the last day of the voting period.

(b) *Importers.* The Importer Ballot Request List (Form LS–77) will be maintained by the FSA headquarters office in Washington, DC, and not posted.

**§ 1230.631 Challenge of votes.**

(a) *Challenge period.* During the dates of the 3-consecutive day voting period and the 7 business days following the voting period, the ballots of producers may be challenged at the FSA county office.

(b) *Who can challenge.* Any person can challenge a producer's vote. Any person who wants to challenge shall do so in writing and shall include the full name of the individual or corporation or other entity being challenged. Each challenge of a producer vote must be made on a separate sheet of paper and each challenge must be signed by the challenger. The identity of the challenger will be kept confidential except as the Secretary may direct or as otherwise required by law.

(c) *Who can be challenged.* Any producer having cast an in-person ballot or an absentee ballot whose name is posted on the In-Person Voter Registration List (Form LS–75) or the Absentee Voter Request List (Form LS–74) can be challenged. There is no challenge process for importers.

(d) *Notification of challenges.* The FSA County Committee or its representative, acting on behalf the Administrator, AMS, will notify challenged producers as soon as practicable, but no later than 12 business days after the date of the last day of the in-person voting period. FSA will notify all challenged persons that documentation such as sales documents, tax records, or other similar documents proving that the person owned and sold hogs or pigs during the representative period must be submitted or his or her vote will not be counted. The documentation must be provided to the FSA county offices within 5 business days of notification and not later than 17 business days after the date of the last day of the voting period.

(e) *Determination of challenges.* The FSA County Committee or its representative, acting on behalf of the Administrator, AMS, will make a determination concerning the challenge based on documentation provided by the producer and will notify challenged producers as soon as practicable, but no later than 22 business days after the date of the last day of the in-person voting period of its decision.

(f) *Challenged ballot.* A challenge to a ballot shall be deemed to have been resolved if the determination of the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, is not appealed within the time allowed for appeal or there has been a determination by the Administrator, AMS, after an appeal.

(g) *Appeal.* A person declared to be ineligible to register and vote by the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, can file an appeal at the FSA county office within 5 business days after the date of receipt of the letter of notification of ineligibility, but not later than November 2, 2000. The FSA county office shall send a producer's appeal by facsimile to the Administrator, AMS, on the date it is filed at the FSA county office or as soon as practical thereafter.

(h) An appeal will be determined by the Administrator, AMS, as soon as practical, but in all cases not later than the 45th business day after the date of the last day of the voting period. The Administrator, AMS, shall send her decision on a producer's appeal to the FSA county office where the producer was initially challenged. The FSA county office shall notify the challenged producer of the Administrator's, AMS, determination on his or her appeal. The Administrator's, AMS, determination on an appeal shall be final.

[65 FR 43508, July 13, 2000, as amended at 65 FR 62579, Oct. 19, 2000]

### § 1230.632 Receiving ballots.

(a) *Producers.* A ballot shall be considered to be received on time if:

(1) It was cast in-person in the county FSA office prior to the close of business on the date of the last day of the in-person voting period; or

(2) It was cast as an absentee ballot, having a postmarked date not later than the last day of the in-person voting period and was received in the county FSA office not later than the close of business, 5 business days after the last day of the in-person voting period.

(b) *Importers.* A ballot shall be considered to be received on time if it had a postmarked date not later than the date of the last day of the in-person voting period and was received in the FSA headquarters office in Washington, DC, not later than the close of business, 5 business days after the last day of the in-person voting period.

### § 1230.633 Canvassing ballots.

(a) *Producers.* (1) Counting the ballots. Under the supervision of FSA CED, acting on behalf of the Administrator, AMS, the in-person registration and certification form envelopes (Form LS–72–2) and the absentee "Pork Referendum" envelopes (Form LS–73–1) containing the "Pork Ballot" envelopes for producer voters will be checked against the In-Person Voter Registration List (Form LS–75) and the Absentee Voter Request List (Form LS–74), respectively, to determine properly registered voters. The ballots of producers voting in-person whose names are not on the In-Person Voter Registration List (Form LS–75), will be declared invalid. Likewise, the ballots of producers voting absentee whose names are not on the Absentee Voter Request List (Form LS–74) will be declared invalid. All ballots of challenged producer voters declared ineligible and invalid ballots will be kept separate from the other ballots and the envelopes containing these ballots will not be opened. The valid ballots will be counted on November 29, 2000, during regular business hours on the 46th business day after the last day of the in-person voting period. FSA county office employees will remove the sealed "Pork Ballot" envelopes (Form LS–72–1) from the registration form envelopes and "Pork Referendum" envelopes (absentee voting) envelopes of all eligible producer voters and all challenged producer voters determined to be eligible. After removing all "Pork Ballot" envelopes, FSA county employees will shuffle the sealed "Pork Ballot" envelopes or otherwise mix them up so that ballots cannot be matched with producers' names. After shuffling the "Pork Ballot" envelopes, FSA county employees will open them and count the ballots. The ballots will be counted as follows:

(i) Number of eligible producers casting valid ballots;

(ii) Number of producers favoring continuation of the Pork Checkoff Program;

(iii) Number of producers favoring termination of the Pork Checkoff Program;

(iv) Number of challenged producer ballots deemed ineligible;

(v) Number of invalid ballots; and

(vi) Number of spoiled ballots.

(2) *Invalid ballots.* Ballots will be declared invalid if a producer voting in-person has failed to print his or her name and address on the In-Person Voter Registration List (Form LS–75) or if an absentee voter's name and address is not recorded on the Absentee Voter Request List (Form LS–74), or the registration form or ballot was incomplete or incorrectly completed.

(3) *Spoiled ballots.* Ballots will be considered spoiled if they are mutilated or marked in such a way that it cannot be determined whether the voter is voting "yes" or "no." Spoiled ballots shall not be considered as approving or disapproving the Pork Checkoff Program, or as a ballot cast in the referendum.

(4) *Confidentiality.* All ballots shall be confidential and the contents of the ballots not divulged except as the Secretary may direct. The public may witness the opening of the ballot box and the counting of the votes but may not interfere with the process.

(b) *Importers*—(1) *Counting the ballots.* FSA headquarters personnel, acting on behalf of the Administrator, AMS, will check the registration forms and ballots for all importer voters against the Importer Ballot Request List (Form LS–77) to determine properly registered voters. The ballots of importers voting whose names are not recorded on the Importer Ballot Request List (Form LS–77), will be declared invalid. All ballots of importer voters declared invalid will be kept separate from the other ballots and the envelopes containing these ballots will not be opened. The valid ballots will be counted on November 29, 2000, during regular office hours on the 46th business day after the date of the last day of the in-person voting period. FSA headquarter office employees will remove the sealed "Pork Ballot" envelope (Form LS–72–1) from the "Pork Referendum" envelopes (Form LS–73–1) of all eligible importer voters. After removing all "Pork Ballot" envelopes, FSA headquarter employees will shuffle the sealed "Pork Ballot" envelopes or otherwise mix them up so that ballots cannot be matched with importers' names. After shuffling the "Pork Ballot" envelopes, FSA headquarters employees will open the envelopes and count the ballots. The ballots will be counted as follows:

(i) Number of eligible importers casting valid ballots;

(ii) Number of importers favoring continuation of the Pork Checkoff Program;

(iii) Number of importers favoring termination of the Pork Checkoff Program;

(iv) Number of importer ballots deemed invalid; and

(v) Number of spoiled ballots.

(2) *Invalid ballots.* Ballots will be declared invalid if an importer voter's name was not recorded on the Importer Ballot Request List (Form LS–77), or the registration form or ballot was incomplete or incorrectly completed.

(3) *Spoiled ballots.* Ballots will be considered spoiled if they were mutilated or marked in such a way that it cannot be determined whether the voter is voting "yes" or "no." Spoiled ballots shall not be considered as a ballot cast in the referendum.

(4) *Confidentiality.* All ballots shall be confidential and the contents of the ballots not divulged except as the Secretary may direct. The public can witness the opening of the ballot box and the counting of the votes but can not interfere with the process.

**§ 1230.634 FSA county office report.**

The FSA county office will notify the FSA State office of the results of the referendum. Each FSA county office will transmit the results of the referendum in its county to the FSA State office. Such report will include the information listed in § 1230.633. The results of the referendum in each county will be made available to the public, after the results of the referendum are announced by the Secretary. A copy of the report of results will be posted for 30 days in the FSA county office in a conspicuous place accessible to the public and a copy will be kept on file in the FSA county office for a period of at least 12 months after the referendum.

### § 1230.635 FSA State office report.

Each FSA State office will transmit to the Administrator, FSA, a written summary of the results of the referendum received from all FSA county offices within the State. The summary shall include the information on the referendum results contained in the reports from all county offices within each State and be certified by the FSA State Executive Director. The FSA State office will maintain a copy of the summary where it will be available for public inspection for a period of not less than 12 months.

### § 1230.636 Results of the referendum.

(a) The Administrator, FSA, will submit the combined results of the FSA State offices' results of the producers' vote and the FSA headquarters office results of the importers' vote to the Administrator, AMS. The Administrator, AMS, will prepare and submit to the Secretary a report of the results of the referendum. The results of the referendum will be announced by the Department in an official press release and published in the FEDERAL REGISTER. State reports on producer balloting, FSA headquarters office report on importer balloting, and related papers will be available for public inspection in the office of the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2627, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems it necessary, the report of producer voting results in any State or county or the report of importer voting results shall be reexamined and checked by such persons as may be designated by the Secretary.

### § 1230.637 Disposition of ballots and records.

(a) *Producer ballots and records.* Each FSA CED will place in sealed containers marked with the identification of the referendum, the voter registration list, absentee voter request list, voted ballots, challenged registration forms/envelopes, challenged absentee voter registration forms, challenged ballots found to be ineligible, invalid ballots, spoiled ballots, and county summaries. Such records will be placed under lock in a safe place under the custody of the FSA CED for a period of not less than 12 months after the referendum. If no notice to the contrary is received from the Administrator, FSA, by the end of such time, the records shall be destroyed.

(b) *Importer ballots and records.* The FSA headquarters office in Washington, DC, will deliver the importers' U.S. Customs Service Form 7501s, the voter registration list, voted ballots, invalid ballots, spoiled ballots, and national summaries and records to the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2627, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC. A Marketing Programs Branch employee will place the ballots and records in sealed containers marked with the identification of the referendum. Such ballots and records will be placed under lock in a safe place under the custody of the Marketing Programs Branch for a period of not less than 12 months after the referendum. If no notice to the contrary is received from the Administrator, AMS, by the end of such time, the records shall be destroyed.

### § 1230.638 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart to govern the conduct of the referendum.

### § 1230.639 Additional absentee voter challenge period.

(a) *Absentee Voter Request List.* The Absentee Voter Request List (Form LS–74) will be available for inspection during an additional challenge period of five business days (October 23, 2000–October 27, 2000) at county FSA offices. The Absentee Voter Request List will be posted daily during regular office hours in a conspicuous public location at FSA county offices during the additional challenge period.

(b) *Who can challenge.* Any person can challenge a producer's vote during the period provided in paragraph (a) of this section. Any person who wants to challenge shall do so in writing and shall include the full name of the individual or corporation or other entity being

challenged. Each challenge of a producer vote must be made on a separate sheet of paper and each challenge must be signed by the challenger. The identity of the challenger will be kept confidential except as the Secretary may direct or as otherwise required by law.

(c) *Who can be challenged.* Any person whose name is on the Absentee Voter Request List who was not subject to challenge during the September 19, 2000, through October 2, 2000, challenge period may be challenged. Those producers whose names were listed on the Absentee Voter Request List and who were subject to challenge because the Absentee Voter Request List indicated they had returned their ballot are not subject to challenge during this additional 5-day period.

(d) *Notification of challenges.* The FSA County Committee or its representative, acting on behalf of the Administrator, AMS, will notify challenged producers as soon as practicable, but no later than the 2nd business day (October 31, 2000) after the last day of the additional challenge period. FSA county offices will notify all challenged persons that documentation such as sales documents, tax records, or other similar documents proving that the person owned and sold hogs or pigs during the representative period must be submitted or his or her vote will not be counted. The documentation must be provided to FSA county offices not later than November 7, 2000.

(e) *Determination of challenges.* The FSA County Committee or its representative, acting on behalf of the Administrator, AMS, will make a determination concerning the challenge based on documentation provided by the producer and will notify challenged producers as soon as practicable but no later than November 9, 2000.

(f) *Challenged ballot.* A challenge to a ballot shall be deemed to have been resolved if the determination of the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, is not appealed within the time allowed for appeal or there has been a determination by the Administrator, AMS, after an appeal.

(g) *Appeal.* A person declared to be ineligible to register and vote by the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, can file an appeal at the FSA county office not later than November 17, 2000. The FSA county office shall send a producer's appeal by facsimile to the Administrator, AMS, on the date it is filed at the FSA office or as soon as practical thereafter.

(h) *Determination of appeals.* An appeal will be determined by the Administrator, AMS, as soon as practical, but in all cases not later than the 45th business day (November 28, 2000) after the date of the last day of the voting period. The Administrator, AMS, shall send her decision on a producer's appeal to the FSA county office where the producer was initially challenged. The FSA county office shall notify the challenged producer of the Administrator's, AMS, determination on his or her appeal. The Administrator's, AMS, determination on an appeal shall be final.

[65 FR 62579, Oct. 19, 2000]

# PART 1245—U.S. HONEY PRODUCER RESEARCH, PROMOTION, AND CONSUMER INFORMATION ORDER

## Subpart A [Reserved]

## Subpart B—Referendum Procedures

Sec.

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1245.101 Definitions.
1245.102 Voting.
1245.103 Instructions.
1245.104 Subagents.
1245.105 Ballots.
1245.106 Referendum report.
1245.107 Confidential information.
1245.108 OMB control number.

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

SOURCE: 75 FR 18398, Apr. 12, 2010, unless otherwise noted.

## Subpart A [Reserved]

## Subpart B—Referendum Procedures

### § 1245.100 General.

Referenda to determine whether eligible U.S. producers favor the issuance, continuance, amendment, suspension,

or termination of the U.S. Honey Producer Research, Promotion, and Consumer Information Order shall be conducted in accordance with this subpart.

**§ 1245.101 Definitions.**

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to re-delegate, or any officer or employee of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Department* 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 delegated, to act in the Secretary's stead.

(c) [Reserved]

(d) *Eligible producer* means any person who produces 100,000 pounds or more of honey in any State for sale in commerce and is subject to pay assessments to the Board on such U.S. honey produced during the representative period and who:

(1) Owns or shares in the ownership of honey bee colonies or beekeeping equipment resulting in the ownership of the U.S. honey produced;

(2) Rents honey bee colonies or beekeeping equipment resulting in the ownership of all or a portion of the U.S. honey produced;

(3) Owns honey bee colonies or beekeeping equipment but does not manage them and, as compensation, obtains the ownership of a portion of the U.S. honey produced; or

(4) Is a party in a lessor-lessee relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce honey that share the risk of loss and receive a share of the U.S. honey produced. No other acquisition of legal title to honey shall be deemed to result in persons becoming eligible producers.

(f) *Honey* means the nectar and saccharine exudations of plants that are gathered, modified, and stored in the comb by honeybees, including comb honey.

(g) *Honey products* mean products where honey is a principal ingredient. For purposes of this subpart, a product shall be considered to have honey as a principal ingredient, if the product contains at least 50 percent honey by weight.

(h) *Order* means the U.S. Honey Producer Research, Promotion, and Consumer Information Order.

(i) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A spouse or marital partner who have title to, or leasehold interest in, honey bee colonies or beekeeping equipment as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the production, or handling for market and the authority to transfer title to the honey so produced, or handled.

(j) *Referendum agent* or *agent* means the individual or individuals designated by the Department to conduct the referendum.

(k) *Representative period* means the period designated by the Department.

(l) *United States or U.S.* means collectively the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

**§ 1245.102 Voting.**

(a) Each person who is an eligible U.S. producer and each person who is an eligible producer-packer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast one ballot in the referendum: However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce U.S. honey or honey products, in which more than one of the parties is a producer, shall be entitled to cast

one ballot in the referendum covering only that producer's share of the ownership of U.S. honey or honey products.

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

(c) All ballots are to be cast by mail, as instructed by the Department.

**§ 1245.103 Instructions.**

(a) *Referenda*. The Order shall not become effective unless the Department determines that the Order is consistent with and will effectuate the purposes of the Act; and for initial and subsequent referenda the Order is favored by a majority of the eligible persons voting in the referendum who also represent a majority of the volume of U.S. honey produced, during a representative period determined by the Department, have been engaged in the production of honey and are subject to assessments under this Order and excluding those exempt from assessment under the Order.

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

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

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

(3) Give reasonable public notice of the referendum:

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

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

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

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

(6) Prepare a report on the referendum.

(7) Announce the results to the public.

**§ 1245.104 Subagents.**

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

**§ 1245.105 Ballots.**

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

**§ 1245.106 Referendum report.**

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on

the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

### § 1245.107 Confidential information.

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

### § 1245.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is OMB control number 0581–0253.

## PART 1250—EGG RESEARCH AND PROMOTION

### Subpart—Referendum Procedures

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1250.202 Voting.
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1250.542 Patents, copyrights, trademarks, and information.

PERSONAL LIABILITY

1250.547 Personal liability.

AUTHORITY: 7 U.S.C. 2701–2718 and 7 U.S.C. 7401.

## Subpart—Referendum Procedures

SOURCE: 75 FR 55256, Sept. 10, 2010, unless otherwise noted.

### § 1250.200 Referenda.

Referenda for the purpose of ascertaining whether the issuance by the Secretary of Agriculture of an Egg Research and Promotion Order, or the continuance, termination, or suspension of such an order, is approved or favored by producers shall, unless supplemented or modified by the Secretary, be conducted in accordance with this subpart.

### § 1250.201 Definitions.

(a) *Act* means the Egg Research and Consumer Information Act and as it may be amended (Pub. L. 93–428, 7 U.S.C. 2701 et seq.).

(b) *Administrator* means the administrator of the Agricultural Marketing Service, with power to redelegate, or any other officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(c) *Egg producer or producer* means any person who either is an egg farmer who acquires and owns laying hens, chicks, and/or started pullets for the purpose of and is engaged in the production of commercial eggs; or is a person who supplied or supplies laying hens, chicks, and/or started pullets to an egg farmer for the purpose of producing commercial eggs pursuant to an oral or written contractual agreement for the production of commercial eggs. Such person is deemed to be the owner of such laying hens unless it is established in writing, to the satisfaction of the Secretary or the Egg Board, that actual ownership of the laying hens is in some other party to the contract. In the event the party to an oral contract who supplied or supplies the laying hens cannot be readily identified by the Secretary or the Egg Board, the person who has immediate possession and control over the laying hens at the egg production facility shall be deemed to be the owner of such hens unless written notice is provided to the Secretary or the Egg Board, signed by the parties to said oral contract, clearly stating that the eggs are being produced under a contractual agreement and identifying the party (or parties) under said contract who is the owner of the hens.

(d) *Order* means the order or any amendment thereto promulgated pursuant to the act with respect to which the Secretary has directed that a referendum be conducted.

(e) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

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

(g) *Representative period* means the period designated by the Secretary pursuant to section 9 of the Act (7 U.S.C. 2708).

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

### § 1250.202 Voting.

(a) Each person who is a producer, as defined in this subpart, at the time of the referendum, who was engaged in the production of commercial eggs during the representative period, and who

is not exempt from the provisions of the order as provided for in § 1250.348 thereof, shall be entitled to only one vote in the referendum.

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

(c) Each producer shall be entitled to cast only one ballot in the referendum.

**§ 1250.203 Instructions.**

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

(a) Determine the time of commencement and termination of the period of the referendum, and the time when all ballots must be received by the referendum agent.

(b) Determine whether ballots may be cast by mail, at polling places, at meetings of producers, or by any combination of the foregoing.

(c) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information for ascertaining whether the person voting or on whose behalf the vote is cast, is an eligible voter, and the total volume of commercial eggs produced during a representative period.

(d) Give reasonable advance notice of the referendum:

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

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

(e) Make available to producers instructions on voting, appropriate registration, ballot, and certification forms, and, except in the case of a referendum on the termination or continuance of an order, a summary of the terms and conditions of the order: Provided, that no person who claims to be qualified to vote shall be refused a ballot.

(f) If the ballots are to be cast by mail, cause all the material specified in paragraph (e) of this section to be mailed to each eligible producer whose name and address are known to the Secretary or the referendum agent.

(g) If the ballots are to be cast at polling places or meetings, determine the necessary number of polling or meeting places, designate them, announce the time of each meeting or the hours during which each polling place will be open, provide the material specified in paragraph (e) of this section, and provide for appropriate custody of ballot forms and delivery to the referendum agent of ballots cast.

(h) At the conclusion of the referendum, canvass the ballots, tabulate the results, and except as otherwise directed, report the outcome to the Administrator and promptly thereafter submit the following:

(1) All ballots received by the agent and appointees, together with a certificate to the effect that the ballots listed are all of the ballots cast and received by the agent and appointees during the referendum period;

(2) A tabulation of all challenged ballots deemed to be invalid; and

(3) A report of the referendum including a detailed statement explaining the method used in giving publicity to the referendum and showing other information pertinent to the manner in which the referendum was conducted.

**§ 1250.204 Subagents.**

The referendum agent may appoint any person or persons deemed necessary or desirable to assist the agent in performing such agent's functions of

this subpart. Each individual so appointed may be authorized by the agent to perform, in accordance with the requirements herein set forth, any or all of the following functions (which, in the absence of such appointment, shall be performed by said agent):

(a) Give public notice of the referendum in the manner specified herein;

(b) Preside at a meeting where ballots are to be cast or as poll officer at a polling place;

(c) See the ballots and the aforesaid texts are distributed to producers and receive any ballots which are cast; and

(d) Record the name and address of each person casting a ballot with said subagent and inquire, as deemed appropriate, into the eligibility of such persons to vote in the referendum.

### § 1250.205 Ballots.

The referendum agent and subagents shall accept all ballots cast; but should they, or any of them, deem that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, and the results of any investigations made with respect thereto, and the disposition thereof. Invalid ballots shall not be counted.

### § 1250.206 Referendum report.

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

### § 1250.207 Confidential information.

The ballots cast or the manner in which any person voted and all information furnished to, compiled by, or in the possession of the referendum agent shall be regarded as confidential. The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

## Subpart—Egg Research and Promotion Order

SOURCE: 40 FR 59190, Dec. 22, 1975, unless otherwise noted.

DEFINITIONS

### § 1250.301 Secretary.

*Secretary* means the Secretary of Agriculture or any other officer or employee of the Department of Agriculture to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in his stead.

### § 1250.302 Act.

*Act* means the Egg Research and Consumer Information Act and as it may be amended (Pub. L. 93–428).

### § 1250.303 Fiscal period.

*Fiscal period* means the calendar year unless the Egg Board, with the approval of the Secretary, selects some other budgetary period.

### § 1250.304 Egg Board or Board.

*Egg Board* or *Board* or other designatory term adopted by such Board, with the approval of the Secretary, means the administrative body established pursuant to § 1250.326.

### § 1250.305 Egg producer or producer.

*Egg producer* or *producer* means any person who either:

(a) Is an egg farmer who acquires and owns laying hens, chicks, and/or started pullets for the purpose of and is engaged in the production of commercial eggs; or

(b) Is a person who supplied or supplies laying hens, chicks, and/or started pullets to an egg farmer for the purpose of producing commercial eggs pursuant to an oral or written contractual argeement for the production of commercial eggs. Such person is deemed to be the owner of such laying hens unless it is established in writing, to the satisfaction of the Secretary or the Egg Board, that actual ownership of the laying hens is in some other party to the contract. In the event the party to an oral contract who supplied or supplies the laying hens cannot be readily

identified by the Secretary or the Egg Board, the person who has immediate possession and control over the laying hens at the egg production facility shall be deemed to be the owner of such hens unless written notice is provided to the Secretary or the Egg Board, signed by the parties to said oral contract, clearly stating that the eggs are being produced under a contractual agreement and identifying the party (or parties) under said contract who is the owner of the hens.

**§ 1250.306 Commercial eggs or eggs.**

*Commercial eggs* or *eggs* means eggs from domesticated chickens which are sold for human consumption either in shell egg form or for further processing into egg products.

**§ 1250.307 Person.**

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

**§ 1250.308 United States.**

*United States* means the 48 contiguous States of the United States of America and the District of Columbia.

**§ 1250.309 Handler.**

*Handler* means any person who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets, such eggs, including eggs of his own production.

**§ 1250.310 Promotion.**

*Promotion* means any action, including paid advertising, to advance the image or desirability of eggs, egg products, spent fowl, or products of spent fowl.

**§ 1250.311 Research.**

*Research* means any type of research to advance the image, desirability, marketability, production, or quality of eggs, egg products, spent fowl, or products of spent fowl, or the evaluation of such research.

**§ 1250.312 Marketing.**

*Marketing* means the sale or other disposition of commercial eggs, egg products, spent fowl, or products of spent fowl in any channel of commerce.

**§ 1250.313 Eligible organization.**

*Eligible organization* means any organization, association, or cooperative which represents egg producers of any egg producing area of the United States certified by the Secretary pursuant to § 1250.356.

**§ 1250.314 Plans and projects.**

*Plans* and *projects* means those research, consumer and producer education, advertising, marketing, product development, and promotion plans, studies, or projects pursuant to § 1250.341.

**§ 1250.315 Part and subpart.**

*Part* means the Egg Research and Promotion Order and all rules, regulations, and supplemental order issued pursuant to the act and the order. "Subpart" refers to the aforesaid order or any other portion or segment of this part.

**§ 1250.316 Representative of a producer.**

*Representative of a producer* means the owner, officer, or an employee of a producer who has been duly authorized to act in the place and stead of the producer.

EGG BOARD

**§ 1250.326 Establishment and membership.**

There is hereby established an Egg Board, hereinafter called the "Board," composed of 18 egg producers or representatives of egg producers, and 18 specific alternates, all appointed by the Secretary from nominations submitted by eligible organizations, associations, or cooperatives, or by other producers pursuant to § 1250.328.

**§ 1250.327 Term of office.**

The members of the Board, and their alternates, shall serve for terms of 2 years, except initial appointments shall be, proportionately, for terms of 2 and 3 years. Each member and alternate member shall continue to serve until his successor is appointed by the

Secretary and has qualified. No member shall serve for more than three consecutive terms.

**§ 1250.328 Nominations.**

All nominations authorized under § 1250.326 shall be made in the following manner:

(a) Within 30 days of the approval of this order by referendum, nominations shall be submitted to the Secretary for each geographic area as specified in paragraph (d) of this section by eligible organizations, associations, or cooperatives certified pursuant to § 1250.356, or, if the Secretary determines that a substantial number of egg producers are not members of, or their interests are not represented by, any such eligible organization, association, or cooperative, then from nominations made by such egg producers in the manner authorized by the Secretary;

(b) After the establishment of the initial Board, the nominations for subsequent Board members and alternates shall be submitted to the Secretary not less than 60 days prior to the expiration of the terms of the members and alternates previously appointed to the Board;

(c) Where there is more than one eligible organization, association, or cooperative within each geographic area, as defined by the Secretary, they may caucus for the purpose of jointly nominating two qualified persons for each member and for each alternate member to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held within a defined geographic area, each eligible organization, association, or cooperative may submit to the Secretary two nominations for each appointment to be made;

(d) The number of members of the initial Board, and their alternates, who shall be appointed from each area are: Area 1–3, Area 2–4, Area 3–2, Area 4–2, Area 5–4, and Area 6–3, for a total of 18 members from all areas. Changes to the Board as provided in paragraph (e) of this section shall be accomplished by determining the percentage of United States egg production in each area times 18 (total Board membership) and rounding to the nearest whole number; and

(e) After the establishment of the initial Board, the area grouping of the 48 contiguous States of the United States, including the area distribution of the 18 members of the Board and their alternates, shall be reviewed at any time not to exceed 5 years by the Board, or by a person or agency designated by the Board to perform such review, and the results shall be reported to the Secretary along with any recommendations by the Board regarding whether the delineation of the areas and the area distribution of the Board should continue without any change, or whether changes should be made in either the areas or the number of Board members to be appointed from each area, providing that each area shall be represented by not less than one Board member and any action recommended shall be subject to the approval of the Secretary.

[40 FR 59190, Dec. 22, 1975, as amended at 60 FR 66861, Dec. 27, 1995]

**§ 1250.329 Selection.**

From the nominations made pursuant to § 1250.328, the Secretary shall appoint the members of the Board, and an alternate for each such member, on the basis of representations provided for in § 1250.326, § 1250.327, and § 1250.328.

**§ 1250.330 Acceptance.**

Any person appointed by the Secretary as a member, or as an alternate member, of the Board shall qualify by filing a written acceptance with the Secretary within a period of time prescribed by the Secretary.

**§ 1250.331 Vacancies.**

To fill any vacancy occasioned by the failure to qualify of any person appointed as a member, or as an alternate member, of the Board, or in the event of the death, removal, resignation, or disqualification of any member or alternate member of the Board, a successor for the unexpired term of such member or alternate member of the Board shall be nominated, qualified, and appointed in the manner specified in § 1250.326, § 1250.328(b), § 1250.329, and § 1250.330, except that replacement of a Board member, or alternate, with an unexpired term of less than 6 months is not necessary.

**§ 1250.332 Alternate members.**

An alternate member of the Board, during the absence of the member for whom he is the alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event of the death, removal, resignation, or disqualification of a member, his alternate shall act for him until a successor for such member is appointed and qualified.

**§ 1250.333 Procedure.**

(a) A majority of the members, including alternates acting for members of the Board, shall constitute a quorum, and any action of the Board shall require the concurring votes of at least a majority of those present and voting. At assembled meetings, all votes shall be cast in person.

(b) For routine and noncontroversial matters which do not require deliberation and exchange of views, and in matters of an emergency nature when there is not enough time to call an assembled meeting of the Board, the Board may also take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph, but any such action by telephone shall be confirmed promptly in writing.

**§ 1250.334 Compensation and reimbursement.**

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

**§ 1250.335 Powers of the Board.**

The Board shall have the following powers:

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

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

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

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

**§ 1250.336 Duties.**

The Board shall have the following duties:

(a) To meet and organize and to select from among its members a chairman and such other officers as may be necessary, to select committees and subcommittees of Board members, to adopt such rules for the conduct of its business as it may deem advisable, and it may establish advisory committees of persons other than Board members;

(b) To appoint or employ such persons as it may deem necessary and to define the duties and determine the compensation of each;

(c) To prepare and submit to the Secretary for his approval budgets on a fiscal-period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable cost of plans and projects as estimated in the budget or budgets submitted to it by prospective contractors, with the Board's recommendations with respect thereto. In preparing a budget for each of the 1994 and subsequent fiscal years, the Board shall, to the maximum extent practicable, allocate a proportion of funds for research projects comparable to the proportion of funds allocated for research projects in the Board's fiscal year 1993 budget.

(d) With the approval of the Secretary, to enter into contracts or agreements with persons, including, but not limited to, State, regional, or national agencies or State, regional, or national egg organizations which administer research, education, or promotion programs, advertising agencies, public relations firms, public or private research organizations, advertising and promotion media, and egg producer organizations, for the development and submission to it of plans and projects authorized by § 1250.341 and for the carrying out of such plans or projects when approved by the Secretary, and for the payment of the cost thereof with funds collected pursuant to § 1250.347. Any such contracts or agreements shall provide that such contractors shall develop and submit to the Board a plan or project together with a budget or budgets which shall show estimated costs to be incurred for such plan or project, and that any such plan or project shall become effective upon

approval by the Secretary. Any such contract or agreement shall also provide that the contractor shall keep accurate records of all of its transactions and make periodic reports to the Board of activities carried out and an accounting for funds received and expended, and such other reports as the Secretary may require;

(e) To review and submit to the Secretary any plans or projects which have been developed and submitted to it by the prospective contractor, together with its recommendations with respect to the approval thereof by the Secretary;

(f) To maintain such books and records and prepare and submit such reports from time to time to the Secretary as he may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(g)–(h) [Reserved]

(i) To prepare and make public, at least annually, a report of activities carried out and an accounting for funds received and expended;

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

(k) To give the Secretary the same notice of meetings of the Board as is given to members in order that he or his representative may attend such meetings;

(l) To act as an intermediary between the Secretary and any producer or handler; and

(m) To submit to the Secretary such information pursuant to this subpart as he may request.

[40 FR 59190, Dec. 22, 1975, as amended at 54 FR 99, Jan. 4, 1989, and 54 FR 11493, Mar. 21, 1989; 54 FR 12310, Mar. 24, 1989; 59 FR 38876, Aug. 1, 1994; 60 FR 66861, Dec. 27, 1995]

RESEARCH, EDUCATION, AND PROMOTION

### § 1250.341 Research, education, and promotion.

The Board shall develop and submit to the Secretary for approval any programs or projects authorized in this section. Such programs or projects shall provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate programs or projects for advertising, sales promotion, and consumer education with respect to the use of eggs, egg products, spent fowl, and products of spent fowl: *Provided, however,* That any such program or project shall be directed towards increasing the general demand for eggs, egg products, spent fowl, or products of spent fowl;

(b) The establishment and carrying on of research, marketing, and development projects and studies with respect to sale, distribution, marketing, utilization, or production of eggs, egg products, spent fowl, and products of spent fowl, and the creation of new products thereof in accordance with section 7(b) of the act, to the end that the marketing and utilization of eggs, egg products, spent fowl, and products of spent fowl may be encouraged, expanded, improved, or made more acceptable, and the data collected by such activities may be disseminated;

(c) The development and expansion of foreign markets and uses for eggs, egg products, spent fowl, and products of spent fowl;

(d) Each program or project authorized under paragraphs (a), (b), and (c) of this section shall be periodically reviewed or evaluated by the Board to insure that each such program or project contributes to a coordinated national program of research, education, and promotion contributing to the maintenance of markets and for the development of new markets for and of new products from eggs, egg products, spent fowl, and products of spent fowl. If it is found by the Board that any such program or project does not further the national purpose of the act, then the Board shall terminate such program or project; and

(e) No advertising or promotion programs shall use false or unwarranted claims or make any reference to private brand names of eggs, egg products, spent fowl, and products of spent fowl or use unfair or deceptive acts or practices with respect to quality, value, or use of any competing product.

EXPENSES AND ASSESSMENTS

### § 1250.346 Expenses.

The Board is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. The total costs incurred by the Board for a fiscal period in collecting producer assessments and having an administrative staff shall not exceed an amount of the projected total assessments to be collected by the Board for such fiscal period that the Secretary determines to be reasonable. The funds to cover such expenses shall be paid from assessments received pursuant to § 1250.347.

[40 FR 59190, Dec. 22, 1975, as amended at 54 FR 100, Jan. 4, 1989, and 54 FR 11493, Mar. 21, 1989]

### § 1250.347 Assessments.

Each handler designated in § 1250.349 and pursuant to regulations issued by the Board shall collect from each producer, except for those producers specifically exempted in § 1250.348, and shall pay to the Board at such times and in such manner as prescribed by regulations issued by the Board an assessment at a rate not to exceed 10 cents per 30-dozen case of eggs, or the equivalent thereof, for such expenses and expenditures, including provisions for a reasonable reserve and those administrative costs incurred by the Department of Agriculture after this subpart is effective, as the Secretary finds are reasonable and likely to be incurred by the Board and the Secretary under this subpart, except that no more than one such assessment shall be made on any case of eggs.

[59 FR 64560, Dec. 15, 1994]

### § 1250.348 Exemptions.

The following shall be exempt from the specific provisions of the Act:

(a) Any egg producer whose aggregate number of laying hens at any time during a 3-consecutive-month period immediately prior to the date assessments are due and payable has not exceeded 75,000 laying hens. The aggregate number of laying hens owned by a trust or similar entity shall be considered ownership by the beneficiaries of the trust or other entity. Ownership of laying hens by an egg producer also shall include the following:

(1) In cases in which the producer is an individual, laying hens owned by such producer or members of such producer's family that are effectively under the control of such producer, as determined by the Secretary;

(2) In cases in which the producer is a general partnership or similar entity, laying hens owned by the entity and all partners or equity participants in the entity; and

(3) In cases in which the producer holds 50 percent or more of the stock or other beneficial interest in a corporation, joint stock company, association, cooperative, limited partnership, or other similar entity, laying hens owned by the entity. Stock or other beneficial interest in an entity that is held by the following shall be considered as held by the producer:

(i) Members of the producer's family described in paragraph (a)(1);

(ii) A general partnership or similar entity in which the producer is a partner or equity participant;

(iii) The partners or equity participants in an entity of the type described in (a)(3)(ii); or

(iv) A corporation, joint stock company, association, cooperative, limited partnership, or other similar entity in which the producer holds 50 percent or more of the stock or other beneficial interests.

(b) Any egg producer owning a flock of breeding hens whose production of eggs is primarily utilized for the hatching of baby chicks.

(c) In order to qualify for exemption from the provisions of the Act under this section, producers claiming such exemption must comply with § 1250.530 regarding certification of exempt producers and other such regulations as may be prescribed by the Secretary as a condition to exemption from the provisions of the Act under this section.

[55 FR 6973, Feb. 28, 1990, as amended at 59 FR 38876, Aug. 1, 1994]

**§ 1250.349 Collecting handlers and collection.**

(a) Handlers responsible for collecting the assessment specified in § 1250.347 shall be any one of the following:

(1) The first person to whom eggs are sold, consigned, or delivered by producers and who grades, cartons, breaks, or otherwise performs a function of a handler under § 1250.309,

(2) A producer who grades, cartons, breaks, or otherwise performs a function of a handler under § 1250.309 for eggs of his own production, or

(3) Such other persons as designated by the Board under rules and regulations issued pursuant to this subpart.

(b) Handlers shall collect and remit to the Egg Board all assessments collected in the manner and in the time specified by the Board pursuant to rules and regulations issued by the Board.

(c) Handlers shall maintain such records as the Egg Board may prescribe pursuant to rules and regulations issued by the Board.

(d) The Board with the approval of the Secretary may authorize other organizations or agencies to collect assessments in its behalf.

[40 FR 59190, Dec. 22, 1975. Redesignated at 55 FR 6973, Feb. 28, 1990]

**§ 1250.350 [Reserved]**

**§ 1250.351 Influencing governmental action.**

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action except to recommend to the Secretary amendments to this subpart.

[40 FR 59190, Dec. 22, 1975. Redesignated at 55 FR 6973, Feb. 28, 1990]

REPORTS, BOOKS, AND RECORDS

**§ 1250.352 Reports.**

Each handler subject to this subpart and other persons subject to section 7(c) of the act may be required to report to the Board periodically such information as is required by regulations and will effectuate the purposes of the act, which information may include but not be limited to the following:

(a) Number of cases of eggs handled;

(b) Number of cases of eggs on which an assessment was collected;

(c) Name and address of person from whom any assessment was collected; and

(d) Date collection of assessment was made on each case of eggs handled.

[40 FR 59190, Dec. 22, 1975. Redesignated at 55 FR 6973, Feb. 28, 1990]

**§ 1250.353 Books and records.**

Each handler subject to this subpart and persons subject to section 7(c) of the act shall maintain and make available for inspection by the Board or the Secretary such books and records as are necessary to carry out the provisions of the subpart and the regulations issued hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least 2 years beyond the fiscal period of their applicability.

[40 FR 59190, Dec. 22, 1975. Redesignated at 55 FR 6973, Feb. 28, 1990]

**§ 1250.354 Confidential treatment.**

(a) All information obtained from such books, records, or reports shall be kept confidential by all officers and employees of the Department of Agriculture and the Board, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request of the Secretary, or to which the Secretary or any officer of the United States is a party and involving this subpart. Nothing in this paragraph shall be deemed to prohibit (1) the issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person, (2) the publication, by direction of the Secretary, of general statements relating to refunds made by the Egg Board during any specific period of time, or (3) the publication, by direction of the Secretary, of the name of any person violating this subpart together with a statement of the particular provisions of this subpart violated by such person.

(b) All information with respect to refunds, except as provided in paragraph (a)(2) of this section, made to individual producers shall be kept confidential by all officers and employees of the Department of Agriculture and the Board.

[40 FR 59190, Dec. 22, 1975. Redesignated at 55 FR 6973, Feb. 28, 1990]

CERTIFICATION OF ORGANIZATIONS

### § 1250.356 Certification of organizations.

Any organization may request the Secretary for certification of eligibility to participate in nominating members and alternate members on the Board to represent the geographic area in which the organization represents egg producers. Such eligibility shall be based in addition to other available information upon a factual report submitted by the organization which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including, but not limited to, the following:

(a) Geographic territory covered by the organization's active membership;

(b) Nature and size of the organization's active membership, proportion of total of such active membership accounted for by producers of commercial eggs, a chart showing the egg production by State in which the organization has members, and the volume of commercial eggs produced by the organization's active membership in such State(s);

(c) The extent to which the commercial egg producer membership of such organization is represented in setting the organization's policies;

(d) Evidence of stability and permanency of the organization;

(e) Sources from which the organization's operating funds are derived;

(f) Functions of the organization; and

(g) The organization's ability and willingness to further the aims and objectives of the act.

The primary consideration in determining the eligibility of an organization shall be whether its egg producer membership consists of a substantial number of egg producers who produce a substantial volume of the applicable geographic area's commercial eggs to reasonably warrant its participation in the nomination of members for the Board or to request the issuance of an order. The Secretary shall certify any organization which he finds to be eligible under this section and his determination as to eligibility shall be final.

MISCELLANEOUS

### § 1250.357 Suspension and termination.

(a) The Secretary shall, whenever he finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the act, terminate or suspend the operation of this subpart or such provision.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of 10 percent or more of the number of egg producers voting in the referendum approving this subpart, to determine whether egg producers favor the termination or suspension of this subpart, and the Secretary shall suspend or terminate such subpart at the end of 6 months after he determines that suspension or termination of the subpart is approved or favored by a majority of the egg producers voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production of commercial eggs, and who produced more than 50 percent of the volume of eggs produced by the egg producers voting in the referendum.

### § 1250.358 Proceedings after termination.

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

(b) The said trustees shall: (1) Continue in such capacity until discharged

by the Secretary, (2) carry out the obligations of the Board under any contracts or agreements entered into by it pursuant to §1250.336, (3) from time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such person as the Secretary may direct, and (4) upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation 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 practicable, in the interest of continuing one or more of the research or promotion programs hitherto authorized.

### §1250.359 Effect of termination or amendment.

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

(a) Affect or waive any right, duty, obligation, or liability which shall have risen or which may hereafter 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 hereunder; or

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

### §1250.360 [Reserved]

### §1250.361 Right of the Secretary.

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

### §1250.362 Amendments.

Amendments to this subpart may be proposed, from time to time, by the Board, or by an organization certified pursuant to section 16 of the act, or by any interested person affected by the provisions of the act, including the Secretary.

### §1250.363 Separability.

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

## Subpart—Rules and Regulations

SOURCE: 41 FR 22925, June 8, 1976, unless otherwise noted.

DEFINITIONS

### §1250.500 Terms defined.

Unless otherwise defined in this subpart, definitions of terms used in this subpart shall be those definitions of terms defined in the Egg Research and Consumer Information Act, hereinafter called the Act, and the Egg Research and Promotion Order, hereinafter called the Order.

(a) *Act*. "Act" means the Egg Research and Consumer Information Act as it may be amended (Pub. L. 93–428).

(b) *Secretary*. "Secretary" means the Secretary of Agriculture or any other officer or employee of the Department of Agriculture to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in his stead.

(c) *Egg Board or Board*. "Egg Board" or "Board" or other designatory term adopted by such Board, with the approval of the Secretary, means the administrative body established pursuant to §1250.326.

(d) *Fiscal period*. "Fiscal period" means the calendar year unless the Egg

Board, with the approval of the Secretary, selects some other budgetary period.

(e) *Egg producer or producer*. "Egg producer" or "producer" means any person who either:

(1) Is an egg farmer who acquires and owns laying hens, chicks, and/or started pullets for the purpose of and is engaged in the production of commercial eggs; or

(2) Is a person who supplied or supplies laying hens, chicks, and/or started pullets to an egg farmer for the purpose of producing commercial eggs pursuant to an oral or written contractual agreement for the production of commercial eggs. Such person is deemed to be the owner of such laying hens unless it is established in writing, to the satisfaction of the Secretary or the Egg Board, that actual ownership of the laying hens is in some other party to the contract. In the event the party to an oral contract who supplied or supplies the laying hens cannot be readily identified by the Secretary or the Egg Board, the person who has immediate possession and control over the laying hens at the egg production facility shall be deemed to be the owner of such hens unless written notice is provided to the Secretary or the Egg Board, signed by the parties to said oral contract, clearly stating that the eggs are being produced under a contractual agreement and identifying the party (or parties) under said contract who is the owner of the hens.

(f) *Commercial eggs or eggs*. "Commercial eggs" or "eggs" means eggs from domesticated chickens which are sold for human consumption either in shell egg form or for further processing into egg products.

(g) *Person*. "Person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

(h) *Handle*. "Handle" means to grade, carton, process, transport, purchase, or in any way place eggs or cause eggs to be placed in the current of commerce. Such term shall not include the washing, the packing in cases, or the delivery by the producer of his own nest run eggs.

(i) *Handler*. "Handler" means any person who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets such eggs, including eggs of his own production.

(j) *Egg products*. "Egg products" means products produced, in whole or in part, from eggs.

(k) *Cooperating agency*. "Cooperating agency" means any person with which the Egg Board has entered into an agreement pursuant to § 1250.517(c).

(l) *Case*. "Case" means the standard shipping package containing 30-dozen eggs or the equivalent thereof.

(m) *Plans and projects*. "Plans" and "projects" mean those research, consumer and producer education, advertising, marketing, product development, and promotion plans, studies, or projects pursuant to § 1250.341.

(n) *Representative of a producer*. "Representative of a producer" means the owner, officer, or an employee of a producer who has been duly authorized to act in the place and stead of the producer.

(o) *Hen or laying hen*. "Hen" or "laying hen" means a domesticated female chicken 20 weeks of age or over, raised primarily for the production of commercial eggs.

(p) *Hatching eggs*. "Hatching eggs" means eggs intended for use by hatcheries for the production of baby chicks.

(q) *United States*. "United States" means the 48 contiguous States of the United States of America and the District of Columbia.

(r) *Promotion*. "Promotion" means any action, including paid advertising, to advance the image or desirability of eggs, egg products, spent fowl, or products of spent fowl.

(s) *Research*. "Research" means any type of research to advance the image, desirability, marketability, production, or quality of eggs, egg products, spent fowl, or products of spent fowl, or the evaluation of such research.

(t) *Consumer education*. "Consumer education" means any action to advance the image or desirability of eggs, egg products, spent fowl, or products of spent fowl.

(u) *Marketing*. "Marketing" means the sale or other disposition of commercial eggs, egg products, spent fowl, or products of spent fowl, in any channel of commerce.

(v) *Commerce*. "Commerce" means interstate, foreign, or intrastate commerce.

(w) *Spent fowl*. "Spent fowl" means hens which have been in production of commercial eggs and have been removed from such production for slaughter.

(x) *Products of spent fowl*. "Products of spent fowl" means commercial products produced from spent fowl.

(y) *Started pullet*. "Started pullet" means a hen less than 20 weeks of age.

(z) *Shell egg packer*. "Shell egg packer" means any person grading eggs into their various qualities.

(aa) *Egg breaker*. "Egg breaker" means any person subject to the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*) engaged in the breaking of shell eggs or otherwise involved in preparing shell eggs for use as egg products.

(bb) *Nest run eggs*. "Nest run eggs" means eggs which are packed as they come from the production facilities without having been sized and/or candled with the exception that some checks, dirties, or obvious undergrades may have been removed and provided further that the eggs may have been washed.

OMB CONTROL NUMBERS ASSIGNED PURSUANT TO THE PAPERWORK REDUCTION ACT

### § 1250.501 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose*. This section collects and displays the control numbers assigned to information collection requirements by the Office of Management and Budget contained in 7 CFR part 1250 pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

(b) *Display*.

| 7 CFR section where identified and described | Current OMB control number |
|---|---|
| Sec.: | |
| 1250.523 | 0581–0098 |
| 1250.528 | 0581–0098 |
| 1250.529 | 0581–0098 |
| 1250.530 | 0581–0098 |
| 1250.535 | 0581–0098 |

(Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627) and Egg Research and Consumer Information Act, as amended (7 U.S.C. 2701–2718))

[48 FR 56566, Dec. 22, 1983]

GENERAL

### § 1250.505 Communications.

Communications in connection with the Order shall be addressed to the Egg Board at its business address.

### § 1250.506 Policy and objective.

(a) It shall be the policy of the Egg Board to carry out an effective and continuous coordinated program of research, consumer and producer education, advertising, and promotion designed to strengthen the egg industry's position in the marketplace, and maintain and expand domestic and foreign markets and uses for eggs, egg products, spent fowl, and products of spent fowl of the United States.

(b) It shall be the objective of the Egg Board to carry out programs and projects which will provide maximum benefit to the egg industry and no undue preference shall be given to any of the various industry segments.

### § 1250.507 Contracts.

The Egg Board, with the approval of the Secretary, may enter into contracts with persons for the development and submission to it of plans or projects authorized by the Order and for carrying out of such plans or projects. Contractors shall agree to comply with the provisions of the Order, this subpart, and applicable provisions of the U.S. Code relative to contracting with the U.S. Department of Agriculture. Subcontractors who enter into contracts or agreements with a primary contractor and who receive or otherwise utilize funds allocated by the Egg Board shall be subject to the provisions of this subpart.

### § 1250.508 Procedure.

The organization of the Egg Board and the procedure for conducting meetings of the Board shall be in accordance with the By-Laws of the Board.

### § 1250.509 USDA costs.

Pursuant to § 1250.347 of the Order, the Board shall pay those administrative costs incurred by the U.S. Department of Agriculture for the conduct of its duties under the Order as determined periodically by the Secretary. Payment shall be due promptly after the billing for such costs.

### § 1250.510 Determination of Board Membership.

(a) Pursuant to § 1250.328 (d) and (e) of the Order, the 48 contiguous States of the United States shall be grouped into 6 geographic areas, as follows: Area 1 (North Atlantic States)—Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and the District of Columbia; Area 2 (South Atlantic States)—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina; Area 3 (East North Central States)—Kentucky, Michigan, Missouri, Ohio, Tennessee; Area 4 (West North Central States)—Colorado, Idaho, Illinois, Indiana, Minnesota, Montana, North Dakota, South Dakota, Wisconsin, Wyoming; Area 5 (South Central States)—Iowa, Kansas, Nebraska; Area 6 (Western States)—Arizona, California, Nevada, New Mexico, Oregon, Texas, Utah, and Washington.

(b) Board representation among the 6 geographic areas is apportioned to reflect the percentages of United States egg production in each area times 18 (total Board membership). The distribution of members of the Board is:

Area 1–3, Area 2–3, Area 3–3, Area 4–3, Area 5–3, and Area 6–3. Each member will have an alternate appointed from the same area.

[71 FR 41727, July 24, 2006]

## ASSESSMENTS, COLLECTIONS, AND REMITTANCES

### § 1250.514 Levy of assessments.

An assessment rate of 10 cents per case of commercial eggs is levied on each case of commercial eggs handled for the account of each producer. Each case of commercial eggs shall be subject to assessment only once. Producers meeting the requirements of § 1250.348 are exempt from the provisions of the Act including this section.

[55 FR 6974, Feb. 28, 1990, as amended at 59 FR 64560, Dec. 15, 1994]

### § 1250.515 Reporting period and payment.

(a) For the purpose of the payment of assessments, either a calendar month or a 4-week accounting period shall be considered the reporting period; however, other accounting periods may be used when approved by the Board on an individual basis. Each collecting handler shall register his reporting period with the Board. All changes in reporting periods shall be requested in writing and subject to approval by the Board.

(b) Each producer shall pay the required assessment on his commercial eggs pursuant to § 1250.514 to the collecting handler designated in § 1250.516 on or before the date of final settlement between the producer and the collecting handler for the eggs received by the collecting handler during each reporting period.

### § 1250.516 Collecting handlers and collection.

(a) Handlers responsible for collecting the assessments shall be any of the following:

(1) The first person to whom eggs are sold, consigned, or delivered by producers and who grades, cartons, or breaks such eggs. Such shell egg breaker or egg packer must collect and remit to the Board the assessments on all eggs handled except eggs for which there is a certification of exemption or eggs for which there is a statement indicating that an assessment has already been paid;

(2) A person who buys or receives nest run eggs from a producer and who does not grade, carton, or break such eggs. Such person shall collect the assessment from the producer and remit to the Egg Board on all such eggs, except for which there is a certification of exemption or eggs for which there is a statement indicating that an assessment has already been paid;

(3) Except as otherwise provided in paragraph (a)(4) of this section, a producer who grades, cartons, or breaks

eggs of his own production shall be responsible for remitting the assessment to the Board on all eggs produced. This would include the eggs which he grades, cartons, or breaks as well as the nest run eggs which are graded, cartoned, or broken by another handler. Such a producer who remits the assessment on nest run eggs to the Board shall provide the handler specified in paragraph (a) (1) or (2) of this section with a written statement that the assessment has already been paid on the nest run eggs; or

(4) Upon approval of the Board, any person who handles eggs for a producer under a written contract that includes express provisions that said handler will remit the assessment on such eggs to the Board shall be the collecting handler notwithstanding the fact that the producer may have graded, cartoned, or otherwise processed the eggs.

Following are some examples to aid in identification of collecting handlers:

(i) Producer sells, assigns, consigns, or otherwise delivers nest run eggs of his own production to a shell egg packer or breaker for preparation for market—the shell egg packer or breaker is the collecting handler and is responsible for remitting to the Egg Board;

(ii) Producer grades, cartons, breaks, or otherwise prepares for marketing a portion of the eggs of his own production and delivers the remaining portion of his nest run eggs to a shell egg packer or breaker—the producer is the collecting handler and shall remit the assessment on his total production to the Board;

(iii) Producer sells all or a portion of his eggs in nest run form to a handler who is not a shell egg packer or breaker—the handler is responsible for collecting the assessment and remitting it to the Egg Board except for eggs covered by a statement indicating that an assessment has already been paid;

(iv) A shell egg packer or breaker who buys or receives nest run eggs from a handler who is not a shell egg packer or breaker—the handler is the collecting handler and shall remit such assessment to the Board;

(v) A shell egg packer or egg breaker buys nest run or graded eggs including undergrade eggs from another shell egg packer or egg breaker—the first shell egg packer or breaker is the collecting handler and shall remit such assessments to the Board.

(b) In the event of a producer's death, bankruptcy, receivership, or incapacity to act, the representative of the producer or his estate, or the person acting on behalf of creditors, shall be considered the producer of the eggs for the purpose of this subpart.

(c) The collecting handler may collect the assessment directly from the producer or deduct the assessment from the proceeds due or paid to the producer on whose eggs the assessment is made.

[41 FR 22925, June 8, 1976, as amended at 42 FR 60724, Nov. 29, 1977]

### § 1250.517 Remittance to Egg Board.

(a) The collecting handler responsible for remittance of assessments to the Board is not relieved of this obligation as a result of his failure to collect payment of the assessment from the egg producer(s).

(b) Each collecting handler required to remit the assessments on the eggs handled during each reporting period, specified in § 1250.515(a), shall remit the assessments directly to the Egg Board by check, draft, or money order payable to the Egg Board on or before the 15th day after the end of said reporting period together with a report pursuant to § 1250.529. The assessment for each reporting period shall be calculated on the basis of the gross volume of eggs subject to assessment received by the collecting handler during each reporting period.

(c) Remittance through cooperating agency.

(1) In any State or specified geographic area the Egg Board, with the approval of the Secretary, may designate by agreement a cooperating agency to collect the assessments in its behalf. Every collecting handler within such a State or geographic area shall remit the assessments for each reporting period, specified in § 1250.515(a), to the designated cooperating agency by check, draft, or money order payable to said cooperating agency on or before the 15th day after the end of said reporting period together with a report pursuant to § 1250.529.

(2) On or before the 20th day after the end of each reporting period, each designated cooperating agency shall remit to the Egg Board the total amount of all assessments received from collecting handlers for said reporting period together with all collecting handler reports. In addition, each designated cooperating agency shall submit to the Egg Board such information as is required by the designation agreement with the Egg Board.

### § 1250.518 Receipts for payment of assessments.

(a) Each collecting handler shall give each producer whose eggs are subject to assessment a receipt for the commercial eggs handled by said collecting handler showing payment of the assessment. This receipt may be on a separate receipt form or included as part of the invoice or settlement sheet for the eggs, but in either event shall contain the following information:

(1) Name, address, and identification number of the collecting handler;

(2) Name and address of the producer who paid the assessment;

(3) Number of cases of eggs on which assessment was paid and the total amount of the assessment; and

(4) Date on which assessment was paid by producer.

(b) All eggs sold, consigned, or delivered from a collecting handler to another handler, excluding cartoned eggs and loose graded eggs sold to the bakeries, restaurants, and institutions, shall be accompanied with the collecting handler's written statement that the assessment on the lot of eggs covered by the invoice has been paid or that lot of eggs or portion thereof is exempt from assessment under provisions of § 1250.514.

### § 1250.519 Late-payment charge.

Any unpaid assessments due to the Board pursuant to § 1250.347 shall be increased by a late-payment charge of 1.5 percent each month beginning with the day following the date such assessments are 30 days past due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. Assessments that are not paid when due because of a person's failure to submit a handler report to the Board as required shall accrue late-payment charges from the time such assessments should have been remitted. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date payment is actually received by the Board, whichever is earlier.

[58 FR 34697, June 29, 1993]

## REGISTRATION, CERTIFICATION AND REPORTS

### § 1250.528 Registration of collecting handlers.

All collecting handlers shall, prior to August 1, 1976, register with the Egg Board by filing a registration statement. Registered collecting handlers will receive an identification number which must appear on all required reports and official communications with the Egg Board. New businesses subject to this subpart beginning after August 1, 1976, shall register with the Egg Board within 30 days following the beginning of operations. The statement of registration shall include:

(a) Name and complete address of the collecting handler;

(b) Name of individual(s) responsible for filing reports with the Egg Board; and

(c) Type of reporting period desired.

### § 1250.529 Reports.

(a) *Collecting handler reports.* (1) Each collecting handler shall make reports on forms made available or approved by the Egg Board. Each collecting handler shall prepare a separate report form each reporting period. Each report shall be mailed to the Egg Board within 15 days after the close of the reporting period and shall contain the following information:

(i) Date of report;

(ii) Reporting period covered by the report;

(iii) Name and address of collecting handler and identification number;

(iv) Total number of cases of eggs handled, total number of cases of eggs subject to collection of assessment, total number of cases of eggs exempt

under §1250.514 from collection of assessment, total number of cases of imported eggs handled, and total number of cases of eggs received from another handler and on which an assessment was already collected;

(v) The names and addresses of producers subject to assessment supplying eggs to the handlers and number of cases of eggs received from each producer;

(vi) Total amount of assessment due for eggs handled during the reporting period and remitted with the report; and

(vii) Such other information as may be required by the Board.

(2) Collecting handler reports shall be filed each reporting period following registration until such time as the Egg Board is notified in writing that the collecting handler has ceased to do business. During reporting periods in which the collecting handler does not handle any eggs, his report form shall state "No Eggs Handled."

(b) The Egg Board may require all persons subject to section 7(c) of the Act to make reports as needed for the enforcement and administration of the Order and as approved by the Secretary.

**§ 1250.530 Certification of exempt producers.**

(a) *Number of laying hens.* Egg producers not subject to the provisions of the Act pursuant to §1250.348 shall file with all handlers to whom they sell eggs a statement certifying their exemption from the provisions of the Act in accordance with the criterion of §1250.348. Certification shall be made on forms approved and provided by the Egg Board to collecting handlers for use by exempt producers. The certification form shall be filed with each handler on or before January 1 of each year as long as the producer continues to do business with the handler. A copy of the certificate of exemption shall be forwarded to the Egg Board by the handler within 30 days of receipt. The certification shall list the following: the name and address of the producer, the basis for producer exemption according to the requirements of §1250.348, and the signature of the producer.

(b) *Organic Production.* A producer who operates under an approved National Organic Program (NOP) (7 CFR part 205) system plan; only produces products that are eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (b)(6) of this section; and is not a split operation shall be exempt from the payment of assessments.

(1) To apply for an exemption under this section, a producer 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 January 1 as long as the producer continues to be eligible for the exemption.

(2) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), a signed certification that the applicant meets all of the requirements specified in paragraph (b) of this section for an assessment exemption, and such other information as may be required by the Board and with the approval of the Secretary.

(3) If the producer complies with the requirements of this section, the Board will grant an assessment exemption and issue a certificate of exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(4) The producer shall provide a copy of the certificate of exemption to each handler to whom the producer sells eggs. The handler shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(5) The exemption will apply at the first reporting period following the issuance of the Certificate of Exemption.

(6) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

(c) If the exempt producer no longer qualifies for an exemption as specified in § 1250.348 or 1250.530(b), that producer shall notify, within 10 days, all handlers with whom the producer has filed a Certificate of Exemption.

[70 FR 2761, Jan. 14, 2005]

RECORDS

### § 1250.535 Retention of records.

(a) Each person required to make reports pursuant to this subpart shall maintain and retain for at least 2 years beyond the fiscal period of their applicability:

(1) One copy of each report submitted to the Egg Board;

(2) Records of all exempt producers including certification of exemption as necessary to verify the address of each exempt producer; and

(3) Such other records as are necessary to verify reports submitted to the Egg Board.

(b) Egg producers subject to § 1250.514 shall maintain and retain for at least 2 years beyond the period of their applicability:

(1) Receipts, or copies thereof, for payment of assessments; and

(2) Such records as are necessary to verify monthly levels of egg production.

### § 1250.536 Availability of records.

Each handler and egg producer subject to this subpart and all persons subject to section 7(c) of the Act shall make available for inspection and copying by authorized employees of the Egg Board and/or the Secretary during regular business hours, such information as is appropriate and necessary to verify compliance with this subpart.

### § 1250.537 Confidentiality.

All information obtained by officers and employees of the Department of Agriculture, the Egg Board, or any person under contract by the Egg Board or otherwise acting on behalf of the Egg Board from the books, records, and reports of persons subject to this subpart, and all information with respect to refunds of assessments made to individual producers, shall be kept confidential in the manner and to the extent provided in § 1250.353 of the Order.

PATENTS, COPYRIGHTS, TRADEMARKS, AND INFORMATION

### § 1250.542 Patents, copyrights, trademarks, and information.

Patents, copyrights, trademarks, and information accruing from work pursuant to any plan or project undertaken by any person on behalf of the Egg Board, financed by assessment funds or other revenues of the Egg Board; shall become property of the U.S Government as represented by the Egg Board; and such patents, copyrights, trademarks, and information may be licensed subject to approval by the Secretary of Agriculture. Upon termination of the Order, the Egg Board shall transfer custody of all such patents, copyrights, trademarks, and information to the Secretary of Agriculture pursuant to the procedure provided for in § 1250.358 who shall utilize them in a manner that he determines to be in the best interest of egg producers. Funds generated from the use of patents, copyrights, trademarks, and information by the Egg Board will be considered income subject to the same fiscal, budget, and audit control as the other funds of the Egg Board. Ownership of inventions made by employees of the Board shall be determined in accordance with Executive Order 10096.

[41 FR 22925, June 8, 1976; 41 FR 23930, June 14, 1976]

PERSONAL LIABILITY

**§ 1250.547 Personal liability.**

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

# PART 1260—BEEF PROMOTION AND RESEARCH

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AUTHORITY: 7 U.S.C. 2901–2911 and 7 U.S.C. 7401.

## Subpart A—Beef Promotion and Research Order

SOURCE: 51 FR 26138, July 18, 1986, unless otherwise noted.

DEFINITIONS

### § 1260.101 Department.

*Department* means the United States Department of Agriculture.

### § 1260.102 Secretary.

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

### § 1260.103 Board.

*Board* means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

### § 1260.104 Committee.

*Committee* means the Beef Promotion Operating Committee established pursuant to the Act and this subpart.

### § 1260.105 Person.

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

### § 1260.106 Collecting person.

*Collecting person* means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

### § 1260.107 State.

*State* means each of the 50 States.

### § 1260.108 United States.

*United States* means the 50 States and the District of Columbia.

### § 1260.109 Unit.

*Unit* means each State, group of States or class designation which is represented on the Board.

### § 1260.110 [Reserved]

### § 1260.111 Fiscal year.

*Fiscal year* means the calendar year or such other annual period as the Board may determine.

### § 1260.112 Federation.

*Federation* means the Beef Industry Council of the National Live Stock and Meat Board, or any successor organization to the Beef Industry Council, which includes as its State affiliates the qualified State beef councils.

### § 1260.113 Established national nonprofit industry-governed organizations.

*Established national nonprofit industry-governed organizations* means organizations which:

(a) Are nonprofit organizations pursuant to sections 501(c) (3), (5) or (6) of the Internal Revenue Code (26 U.S.C. 501(c) (3), (5) and (6));

(b) Are governed by a board of directors representing the cattle or beef industry on a national basis; and

(c) Were active and ongoing before the enactment of the Act.

**§ 1260.114 Eligible organization.**

*Eligible organization* means any organization which has been certified by the Secretary pursuant to the Act and this part as being eligible to submit nominations for membership on the Board.

**§ 1260.115 Qualified State beef council.**

*Qualified State beef council* means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

**§ 1260.116 Producer.**

*Producer* means any person who owns or acquires ownership of cattle; provided, however, that a person shall not be considered a producer within the meaning of this subpart if (a) the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee; or (b) the person (1) acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (2) resold such cattle no later than ten (10) days from the date on which the person acquired ownership, and (3) certified, as required by regulations prescribed by the Board and approved by the Secretary, that the requirements of this provision have been satisfied.

**§ 1260.117 Importer.**

*Importer* means any person who imports cattle, beef, or beef products from outside the United States.

**§ 1260.118 Cattle.**

*Cattle* means live domesticated bovine animals regardless of age.

**§ 1260.119 Beef.**

*Beef* means flesh of cattle.

**§ 1260.120 Beef products.**

*Beef products* means edible products produced in whole or in part from beef, exclusive of milk and products made therefrom.

**§ 1260.121 Imported beef or beef products.**

*Imported beef or beef products* means products which are imported into the United States which the Secretary determines contain a substantial amount of beef including those products which have been assigned one or more of the following numbers in the Tariff Schedule of the United States: 106.1020, 106.1040, 106.1060, 106.1080, 107.2000, 107.2520, 107.4000, 107.4500, 107.4820, 107.4840, 107.5220, 107.5240, 107.5500, 107.6100, 107.6200, 107.6300.

**§ 1260.122 Promotion.**

*Promotion* means any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace.

**§ 1260.123 Research.**

*Research* means studies relative to the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development.

**§ 1260.124 Consumer information.**

*Consumer information* means nutritional data and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products.

**§ 1260.125 Industry information.**

*Industry information* means information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry.

**§ 1260.126 Plans and projects.**

*Plans and projects* means promotion, research, consumer information and industry information plans, studies or projects conducted pursuant to this subpart.

### § 1260.127 Marketing.

*Marketing* means the sale or other disposition in commerce of cattle, beef or beef products.

### § 1260.128 Act.

*Act* means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99–198 and any amendments thereto.

### § 1260.129 Customs Service.

*Customs Service* means the United States Customs Service of the United States Department of the Treasury.

### § 1260.130 Part and subpart.

*Part* means the Beef Promotion and Research Order and all rules and regulations issued pursuant to the Act and the order, and the order itself shall be a "subpart" of such Part.

CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD

### § 1260.141 Membership of Board.

(a) Beginning with the 2008 Board nominations and the associated appointments effective early in the year 2009, the United States shall be divided into 39 geographical units and 1 unit representing importers, and the number of Board members from each unit shall be as follows:

CATTLE AND CALVES [1]

| State/unit | (1,000 Head) | Directors |
|---|---|---|
| 1. Alabama | 1,307 | 1 |
| 2. Arizona | 930 | 1 |
| 3. Arkansas | 1,773 | 2 |
| 4. California | 5,450 | 5 |
| 5. Colorado | 2,617 | 3 |
| 6. Florida | 1,707 | 2 |
| 7. Idaho | 2,117 | 2 |
| 8. Illinois | 1,347 | 1 |
| 9. Indiana | 883 | 1 |
| 10. Iowa | 3,783 | 4 |
| 11. Kansas | 6,550 | 7 |
| 12. Kentucky | 2,363 | 2 |
| 13. Louisiana | 847 | 1 |
| 14. Michigan | 1,030 | 1 |
| 15. Minnesota | 2,390 | 2 |
| 16. Mississippi | 1,013 | 1 |
| 17. Missouri | 4,450 | 4 |
| 18. Montana | 2,383 | 2 |
| 19. Nebraska | 6,500 | 7 |
| 20. Nevada | 500 | 1 |
| 21. New Mexico | 1,543 | 2 |
| 22. New York | 1,410 | 1 |
| 23. North Carolina | 860 | 1 |

CATTLE AND CALVES [1]—Continued

| State/unit | (1,000 Head) | Directors |
|---|---|---|
| 24. North Dakota | 1,760 | 2 |
| 25. Ohio | 1,280 | 1 |
| 26. Oklahoma | 5,350 | 5 |
| 27. Oregon | 1,397 | 1 |
| 28. Pennsylvania | 1,603 | 2 |
| 29. South Dakota | 3,717 | 4 |
| 30. Tennessee | 2,240 | 2 |
| 31. Texas | 13,933 | 14 |
| 32. Utah | 830 | 1 |
| 33. Virginia | 1,640 | 2 |
| 34. Wisconsin | 3,383 | 3 |
| 35. Wyoming | 1,403 | 1 |
| 36. Northwest | 1. | |
| Alaska | 15. | |
| Hawaii | 158. | |
| Washington | 1,107. | |
| Total | 1,280. | |
| 37. Northeast | 1. | |
| Connecticut | 54. | |
| Delaware | 23. | |
| Maine | 90. | |
| Massachusetts | 46. | |
| New Hampshire | 38. | |
| New Jersey | 41. | |
| Rhode Island | 5. | |
| Vermont | 272. | |
| Total | 569. | |
| 38. Mid-Atlantic | | 1 |
| Maryland | 228. | |
| West Virginia | 412. | |
| Total | 640. | |
| 39. Southeast | | 2 |
| Georgia | 1,187. | |
| South Carolina | 415. | |
| Total | 1,602. | |
| 40. Importer [2] | | 9 |

[1] 2005, 2006, and 2007 average of January 1 cattle inventory data.
[2] 2004, 2005, and 2006 average of annual import data.

(b) The Board shall be composed of cattle producers and importers appointed by the Secretary from nominations submitted pursuant to the Act and regulations of this Part. A producer may only be nominated to represent the unit in which that producer is a resident.

(c) At least every three (3) years, and not more than every two (2) years, the Board shall review the geographic distribution of cattle inventories throughout the United States and the volume of imported cattle, beef, and beef products and, if warranted, shall reapportion units and/or modify the number of Board members from units in order to best reflect the geographic distribution of cattle production volume in the United States and the volume of imported cattle, beef, or beef products into the United States.

(d) The Board may recommend to the Secretary a modification in the number of cattle per unit necessary for representation on the Board.

(e) The following formula will be used to determine the number of Board members who shall serve on the Board for each unit:

(1) Each geographic unit or State that includes a total cattle inventory equal to or greater than five hundred thousand (500,000) head of cattle shall be entitled to one representative on the Board;

(2) States which do not have total cattle inventories equal to or greater than five hundred thousand (500,000) head of cattle shall be grouped, to the extent practicable, into geographically contiguous units each of which have a combined total inventory of not less than 500,000 head of cattle and such unit(s) shall be entitled to at least one representative on the Board;

(3) Importers shall be represented by a single unit, with the number of Board members representing such unit based upon a conversion of the total volume of imported cattle, beef or beef products into live animal equivalencies;

(4) Each unit shall be entitled to representation by an additional Board member for each one million (1,000,000) head of cattle within the unit which exceeds the initial five hundred thousand (500,000) head of cattle within the unit qualifying such unit for representation.

(f) In determining the volume of cattle within the units, the Board and the Secretary shall utilize the information received by the Board pursuant to §§ 1260.201 and 1260.202 industry data and data published by the Department.

[51 FR 26138, July 18, 1986, as amended at 55 FR 20445, May 17, 1990; 58 FR 12999, Mar. 9, 1993; 60 FR 62020, Dec. 4, 1995; 64 FR 3815, Jan. 26, 1999; 67 FR 11412, Mar. 14, 2002; 70 FR 7005, Feb. 10, 2005; 73 FR 60098, Oct. 10, 2008]

### § 1260.142 Term of office.

(a) The members of the Board shall serve for terms of three (3) years, except that the members appointed to the initial Board shall serve, proportionately, for terms of 1, 2, and 3 years. To the extent practicable, the terms of Board members from the same unit shall be staggered for the initial Board.

(b) Each member shall continue to serve until a successor is appointed by the Secretary.

(c) No member shall serve more than two consecutive 3-year terms in such capacity.

### § 1260.143 Nominations.

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

(a) Nominations shall be obtained by the Secretary from eligible organizations. An eligible organization shall only submit nominations for positions on the Board representing units in which such eligible organization can establish that it is certified as an eligible organization to submit nominations for that unit. If the Secretary determines that a unit is not represented by an eligible organization, then the Secretary may solicit nominations from organizations, and producers residing in that unit.

(b) Nominations for representation of the importer unit may be submitted by—

(1) Organizations which represent importers of cattle, beef or beef products, as determined by the Secretary, or

(2) Individual importers of cattle, beef or beef products. Individual importers submitting nominations for representation of the importer unit must establish to the satisfaction of the Secretary that the persons submitting the nominations are importers of cattle, beef or beef products.

(c) After the establishment of the initial Board, the Department shall announce when a vacancy does or will exist. Nominations for subsequent Board members shall be submitted to the Secretary not less than sixty (60) days prior to the expiration of the terms of the members whose terms are expiring, in the manner as described in this section. In the case of vacancies due to reasons other than the expiration of a term of office, successor Board members shall be appointed pursuant to § 1260.146.

(d) Where there is more than one eligible organization representing producers in a unit, they may caucus and jointly nominate two qualified persons for each position representing that unit on the Board for which a member

is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary two nominees for each appointment to be made to represent that unit.

### § 1260.144 Nominee's agreement to serve.

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

(a) Serve on the Board if appointed; and

(b) Disclose any relationship with any beef promotion entity or with any organization that has or is being considered for a contractual relationship with the Board.

### § 1260.145 Appointment.

(a) From the nominations made pursuant to § 1260.143, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1260.141.

(b) Producers or importers serving on the Federation Board of Directors shall not be eligible for appointment to serve on the Board for a concurrent term.

### § 1260.146 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall request that nominations for a successor for the vacancy be submitted by the eligible organization(s) representing producers or importers of the unit represented by the vacancy. If no eligible organization(s) represents producers or importers in such unit, then the Secretary shall determine the manner in which nominations for the vacancy are submitted.

### § 1260.147 Procedure.

(a) At a properly convened meeting of the Board, a majority of the members shall constitute a quorum, and any action of the Board at such a meeting shall require the concurring votes of at least a majority of those present at such meeting. The Board shall establish rules concerning timely notice of meetings.

(b) When in the opinion of the chairperson of the Board emergency action is considered necessary, and in lieu of a properly convened meeting, the Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph, but any such action by telephone shall be confirmed promptly in writing. In the event that such action is taken, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force as though such action had been taken at a regular or special meeting of the Board.

### § 1260.148 Compensation and reimbursement.

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

### § 1260.149 Powers of the Board.

The Board shall have the following powers:

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

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

(c) To receive or initiate, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(d) To adopt such rules for the conduct of its business as it may deem advisable;

(e) To recommend to the Secretary amendments to this subpart; and

(f) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1260.172, in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully

guaranteed as to principal and interest by the United States.

**§ 1260.150 Duties of the Board.**

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson, a vice-chairperson and a treasurer and such other officers as may be necessary;

(b) To elect from its members an Executive Committee of no more than 11 and no less than 9 members, whose membership shall, to the extent practicable, reflect the geographic distribution of cattle numbers or their equivalent. The vice-chairperson of the Board shall serve as chairperson of the Executive Committee and the chairperson and the treasurer of the Board shall serve as members of the Executive Committee;

(c) To delegate to the Executive Committee the authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(d) To elect from its members 10 representatives to the Beef Promotion Operating Committee which shall be composed of 10 members from the Board and 10 members elected by the Federation;

(e) To utilize the resources, personnel, and facilities of established national nonprofit industry-governed organizations;

(f) To review and, if approved, submit to the Secretary for approval, budgets prepared by the Beef Promotion Operating Committee on a fiscal period basis of the Committee's anticipated expenses and disbursements in the administration of the Committee's responsibilities, including probable costs of promotion, research, and consumer information and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein;

(g) To prepare and submit to the Secretary for approval budgets on a fiscal period basis of the Board's overall anticipated expenses and disbursements, including the Committee's anticipated expenses and disbursements, in the administration of this subpart;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i)–(j) [Reserved]

(k) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

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

(m) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary, or his representative may attend such meetings;

(n) To review applications submitted by State beef promotion organizations pursuant to § 1260.181 and to make determinations with regard to such applications;

(o) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(p) To encourage the coordination of programs of promotion, research, consumer information and industry information designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

[51 FR 26138, July 18, 1986, as amended at 60 FR 58502, Nov. 28, 1995]

**§ 1260.151 Expenses.**

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve), as the Secretary finds are reasonable and likely to be incurred by the board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with this subpart. Administrative expenses incurred by the board shall not exceed 5 percent of

the projected revenue of that fiscal period. Expenses authorized in this paragraph shall be paid from assessments collected pursuant to § 1260.172.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1260.172, for administrative costs incurred by the Department to carry out its responsibilities pursuant to this subpart after the effective date of this subpart.

(c) [Reserved]

(d) Expenditures for the maintenance and expansion of foreign markets for beef and beef products shall be limited to an amount equal to or less than the total amount of assessments paid pursuant to § 1260.172(a).

[51 FR 26138, July 18, 1986, as amended at 53 FR 52631, Dec. 29, 1988 and 54 FR 15918, Apr. 20, 1989; 60 FR 58502, Nov. 28, 1995]

BEEF PROMOTION OPERATING COMMITTEE

### § 1260.161 Establishment and membership.

(a) There is hereby established a Beef Promotion Operating Committee of 20 members. The Committee shall be composed of 10 Board members elected by the Board and 10 producers elected by the Federation.

(b) Board representation on the Committee shall consist of the chairperson, vice-chairperson and treasurer of the Board, and seven representatives of the Board who will be duly elected by the Board to serve on the Committee. The seven representatives to the Committee elected by the Board shall, to the extent practical, reflect the geographic and unit distribution of cattle numbers, or the equivalent thereof.

(c) Federation representation on the Committee shall consist of the Federation chairperson, vice-chairperson, and eight duly elected producer representatives of the Federation Board of Directors who are members or ex officio members of the Board of Directors of a qualified State beef council. The eight representatives of the Federation elected to serve on the Committee shall, to the extent practical, reflect the geographic distribution of cattle numbers. The Federation shall submit to the Secretary the names of the representatives elected by the Federation to serve on the Committee and the manner in which such election was held and that such representatives are producers and are members or ex officio members of the Board of Directors of a qualified State beef council on the Federation Board of Directors. The prospective Federation representatives shall file with the Secretary a written agreement to serve on the Committee and to disclose any relationship with any beef promotion entity or with any organization that has or is being considered for a contractual relationship with the Board or the Committee. When the Secretary is satisfied that the above conditions are met, the Secretary shall certify such representatives as eligible to serve on the Committee.

### § 1260.162 Term of office.

(a) The members of the Committee shall serve for a term of 1 year.

(b) No member shall serve more than six consecutive terms.

### § 1260.163 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Committee, the Board or the Federation, depending upon which organization is represented by the vacancy, shall submit the name of a successor for the position in the manner utilized to elect representatives pursuant to § 1260.161 (b) and (c) of this section.

### § 1260.164 Procedure.

(a) Attendance of at least 15 members of the Committee shall constitute a quorum at a properly convened meeting of the Committee. Any action of the Committee shall require the concurring votes of at least two-thirds of the members present. The Committee shall establish rules concerning timely notice of meetings.

(b) When in the opinion of the chairperson of the Committee emergency action must be taken before a meeting can be called, the Committee may take action upon the concurring votes of no less than two-thirds of its members by mail, telephone, or telegraph. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed

promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Committee.

**§ 1260.165 Compensation and reimbursement.**

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

**§ 1260.166 Officers of the Committee.**

The following persons shall serve as officers of the Committee:

(a) The chairperson of the Board shall be chairperson of the Committee.

(b) The chairperson of the Federation shall be vice-chairperson of the Committee.

(c) The treasurer of the Board shall be treasurer of the Committee.

(d) The Committee shall elect or appoint such other officers as it may deem necessary.

**§ 1260.167 Powers of the Committee.**

The Committee shall have the following powers:

(a) To receive and evaluate, or on its own initiative, develop and budget for plans or projects to promote the use of beef and beef products as well as projects for research, consumer information and industry information and to make recommendations to the Secretary regarding such proposals;

(b) To select committees and subcommittees of Committee members, and to adopt such rules for the conduct of its business as it may deem advisable;

(c) To establish committees of persons other than Committee members to advise the Committee and pay the necessary and reasonable expenses and fees of the members of such committees.

**§ 1260.168 Duties of the Committee.**

The Committee shall have the following duties:

(a) To meet and to organize;

(b) To contract with established national nonprofit industry-governed organizations to implement programs of promotion, research, consumer information and industry information;

(c) To disseminate information to Board members;

(d) To prepare and submit to the Board for approval budgets on a fiscal-period basis of its anticipated expenses and disbursements in the administration of its responsibilities, including probable costs of promotion, research, consumer information and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein;

(e) To develop and submit to the Secretary for approval promotion, research, consumer information and industry information plans or projects;

(f) With the approval of the Secretary to enter into contracts or agreements with established national nonprofit industry-governed organizations for the implementation and conduct of activities authorized under §§ 1260.167 and 1260.169 and for the payment of the cost of such activities with funds collected through assessments pursuant to § 1260.172. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Committee a budget or budgets which shall show the estimated cost to be incurred for such activity or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Committee or Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary, the Committee or the Board may require. The Secretary or agents of the Committee or the Board may audit periodically the records of the contracting party;

(g) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(h) To give the Secretary the same notice of meetings of the Committee and its subcommittees and advisory

committees in order that the Secretary, or his representative, may attend such meetings;

(i) To submit to the Board and to the Secretary such information pursuant to this subpart as may be requested; and

(j) To encourage the coordination of programs of promotion, research, consumer information and industry information designed to strengthen the cattle industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

**§ 1260.169 Promotion, research, consumer information and industry information.**

The Committee shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any plans and projects for promotion, research, consumer information and industry information authorized by this subpart. Such plans and projects shall provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research, consumer information and industry information, with respect to beef and beef products designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products;

(b) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of beef and beef products and the creation of new products thereof, to the end that marketing and utilization of beef and beef products may be encouraged, expanded, improved or made more acceptable in the United States and foreign markets;

(c) Each plan or project authorized under paragraph (a) and (b) of this section shall be periodically reviewed or evaluated by the Committee to ensure that each such plan or project contributes to an effective program of promotion, research, consumer information and industry information. If it is found by the Committee that any such plan or project does not further the purposes of the Act, then the Committee shall terminate such plan or project;

(d) In carrying out any plan or project of promotion or advertising implemented by the Committee, no reference to a brand or trade name of any beef product shall be made without the approval of the Board and the Secretary. No such plans or projects shall make use of any unfair or deceptive acts or practices, including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product; and

(e) No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this part.

ASSESSMENTS

**§ 1260.172 Assessments.**

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

(2) Any producer marketing cattle of that producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, or for export purposes, shall remit to a qualified State beef council or to the Board an assessment on such cattle at the rate of one dollar ($1) per head of cattle or the equivalent thereof.

(3) In determining the assessment due from each producer pursuant to § 1260.172(a), a producer who is contributing to a qualified State beef council(s) shall receive a credit from the Board for contributions to such Council, but not to exceed 50 cents per head of cattle assessed.

(4) In order for a producer described in § 1260.172(a) to receive the credit authorized in § 1260.172(a)(3), the qualified

State beef council or the collecting person must establish to the satisfaction of the Board that the producer has contributed to a qualified State beef council.

(5) Each person responsible for the remittance of the assessment pursuant to §1260.172 (a) (1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board. However, the Board, with the approval of the Secretary, may authorize qualified State beef councils to propose modifications to the foregoing "State of origin" rule to ensure effective coordination of assessment collections between qualified State beef councils. Qualified State beef councils and the Board shall coordinate assessment collection procedures to ensure that producers selling or marketing cattle in interstate commerce are required to pay only one assessment per individual sale of cattle. For the purpose of this subpart, "State of origin" rule means the State where the cattle were located at time of sale, or the State in which the cattle were located prior to sale if such cattle were transported interstate for the sole purpose of sale. Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

(6) If a State law or regulation promulgated pursuant to State law requires the payment and collection of a mandatory, nonrefundable assessment of more fifty (50) cents per head on the sale and purchase of cattle, or the equivalent thereof for beef and beef products as described in §1260.172 (a)(1) and (2) for use by a qualified State beef council to fund activities similar to those described in §1260.169, and such State law or regulation authorizes the issuance of a credit of that amount of the assessment which exceeds fifty (50) cents to producers who waive any right to the refund of the assessment credited by the State due pursuant to this subpart, then any producer subject to such State law or regulation who pays only the amount due pursuant to such State law or regulation and this subpart, including any credits issued, shall thereby waive that producer's right to receipt from the Board of a refund of such assessment for that portion of such refund for which the producer received credit pursuant to such State law or regulation.

(b) *Importer assessments.* (1) Importers of cattle, beef, and beef products into the United States shall pay an assessment to the Board through the U.S. Customs Service, or in such other manner as may be established by regulations approved by the Secretary.

(2) The assessment rates for imported cattle, beef, and beef products are as follows:

IMPORTED LIVE CATTLE

| HTS No. | Assessment rate (head) |
|---|---|
| 0102.10.0010 | $1.00 |
| 0102.10.0020 | 1.00 |
| 0102.10.0030 | 1.00 |
| 0102.10.0050 | 1.00 |
| 0102.90.2011 | 1.00 |
| 0102.90.2012 | 1.00 |
| 0102.90.4024 | 1.00 |
| 0102.90.4028 | 1.00 |
| 0102.90.4034 | 1.00 |
| 0102.90.4038 | 1.00 |
| 0102.90.4054 | 1.00 |
| 0102.90.4058 | 1.00 |
| 0102.90.4062 | 1.00 |
| 0102.90.4064 | 1.00 |
| 0102.90.4066 | 1.00 |
| 0102.90.4068 | 1.00 |
| 0102.90.4072 | 1.00 |
| 0102.90.4074 | 1.00 |
| 0102.90.4082 | 1.00 |
| 0102.90.4084 | 1.00 |

IMPORTED BEEF AND BEEF PRODUCTS

| HTS No. | Assessment rate per kg |
|---|---|
| 0201.10.0510 | .01459542 |
| 0201.10.0590 | .00379102 |
| 0201.10.1010 | .01459542 |
| 0201.10.1090 | .00379102 |
| 0201.10.5010 | .01459542 |
| 0201.10.5090 | .00511787 |
| 0201.20.0200 | .00530743 |
| 0201.20.0400 | .00511787 |
| 0201.20.0600 | .00379102 |
| 0201.20.1000 | .00530743 |
| 0201.20.3000 | .00511787 |
| 0201.20.5000 | .00379102 |
| 0201.20.8090 | .00379102 |
| 0201.30.0200 | .00530743 |
| 0201.30.0400 | .00511787 |
| 0201.30.0600 | .00379102 |
| 0201.30.1000 | .00530743 |
| 0201.30.3000 | .00511787 |
| 0201.30.5000 | .00511787 |
| 0201.30.8090 | .00511787 |
| 0202.10.0510 | .01459542 |

IMPORTED BEEF AND BEEF PRODUCTS—Continued

| HTS No. | Assessment rate per kg |
|---|---|
| 0202.10.0590 | .00379102 |
| 0202.10.1010 | .01459542 |
| 0202.10.1090 | .00370102 |
| 0202.10.5010 | .01459542 |
| 0202.10.5090 | .00379102 |
| 0202.20.0200 | .00530743 |
| 0202.20.0400 | .00511787 |
| 0202.20.0600 | .00379102 |
| 0202.20.1000 | .00530743 |
| 0202.20.3000 | .00511787 |
| 0202.20.5000 | .00379102 |
| 0202.20.8000 | .00379102 |
| 0202.30.0200 | .00530743 |
| 0202.30.0400 | .00511787 |
| 0202.30.0600 | .00527837 |
| 0202.30.1000 | .00530743 |
| 0202.30.3000 | .00511787 |
| 0202.30.5000 | .00511787 |
| 0202.30.8000 | .00379102 |
| 0206.10.0000 | .00379102 |
| 0206.21.0000 | .00379102 |
| 0206.22.0000 | .00379102 |
| 0206.29.0000 | .00379102 |
| 0210.20.0000 | .00615701 |
| 1601.00.4010 | .00473877 |
| 1601.00.4090 | .00473877 |
| 1601.00.6020 | .00473877 |
| 1602.50.0900 | .00663428 |
| 1602.50.1020 | .00663428 |
| 1602.50.1040 | .00663428 |
| 1602.50.2020 | .00701388 |
| 1602.50.2040 | .00701388 |
| 1602.50.6000 | .00720293 |

(3) The Board may prescribe by regulation, with the approval of the Secretary, an increase or decrease in the level of assessments for imported beef and beef products based upon revised determinations of live animal equivalencies.

(4) The assessments due upon imported cattle, beef and beef products shall be remitted to the Customs Service upon importation of the cattle, beef or beef products into the United States, or in such other manner as may be provided by regulations prescribed by the Board and approved by the Secretary.

(c) The collection of assessments pursuant to § 1260.172 (a) and (b) shall begin with respect to cattle purchased or cattle, beef, and beef products imported on and after the effective date of this section and shall continue until terminated by the Secretary.

(d) Money remitted pursuant to this subpart shall be in the form of a negotiable instrument made payable as appropriate to the qualified State beef council or the "Cattlemen's Beef Promotion and Research Board." Such remittances and the reports specified in § 1260.201 shall be mailed to the location designated by the Board.

[51 FR 26138, July 18, 1986, as amended at 53 FR 52631, Dec. 29, 1988 and 54 FR 15918, Apr. 20, 1989; 54 FR 28019, July 5, 1989; 71 FR 47076, Aug. 16, 2006]

### §§ 1260.173–1260.174 [Reserved]

### § 1260.175 Late-payment charge.

Any unpaid assessments due to the Board pursuant to § 1260.172 shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the qualified State beef council or Board, whichever is earlier.

### § 1260.176 Adjustment of accounts.

Whenever the Board or the Department determines that money is due the Board or that money is due any person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1260.172. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months except that the Board shall make prompt payment when an overpayment cannot be adjusted by a credit.

**§ 1260.181 Qualified State beef councils.**

(a) Any beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives assessments or contributions from producers and conducts beef promotion, research, consumer information and/or industry information programs may apply for certification of qualification so that producers may receive credit pursuant to § 1260.172(a)(3) for contributions to such organization. The Board shall review such applications for certification and shall make a determination as to certification of such applicant.

(b) In order for the State beef council to be certified by the Board as a qualified State beef council, the council must:

(1) Conduct activities as defined in § 1260.169 that are intended to strengthen the beef industry's position in the marketplace;

(2) Submit to the Board a report describing the manner in which assessments are collected and the procedure utilized to ensure that assessments due are paid;

(3) Certify to the Board that such council will collect assessments paid on cattle originating from the State or unit within which the council operates and shall establish procedures for ensuring compliance with this subpart with regard to the payment of such assessments;

(4) Certify to the Board that such organization shall remit to the Board assessments paid and remitted to the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3), by the last day of the month in which the assessment was remitted to the qualified State beef council unless the Board determines a different date for remittance of assessments.

(5) [Reserved]

(6) Certify to the Board that the council will furnish the Board with an annual report by a certified public accountant of all funds remitted to such council pursuant to this subpart and any other reports and information the Board or Secretary may request; and

(7) Not use council funds collected pursuant to this subpart for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

[51 FR 26138, July 18, 1986, as amended at 60 FR 58502, Nov. 28, 1995]

REPORTS, BOOKS AND RECORDS

**§ 1260.201 Reports.**

Each importer, person marketing cattle, beef or beef products of that person's own production directly to consumers, and each collecting person making payment to producers and responsible for the collection of the assessment under § 1260.172 shall report to the Board periodically information required by regulations prescribed by the Board and approved by the Secretary. Such information may include but is not limited to the following:

(a) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transaction;

(b) The number of cattle imported; or the equivalent thereof of beef or beef products;

(c) The amount of assessment remitted;

(d) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and,

(e) The date any assessment was paid.

EFFECTIVE DATE NOTE: § 1260.201 contains information collection and recordkeeping requirements and will not become effective until approval is given by the Office of Management and Budget.

**§ 1260.202 Books and records.**

Each person subject to this subpart shall maintain and make available for inspection by the Secretary the records required by regulations prescribed by the Board and approved by the Secretary that are necessary to carry out the provisions of this subpart, including records necessary to verify any required reports. Such records shall be

maintained for the period of time prescribed by the regulations issued hereunder.

[51 FR 26138, July 18, 1986; 51 FR 26686, July 25, 1986]

EFFECTIVE DATE NOTE: § 1260.202 contains information collection and recordkeeping requirements and will not become effective until approval is given by the Office of Management and Budget.

### § 1260.203 Confidential treatment.

All information obtained from such books, records or reports required under the Act and this subpart shall be kept confidential by all persons, including employees and agents and former employees and agents of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and employees and all former officers and employees of contracting organizations having access to such information, and shall not be available to Board members or any other producers or importers. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to this information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

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

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

[51 FR 26138, July 18, 1986; 51 FR 26686, July 25, 1986]

MISCELLANEOUS

### § 1260.211 Proceedings after termination.

(a) Upon the termination of this subpart the Board shall recommend not more than 11 of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

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

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to §§ 1260.150 and 1260.168.

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

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

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation 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 used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information or industry information plans or projects authorized pursuant to this subpart.

[51 FR 26138, July 18, 1986; 51 FR 26686, July 25, 1986]

### § 1260.212 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 hereafter 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 person, with respect to any such violation.

**§ 1260.213 Removal.**

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

**§ 1260.214 Personal liability.**

No member, employee or agent of the Board or the Committee, including employees or agents of a qualified State beef council acting on behalf of the Board, shall be held personally responsible, either individually or jointly, in any way whatsoever, to any person for errors in judgment, mistakes or other acts of either commission or omission, or such member or employee, except for acts of dishonesty or willful misconduct.

**§ 1260.215 Patents, copyrights, inventions and publications.**

(a) Any patents, copyrights, inventions or publications developed through the use of funds collected by the Board under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, ensure to the benefit of the Board. Upon termination of this subpart, § 1260.211 shall apply to determine disposition of all such property.

(b) Should patents, copyrights, inventions or publications be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions or publications shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, invention or publication in a manner consistent with paragraph (a) of this section.

**§ 1260.216 Amendments.**

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

**§ 1260.217 Separability.**

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

## Subpart B—Rules and Regulations

SOURCE: 53 FR 5754, Feb. 26, 1988, unless otherwise noted.

**§ 1260.301 Terms defined.**

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms as appears in Subpart A of this part.

**§ 1260.302 Organic exemption.**

(a) A producer who operates under an approved National Organic Program

(NOP) (7 CFR part 205) system plan; only produces products that re eligible to be labeled as 100 percent organic under the NOP, except as provided for in paragraph (i) of this section; and is not a split operation shall be exempt from the payment of assessments.

(b) To apply for an exemption under this section, the producer shall submit the request to the Board or QSBC—on a form provided by the Board or QSBC—at any time initially and annually thereafter on or before January 1 as long as the producer continues to be eligible for the exemption.

(c) The request shall include the following: the producer's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the producer complies with the requirements of this section, the Board or QSBC will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board or QSBC will have 60 days to approve the exemption request; after August 15, 2005, the Board or QSBC will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) The producer shall provide a copy of the Certificate of Exemption to each person responsible for collecting and remitting the assessment.

(f) The person responsible for collecting and remitting the assessment shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board or QSBC.

(g) An importer who imports only products that are eligible to be labeled as 100 percent organic under the NOP (7 CFR part 205) and who is not a split operation shall be exempt from the payment of assessments. That importer may submit documentation to the Board and request an exemption from assessment on 100 percent organic cattle or beef and beef products—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of producers in paragraph (c) 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 (HTS) classification valid for 1 year from the date of issue. This HTS classification should be entered by the importer on the Customs entry documentation. Any line item entry of 100 percent organic cattle or beef and beef products bearing this HTS classification assigned by the Board will not be subject to assessments.

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

(i) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer from exemption under this section, except that producers who produce both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2762, Jan. 14, 2005]

### § 1260.310 Domestic assessments.

(a) A $1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner designated in § 1260.311.

(b) If more than one producer shares the proceeds received for the cattle sold, each such producer is obligated to

pay that portion of the assessments which are equivalent to the producer's proportionate share of the proceeds.

(c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

### § 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraphs (b), (c), and (f) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1-per-head of cattle purchased and shall be responsible for remitting assessments to the QSBC or the Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

(b) Any producer marketing cattle of that producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, shall be responsible for remitting to the qualified State beef council or the Cattlemen's Board pursuant to § 1260.312, an assessment on such cattle at the rate of $1.00 per head of cattle or the equivalent thereof. The obligation to remit the assessment shall attach upon slaughter of the cattle, and the producer responsible for remitting the assessment shall remit the assessment in the manner provided in § 1260.312. For the purposes of this subpart, a producer marketing cattle of the producer's own production in the form of beef or beef products shall be considered a collecting person.

(c) In the States listed in the following chart there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale. In addition, when cattle are sold in the sales transactions listed below in those States, these State authorized inspectors are authorized to, and shall, except as provided for in paragraph (f) of this section, collect assessments due as a result of the sale of cattle. In those transactions in which inspectors are responsible for collecting assessments, the person paying the producer shall not be responsible for the collection and remittance of such assessments. The following chart identifies the party responsible for collecting and remitting assessments in these States:

| State | Sales through auction market | Sales to a slaughter/packer | Sales to a feedlot | Sales to an order buyer/dealer | Country sales [1] |
|---|---|---|---|---|---|
| Arizona | CP | CP | CP | B | B |
| California | CP | CP | B | B-CP | B |
| Colorado | CP | B | B | B | B |
| Idaho | B | B | B | B | B |
| Montana | CP | B | B | B | B |
| Nebraska | CP | CP | B-CP | B-CP | B-CP |
| Nevada | B | B | B | B | B |
| Oregon | CP | B-CP | B | B | B |
| New Mexico | CP | B-CP | B-CP | B-CP | B-CP |
| Utah | CP | B-CP | B | B | B |
| Washington | CP | CP | B | B-CP | B |
| Wyoming | CP | B | B | B | B |

**Key:**

B—Brand inspector has responsibility to collect and remit assessments due.

CP—The person paying the producer shall be the collecting person and has responsibility to collect and remit the assessments due.

B-CP—Brand inspector has responsibility to collect; however, when there has not been a physical brand inspection the person paying the producer shall be the collecting person and has the responsibility to collect and remit assessments due.

[1] For the purpose of this subpart, the term "country sales" shall include any sales not conducted at an auction or livestock market and which is not a sale to a slaughter/packer, feedlot, or order buyer or dealer.

(d) For cattle delivered on futures contracts, the commission firm or the market agency representing the seller in the delivery of cattle shall be the collecting person.

(e) In a case where a producer sells cattle as part of a custom slaughter operation, the producer shall be the collecting person in the same manner as if the cattle were slaughtered for sale.

(f)(1) In lieu of each person making a payment to a producer for cattle purchased in the United States, producers are provided the option in accordance with this paragraph (f) to remit the assessment to the QSBC in the State in which the producer resides. A producer who transports, prior to sale, cattle of that producer's own production to another State, may elect to make a directed payment of the $1-per-head assessment in advance to the QSBC in the State in which the producer resides, provided that the producer fulfills the following requirements:

(i) Transports the cattle under retained ownership to a feedlot or similar location, and the cattle remain at such location, prior to sale, for a period not less than 30 days; and

(ii) The producer, either before or at the time of transport, signs a Certification of Producer Directed Payment of Cattle Assessments form indicating that the assessment has been paid in advance, and remits the assessment to the appropriate QSBC. A copy of the certification form indicating the payment of the assessment shall be sent by the producer with the assessment when remitted to the QSBC. The producer also shall send a copy of the certification form to the feedlot operator at the time the cattle are delivered. A copy of the certification form also shall be given to the purchaser of the cattle by the feedlot operator at the time of sale.

(2) The certification form will include the following information:

(i) Producer's Name.

(ii) Producer's social security number or Tax I.D. number.

(iii) Producer's address (street address or P.O. Box, city, State, and zip code).

(iv) Signature of Producer.

(v) Producer's State of residence.

(vi) Number of cattle shipped to out of State feedyard under retained ownership.

(vii) Date cattle shipped.

(viii) State where cattle will be on feed.

(ix) Name of feedyard.

(x) Address of feedyard.

(3) Cattle of a producer's own production shall be those cattle which meet all of the following requirements:

(i) The cattle shall be offspring of a producer's own cow herd;

(ii) The cattle shall have been continuously and exclusively under the producer's ownership; and

(iii) The cattle are transported to a feedlot with such producer continuously owning the cattle through the entire feeding phase.

(4) For those cattle for which the assessment has been producer directed and paid in advance pursuant to paragraph (f)(1) of this section, the purchaser of the cattle shall not be required to collect and remit the assessment, but shall maintain on file a copy of the Certification of Producer Directed Payment of Cattle Assessments form completed and signed by the producer who originally transported the cattle under retained ownership.

(5) For those cattle for which the assessment has been producer directed and paid in advance pursuant to paragraph (f)(1) of this section, copies of the completed Certification of Producer Directed Payment of Cattle Assessments form shall be maintained on file by the producer, the QSBC or the Board, the feedlot operator, and the purchaser of the cattle for 3 years.

(6) Producers shall not receive credit of the assessment required to be paid pursuant to paragraph (f)(1) of this section for those cattle lost because of death.

[53 FR 5754, Feb. 26, 1988, as amended at 67 FR 61766, Oct. 2, 2002]

### § 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is

no qualified State beef council in such State, then to the Cattlemen's Board as follows:

(a) *Reports*. Each collecting person shall make reports on forms made available or approved by the Cattlemen's Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen's Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods*. Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances*. The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27–275; Kansas City, Missouri 64180–0001, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

### § 1260.313 Document evidencing payment of assessments.

Each collecting person responsible for remitting an assessment to a qualified State beef council or the Board, other than a producer slaughtering cattle of the producer's own production for sale, is required to give the producer from whom the collecting person collected an assessment written evidence of payment of the Beef Promotion and Research Assessments. Such written evidence serving as a receipt shall contain the following information:

(a) Name and address of the collecting person.

(b) Name of producer who paid assessment.

(c) Number of head of cattle sold.

(d) Total assessments paid by the producer.

(e) Date.

### § 1260.314 Certification of non-producer status for certain transactions.

(a) The assessment levied on each head of cattle sold shall not apply to cattle owned by a person:

(1) If the person certifies that the person's only share in the proceeds of a sale of cattle, beef, or beef products is a sales commission, handling fee or other service fee; or

(2) If the person:

(i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party,

(ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and

(iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, has been collected and has been remitted, or will be remitted in a timely fashion.

(b) Each person seeking non-producer status pursuant to § 1260.116 shall provide the collecting person, on a form approved by the Board and the Secretary, with a Statement of Certification of Non-Producer Status at the time the collecting person makes payment to the seller of cattle, in lieu of the assessment that would otherwise be due, except as provided for in paragraphs (c) and (d) of this section.

(c) When the seller of cattle is not physically present during a sales transaction in which the seller claims non-

producer status, such seller shall deliver to the collecting person an original Statement of Certification of Non-Producer Status within 10 business days of the date the collecting person makes payment to the seller of the cattle.

(d) If the collecting person is a brand inspector, as provided for in § 1260.311, the seller of cattle claiming non-producer status shall provide to the brand inspector at the time the physical brand inspection is completed, in lieu of the assessment that would otherwise be due, either: a Statement of Certification of Non-Producer Status or a valid brand inspection certificate which shows collection of the assessment by a brand inspector in a transaction which took place not more than 10 days prior to the sale of the cattle.

(e) A copy of the Statement of Certification of Non-Producer Status shall be forwarded, upon request, by the collecting person to the qualified State beef council or the Cattlemen's Board.

[53 FR 5754, Feb. 26, 1988, as amended at 66 FR 26784, May 15, 2001]

### § 1260.315 Qualified State Beef Councils.

The following State beef promotion entities have been certified by the Board as qualified State beef councils:

Alabama Cattlemen's Association
Arizona Beef Council
Arkansas Beef Council
California Beef Council
Colorado Beef Council
Florida Beef Council, Inc.
Georgia Beef Board, Inc.
Idaho Beef Council
Illinois Beef Council
Indiana Beef Council
Iowa Beef Cattle Producers Association
Kansas Beef Council
Kentucky Beef Cattle Association
Louisiana Beef Industry Council
Maryland Beef Council
Michigan Beef Industry Commission
Minnesota Beef Council
Mississippi Cattle Industry Board
Missouri Beef Industry Council
Montana Beef Council
Nebraska Beef Industry Development Board
Nevada Beef Council
New Mexico Beef Council
New York Beef Industry Council
North Carolina Cattlemen's Association
North Dakota Beef Commission
Ohio Beef Council
Oklahoma Beef Commission
Oregon Beef Council
Pennsylvania Beef Council, Inc.
South Carolina Cattle and Beef Board
South Dakota Beef Industry Council
Tennessee Beef Industry Council
Texas Beef Industry Council
Utah Beef Council
Vermont Beef Council
Virginia Cattle Industry Board
Washington State Beef Commission
West Virginia Beef Industry
Wisconsin Beef Council
Wyoming Beef Council

### § 1260.316 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control number 0851–0152.

## Subpart C [Reserved]

## Subpart D—Beef Promotion and Research: Certification and Nomination Procedures for the Cattlemen's Beef Promotion and Research Board

SOURCE: 51 FR 11559, Apr. 4, 1986, unless otherwise noted. Redesignated at 51 FR 26138, July 18, 1986, and further redesignated at 51 FR 35197, Oct. 1, 1986. Redesignated also at 53 FR 9858, Mar. 28, 1988.

### § 1260.500 General.

State organizations or associations shall be certified by the Secretary as provided for in the Beef Promotion and Research Act of 1985 to be eligible to make nominations of cattle producers to the Board. Additionally, where there is no eligible organization or association in a State, the Secretary may provide for nominations in the manner prescribed in this subpart. Organizations or associations determined by the Secretary to represent importers of cattle, beef, and beef products may submit nominations for membership on the Board in a manner prescribed by the Secretary in this subpart. The number of nominees required for each allotted position will be determined by the Secretary.

**§ 1260.510 Definitions.**

As used in this subpart:

*Act* means the Beef Promotion and Research Act of 1985 (7 U.S.C. 2901–2918).

*Beef* means the flesh of cattle.

*Beef products* means edible products produced in whole or in part from beef, exclusive of milk and milk products produced therefrom.

*Board* means the Cattlemen's Beef Promotion and Research Board established under section 5(1) of the Act.

*Cattle* means live, domesticated bovine animals regardless of age.

*Department* means the United States Department of Agriculture.

*Importer* means a person who imports cattle, beef, or beef products from outside the United States.

*Livestock and Seed Division* means the Livestock and Seed Division of the Department's Agricultural Marketing Service.

*Producer* means a person who owns or acquires ownership of cattle, except that a person shall not be considered to be a producer if the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee.

*Secretary* means the Secretary of Agriculture of the United States, 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.

*State* means each of the 50 States.

*Unit* means a State or combination of States which has a total inventory of not less than 500,000 head of cattle; or importers.

**§ 1260.520 Responsibility for administration of regulations.**

The Livestock and Seed Division shall have the responsibility for administering the provisions of this subpart.

**§ 1260.530 Certification of eligibility.**

(a) *State organizations or associations: Requirements for certification.* (1) To be eligible for certification to nominate producer members to the Board, State organizations or associations must meet all of the following criteria:

(i) Total paid membership must be comprised of at least a majority of cattle producers or represent at least a majority of cattle producers in a State or unit.

(ii) Membership must represent a substantial number of producers who produce a substantial number of cattle in such State or unit.

(iii) There must be a history of stability and permanency.

(iv) There must be a primary or overriding purpose of promoting the economic welfare of cattle producers.

(2) Written evidence of compliance with the certification criteria shall be contained in a factual report submitted to the Secretary by all applicant State organizations or associations.

(3) The primary consideration in determining the eligibility of a State organization or association shall be based on the criteria set forth in this section. However, the Secretary may consider any additional information that the Secretary deems relevant and appropriate.

(4) The Secretary shall certify any State organization or association which he determines complies with the criteria in this section, and his eligibility determination shall be final.

(b) *Organizations or associations representing importers.* The determination by the Secretary as to the eligibility of importer organizations or associations to nominate members to the Board shall be based on applications containing the following information:

(1) The number and type of members represented (*i.e.*, beef, or cattle importers, etc.).

(2) Annual import volume in pounds of beef and beef products and/or the number of head of cattle.

(3) The stability and permanency of the importer organization or association.

(4) The number of years in existence.

(5) The names of the countries of origin for cattle, beef, or beef products imported.

The Secretary may also consider additional information that the Secretary deems relevant and appropriate. The Secretary's determination as to eligibility shall be final.

**§ 1260.540 Application for certification.**

(a) *State organizations or associations.* Any State organization or association

which meets the eligibility criteria specified in § 1260.530(a) for certification is entitled to apply to the Secretary for such certification of eligibility to nominate producers for appointment to the Board. To apply, such organization or association must submit a completed "Application for Certification of Organization or Association," Form LS–25, contained in § 1260.640. It may be reproduced or additional copies may be obtained from the Livestock and Seed Division; Agricultural Marketing Service, USDA; 14th and Independence Avenue, SW., Room 2610–S; Washington, DC 20250. (Telephone: 202/447–2650.)

(b) *Importer organizations or associations.* Any organization or association whose members import cattle, beef, or beef products into the United States may apply to the Secretary for determination of eligibility to nominate importers under the Act. Applications shall be in writing and shall contain the information required by § 1260.530. Interested organizations or associations may contact the Livestock and Seed Division; Agricultural Marketing Service, USDA; 14th and Independence Avenue, SW., Room 2610–S; Washington, DC 20250; (Telephone: 202/447–2650) for information concerning application procedures.

**§ 1260.550 Verification of information.**

The Secretary may require verification of the information to determine eligibility for certification to make nominations under the Act.

**§ 1260.560 Review of certification.**

The Secretary may terminate or suspend certification or eligibility of any organization or association if it ceases to comply with the certification or eligibility criteria set forth in this subpart. The Secretary may require any information deemed necessary to ascertain whether the organization or association may remain certified or eligible to make nominations.

**§ 1260.570 Notification of certification and the listing of certified organizations.**

Organizations and associations shall be notified in writing as to whether they are eligible to nominate producer members to the Board. A copy of the certification or eligibility determination shall be furnished to certified or eligible organizations and associations. Copies shall also be maintained on file in the Livestock and Seed Division office, where they will be available for inspection.

**§§ 1260.580–1260.600 [Reserved]**

**§ 1260.610 Acceptance of appointment.**

Producers and importers nominated to the Board must signify in writing their intent to serve if appointed.

**§ 1260.620 Confidential treatment of information.**

All documents and information submitted to or obtained by the Department shall be kept confidential by all employees of the Department, except that the Secretary may issue general statements based upon the information collected from a number of different sources. These general statements will not identify any information as having been furnished by any one source.

**§ 1260.630 Paperwork Reduction Act assigned number.**

The OMB has approved the information collection request contained in this subpart under the provisions of 44 U.S.C. Chapter 35, and OMB Control Number 0581–152 has been assigned.

**§ 1260.640 Application for Certification Form.**

The following official form, "Application for Certification of Association or Organization," must be completed and submitted to the Department by eligible State organizations or associations seeking certification by the Secretary. This form may be reproduced.

Information is collected in order to determine eligibility of organizations or associations to nominate cattle producers to serve as members of the Board. Application is voluntary and information is held confidential (Beef Promotion and Research Act of 1985).

U.S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

APPLICATION FOR CERTIFICATION OF ORGANIZATION OR ASSOCIATION

Form Approved
OMB NO. 0581-0152
Expires 12-31-88

Organizations or associations must apply for certification by the Secretary to be eligible to participate in the making of nominations of cattle producers to serve as members of the Cattlemen's Beef Promotion and Research Board as provided in the Beef Promotion and Research Act of 1985. Information submitted in response to all items must be complete. Please type or print clearly. Send original only to: *Marketing Programs and Procurement Branch*
*Livestock and Seed Division, AMS*
*U. S. Department of Agriculture, Room 2610-S*
*Washington, DC 20250*

1. NAME AND ADDRESS OF ORGANIZATION *(Street address or P.O. Box No., City, State, ZIP)*

TEL. (AC .....) .....

2. TYPE OF ORGANIZATION *(Check one)*
☐ Cattle Assoc. ☐ General Farm Organization
☐ Other *(Specify)* .....

3. STATE

4. TOTAL PAID MEMBERSHIP *(Most RECENT FULL calendar year)*
IN 198__ NO. _____

5. NUMBER OF PAID MEMBERS ENGAGED IN CATTLE PRODUCTION *(Most RECENT FULL calendar year)*
IN 198__ NO. _____

6. TOTAL ESTIMATED INVENTORY OF CATTLE OWNED BY PAID MEMBERS *(Most RECENT FULL calendar year)*
AS OF JAN. 1, 198__ NO. _____

7. AS EVIDENCE OF THE STABILITY AND PERMANENCY OF THE ORGANIZATION, GIVE:

A. No. of Years in Existence

B. No. of Paid Members during each of the last four calendar years:

| | 198__ | 198__ | 198__ | 198__ |
|---|---|---|---|---|
| No. → | | | | |

C. Other Evidence *(Explain)*

I hereby certify that: (1) a primary or overriding purpose of this organization or association is to promote the economic welfare of cattle producers, and (2) the information provided in response to the above items is true, complete, and correct to the best of my knowledge. The Secretary of Agriculture may examine our books, documents, papers, records, files, and facilities to verify any of the information submitted and may procure such other information as may be required to determine this organization's or association's eligibility for certification.

8. NAME AND TITLE OF PERSON COMPLETING THIS APPLICATION *(Type or print)*

9. DATE

10. SIGNATURE

FORM LS-25
(JAN 86)

# PART 1270—WOOL AND MOHAIR ADVERTISING AND PROMOTION [RESERVED]

AUTHORITY: 7 U.S.C. 1781–1787.

# PART 1280—LAMB PROMOTION, RESEARCH, AND INFORMATION ORDER

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AUTHORITY: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

SOURCE: 67 FR 17857, Apr. 11, 2002, unless otherwise noted.

## Subpart A—Lamb Promotion, Research, and Information Order

DEFINITIONS

### § 1280.101 Act.

*Act* means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425; Pub. L. 104–127; 110 Stat. 1029, as amended), or any amendments thereto.

### § 1280.102 Board.

*Board* means the Lamb Promotion, Research, and Information Board established pursuant to § 1280.201.

### § 1280.103 Certified organization.

*Certified organization* means any organization which has been certified by the Secretary pursuant to this part as being eligible to submit nominations for membership on the Board.

### § 1280.104 Conflict of Interest.

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

### § 1280.105 Department.

*Department* means the United States Department of Agriculture.

### § 1280.106 Exporter.

*Exporter* means any person who exports domestic live lambs from the United States.

### § 1280.107 Feeder.

*Feeder* means any person who acquires ownership of lambs and feeds such lambs in the U.S. until they reach slaughter weight.

### § 1280.108 First handler.

*First handler* means the packer or other person who buys or takes possession of lambs from a producer or feeder for slaughter, including custom slaughter. If a producer or feeder markets lamb products directly to consumers, the producer or feeder shall be considered to be a first handler with respect to such lambs produced by the producer or feeder.

### § 1280.109 Fiscal period and marketing year.

*Fiscal period and marketing year* means the 12-month period ending on December 31 or such other consecutive 12-month period as shall be recommended by the Board and approved by the Secretary.

### § 1280.110 Information.

*Information* means information and programs that are designed to increase efficiency in producing lambs, to maintain and expand existing markets, and to develop new markets, marketing strategies, increased market efficiency, and activities that are designed to enhance the image of lamb and lamb products on a national or international basis. These include:

(a) Consumer information, which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, and nutritional attributes of lamb and lamb products; and

(b) Industry information, which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the lamb industry, and activities to enhance the image of lamb.

**§ 1280.111 Lamb.**

*Lamb* means ovine animals of any age, including ewes and rams.

**§ 1280.112 Lamb products.**

*Lamb products* means products produced in whole or in part from lamb, including pelts, and excluding wool and wool products.

**§ 1280.113 Order.**

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

**§ 1280.114 Part and subpart.**

*Part* means the Lamb Promotion, Research, and Information Order and all rules and regulations issued pursuant to the Act and the Order. The Order shall be a *subpart* of the Part.

**§ 1280.115 Person.**

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

**§ 1280.116 Producer.**

*Producer* means any person who owns and produces lambs in the United States for sale.

**§ 1280.117 Producer information.**

*Producer information* means activities designed to provide producers, feeders, and first handlers with information relating to production or marketing efficiencies, development of new markets, program activities, or other information that would facilitate an increase in the demand for lambs or lamb products.

**§ 1280.118 Promotion.**

*Promotion* means any action, including paid advertising and the dissemination of culinary and nutritional information and public relations with emphasis on new marketing strategies, to present a favorable image of U.S. lamb products to the public for the purpose of improving the competitive position of U.S. lamb and lamb products in the marketplace and to stimulate sales.

**§ 1280.119 Referendum.**

*Referendum* means a referendum to be conducted by the Secretary pursuant to the Act whereby producers, feeders, first handlers, and exporters shall be given the opportunity to vote to determine whether the continuance of this subpart is favored by a majority of eligible persons voting and a majority of volume voting.

**§ 1280.120 Research.**

*Research* means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of lamb or lamb products.

**§ 1280.121 Secretary.**

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

**§ 1280.122 Seedstock producer.**

*Seedstock producer* means any lamb producer in the U.S. who engages in the production and sale of breeding replacement lambs or semen or embryos.

**§ 1280.123 State.**

*State* means each of the 50 States and the District of Columbia.

**§ 1280.124 Suspend.**

*Suspend* means to issue a rule under § 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.

**§ 1280.125 Terminate.**

*Terminate* means to issue a rule under § 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.

**§ 1280.126 Unit.**

*Unit* means each State, group of States, or class designation (producers, feeders, first handlers, or seedstock producers) that is represented on the Board.

**§ 1280.127 United States.**

*United States* means collectively the 50 States and the District of Columbia.

**§ 1280.128 Wool.**

*Wool* means fiber from the fleece of a lamb.

**§ 1280.129 Wool products.**

*Wool products* means products produced, in whole or in part, from wool and products containing wool fiber, excluding pelts.

LAMB PROMOTION, RESEARCH, AND INFORMATION BOARD

**§ 1280.201 Establishment and membership.**

(a) There is hereby established a Lamb Promotion, Research and Information Board of 13 members. Members of the Board shall be appointed by the Secretary from nominations submitted in accordance with this subpart. The seats shall be apportioned as follows:

(1) *Producers*. There shall be six producer representatives on the Board appointed by the Secretary from nominations submitted pursuant to this subpart. For purposes of nominating and appointing producers to the Board, the United States as defined within this subpart shall be divided into two regions. Each region must be represented by at least two producers. The Secretary will appoint the remaining two producers to ensure that the criteria specified in paragraphs (a)(1)(i), (ii), and (iii) of this section are met. Region 1 shall include the geographic area east of the Mississippi River, which includes the following States: Maine, New Hampshire, Vermont, New York, Massachusetts, Connecticut, Pennsylvania, Rhode Island, New Jersey, Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Michigan, Illinois and Wisconsin. Region 2 shall consist of all States west of the Mississippi River, which includes the following states: Minnesota, Iowa, Missouri, Arkansas, Louisiana, Texas, Oklahoma, Kansas, Nebraska, North Dakota, South Dakota, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Washington, Oregon, Nevada, California, Hawaii and Alaska. With regard to appointments to the Board, the Secretary shall ensure that the representation for producers on the Board shall meet the following criteria:

(i) Two producers appointed to the Board shall own annually 100 or less head of lambs;

(ii) One producer shall own annually between 101 and 500 head of lambs; and

(iii) Three producers shall own more than 500 head of lambs annually.

(2) *Feeders*. There shall be three feeder representatives on the Board appointed by the Secretary from nominations submitted pursuant to this subpart. The Secretary will appoint two feeder representatives to ensure that the criteria in paragraphs (a)(2)(i), (ii) and (iii) of this section are met. The third feeder representative will be appointed by the Secretary and will not be chosen or bound by size requirements.

(i) At least one of the feeders appointed to the Board shall feed less than 5,000 head of lambs annually.

(ii) At least one of the feeders appointed to the Board shall feed 5,000 or more head of lambs annually.

(iii) The Secretary shall ensure that the feeders appointed to the Board are not all located in one geographic region as established for producers pursuant to paragraph (a)(1) of this section.

(3) *First handlers*. There shall be three first handler representatives appointed to the Board by the Secretary from nominations submitted pursuant to this subpart.

(4) *Seedstock producers*. There shall be one seedstock producer appointed to the Board by the Secretary from nominations submitted pursuant to this subpart.

(b) In soliciting nominations for the Board, the Secretary will request those nominating to identify specific categories in which nominees will qualify.

(c) *Adjustment of membership*. At least once every 5 years, the Board will review the geographical distribution of the United States production of lambs. The review will be conducted using the National Agricultural Statistics Service inventory figures and the Board's annual assessment receipts. If warranted, the Board will recommend to

the Secretary that the membership on the Board be adjusted to reflect changes in geographical distribution of domestic lamb production.

**§ 1280.202 Nominations.**

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

(a) Nominations shall be obtained by the Secretary from eligible organizations certified under § 1280.206. Certified eligible organizations representing producers, feeders, first handlers, or seedstock producers shall submit to the Secretary at least two nominees for each seat on the Board. If the Secretary determines that a unit is not represented by a certified eligible organization, then the Secretary may solicit nominations from other organizations or other persons residing in the unit.

(b) After the establishment of the initial Board, the Department shall announce when a vacancy does or will exist. Nomination for subsequent Board members shall be submitted to the Secretary not less than 60 days prior to the expiration of the terms of the members whose terms are expiring, in the manner as described in this section. In the case of vacancies due to reasons other than the expiration of a term of office, successor Board members shall be appointed pursuant to § 1280.205.

(c) When there is more than one certified eligible organization representing the unit or when the Secretary solicits nominations from organizations and persons residing in that unit, they may caucus and jointly nominate, two qualified persons for each position representing that unit on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary two nominees for each appointment to be made to represent that unit.

**§ 1280.203 Nominee's agreement to serve.**

Any producer, feeder, first handler, or seedstock producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any lamb promotion entity or with any organization that has or is being considered for a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters that concern the relationship disclosed under paragraph (b) of this section.

**§ 1280.204 Appointment.**

From the nominations made pursuant to § 1280.202, the Secretary shall appoint the members of the Board on the basis of representation provided in § 1280.201.

**§ 1280.205 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or the Secretary shall request nominations for a successor pursuant to § 1280.202 and such successor shall be appointed pursuant to § 1280.204.

**§ 1280.206 Certification of organizations.**

(a) *In General.* The eligibility of State, regional, or national organizations to represent producers, seedstock producers, feeders, and first handlers and to participate in the making of nominations under this subpart shall be certified by the Secretary. The Secretary shall certify any organization that the Secretary determines meets the eligibility criteria established under paragraphs (b) and (c) of this section. An eligibility determination by the Secretary shall be final.

(b) *Basis for Certification.* Certification shall be based upon, in addition to other available information, a factual report submitted by the organization that shall contain information considered relevant and specified by the Secretary, including:

(1) The geographic territory covered by the active membership of the organization;

(2) The nature and size of the active membership of the organization, including the number of active producers, seedstock producers, feeders, or first handlers represented by the organization;

(3) Evidence of stability and permanency of the organization;

(4) Sources from which the operating funds of the organization are derived;

(5) The functions of the organization; and

(6) The ability and willingness of the organization to further the purpose and objectives of the Act.

(c) *Primary Considerations*. The primary considerations in determining the eligibility of an organization under this paragraph shall be whether:

(1) The membership of the organization consists primarily of producers, seedstock producers, feeders, or first handlers who market or handle a substantial quantity of lamb or lamb products; and

(2) A primary purpose of the organization is in the production or marketing of lamb or lamb products.

**§ 1280.207 Term of office.**

(a) The members of the Board shall serve for a term of 3 years, except that the members appointed to the initial Board shall serve proportionately for terms of 1-year, 2-years, and 3-years.

(b) No member may serve more than two consecutive 3-year terms.

(c) Each member shall continue to serve until a successor is appointed by the Secretary and has accepted the position.

**§ 1280.208 Compensation.**

Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board.

**§ 1280.209 Removal.**

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

**§ 1280.210 Powers and duties of the Board.**

The Board shall have the following powers and duties:

(a) To administer this subpart in accordance with its terms and provisions;

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary to administer the Order, including activities authorized to be carried out under the Order;

(c) To meet not less than annually, organize, and select from among the members of the Board a Chairperson, Vice Chairperson, Secretary/Treasurer, other officers, and committees and subcommittees, as the Board determines to be appropriate;

(d) To prepare and submit for the approval of the Secretary, fiscal year budgets in accordance with § 1280.212.

(e) To employ persons, other than the members, as the Board considers necessary to assist the Board in carrying out its duties, and to determine the compensation and specify the duties of the persons;

(f) To develop and submit plans and projects to the Secretary for the Secretary's approval, and to enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information (including producer information), or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and make such other reports available as the Board or the Secretary considers relevant. Any 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 or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

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

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

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

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

(h) To recommend to the Secretary such amendments to the Order as the Board considers appropriate;

(i) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(j) To cause its books to be audited by a competent auditor at the end of each fiscal year and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(k) To give the Secretary the same notice of meetings of the Board as 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 of the Board to the Secretary;

(l) To furnish to the Secretary any information or records that the Secretary may request;

(m) To work to achieve an effective, continuous, and coordinated program of promotion, research, and information (including producer information), designed to strengthen the lamb industry's position in the marketplace; maintain and expand existing markets and uses for lamb and lamb products; and to carry out programs, plans, and projects designed to provide maximum benefits to the lamb industry;

(n) To provide not less than annually a report to producers, feeders and first handlers, accounting for the funds expended by the Board, and describing programs implemented under the Act; and to make such report available to the public upon request;

(o) To invest funds in accordance with § 1280.213.

### § 1280.211 Prohibited activities.

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

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

(b) Using funds collected under the Order to undertake any action for the purpose of influencing legislation or governmental action or policy, other than recommending to the Secretary amendments to the Order; and

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

## EXPENSES

### § 1280.212 Budget and expenses.

(a) The Board shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering, this subpart. The budget shall be submitted before the beginning of each fiscal year, and as frequently as may be necessary thereafter.

(b) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another.

(c) The Board is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary

finds are reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

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

(e) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

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

(g) The Board may not expend for administration, maintenance, and functioning of the Board in any fiscal year an amount that exceeds 10 percent of the assessments and other income received by the Board for that fiscal year, except for the initial fiscal year. Reimbursements to the Secretary required under paragraph (f) of this section are excluded from this limitation on spending.

**§ 1280.213 Investment of funds.**

The Board may invest, pending disbursement, funds it receives under this subpart, only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a financial institution that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States. Income from any such investment may be used for any purpose for which the invested funds may be used.

**§ 1280.214 Refund escrow accounts.**

(a) The Board shall establish an interest bearing escrow account with a financial institution which is a member of the Federal Reserve System and will deposit into such account an amount equal to the product obtained by multiplying:

(1) The total amount of assessments collected by the Board during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum; by

(2) Ten percent (10 percent)

(b) The Board shall pay refunds of assessments to eligible persons requesting refunds during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in paragraph (c) of this section.

(c) If the amount deposited in the escrow account is less than the amount of refunds requested, the Board shall prorate the amount deposited in such account among all eligible persons who request a refund of assessments paid no later than the date the required referendum results are announced by the Secretary.

**§ 1280.215 Refunds.**

Any producer, seedstock producer, feeder, first handler, or exporter from whom an assessment is collected and remitted to the Board, or who pays an assessment directly to the Board, under authority of the Act and this subpart through the announcement of the results of the required referendum, and who is not in favor of supporting the promotion and research program as provided for in this subpart, shall have the right to receive from the Board a refund of such assessment, or a pro rata share thereof, upon submission of proof satisfactory to the Board that the producer, seedstock producer, feeder, first handler, or exporter paid the assessment for which refund is sought. Any such demand shall be made by such producer, seedstock producer, feeder, first handler, or exporter in accordance with the provisions of this

subpart and in a manner consistent with regulations recommended by the Board and prescribed by the Secretary.

### § 1280.216 Procedure for obtaining a refund.

Each producer, seedstock producer, feeder, first handler, or exporter who pays an assessment pursuant to the Act and this subpart during the period beginning on the effective date of the Order and ending on the date the required referendum results are announced may obtain a refund of such assessment only by following the procedures prescribed in this section and any regulations recommended by the Board and prescribed by the Secretary.

(a) *Application form.* A producer, seedstock producer feeder, first handler, or exporter shall obtain a Board-approved refund application form from the Board. Such form may be obtained by written request to the Board and the request shall bear the producer's, seedstock producer's, feeder's, first handler's, or exporter's signature or properly witnessed mark.

(b) *Submission of refund application to Board.* Any producer, seedstock producer, feeder, first handler, or exporter requesting a refund shall submit an application on the prescribed form to the Board within 60 days from the date the assessments were paid by such producer, seedstock producer, feeder, first handler, or exporter but no later than the date the results of the required referendum are announced by the Secretary. The refund application shall show:

(1) The producer's, seedstock producer's, feeder's, first handler's, or exporter's name and address;

(2) Name and address of the person who collected applicant's assessment;

(3) Number of head of lambs, weight of lambs, or its equivalent, on which a refund is requested;

(4) Total amount of refund requested;

(5) Date or inclusive dates on which assessments were paid;

(6) Certification that the producer, seedstock producer, feeder, first handler, or exporter did not collect the assessment from another producer, seedstock producer, feeder, first handler; or exporter or documentation of assessments collected from others; and

(7) The producer's, seedstock producer's, feeder's, first handler's, or exporter's signature or properly witnessed mark.

(c) *Proof of payment of assessments.* The documentation provided pursuant to § 1280.225(b) to the producer, seedstock producer, feeder, first handler, or exporter by the person responsible for collecting an assessment pursuant to this subpart, or a copy thereof, or such other evidence deemed satisfactory to the Board, shall accompany the producer's, seedstock producer's, feeder's, first handler's, or exporter's refund application.

(d) *Payment of refunds.* The Board shall initiate payment of refund requests, or pay a pro rata share thereof, within 90 days of the date the results of the required referendum are released by the Secretary. Refunds shall be paid in a manner consistent with § 1280.214.

ASSESSMENTS

### § 1280.217 Lamb purchases.

(a) Except as prescribed by regulations approved by the Secretary, each first handler, or exporter making payment to a producer, seedstock producer, or feeder for lambs purchased from such producer, seedstock producer, or feeder shall collect an assessment from the producer, seedstock producer, or feeder. Each producer, seedstock producer, or feeder shall pay such assessment to the first handler or exporter, at the rate of one-half cent ($.005) per pound of live lambs sold.

(b) Except as otherwise specified in this subpart, a person shall not be considered a producer, seedstock producer, or feeder within the meaning of this subpart if;

(1) The person's only share in the proceeds of a sale of lambs is a sales commission, handling fee, or other service fee; or

(2) The person:

(i) Acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party,

(ii) Resold such lambs no later than 10 days from the date on which the person acquired ownership, and

(iii) Certified, as required by regulations recommended by the Board and

prescribed by the Secretary, that the requirements of this provision have been satisfied.

(c) Each person processing or causing to be processed lambs or lamb products of that person's own production and marketing such lambs or lamb products, shall pay an assessment on such lambs or lamb products on the live weight of the lamb at the time of slaughter at the rate established in paragraph (e) of this section. In addition, pursuant to § 1280.108, such individual would be considered a first handler and would be required by § 1280.219 to pay an additional assessment of $.30 per head. As the first handler, the individual must remit the total amount of assessment to the Board.

(d) A person who is a market agency; *i.e.*, commission merchant, auction market, or livestock market in the business of receiving lambs for sale or commission for or on behalf of a producer, seedstock producer, or feeder shall collect an assessment from the producer, seedstock producer, or feeder and shall pass the collected assessments on to the subsequent purchaser pursuant to this subpart and regulations recommended by the Board and prescribed by the Secretary.

(e) *Rate.* Except as otherwise provided, the rate of assessment shall be one-half of a cent ($.005 per pound) per pound on all live lambs sold. The rate of assessment may be raised or lowered no more than twenty-hundredths of a cent ($.002) in any one year. The Board may recommend any change to the Department. Prior to a change in the assessment rate, the Department will provide notice by publishing in the FEDERAL REGISTER any proposed changes with interested parties allowed to provide comment.

(f) The collection of assessments pursuant to § 1280.217, § 1280.218, and § 1280.219 shall begin with respect to lambs purchased, or lambs or lamb products marketed on or after the effective date established by the Secretary and shall continue until terminated or suspended by the Secretary.

(g) If the Board is not in place by the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments and invest them on behalf of the Board, and shall pay such assessments and any interest earned to the Board when it is formed. The Secretary shall have the authority to promulgate rules and regulations concerning assessments and the collection of assessments, if the Board is not in place or is otherwise unable to develop such rules and regulations.

(h) Payment remitted pursuant to this subpart shall be in the form of a negotiable instrument made payable to the Board. Such remittances and the reports specified in § 1280.223 and § 1280.225 shall be mailed to the location designated by the Board.

### § 1280.218 Exporter.

Each person exporting live lambs shall remit to the Board an assessment on such lambs at the time of export at the rate established in § 1280.217(e). An exporter directly exporting his or her own lambs shall remit an assessment to the Board at the rate established in § 1280.217(e).

### § 1280.219 First handlers.

Each first handler, in addition to remitting the assessment collected pursuant to § 1280.217, shall pay an assessment equal to thirty cents ($.30) per head of lambs purchased by the first handler for slaughter or slaughtered by such first handler pursuant to a custom slaughter arrangement. The rates of assessment for first handlers shall be increased or decreased proportionately if the assessment paid by producers, seedstock producers, and feeders is increased or decreased. Such assessment shall be remitted with the assessments collected pursuant to § 1280.217.

### § 1280.220 Collections.

(a) Each first handler and each exporter responsible for the collection of assessments under this subpart shall remit assessments to the Board by the 15th day of the month following the month in which the lambs were purchased for slaughter or export, as required by regulations recommended by the Board and prescribed by the Secretary, has provided otherwise; or

(b) If a first handler marketed lambs or lamb products directly to consumers, assessments shall be remitted to the Board by the 15th day of the

month following the month in which the lambs or lamb products were marketed, as required by regulations recommended by the Board and prescribed by the Secretary, has provided otherwise.

(c) *Late payment charges.* Any unpaid assessments due to the Board pursuant to § 1280.217 shall be increased 2 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this paragraph, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this paragraph, any assessment determined at a date later than the date prescribed by this subpart, because of a person's failure to timely submit a report to the Board, shall be considered to have been payable by the date it would have been due if the report had been timely filed. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

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

### § 1280.221 Prohibition on use of funds.

No funds collected by the Board under this subpart shall be used to undertake any action for the purpose of influencing legislation or governmental action or policy, other than recommending to the Secretary amendments to this subpart. A plan or project conducted pursuant to this title shall not make false or misleading claims on behalf of lamb or lamb products or disparage a competing product.

REPORTS, BOOKS, AND RECORDS

### § 1280.222 Books and Records of Board.

The Board shall:

(a) Maintain such books and records, which shall be made available to the Secretary for inspection and audit, as the Secretary may prescribe,

(b) Prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe, and

(c) Account for the receipt and disbursement of all funds entrusted to it. The Board shall cause its books and records to be audited by an independent auditor at the end of each fiscal year, and a report of such audit to be submitted to the Secretary.

### § 1280.223 Reports.

Each first handler required to remit assessments to the Board for live lambs pursuant to § 1280.217, each first handler marketing lamb products of that person's own production, and each exporter of lambs, shall report to the Board information pursuant to regulations recommended by the Board and prescribed by the Secretary. Such information may include but is not limited to the following:

(a) The number of lambs purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, the total weight in pounds, and the dates of such transactions;

(b) The number of lambs exported; the total weight in pounds of lambs exported;

(c) The amount of assessment remitted;

(d) The basis; if necessary, to show why the remittance is less than the total weight in pounds of lamb multiplied by the assessment rate;

(e) The date any assessment was paid.

### § 1280.224 Periodic evaluation.

Pursuant to the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7401), the Board shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other programs conducted by the Board. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this paragraph.

### § 1280.225 Books and records of persons.

(a) Each first handler, exporter of lambs, and market agency shall maintain and make available for inspection

such books and records as may be required by regulations recommended by the Board and prescribed by the Secretary, including records necessary to verify any required reports. Such records shall be maintained for at least 2 years beyond the fiscal period of their applicability.

(b) Document evidencing payment of assessments. Each person, including first handlers, exporters and market agencies, responsible for collecting an assessment paid pursuant to this subpart is required to give the person from whom the assessment was collected, written evidence of payment of the assessments paid pursuant to this subpart. Such written evidence serving as a receipt shall include, but not be limited to, the following information:

(1) Name and address of the person collecting the assessment.

(2) Name of person who paid assessment.

(3) Number of head of lamb sold.

(4) Total weight in pounds of lamb sold.

(5) Total assessments paid by the producer, seedstock producer, or feeder.

(6) Date of sale.

(7) Such other information as the Board, with the approval of the Secretary, may require.

### § 1280.226 Use of information.

Information from records or reports required pursuant to this subpart shall be made available to the Secretary as is appropriate to the administration or enforcement of the Act, subpart or any regulation issued under the Act. In addition, the Secretary may authorize the use, under this part, of information regarding person paying producers, seedstock producers, feeders, first handlers, or exporters that is accumulated under laws or regulations other than the Act or regulations issued under the Act.

### § 1280.227 Confidentiality.

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, producers, seedstock producers, feeders, exporters, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party. 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 violating this subpart, together with a statement of the particular provisions of this subpart violated by such person.

## MISCELLANEOUS

### § 1280.228 Right of the Secretary.

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

### § 1280.229 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, 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.

### § 1280.230 Separability.

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

is held invalid, the validity of the remainder of this subpart, or the applicability thereof to other persons or circumstances shall not be affected thereby.

### § 1280.231 Patents, copyrights, inventions, product formulations, and publications.

(a) Any patents, copyrights, inventions or publications developed through the use of funds collected by the Board under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale leasing, franchising, or other uses of such patents, copyrights, inventions, or publication, inure to the benefit of the Board. Upon termination of this subpart, § 1280.235 shall apply to determine the disposition of all such property.

(b) Should patents, copyrights, inventions or publications be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions or publications shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, invention or publication in a manner consistent with paragraph (a) of this section.

### § 1280.232 Amendments.

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

### § 1280.233 Referenda.

(a) *Required referendum.* For the purpose of ascertaining whether the persons subject to this part favor the continuation, suspension, or termination of this part, the Secretary shall conduct a referendum among persons subject to assessments under § 1280.217, § 1280.218, and § 1280.219 who, during a representative period determined by the Secretary, have engaged in the production, feeding, handling, or slaughter of lamb; or the exportation of lamb.

(1) *Time for referendum.* The referendum shall be conducted not later than 3 years after assessments first begin under this part.

(2) *Approval of part.* This part may be approved in a referendum by a majority of those persons voting for approval who also represent a majority of the volume of lamb produced, fed, slaughtered, handled, and exported.

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

(1) Not later than 7 years after assessments first begin under this part;

(2) At the request of the Board established pursuant to § 1280.201; or

(3) At the request of 10 percent or more of the lamb producers, seedstock producers, feeders, first handlers, and exporters eligible to vote to determine if the persons favor the continuation, suspension, or termination of this part.

(c) *Other referenda.* The Secretary may conduct a referendum at any time to determine whether the continuation, suspension or termination of this part or a provision of this part is favored by lamb producers, seedstock producers, feeders, first handlers, and exporters eligible to vote.

(d) *Costs of referenda.* The Board shall reimburse the Secretary for any expenses incurred by the Secretary to conduct referenda.

(e) *Manner of conducting referenda.* A referendum conducted under this section with respect to this part shall be conducted in the manner determined by the Secretary to be appropriate.

(1) *Voting.* Eligible voters may vote by mail ballot in the referendum or in person if so prescribed by the Secretary.

(2) *Notice.* Not later than 30 days before a referendum is conducted under this section with respect to this part, the Secretary shall notify the eligible voters, in such manner as determined by the Secretary, of the period during which voting in the referendum will occur. The notice shall explain any registration and voting procedures established under this part.

### § 1280.234 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, subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act,

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

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

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

### § 1280.235 Proceedings after termination.

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

(b) The said trustees shall:

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

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

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

(4) Upon the direction of the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the Board or the same obligations as imposed upon the Board and the trustees.

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

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be returned to the persons who contributed such funds, or paid assessments, or if not practicable, shall be turned over to the Department to be utilized, to the extent practicable, in the interest of continuing one or more of the lamb research or information programs hitherto authorized.

### § 1280.236 Effect of termination or amendment.

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

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

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

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

### § 1280.237 Rules and Regulations.

The Secretary may prescribe such rules and regulations as may be necessary to effectively carry out the provisions of this subpart.

### § 1280.238 OMB Control Numbers.

The control number for the information requirements assigned by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 is 0581–0198, except that the OMB control number for the nominee background form is 0505–0001.

## Subparts B [Reserved]

## Subpart C—Rules and Regulations

SOURCE: 67 FR 39253, June 7, 2002, unless otherwise noted.

### § 1280.401 Terms defined.

As used throughout this subpart, unless the context otherwise requires,

terms shall have the same meaning as the definition of such terms in subpart A of this part.

**§ 1280.402 Assessments.**

(a) *Sharing proceeds of sale.* If more than one producer, feeder, or seedstock producer shares the proceeds received for the lamb or lamb products sold, each such producer, feeder, or seedstock producer is obligated to pay that portion of the assessments that is equivalent to that producer's, feeder's, or seedstock producer's proportionate share of the proceeds.

(b) *Market agencies.* A person who is a market agency; *i.e.*, commission merchant, auction market, or livestock market in the business of receiving lambs or lamb products for sale on commission for or on behalf of a producer, feeder, or seedstock producer, will be required to collect an assessment from the producer, feeder, or seedstock producer and pass the collected assessment on to the subsequent purchaser(s) until remitted by a first handler or exporter responsible for submitting assessments under this part.

(c) *Failure to collect.* Failure of a person to collect the assessment on lambs purchased from a producer, feeder, or seedstock producer shall not relieve the producer, feeder, or seedstock producer of their obligation to pay the assessment and to remit the assessment to the Secretary.

(d) *Death, bankruptcy, receivership or incapacity to act.* In the event of a producer's, feeder's, seedstock producer's, or exporter's death, bankruptcy, receivership or incapacity to act, the representative of such producer's, feeder's, seedstock producer's, or exporter's estate, the person acting on behalf of creditors or other person acting in such person's stead, shall be considered the producer, feeder, or seedstock producer and shall be required to pay an assessment or collect an assessment.

(e) *Remittance of assessments.* (1) Assessments shall be remitted to the Lamb Promotion, Research, and Information Program, c/o the Secretary at USDA, 23029 Network Place, Chicago, Illinois 60673–1230, with a "Monthly Remittance Report" form LS–81 not later than the 15th day of the following month in which lambs or lamb products were purchased for slaughter or export, or marketed, if a first handler markets lambs or lamb products directly to consumers, in order to avoid late payment charges.

(2) In cases where a producer or feeder sells lambs as part of a custom slaughter operation, the producer or feeder shall be responsible for remitting the assessments pursuant to § 1280.219.

(3) Each person processing or causing to be processed lamb or lamb products of that person's own production and marketing such lamb or lamb products shall be responsible for remitting the assessments pursuant to § 1280.217(c).

(4) Late payment charges. Any unpaid assessments due to the Board pursuant to § 1280.217 shall be increased 2 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this paragraph, shall be increased at the same rate on the corresponding day of each month thereafter until paid. Any assessment received at a date later than the date prescribed by this part, because of a persons failure to submit a timely report to the Secretary, shall be considered to have been payable by the date it would have been due if the report had been filed in a timely manner. The timeliness of a payment to the Secretary shall be based on the applicable postmark date or the date actually received by the Secretary, whichever is earlier.

(5) Weekends and holidays. If the 15th day of the month falls on a Saturday, Sunday, or a federally recognized holiday then the required reports and assessment will be due the next business day in order to avoid late payment charges.

(f) *Non-producer status for certain transactions.* (1) Each person seeking non-producer status pursuant to § 1280.217 shall provide the person remitting the assessment a Statement of Certification of Non-Producer Status form (LS–78).

(2) A copy of the Statement of Certification of Non-Producer Status shall be forwarded by the person collecting the assessment to the Secretary.

**§ 1280.403 Refunds.**

(a) *Procedure for obtaining a refund.* Any producer, seedstock producer, feeder, first handler, or exporter from whom an assessment is collected and remitted to the Secretary, or who pays an assessment directly to the Secretary, under the authority of the Act and the Order through the announcement of the results of the required referendum, shall have a right to receive a refund of such assessment, or pro rata share thereof, upon submission of proof satisfactory that such person paid the assessment for which the refund is sought. Any such demand shall be made in accordance with the provision of the Order and this subpart.

(b) *Refund application form.* A producer shall obtain an approved application from the Secretary. Such form may be obtained by written request to the Lamb Promotion, Research, and Information Program, c/o the Secretary at USDA, P.O. Box 23198, Washington, DC 20026–3198.

(c) *Submission of refund application to the Secretary.* Any producer, seedstock producer, feeder, first handler, or exporter requesting a refund shall submit an application on the prescribed form to the Secretary within 60 days from the date the assessments were paid by such producer, seedstock producer, feeder, first handler, or exporter but no later than the date the results of the required referendum are announced by the Secretary.

(d) *Proof of payment of assessments.* The documentation provided pursuant to § 1280.225(b) to the producer, seedstock producer, feeder, first handler, or exporter by the person responsible for collecting an assessment pursuant to the Order and this subpart or such other evidence deemed satisfactory to the Secretary, shall accompany the producer's, seedstock producer's, feeder's, first handler's, or exporter's refund application.

(e) *Payment of refunds.* Refunds will be paid pursuant to § 1280.216(d).

**§ 1280.404 Reporting.**

(a) Each first handler required to submit assessments for live lambs pursuant to § 1280.217, each first handler marketing lamb products of that person's own production, and each exporter of lambs, shall report to the Secretary the following information on form LS–81.

(1) The number of lambs purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, the total weight in pounds, and the dates of such transactions;

(2) The number of lambs exported and the total weight in pounds of lambs exported;

(3) The amount of assessment remitted;

(4) The basis; if necessary, to show why the remittance is less than the total weight in pounds of lamb multiplied by the assessment rate; and

(5) The date any assessment was paid.

(b) *Reporting periods.* For reports required pursuant to § 1280.223, each calendar month shall be a reporting period.

**§ 1280.405 Books and records.**

(a) Each first handler, exporter of lambs, and market agency shall maintain and, during normal business hours, make available for inspection by representatives of the Secretary, such books and records as are necessary to carry out the provisions of this part, including such books and records as are necessary to verify any required reports.

(b) *Documents evidencing payments of assessments.* Each person, including first handlers, exporters, and market agencies, responsible for collecting an assessment paid pursuant to this part is required to give the person from whom the assessment was collected, written evidence of payment of the assessments paid. Such written evidence serving as a receipt shall include the following information:

(1) Name and address of the person collecting the assessment.

(2) Name of person who paid assessment.

(3) Number of head of lambs sold.

(4) Total weight in pounds of lamb sold.

(5) Total assessments paid by the producer, seedstock producer, or feeder.

(6) Date of sale.

(7) Such other information as the Secretary may require.

### § 1280.406 Exemption.

(a) A producer, seed stock producer, or feeder who produces (including producing by feeding) only products that are eligible to be labeled as 100 percent organic under the National Organic Program (NOP) (7 CFR part 205), except as provided for in paragraph (h) of this section; a handler who handles only products that are eligible to be labeled as 100 percent organic under the NOP; or an exporter who exports only products that are eligible to be labeled as 100 percent organic under the NOP; and who operates under an approved NOP system plan and is not a split operation.

(b) To apply for an exemption under this section, the person shall submit the request to the Board—on a form provided by the Board—at any time initially and annually thereafter on or before January 1 as long as the person continues to be eligible for the exemption.

(c) The request shall include the following: the person's name and address, a copy of the organic farm or organic handling operation certificate provided by a USDA-accredited certifying agent as defined in section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502), 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.

(d) If the person complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the producer. For exemption requests received on or before August 15, 2005, the Board will have 60 days to approve the exemption request; after August 15, 2005, the Board will have 30 days to approve the exemption request. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(e) An exempt producer shall provide a copy of the Certificate of Exemption to each person to whom the producer sells ovine animals or lamb and lamb products. The Certificate of Exemption must accompany the ovine animals through the production chain to the person responsible for remitting the assessment to the Board.

(f) The person shall maintain records showing the exempt producer's name and address and the exemption number assigned by the Board.

(g) The exemption will apply at the first reporting period following the issuance of the exemption.

(h) Agricultural commodities produced and marketed under an organic system plan, as described in 7 CFR 205.201, but not sold, labeled, or represented as organic, shall not disqualify a producer, seed stock producer, or feeder from exemption under this section, except that persons producing or feeding both organic and non-organic agricultural commodities as a result of split operations shall not qualify for exemption. Reasons for conventional sales include lack of demand for organic products, isolated use of antibiotics for humane purposes, chemical or pesticide use as the result of State or emergency spray programs, and crops from a buffer area as described in 7 CFR part 205, provided all other criteria are met.

[70 FR 2762, Jan. 14, 2005]

## Subpart D [Reserved]

## Subpart E—Procedures To Request a Referendum

DEFINITIONS

SOURCE: 69 FR 77572, Dec. 27, 2004, unless otherwise noted.

### § 1280.601 Terms defined.

As used throughout this subpart, unless the context otherwise requires, terms shall have the same meaning as the definition of such terms in subpart A of this part.

### § 1280.602 Administrator, AMS.

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

**§ 1280.603 Administrator, FSA.**

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

**§ 1280.604 Eligibility.**

*Eligibility* is defined as any person subject to the assessment who during the representative period determined by the Secretary have engaged in the production, feeding, or slaughtering of lambs. Such persons are eligible to participate in the referendum. Those persons whose only share in the proceeds of a sale of lambs is a sales commission, handling fee or other service fee or the person acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party and resold such lambs no later than 10 days from the date on which the person acquired ownership are not considered are producers, seedstock producers, or feeders and not subject to the assessment. Such persons will not be eligible to participate in the referendum.

**§ 1280.605 Farm Service Agency.**

*Farm Service Agency* also referred to as "FSA" means the Farm Service Agency of USDA.

**§ 1280.606 Farm Service Agency County Committee.**

*Farm Service Agency County Committee*, also referred to as "FSA County Committee or COC," means the group of persons within a county who are elected to act as the Farm Service Agency County Committee.

**§ 1280.607 Farm Service Agency County Executive Director.**

*Farm Service Agency County Executive Director*, also referred to as "CED," means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and to be responsible for the day-to-day operation of the FSA county office, or the person acting in such capacity.

**§ 1280.608 Farm Service Agency State Committee.**

*Farm Service Agency State Committee*, also referred to as "FSA State Committee," means the group of persons within a State who are appointed by the Secretary to act as the Farm Service Agency State Committee.

**§ 1280.609 Farm Service Agency State Executive Director.**

*Farm Service Agency State Executive Director*, Farm Service Agency State Executive Director, also referred to as "SED," means the person within a State who is appointed by the Secretary to be responsible for the day-to-day operation of the FSA State Office, or the person acting in such capacity.

**§ 1280.610 Public notice.**

*Public notice* means not later than 30-days before the referendum is conducted, the Secretary shall notify the eligible voters in such manner as determined by the Secretary, of the voting period during which voting in the referendum will occur. The notice shall explain any registration and voting procedures established under § 518 of the Act.

**§ 1280.611 Representative period.**

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

**§ 1280.612 Volume of production.**

(a) For producers and seedstock producers, the term *volume of production* means the total number of live domestic lambs owned and produced during the most recent calendar year.

(b) For feeders, *volume of production* means the total number of lambs owned and fed during the most recent calendar year.

(c) For first handlers, *volume of production* means the total number of lambs slaughtered during the most recent calendar year.

**§ 1280.613 Voting period.**

The term *voting period* means a 4-week period to be announced by the Secretary for voting the referendum.

PROCEDURES

### § 1280.620 General.

A referendum to determine whether eligible persons favor the continuance of this part shall be carried out in accordance with this subpart.

(a) The referendum will be conducted at county FSA offices.

(b) The Secretary shall determine if at least a majority of those persons voting for approval who also represent a majority of the volume of lambs owned and produced; owned and fed; or slaughtered, favor the continuance of this part.

### § 1280.621 Supervision of the process for conducting a referendum.

The Administrator, AMS, shall be responsible for supervising the process of permitting persons to vote in a referendum in accordance with this subpart.

### § 1280.622 Eligibility.

(a) Any person subject to the assessment who during the representative period determined by the Secretary has engaged in the production, feeding, or slaughtering of lambs is eligible to participate in the referendum. Those persons whose only share in the proceeds of a sale of lambs is a sales commission, handling fee or other service fee or the person acquired ownership of the lambs to facilitate the transfer of ownership of such lambs from the seller to a third party and resold such lambs no later than 10 days from the date on which the person acquired ownership are not considered are producers, seedstock producers, or feeders and not subject to the assessment. Such persons will not be eligible to participate in the referendum.

(b) *Proxy Registration.* (1) Proxy registration is not authorized, except that an officer or employee of a corporate producer, feeder, seedstock producer, or first handler, or any guardian, administrator, executor, or trustee of a person's estate, or an authorized representative of any eligible producer, feeder, seedstock producer, or first handler entity (other than an individual person), such as a corporation or partnership, may vote on behalf of that entity. Further, an individual cannot vote on behalf of another individual (*i.e.*, spouse, sharecrop lease, etc.).

(2) Any individual, who votes on behalf of any producer, feeder, seedstock producer, or first handler entity, shall certify that he or she is authorized by such entity to take such action. Upon request of the county FSA office, the person voting may be required to submit adequate evidence of such authority.

(c) *Joint and group interest.* A group of individuals, such as members of a family, joint tenants, tenants in common, a partnership, owners of community property, or a corporation who engaged in the production, feeding, or slaughtering of lambs during the representative period as a producer, feeder, seedstock producer, or first handler entity shall be entitled to cast only one vote; provided, however, that any individual member of a group who is an eligible person separate from the group may vote separately.

### § 1280.623 Time and place of the referendum.

(a) The opportunity to vote in the referendum shall be provided during a 4-week period beginning and ending on a date determined by the Secretary. Eligible persons shall have the opportunity to vote following the procedures established in this subpart during the normal business hours of each county FSA office.

(b) Persons can determine the location of county FSA offices by contacting the nearest county FSA office, the State FSA office, or through an online search of FSA's Web site at *http://www.fsa.usda.gov/pas/default.asp.*

(c) Each eligible person shall cast a ballot in the county FSA office where FSA maintains the person's administrative farm records. For eligible persons not participating in FSA programs, the opportunity to vote will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production, feeding, slaughtering, of lambs in more than one county will vote in the county FSA office where the person does most of his or her business.

**§ 1280.624 Facilities.**

Each county FSA office will provide:

(a) a voting place that is well known and readily accessible to persons in the county and that is equipped and arranged so that each person can complete and submit their ballot in secret without coercion, duress, or interference of any sort whatsoever, and

(b) a holding container of sufficient size so arranged that no ballot or supporting documentation can be read or removed without breaking seals on the container.

**§ 1280.625 Certification and referendum form ballot form.**

Form LS–86 shall be used to vote in the referendum and certify eligibility. Eligible persons will be required to complete a ballot in its entirety, vote "yes" or "no" to continue the program, enter the number of lambs (volume of production) owned and produced; owned and fed; or slaughtered during a representative period and provide documentation such as a sales receipt or remittance form showing that the person voting was engaged in the production, feeding, or slaughtering of lambs during the representative period. The person or authorized representative shall sign the ballot certifying that they or the entity they represent were engaged in the production, feeding, or slaughtering of lambs during the representative period and that the volume of production voted is true and accurate.

**§ 1280.626 Certification and voting procedures.**

(a) Each eligible person shall be provided the opportunity to cast a ballot during the voting period announced by the Secretary.

(1) Each eligible person shall be required to complete form LS–86 in its entirety, sign it, and provide evidence that they were engaged in the production, feeding, or slaughtering of lambs during the representative period. The person must legibly place his or her name and, if applicable, the entity represented, address, county, and telephone number. The person shall sign and certify on form LS–86 that:

(i) The person was engaged in the production, feeding, or slaughtering of lambs during the representative period;

(ii) The person voting on behalf of a corporation or other entity is authorized to do so;

(iii) The person has cast only one vote; and

(iv) The volume of production listed on the ballot is true and accurate.

(2) Only a completed and signed form LS–86 accompanied by supporting documentation showing that the person was engaged in the production, feeding, or slaughter of lambs during the representative period shall be considered a valid vote.

(b) To vote, eligible persons may obtain form LS–86 in-person, by mail, or by facsimile from county FSA offices or through the Internet during the voting period. A completed and signed form LS–86 and supporting documentation, such as a sales receipt or remittance form, must be returned to the appropriate county FSA office where FSA maintains and processes the person's administrative farm records. For a person not participating in FSA programs, the opportunity to vote in a referendum will be provided at the county FSA office serving the county where the person owns or rents land. A person engaged in the production, feeding, or slaughtering of lambs in more than one county will vote in the county FSA office where the person does most of his or her business. Forms obtained via the Internet will be located at *www.ams.usda.gov/lsmarketingprograms*.

(c) A completed and signed form LS–86 and the supporting documentation may be returned in-person, by mail, or facsimile to the appropriate county FSA office. Form LS–86 and supporting documentation returned in-person or by facsimile, must be received in the appropriate county FSA office prior to the close of the work day on the final day of the voting period to be considered a valid ballot. Form LS–86 and the accompanying documentation returned by mail must be postmarked no later than midnight of the final day of the voting period and must be received in the county FSA office on the 5th business day following the final day of the voting period.

(d) Persons who obtain form LS–86 in-person at the appropriate FSA county office may complete and return it

the same day along with the supporting documentation.

[69 FR 77572, Dec. 27, 2004, as amended at 73 FR 76194, Dec. 16, 2008]

### § 1280.627 Canvassing voting ballots.

(a) Canvassing of form LS–86 shall take place at the county FSA offices on the 6th business day following the final day of the voting period. Such canvassing, acting on behalf of the Administrator, AMS, shall be in the presence of at least two members of the county committee. If two or more of the counties have been combined and are served by one county office, the canvassing of the requests shall be conducted by at least one member of the county committee from each county served by the county office. The FSA State committee or the State Executive Director, if authorized by the State Committee, may designate the County Executive Director (CED) and a county or State FSA office employee to canvass the ballots and report the results instead of two members of the county committee when it is determined that the number of eligible voters is so limited that having two members of the county committee present for this function is impractical, and designate the CED and/or another county or State FSA office employee to canvass requests in any emergency situation precluding at least two members of the county committee from being present to carry out the functions required in this section.

(b) Form LS–86 should be canvassed as follows:

(1) *Number of valid ballots.* A person has been declared eligible by FSA to vote by completing form LS–86 in its entirety, signing it, voting volume of production, and providing supporting documentation that shows the person who cast the ballot during the voting period was engaged in the production, feeding, or slaughtering of lambs during the representative period. Such ballot will be considered a valid ballot.

(2) *Number of ineligible ballots.* If FSA cannot determine that a person is eligible based on the submitted documentation or if the person fails to submit the required supporting documentation, the person shall be determined to be ineligible. FSA shall notify ineligible persons in writing as soon as practicable but no later than the 8th business day following the final day of the voting period.

(c) *Appeal.* A person declared to be ineligible by FSA can appeal such decision and provide additional documentation to the FSA county office within 5 business days after the postmark date of the letter of notification of ineligibility. FSA will then make a final decision on the person's eligibility and notify the person of the decision.

(d) *Invalid ballots.* An invalid ballot includes, but is not limited to the following:

(1) Form LS–86 is not signed or all required information has not been provided;

(2) Form LS–86 and supporting documentation returned in-person or by facsimile was not received by close of business on the last business day of the voting period;

(3) Form LS–86 and supporting documentation returned by mail was not postmarked by midnight of the final day of the voting period;

(4) Form LS–86 and supporting documentation returned by mail was not received in the county FSA office by the 5th business day following the final day of the voting period;

(5) Form LS–86 or supporting documentation is mutilated or marked in such a way that any required information on the form is illegible; or

(6) Form LS–86 and supporting documentation not returned to the appropriate county FSA office.

### § 1280.628 Counting ballots.

(a) Form LS–86 shall be counted by county FSA offices on the same day as the ballots are canvassed if there are no ineligibility determinations to resolve. For those county FSA offices that do have ineligibility determinations, the requests shall be counted no later than the 14th business day following the final day of the voting period.

(b) Ballots shall be counted as follows:

(1) Number of valid ballots cast;

(2) Number of persons favoring the Order;

(3) Number of persons not favoring the Order;

(4) Volume of production voted favoring the continuation of the Order;

(5) Volume of production voted not favoring the continuation of the Order; and

(6) Number of invalid ballots.

### § 1280.629 FSA county office report.

The county FSA office report shall be certified as accurate and complete by the CED or designee, acting on behalf of the Administrator, AMS, as soon as may be reasonably possible, but in no event shall submit no later than 18th business day following the final day of the specified period. Each county FSA office shall transmit the results in its county to the FSA State office. The results in each county may be made available to the public upon notification by the Administrator, FSA, that the final results have been released by the Secretary. A copy of the report shall be posted for 30 calendar days following the date of notification by the Administrator, FSA, in the county FSA office in a conspicuous place accessible to the public. One copy shall be kept on file in the county FSA office for a period of at least 12 months after notification by FSA that the final results have been released by the Secretary.

### § 1280.630 FSA State office report.

Each FSA State office shall transmit to the Administrator, FSA, as soon as possible, but in no event later than the 20th business day following the final day of the voting period, a report summarizing the data contained in each of the reports from the county FSA offices. One copy of the State summary shall be filed for a period of not less than 12 months after the results have been released and available for public inspection after the results have been released.

### § 1280.631 Results of the referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, the reports from all State FSA offices. The Administrator, AMS, shall tabulate the results of the ballots. USDA will issue an official press release announcing the results of referendum and publish the same results in the FEDERAL REGISTER. In addition, USDA will post the official results at the following Web site: *http://www.ams.usda.gov/LSMarketingPrograms* or such other Web site as announced by the Administrator of AMS. Subsequently, State reports and related papers shall be available for public inspection upon request during normal business hours in the Marketing Programs Branch; Livestock and Seed Program, AMS, USDA, Room 2628–S; STOP 0251; 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems necessary, a State report or county report shall be reexamined and checked by such persons who may be designated by the Secretary.

[69 FR 77572, Dec. 27, 2004, as amended at 73 FR 76194, Dec.16, 2008]

### § 1280.632 Disposition of records.

Each FSA CED will place in sealed containers marked with the identification of the "Lamb Checkoff Program Referendum," all of the form LS–86's along with the accompanying documentation and county summaries. Such records will be placed in a secure location under the custody of FSA CED for a period of not less than 12 months after the date of notification by the Administrator, FSA, that the final results have been announced by the Secretary. If the county FSA office receives no notice to the contrary from the Administrator, FSA, by the end of the 12 month period as described above, the CED or designee shall destroy the records.

### § 1280.633 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart.

### § 1280.634 Confidentiality.

The names of persons voting in the referendum and ballots shall be confidential and the contents of the ballots shall not be divulged except as the Secretary may direct. The public may witness the opening of the ballot box and the counting of the votes but may not interfere with the process.

# PART 1290—SPECIALTY CROP BLOCK GRANT PROGRAM

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AUTHORITY: 7 U.S.C. 1621 note.

SOURCE: 71 FR 53307, Sept. 11, 2006, unless otherwise noted.

## § 1290.1 Purpose and scope.

Pursuant to the authority conferred by Section 101 of the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note) AMS will make grants to States to enhance the competitiveness of specialty crops in accordance with the terms and conditions set forth herein and other applicable federal statutes and regulations including, but not limited to, 7 CFR Part 3016.

## § 1290.2 Definitions.

(a) *AMS* means the Agricultural Marketing Service of the U. S. Department of Agriculture.

(b) *Application* means application for Specialty Crop Block Grant Program.

(c) "*Enhancing the competitiveness*" of specialty crops includes, but is not limited to: Research, promotion, marketing, nutrition, trade enhancement, food safety, food security, plant health programs, education, "buy local" programs, increased consumption, increased innovation, improved efficiency and reduced costs of distribution systems, environmental concerns and conservation, product development, and developing cooperatives.

(d) *Grant period* means the period of time from when the grant agreement is signed until the completion of all SCBGP projects submitted in the State plan.

(e) *Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant agreement.

(f) *Outcome measure* means an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public.

(g) *Project* means all proposed activities to be funded by the SCBGP.

(h) *Specialty crop* means fruits and vegetables, tree nuts, dried fruits, and nursery crops (including floriculture).

(i) *State* means the fifty States, the District of Columbia, and the Commonwealth of Puerto Rico.

(j) *State department of agriculture* means the agency, commission, or department of a State government responsible for agriculture within the State.

(k) *Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of funds provided.

## § 1290.3 Eligible grant applicants.

Eligible grant applicants are State departments of agriculture from the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico.

## § 1290.4 Eligible grant project.

(a) To be eligible for a grant, the project(s) must enhance the competitiveness of specialty crops.

(b) To be eligible for a grant, the project(s) must be completed 3 calendar years after the grant agreement prescribed in § 1290.8 is signed. The grant period is established by the longest approved project submitted in the State plan. However, for cause, an extension of the grant period not to exceed three years may be granted by AMS on a case by case basis with a written request from the State.

## § 1290.5 Restrictions and limitations on grant funds.

(a) Grant funds may not be used to fund political activities in accordance with provisions of the Hatch Act (5 U.S.C. 1501–1508 and 7324–7326).

(b) All travel expenses associated with SCBGP projects must follow Federal Travel Regulations (41 CFR Chapters 300 through 304) unless State travel requirements are in place.

(c) Grant funds shall supplement the expenditure of State funds in support of specialty crops grown in that State, rather than replace State funds.

### § 1290.6 Completed application.

Completed applications shall be clear and succinct and shall include the following documentation satisfactory to AMS.

(a) Completed applications must include an SF–424 "Application for Federal Assistance".

(b) Completed applications must also include one State plan to show how grant funds will be utilized to enhance the competitiveness of specialty crops. The state plan shall include the following:

(1) *Cover page*. Include the lead agency for administering the plan and an abstract of 200 words or less for each proposed project.

(2) *Project purpose*. Clearly state the specific issue, problem, interest, or need to be addressed. Explain why each project is important and timely.

(3) *Potential impact*. Discuss the number of people or operations affected, the intended beneficiaries of each project, and/or potential economic impact if such data are available and relevant to the project(s).

(4) *Financial feasibility*. For each project, provide budget estimates for the total project cost. Indicate what percentage of the budget covers administrative costs. Administrative costs should not exceed 10 percent of any proposed budget. Provide a justification if administrative costs are higher than 10 percent.

(5) *Expected measurable outcomes*. Describe at least two discrete, quantifiable, and measurable outcomes that directly and meaningfully support each project's purpose. The outcome measures must define an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public.

(6) *Goal(s)*. Describe the overall goal(s) in one or two sentences for each project.

(7) *Work plan*. Explain briefly how each goal and measurable outcome will be accomplished for each project. Be clear about who will do the work. Include appropriate time lines. Expected measurable outcomes may be long term that exceed the grant period. If so, provide a timeframe when long term outcome measure will be achieved.

(8) *Project oversight*. Describe the oversight practices that provide sufficient knowledge of grant activities to ensure proper and efficient administration.

(9) *Project commitment*. Describe how all grant partners commit to and work toward the goals and outcome measures of the proposed project(s).

(10) *Multi-state projects*. If the project is a multi-state project, describe how the States are going to collaborate effectively with related projects. Each State participating in the project should submit the project in their State plan indicating which State is taking the coordinating role and the percent of the budget covered by each State.

### § 1290.7 Review of grant applications.

Applications will be reviewed and approved or rejected as appropriate for conformance with the provisions in § 1290.6. AMS may request the applicant provide for additional information or clarification.

### § 1290.8 Grant agreements.

(a) After review and approval of a grant application, AMS will enter into a grant agreement with the State department of agriculture.

(b) AMS grant agreements will include at a minimum the following:

(1) The projects in the approved State plan.

(2) Total amount of Federal financial assistance that will be advanced.

(3) Terms and conditions pursuant to which AMS will fund the project(s).

### § 1290.9 Reporting and oversight requirements.

(a) An annual performance report will be required of all State departments of agriculture 90 days after the end of the first year of the date of the signed grant agreement and each year until the expiration date of the grant period. If the grant period is one year or less, then only a final performance

report (see paragragh (b) of this section) is required. The annual performance report shall include the following:

(1) Briefly summarize activities performed, targets, and/or performance goals achieved during the reporting period for each project.

(2) Note unexpected delays or impediments as well as favorable or unusual developments for each project.

(3) Outline work to be performed during the next reporting period for each project.

(4) Comment on the level of grant funds expended to date for each project.

(b) A final performance report will be required by the State department of agriculture within 90 days following the expiration date of the grant period. The final progress report shall include the following:

(1) An outline of the issue, problem, interest, or need for each project.

(2) How the issue or problem was approached via the project(s).

(3) How the goals of each project were achieved.

(4) Results, conclusions, and lessons learned for each project.

(5) How progress has been made to achieve long term outcome measures for each project.

(6) Additional information available (e.g., publications, Web sites).

(7) Contact person for each project with telephone number and e-mail address.

(c) A final SF–269A "Financial Status Report (Short Form)" (SF–269 "Financial Status Report (Long Form)" if the project(s) had program income) is required within 90 days following the expiration date of the grant period.

(d) AMS will monitor States, as it determines necessary, to assure that projects are completed in accordance with the approved State plan. If AMS, after reasonable notice to a State, finds that there has been a failure by the State to comply substantially with any provision or requirement of the State plan, AMS may disqualify, for one or more years, the State from receipt of future grants under the SCBGP.

(e) States shall diligently monitor performance to ensure that time schedules are being met, project work within designated time periods is being accomplished, and other performance measures are being achieved.

(f) State departments of agriculture shall retain records pertaining to the SCBGP for 3 years after completion of the grant period or until final resolution of any audit findings or litigation claims relating to the SCBGP.

### § 1290.10 Audit requirements.

The State is accountable for conducting a financial audit of the expenditures of all SCBGP funds. The State shall submit to AMS not later than 30 days after completion of the audit, a copy of the audit results.

## PART 1291—SPECIALTY CROP BLOCK GRANT PROGRAM—FARM BILL

Sec.

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1291.11 Audit requirements.

AUTHORITY: 7 U.S.C. 1621 note, as amended.

SOURCE: 73 FR 51589, Sept. 4, 2008, unless otherwise noted.

### § 1291.1 Purpose and scope.

(a) Pursuant to the authority conferred by Section 101 of the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note), as amended by Section 10109 of the Food, Conservation, and Energy Act of 2008, Public Law 110–246, AMS will make grants to states to enhance the competitiveness of specialty crops in accordance with the terms and conditions set forth herein and other applicable federal statutes and regulations, including, but not limited to, 7 CFR part 3015 and part 3016.

(b) AMS encourages states to develop projects solely to enhance the competitiveness of specialty crops pertaining to the following issues affecting the specialty crop industry: increasing child and adult nutrition knowledge

and consumption of specialty crops; participation of industry representatives at meetings of international standard setting bodies in which the U.S. government participates; improving efficiency and reducing costs of distribution systems; assisting all entities in the specialty crop distribution chain in developing "Good Agricultural Practices", "Good Handling Practices", "Good Manufacturing Practices", and in cost-share arrangements for funding audits of such systems for small farmers, packers and processors; investing in specialty crop research, including organic research to focus on conservation and environmental outcomes; enhancing food safety; developing new and improved seed varieties and specialty crops; pest and disease control; and sustainability.

[74 FR 13316, Mar. 27, 2009]

**§ 1291.2 Definitions.**

(a) *AMS* means the Agricultural Marketing Service of the U.S. Department of Agriculture.

(b) *Application* means the application for the Specialty Crop Block Grant Program—Farm Bill (SCBGP–FB).

(c) *Beginning farmer or rancher* means an individual or entity who has not operated a farm or ranch for more than 10 years and substantially participates in the operation.

(d) *Capital expenditures* means expenditures for the acquisition cost of capital assets (equipment, buildings, land), or expenditures to make improvements to capital assets that materially increase their value or useful life. Acquisition cost means the cost of the asset including the cost to put it in place. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in, or excluded from the acquisition cost in accordance with the governmental unit's regular accounting practices.

(e) *Equipment* means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of the capitalization level established by the governmental unit for financial statement purposes, or $5000.

(f) *General purpose equipment* means equipment, which is not limited to research, scientific or other technical activities. Examples include office equipment and furnishings, telephone networks, information technology equipment and systems, reproduction and printing equipment, and motor vehicles.

(g) *Grant period* means the period of time from when the grant agreement is signed to the completion of all SCBGP-FB projects submitted in the State plan.

(h) *Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant agreement.

(i) *Indirect costs* means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved.

(j) *Outcome measure* means an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public.

(k) *Project* means all proposed activities to be funded by the Specialty Crop Block Grant Program—Farm Bill.

(l) *Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a socially disadvantaged group. A "Socially Disadvantaged Group" is a group whose members have been subject to discrimination on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or a part of an individual's income is derived from any public assistance program.

(m) *Special purpose equipment* means equipment which is used only for research, scientific, or other technical activities.

(n) *Specialty crop* means fruits and vegetables, tree nuts, dried fruits, horticulture and nursery crops (including floriculture).

(o) *State* means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(p) *State department of agriculture* means the agency, commission, or department of a state government responsible for agriculture within the state.

(q) *Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of funds provided.

[74 FR 13316, Mar. 27, 2009]

### § 1291.3 Eligible grant applicants.

Eligible grant applicants are State departments of agriculture from the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

### § 1291.4 Eligible grant project.

(a) To be eligible for a grant, the project(s) must solely enhance the competitiveness of U.S. grown or U.S. territory grown eligible specialty crops, in either domestic or foreign markets.

(b) To be eligible for a grant, the project(s) must be completed within three calendar years after the grant agreement prescribed in § 1291.8 of this part is signed. The grant period is established by the longest approved project submitted in the State plan. However, for cause, an extension of the grant period not to exceed three years may be granted by AMS on a case by case basis with a written request from the State.

(c) Projects should benefit the specialty crop industry and/or the public rather than a single organization, institution, individual, or commercial product. Single organizations, institutions, and individuals are eligible to participate as project partners.

(d) Multi-state projects that address solutions to problems that cross state boundaries are eligible.

[73 FR 51589, Sept. 4, 2008, as amended at 74 FR 13317, Mar. 27, 2009]

### § 1291.5 Restrictions and limitations on grant funds.

(a) Grant funds may not be used to fund political activities in accordance with provisions of the Hatch Act (5 U.S.C. 1501–1508 and 7321–7326).

(b) Development or participation in lobbying activities pursuant to 31 U.S.C. 1352 including costs of membership in organizations substantially engaged in lobbying are unallowable.

(c) Grant funds shall supplement the expenditure of State funds in support of specialty crops grown in that State, rather than replace State funds.

(d) Grantees and subgrantees must comply with 7 CFR Part 3015.

(e) Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct and indirect charges.

(f) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of $5000 or more have the prior approval of AMS.

(g) Rental costs of buildings and equipment are allowable as direct costs in accordance with the cost principles in subpart T of 7 CFR part 3015.

[73 FR 51589, Sept. 4, 2008, as amended at 74 FR 13317, Mar. 27, 2009]

### § 1291.6 Completed application.

Completed applications shall be clear and succinct and shall include the following documentation satisfactory to AMS.

(a) One SF–424 "Application for Federal Assistance".

(b) SF–424A "Budget Information—Non-Construction Programs" showing the budget for each project.

(c) One SF–424B "Assurances—Non-Construction Program".

(d) Completed applications must also include one State plan to show how grant funds will be utilized solely to enhance the competitiveness of specialty crops. The State plan shall include the following:

(1) *Cover page and granting processes.* Include the point of contact and lead

agency for administering the plan. Provide a description of the affirmative steps taken to conduct outreach to socially disadvantaged farmers and beginning farmers. Describe how these groups were identified and the methods used to reach out to them. Identify if an award was made to either a socially disadvantaged farmer or a beginning farmer. If steps were not taken to conduct outreach to these groups, provide a justification for why not. Provide a description of the affirmative steps taken to conduct a competitive grant process. Include the steps taken to conduct outreach to specialty crop stakeholders to receive and consider public comment to identify their priority needs in enhancing the competiveness of specialty crops. Identify the methods used to solicit proposals that meet specialty crop stakeholders' needs, including any focus on multi-state projects. Include a description of the process used to review proposals in a fair and equitable manner. State departments of agriculture may also provide a copy of the issued request for proposals. If a competitive grant process was not used, provide a justification why not.

(2) *Project title and abstract*. Include the title of the project and an abstract of 200 or fewer words for each project.

(3) *Project purpose*. For each project, clearly state the purpose of the project. Describe the specific issue, problem, interest, or need to be addressed. Explain why the project is important and timely. If funding is being directed at a state marketing program, describe how the state will ensure that funding is being used solely to enhance the competitiveness of specialty crops as defined in § 1291.2(n). If a project builds on a previous Specialty Crop Block Grant Program (SCBGP) or SCBGP–FB project, indicate clearly how the new project compliments previous work. For each project, indicate if the project will be or has been submitted to or funded by another Federal or State grant program.

(4) *Potential impact*. Discuss the number of people or operations affected, the intended beneficiaries of each project, and/or potential economic impact if such data are available and relevant to the project.

(5) *Expected measurable outcomes*. For each project, describe at least one distinct, quantifiable, and measurable outcome-oriented objective that directly and meaningfully supports the project's purpose. The measurable outcome-oriented objective must define an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public. Outcome measures may be long term that exceed the grant period. Describe how performance toward meeting outcomes will be monitored. For each project, include a performance-monitoring plan to describe the process of collecting and analyzing data to meet the outcome-oriented objectives.

(6) *Work plan*. For each project, explain briefly the activities that will be performed to accomplish the objectives of the project. Be clear about who will do the work. Include appropriate time lines.

(7) *Budget narrative*. The limit on indirect costs, not to exceed 10 percent, will be published in a FEDERAL REGISTER notice each fiscal year. Provide a justification if indirect costs exceed 10 percent or exceed that fiscal year's limit as announced in the FEDERAL REGISTER. Provide in sufficient detail information about the budget categories listed on SF–424A for each project to demonstrate that grant funds are being expended on eligible grant activities that meet the purpose of the program.

(8) *Project oversight*. Describe the oversight practices that provide sufficient knowledge of grant activities to ensure proper and efficient administration for each project.

(9) *Project commitment*. Describe how all grant partners commit to and work toward the goals and outcome measures of each proposed project(s).

(10) *Multi-state projects*. If the project is a multi-state project, describe how the states are going to collaborate effectively with related projects with one state assuming the coordinating role. Indicate the percent of the budget covered by each state.

[74 FR 13317, Mar. 27, 2009]

### § 1291.7 Review of grant applications.

(a) Applications will be reviewed and approved or rejected as appropriate for conformance with the provisions in § 1291.6 of this part. AMS may request the applicant provide additional information or clarification.

(b) Incomplete applications as of the deadline for submission will not be considered.

### § 1291.8 Grant agreements.

(a) After approval of a grant application, AMS will enter into a grant agreement with the State department of agriculture.

(b) AMS grant agreements will include at a minimum the following:

(1) The projects in the approved State plan.

(2) Total amount of Federal financial assistance that will be advanced.

(3) Beginning and end dates of the grant agreement period.

(4) Terms and conditions pursuant to which AMS will fund the project(s).

### § 1291.9 Unobligated funds.

(a) States who do not apply for or do not request all available funding during the specified grant application period will forfeit all or that portion of available funding not requested for that application year.

(b) Funds not obligated will be allocated, by a date as determined by the Secretary, pro rata to the remaining States who applied during the specified grant application period to be solely expended on projects previously approved in their State plan.

### § 1291.10 Reporting and oversight requirements.

(a) An annual performance report will be required of all State departments' of agriculture within 90 days after the completion of the first year of the project(s), until the expiration date of the grant agreement. If the grant period is one year or less, then only a final performance report is required (See paragraph (b) of this section). The annual performance report shall include the following:

(1) *Activities Performed*. Briefly summarize activities performed, targets, and/or performance goals achieved during the reporting period to meet measurable outcomes for each project.

(2) *Problems and Delays*. Note unexpected delays or impediments for each project.

(3) *Future Project Plans*. Outline work to be performed during the next reporting period for each project.

(4) *Funding Expended To Date*. Comment on the level of grant funds expended to date for each project.

(b) A final performance report will be required of all State departments of agriculture within 90 days following the expiration date of the grant period. The final progress report shall include the following:

(1) *Project Summary*. An outline of the issue, problem, interest, or need for each project.

(2) *Project Approach*. How the issue or problem was approached via each project.

(3) *Goals and Outcomes Achieved*. How the performance goals and measurable outcomes were achieved for each project(s). If outcome measures were long term, summarize the progress that has been made towards achievement.

(4) *Beneficiaries*. Description and quantitative data for the number of people or operations that have benefited from the project's accomplishments, and/or the potential economic impact of each project.

(5) *Lessons Learned*. Lessons learned, results, conclusions, for each project. If outcome measures were not achieved, identify and share the lessons learned to help expedite problem-solving.

(6) *Contact Person*. List the contact person for each project with telephone number and email address.

(7) *Additional Information*. Include other relevant project information available (e.g. publications, Web sites, photographs).

(c) A final SF–269A "Financial Status Report (Short Form)" or SF–269 "Financial Status Report (Long Form)" if the project(s) had program income, is required within 90 days following the expiration date of the grant period.

(d) AMS will monitor States, as it determines necessary, to assure that projects are completed in accordance with the approved State plan. If AMS, after reasonable notice to a State, and

opportunity to be heard, finds that there has been a failure by the State to comply substantially with any provision or requirement of the State plan, AMS may disqualify, for one or more years, the State from receipt of future grants under the SCBGP or SCBGP–FB.

(e) States shall diligently monitor performance to ensure that time schedules are being met, project work within designated time periods is being accomplished, and other performance measures are being achieved.

[73 FR 51589, Sept. 4, 2008, as amended at 74 FR 13318, Mar. 27, 2009]

**§ 1291.11 Audit requirements.**

Each year that a State receives a grant under the SCBGP–FB, the State is required to conduct an audit of the expenditures of SCBGP–FB funds. If the Single Audit Act applies to an eligible grantee, the State shall submit the annual audit results to AMS within 30 days after completion of the audit. If the Single Audit Act does not apply, the State shall conduct an audit of all SCBGP–FB funds no later than 60 days after the end date of the grant agreement. The State shall submit to AMS not later than 30 days after completion of the audit, a copy of the audit results.

# CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

EDITORIAL NOTE: Nomenclature changes to chapter XIV appear at 60 FR 1710, Jan. 5, 1995, and 60 FR 64297, Dec. 15, 1995.

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CROSS REFERENCE: For regulations relative to standards, inspections, and marketing practices, see Chapter I of this title.

# SUBCHAPTER A—GENERAL REGULATIONS AND POLICIES

## PART 1400—PAYMENT LIMITATION AND PAYMENT ELIGIBILITY FOR 2009 AND SUBSEQUENT CROP, PROGRAM, OR FISCAL YEARS

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AUTHORITY: 7 U.S.C. 1308, 1308–1, 1308–2, 1308–3, 1308–3a, 1308–4, and 1308–5.

SOURCE: 73 FR 79273, Dec. 29, 2008, unless otherwise noted.

## Subpart A—General Provisions

### § 1400.1 Applicability.

(a) This part, except as otherwise noted, is applicable to all of the following programs and any other programs as provided in individual program regulations in this chapter (including, but not limited to, all price support programs in parts 1421, 1430, and 1434 of this chapter):

(1) The Direct and Counter-cyclical Program (DCP), including the Average Crop Revenue Election (ACRE), part 1412 of this chapter;

(2) The Conservation Reserve Program (CRP), part 1410 of this chapter with respect to contracts approved on or after October 1, 2008;

(3) The Noninsured Crop Disaster Assistance Program (NAP), part 1437 of this chapter;

(4) The Supplemental Revenue Assistance Program (SURE), part 760 of this title;

(5) The Livestock Forage Disaster Program (LFP), Livestock Indemnity Program (LIP), and the Emergency Assistance Program for Livestock, Honey Bees and Farm-raised Fish (ELAP), part 760 of this title;

(6) The Tree Assistance Program (TAP), part 760 of this title; and

(7) The Natural Resource Conservation Service (NRCS) conservation programs of this title including Agricultural Management Assistance (AMA), Agricultural Water Enhancement Program (AWEP), Chesapeake Bay Watershed Program (CBWP), Conservation

Stewardship Program (CSTP), Cooperative Conservation Partnership Initiative (CCPI), Environmental Quality Incentives Program (EQIP), Farm and Ranchland Protection Program (FRPP), Grasslands Reserve Program (GRP), Wetlands Reserve Program (WRP), and Wildlife Habitat Incentive Program (WHIP).

(8) Subparts C and D of this part do not apply to the programs listed in paragraphs (a)(2) through (a)(7) of this section.

(b) This part will apply to the programs specified in:

(1) Paragraphs (a)(1), (3), (4), and (6) of this section on a crop year basis;

(2) To the program in paragraph (a)(2) of this section on a fiscal year basis;

(3) To the programs in paragraph (a)(5) of this section on a calendar year basis; and

(4) To the programs in paragraph (a)(7) of this section based on available funding.

(c) This part will be used to determine the manner in which payments will be attributed to persons and legal entities for the payment limitations provided in this section and to other programs as provided in individual program regulations in this chapter.

(d) Where more than one provision of this part may apply, the provision which is most restrictive on the program participant will be applied.

(e) The payment limitations of this part are not applicable to:

(1) Payments made under State conservation reserve enhancement program agreements approved by the Secretary and

(2) Payments made subject to this part if ownership interest in land or a commodity is transferred as the result of the death of a program participant and the new owner of the land or commodity has succeeded to the contract of the prior owner. If the successor is otherwise eligible, payments cannot exceed the amount the previous owner was entitled to receive at the time of death.

(f) The following amounts are the limitations on payments per person or legal entity for the applicable period for each payment or benefit.

| Payment or benefit | Limitation per person or legal entity, per crop, program, or fiscal year |
|---|---|
| (1) Direct Payments for covered commodities [1] | $40,000 |
| (2) Direct Payments for peanuts [1] | 40,000 |
| (3) CRP annual rental payments [2] | 50,000 |
| (4) GRP | 50,000 |
| (5) WHIP | 50,000 |
| (6) WRP [3] | 50,000 |
| (7) Counter-Cyclical Payments for covered commodities [3] | 65,000 |
| (8) Counter-Cyclical Payments for peanuts [3] | 65,000 |
| (9) NAP payments | 100,000 |
| (10) Supplemental Agricultural Disaster Assistance [4] | 100,000 |
| (11) TAP | 100,000 |
| (12) CSTP [5] | 200,000 |
| (13) EQIP | 300,000 |

[1] If the person or legal entity has a direct or indirect interest in payments earned on a farm that is in ACRE, this limitation will reflect a 20 percent reduction in direct payments on each farm that is participating in ACRE.

[2] Limitation is applicable to annual rental payments received directly and indirectly from all CRP contracts regardless of contract approval date, except payments received directly and indirectly under CRP contracts approved prior to October 1, 2008, may exceed the limitation, subject to payment limitation rules in effect on the date of contract approval.

[3] The payment limit does not apply to payments for perpetual or 30 year easements or under 30 year contracts.

[4] Under ACRE, this amount will be a combined limitation for counter-cyclical and ACRE payments. If a person or legal entity has a direct or indirect interest in payments earned on a farm that is participating in ACRE, this limitation will reflect an increase for the amount that the direct payments were reduced.

[5] Total payments received under Supplemental Agricultural Disaster Assistance through SURE, LIP, LFP, and ELAP may not exceed $100,000.

[6] The $200,000 limit is the total limit for 2009 through 2012.

Note: AMA, AWEP, CBWP, CCPI, and FRPP are all limited by available funding rather then an amount by participant.

(g) With respect to contracts for conservation programs approved prior to October 1, 2008, the payment limitation rules in 7 CFR part 1400 in effect on September 30, 2008 will be applicable (see 7 CFR part 1400, revised as of January 1, 2008).

[73 FR 79273, Dec. 29, 2008, as amended at 74 FR 31577, July 2, 2009; 75 FR 899, Jan. 7, 2010]

### § 1400.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), and the Administrator, Farm Service Agency (FSA). In the field, the regulations in this part will be administered by the FSA State and county committees (referred to as "State committee" and "county committee," respectively).

(b) State executive directors, county executive directors, and State and

county committees do not have authority to modify or waive any of the provisions of this part.

(c) The State committee may take any action authorized or required by this part to be taken by the county committee that has not been taken by such committee. The State committee may also:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation in this part to a State or county committee precludes the Executive Vice President, CCC, and the Administrator, FSA, or a designee, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Benefits from programs subject to this part may not be issued until all required forms and necessary payment eligibility and payment limitation determinations are made.

(f) The initial payment eligibility determinations will be made within 60 days after the required forms and any other supporting documentation needed in making such determinations are received in the county FSA office. If the determination is not made within 60 days, the producer will receive a determination for that program year that reflects the determination sought by the producer unless the Deputy Administrator determines that the producer did not follow the farm operating plan that was presented to the county or State committee for such year.

(g) Initial determinations concerning the provisions of this part will be made by the FSA State office with respect to any farm operating plan that is for a joint operation with six or more members.

(h) Reviews of farming operations and corresponding documentation submitted by program participants may be conducted at any time to determine compliance with applicable statutes and regulations. The completion of such reviews is not subject to the time constraints specified in paragraph (f) of this section.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 899, Jan. 7, 2010]

### § 1400.3 Definitions.

(a) The terms defined in part 718 of this title are applicable to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions are also applicable to this part:

*Active personal labor* means personally providing physical activities necessary in a farming operation, including activities involved in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities in the farming operation. Other physical activities include those physical activities required to establish and maintain conserving cover crops on CRP acreages and those physical activities necessary in livestock operations.

*Active personal management* means personally providing and participating in:

(1) The general supervision and direction of activities and labor involved in the farming operation; or

(2) Services (whether performed on-site or off-site) reasonably related and necessary to the farming operation, including:

(i) Supervision of activities necessary in the farming operation, including activities involved in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities, as well as activities required to establish and maintain conserving cover crops on CRP acreage and activities required in livestock operations;

(ii) Business-related actions, which include discretionary decision making;

(iii) Evaluation of the financial condition and needs of the farming operation;

(iv) Assistance in the structuring or preparation of financial reports or analyses for the farming operation;

(v) Consultations in or structuring of business-related financing arrangements for the farming operation;

(vi) Marketing and promotion of agricultural commodities produced by the farming operation;

(vii) Acquiring technical information used in the farming operation; and

(viii) Any other management function reasonably necessary to conduct the farming operation and for which service the farming operation would ordinarily be charged a fee.

*Administrator* means the Administrator of the Farm Service Agency including any designee of the Administrator.

*Alien* means any person not a citizen or national of the United States.

*Attribution* means the combination of any payment made directly to a person or legal entity with the person's or legal entity's pro rata direct and indirect interest in payments received by a legal entity, joint venture, or general partnership.

*Average Adjusted Gross Farm Income* means the average of the portion of adjusted gross income of the person or legal entity that is attributable to activities related to farming, ranching, or forestry for the 3 taxable years preceding the most immediately preceding complete taxable year.

*Average Adjusted Gross Income* means the average of the adjusted gross income as defined under 26 U.S.C. 62 or comparable measure of the person or legal entity over the 3 taxable years preceding the most immediately preceding complete taxable year.

*Average Adjusted Gross Nonfarm Income* means the difference between the average adjusted gross income for the person or legal entity and the average adjusted gross farm income for the person or legal entity.

*Capital* means the funding provided by a person or legal entity to the farming operation, independent and separate from all other farming operations, in order for such operation to conduct farming activities. In determining whether a person or legal entity has independently contributed capital, in the form of funding, to the farming operation, such capital must have been derived from a fund or account separate and distinct from that of any other person or legal entity involved in such operation. Capital does not include the value of any labor or management that is contributed to the farming operation or any outlays for land or equipment. A capital contribution must be a direct out-of-pocket input of a specified sum or an amount borrowed by the person or legal entity and does not include advance program payments.

*Chief* means the Chief of the Natural Resources Conservation Service including any designee of the Chief (also referred to in this part as NRCS Chief).

*Contribution* means providing land, capital, or equipment assets, and the actions of providing active personal labor or active personal management to a farming operation in exchange for, or with the expectation of, deriving benefit based solely on the success of the farming operation.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, Farm Service Agency including any designee.

*Equipment* means the machinery and implements needed by the farming operation to conduct activities of the farming operation, including machinery and implements involved in land preparation, planting, cultivating, harvesting, or marketing of the crops involved. Equipment also includes machinery and implements needed to establish and maintain conserving cover crops on CRP acreages and those needed to conduct livestock operations. Such equipment may be leased from any source. If such equipment is leased from another person or legal entity with an interest in the farming operation, such equipment must be leased at a fair market value.

*Family member* means a person to whom another member in the farming operation is related as a lineal ancestor, lineal descendant, sibling, spouse, or otherwise by marriage.

*Farming operation* means a business enterprise engaged in the production of agricultural products, commodities, or livestock, operated by a person, legal entity, or joint operation that is eligible to receive payments, directly or indirectly, under one or more of the programs specified in § 1400.1. A person or legal entity may have more than one farming operation if such person or legal entity is a member of one or more joint operations.

*Indian tribe* means any Indian tribe, band, nation, pueblo, or other organized group or community, including

any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

*Interest in a farming operation* means one of the following:

(1) Owner or renter of the land in the farming operation;

(2) An interest in the agricultural products, commodities, or livestock produced by the farming operation; or

(3) A member of a joint operation that either owns or rents land in the farming operation or has an interest in the agricultural products, commodities, or livestock produced by the farming operation.

*Irrevocable trust* means a trust as specified in this definition. Any trust not meeting this definition will be considered a revocable trust. A trust may be considered to be an irrevocable trust only if:

(1) The trust cannot be modified or terminated by the grantor;

(2) The grantor has no future, contingent, or remainder interest in the corpus of the trust; and

(3) The trust agreement does not provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent upon either the remainder beneficiary achieving at least the age of majority or the death of the grantor or income beneficiary.

*Joint operation* means a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.

*Land* means farmland that meets the specific requirements of the applicable program. Such land may be leased from any source. If such land is leased from another person or legal entity with an interest in the crop or crop proceeds, such land must be leased at a fair market value.

*Lawful alien* means any person who is not a citizen or national of the United States but who is admitted into the United States for permanent residence under the Immigration and Nationality Act and possesses a valid Alien Registration Receipt Card issued by the United States Citizenship and Immigration Services, Department of Homeland Security.

*Legal entity* means an entity created under Federal or State law and that:

(1) Owns land or an agricultural commodity, product, or livestock; or

(2) Produces an agricultural commodity, product, or livestock.

*Payment* means:

(1) Payments made in accordance with part 1412 or successor regulation of this chapter;

(2) CRP annual rental payments made in accordance with part 1410 or successor regulation of this chapter;

(3) NAP payments made in accordance with part 1437 or successor regulation of this chapter; and

(4) For other programs, any payments designated in individual program regulations in this chapter.

*Person* means an individual, natural person and does not include a legal entity.

*Public school* means a primary, elementary, secondary school, college, or university that is directly administered under the authority of a governmental body or that receives a predominant amount of its financing from public funds.

*Secretary* means the Secretary of the United States Department of Agriculture.

*Sharecropper* means a person who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of such crop in return for the provision of such labor.

*Significant contribution* means the provision of the following to a farming operation:

(1)(i) For land, capital, or equipment contributed independently by a person or legal entity, a contribution that has a value at least equal to 50 percent of the person's or legal entity's commensurate share of the total:

(A) Value of the capital necessary to conduct the farming operation;

(B) Rental value of the land necessary to conduct the farming operation; or

(C) Rental value of the equipment necessary to conduct the farming operation; or

(ii) If the contribution by a person or legal entity consists of any combination of land, capital, and equipment, such combined contribution must have a value at least equal to 30 percent of the person's or legal entity's commensurate share of the total value of the farming operation;

(2) For active personal labor, an amount contributed by a person to the farming operation that is described by the smaller of the following:

(i) 1,000 hours per calendar year; or

(ii) 50 percent of the total hours that would be necessary to conduct a farming operation that is comparable in size to such person's or legal entity's commensurate share in the farming operation;

(3) With respect to active personal management, activities that are critical to the profitability of the farming operation, taking into consideration the person's or legal entity's commensurate share in the farming operation; and

(4) With respect to a combination of active personal labor and active personal management, when neither contribution by itself meets the requirement of paragraphs (2) and (3) of this definition, a combination of active personal labor and active personal management that, when made together, results in a critical impact on the profitability of the farming operation in an amount at least equal to either the significant contribution of active personal labor or active personal management as defined in paragraphs (2) and (3) of this definition.

*Substantial amount of active personal labor* means the provision of active personal labor to a farming operation in an amount described by the smaller of the following:

(1) 1,000 hours per calendar year; or

(2) 50 percent of the total hours that would be necessary to conduct a farming operation that is comparable in size to the person's or legal entity's commensurate share in the farming operation.

*Total value of the farming operation* means the total of the costs, excluding the value of active personal labor and active personal management contributed by a person who is a member of the farming operation, needed to carry out the farming operation for the year for which the determination is made.

**§ 1400.4 Indian Tribe.**

Provisions of this part do not apply to Indian tribes as defined in § 1400.3.

**§ 1400.5 Denial of program benefits.**

(a) All or any part of a payment otherwise due a person or legal entity on all farms in which the person or legal entity has an interest may be withheld or be required to be refunded if the person or legal entity fails to comply with the provisions of this part.

(b) All or any part of a payment otherwise due a person or legal entity on all farms in which the person or legal entity has an interest may be withheld or be required to be refunded if the person or legal entity fails to comply with the provisions of this part and adopts or participates in adopting a scheme or device designed to evade this part, or that has the effect of evading this part. Such acts may include, but are not limited to:

(1) Concealing information that affects the application of this part;

(2) Submitting false or erroneous information; or

(3) Creating a business arrangement using rental agreements and other arrangements to conceal the interest of a person or legal entity in a farm or farming operation for the purpose of obtaining program payments the person or legal entity would otherwise not be eligible to receive. Indicators of such business arrangement include, but are not limited to the following:

(i) No crops are grown or agricultural commodities produced by the represented operation;

(ii) The represented operation has no appreciable assets;

(iii) The only source of capital for the operation is the program payments; or

(iv) The represented operation exists only for the receipt of program payments.

(c) If the Deputy Administrator determines that a person or legal entity has adopted a scheme or device to

evade, or that has the purpose of evading, the provisions of 7 U.S.C. 1308, 1308–1, or 1308–3, as amended, such person or legal entity will be ineligible to receive payments under the programs specified in § 1400.1 in the year for such scheme or device was adopted and the succeeding year.

(d) A person or legal entity that perpetuates a fraud, commits fraud, or participates in equally serious actions for the benefit of the person or legal entity, or the benefit of any other person or legal entity, to exceed the applicable limit on payments or the requirements of this part will be subject to a five-year denial of all program benefits. Such other equally serious actions may include, but are not limited to:

(1) Knowingly engaged in, or aided in the creation of a fraudulent document;

(2) Failed to disclose material information relevant to the administration of the provisions of this part, or

(3) Any other actions of a person or legal entity determined by the Deputy Administrator as designed or intended to circumvent the provisions of this subpart.

(e) Program payments and benefits will be denied on pro-rata basis:

(1) In accordance to the interest held by the person or legal entity in any other legal entity or joint operations and

(2) To any person or legal entity that is a cash rent tenant on land owned or under control of a person or legal entity for which a determination of this section has been made.

### § 1400.6 Joint and several liability.

(a) Any legal entity, including joint operations, and any member of a legal entity determined to have knowingly participated in a scheme or device, or other such equally serious actions to evade the payment limitation provisions, or that has the purpose of evading the provisions of this part, will be jointly and severally liable for any amounts determined to be payable as the result of the scheme or device, or other such equally serious actions, including amounts necessary to recover the payments.

(b) Any person or legal entity that cooperates in the enforcement of the payment limitation and payment eligibility provisions of this part may be partially or fully released from liability, as determined by the Executive Vice President, CCC.

(c) The provisions of this section will be applicable in addition to any liability that arises under a criminal or civil statute.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 899, Jan. 7, 2010]

### § 1400.7 [Reserved]

### § 1400.8 Equitable treatment.

(a) Actions taken by a person or legal entity in good faith based on action or advice of an authorized representative of the Administrator may be accepted as meeting the requirements of this part to the extent the Administrator deems necessary to provide fair and equitable treatment to such person or legal entity.

(b) Actions taken by a person or legal entity in good faith based on action or advice of an authorized representative of the NRCS Chief may be accepted as meeting the requirements of this part to the extent the NRCS Chief deems necessary to provide fair and equitable treatment to such person or legal entity.

### § 1400.9 Appeals.

(a) A person or legal entity may obtain reconsideration and review of determinations made under this part in accordance with the appeal regulations set forth in part 780 of this title. With respect to such appeals, the applicable reviewing authority will:

(1) Schedule a hearing with respect to the appeal within 45 days following receipt of the written appeal and

(2) Issue a determination within 60 days following the hearing.

(b) The time limitations provided in paragraph (a) will not apply if:

(1) The appellant, or the appellant's representative, requests a postponement of the scheduled hearing;

(2) The appellant, or the appellant's representative, requests additional time following the hearing to present additional information or a written closing statement;

(3) The appellant has not timely presented information to the reviewing authority; or

(4) An investigation by the Office of Inspector General is ongoing or a court proceeding is involved that affects the amount of payments a person may receive.

(c) If the deadlines provided in paragraphs (a) and (b) of this section are not met, the relief sought by the producer's appeal will be granted for the applicable crop year unless the Deputy Administrator determines that the producer did not follow the farm operating plan initially presented to the county committee for the year that is the subject of the appeal.

(d) An appellant may waive the provisions of paragraphs (a) and (b) of this section.

## Subpart B—Payment Limitation

### § 1400.100 Revocable trust.

A revocable trust and the grantor of the trust will be considered to be the same person.

### § 1400.101 Minor children.

(a) Except as provided in paragraph (b) of this section, payments received by a child under 18 years of age as of June 1 of the applicable crop, program, or fiscal year, including such a person who is the beneficiary of a trust or who is an heir of an estate, will be attributed for the entire crop, program, or fiscal year to the parent receiving the greater amount of program payments subject to this part or to any court-appointed person such as a guardian or conservator who is responsible for the minor.

(b) Payments received by a minor will not be attributed to the minor's parent or to any court-appointed person such as a guardian or conservator who is responsible for the minor if all of the following apply:

(1) The minor is a producer on a farm and the minor's parents or any court-appointed person such as guardian or conservator who is responsible for the minor, does not have any interest in the farm;

(2) The minor has established and maintains a separate household from the minor's parents or any court-appointed person such as a guardian or conservator who is responsible for the minor, and such minor personally carries out the farming activities with respect to the minor's farming operation for which there is a separate accounting; and

(3) The minor does not live in the same household as such minor's parents and:

(i) Is represented by a court-appointed guardian or conservator who is responsible for the minor and

(ii) Ownership of the farm is vested in the minor.

(c) A person will be considered to be a minor until the age 18 is reached. Court proceedings conferring majority on a person under 18 years of age will not change such person's status as a minor.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 899, Jan. 7, 2010]

### § 1400.102 States, political subdivisions, and agencies thereof.

(a) A State, political subdivision, and agency thereof, is not eligible for payments or benefits under programs specified in § 1400.1(a)(1), unless the exception provided in paragraph (b) of this section applies.

(b) Subject to the limitation in paragraph (c) of this section, a State, political subdivision, and any agency thereof, may receive payments or benefits under programs specified in § 1400.1 if both of the following apply:

(1) The land for which payments are received is owned by the State, political subdivision, or agency thereof and

(2) The payments are used solely for the support of public schools;

(c) The total payments described in paragraph (b) of this section cannot exceed $500,000 annually except for States with a population less than 1,500,000, as established by the most recent U.S. Census Bureau annual estimate of such State's resident population.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 899, Jan. 7, 2010]

### § 1400.103 Charitable organizations.

(a) A charitable organization, including a club, society, fraternal organization, or religious organization will be considered a separate legal entity for payment limitation purposes to the extent that such an entity is independently engaged in the production of crops, agricultural commodities, or

livestock, except where the land or the proceeds from the farming operation may transfer to a legal entity that exercises control or authority over such organization.

(b) If the land or the proceeds from the farming operation may transfer to a legal entity that exercises control or authority over the charitable organization, payments to the charitable organization will be attributed to the parent organization.

### § 1400.104 Changes in farming operations.

(a) Any change in a farming operation that would increase the number of persons or legal entities to which the provisions of this part apply must be bona fide and substantive. If bona fide, the following will be considered to be a substantive change in the farming operation:

(1) The addition of a family member to a farming operation in accordance with § 1400.208, except that such an addition will not affect the status of any other person or legal entity that is added to the farming operation; or

(2) With respect to a landowner only, a change from a cash rent to a share rent; or

(3) An increase through the acquisition of base acres not previously involved in the farming operation of at least 20 percent or more in the total base acres involved in the farming operation.

(i) For the purpose of payment limitations, such an increase in base acres will be considered an applicable bona fide and substantive change for the increase of only one person or legal entity to the farming operation, unless;

(ii) A representative of the State FSA office determines, based on the magnitude and complexity of the change represented, the increase in base acres supports additional persons or legal entities to the farming operation; or

(4) A change in ownership by sale or gift of equipment from a person or legal entity previously engaged in a farming operation to a person or legal entity that has not been involved in such operation. The sale or gift of equipment will be considered to be bona fide and substantive only if:

(i) The transferred amount of such equipment is commensurate with the new person's or legal entity's share of the farming operation,

(ii) The sale or gift of the equipment was based on the equipment's fair market value,

(iii) The former owner of the equipment has no direct or indirect control over such equipment,

(iv) The transaction was not financed by the former owner, and

(v) Preference was not given to the former owner to re-purchase the equipment at a later date; or

(5) A change in ownership by sale or gift of land from a person or legal entity who previously has been engaged in a farming operation to a person or legal entity that has not been involved in such operation. The sale or gift of land will be considered to be bona fide and substantive only if:

(i) The transferred amount of such land is commensurate with the new person's or legal entity's share of the farming operation,

(ii) The sale or gift of land was based on the land's fair market value,

(iii) The former owner of the land has no direct or indirect control over such land,

(iv) The transaction was not financed by the former owner, and

(v) Preference was not given to the former owner to re-purchase the land at a later date.

(b) Unless the requirements in paragraph (a) of this section are met, the increase in persons or legal entities in the farming operation will not be recognized for payment limitation purposes and the additional persons or legal entities are not eligible for program payment identified in § 1400.1 otherwise resulting from the farming operation.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 899, Jan. 7, 2010]

### § 1400.105 Attribution of payments.

(a) A payment made directly to a person or legal entity will be combined with the pro rata interest of the person or legal entity in payments received by a legal entity in which the person or legal entity has a direct or indirect

ownership interest, unless the payments of the legal entity have been reduced by the pro rata share of the person or legal entity.

(b) A payment made to a legal entity will be attributed to those persons who have a direct and indirect ownership interest in the legal entity, unless the payment of the legal entity has been reduced by the pro rata share of the person.

(c) Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

(1) First level of ownership—any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-tier or payment legal entity;

(2)(i) Second level of ownership—any payment made to a first-tier legal entity that is owned in whole or in part by another legal entity (referred to as a second-tier legal entity) will be attributed to the second-tier legal entity in proportion to the ownership of the second-tier legal entity in the first-tier legal entity;

(ii) If the second-tier legal entity is owned in whole or in part by a person, the amount of the payment made to the first-tier legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-tier legal entity by the person.

(3) Third and fourth levels—except as provided in paragraph (2)(ii) of this section, any payments made to a legal entity at the third and fourth tiers of ownership will be attributed in the same manner as specified in paragraph (2)(i) of this section.

(4) Fourth-tier ownership—if the fourth-tier of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-tier or payment legal entity in the amount that represents the indirect ownership in the first-tier or payment legal entity by the fourth-tier legal entity.

(d) For purposes of administering direct attribution, and to determine a person's or legal entity's ownership interest in a legal entity that receives a payment subject to limitation; the ownership interest on June 1 of each year will be used.

(1) If the change in ownership interest is due to the death of an interest holder in the legal entity or the legal entity did not exist on June 1 of the applicable year, the Deputy Administrator may determine that a change after June 1 is considered relevant or effective for the current year.

(2) Changes that occur after June 1 cannot be used to increase the amount of program payments a legal entity, or its members, is eligible to receive directly or indirectly for the applicable year.

(e) Direct attribution of payments is not applicable to a cooperative association of producers with respect to commodities produced by the members of the association that are marketed by the association on behalf of the members of the association. The payments will instead be attributed to the producers as persons.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.106 Payment limits.

(a) Payments made to a person or legal entity will not exceed the amounts specified in subpart A of this part.

(b) Payments made to a joint operation cannot exceed, for each payment specified in subpart A of this part, the amount determined by multiplying the maximum payment amount specified in subpart A of this part by the number of persons and legal entities, other than joint operations, that comprise the ownership of the joint operation.

(c) Payments made to a legal entity will be reduced proportionately by an amount that represents the direct or indirect ownership in the legal entity by any person or legal entity that has otherwise reached the applicable maximum payment limitation.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.107 Notification of interests.

(a) In order to be eligible to receive any payment specified in subpart A of

this part, or any other program as provided in individual program regulations in this chapter, a person or legal entity must, provide information in the manner as prescribed by the Deputy Administrator.

(b) The information required to be submitted under paragraph (a) of this section must include:

(1) The name and social security number of each person, or the name and taxpayer identification number of each legal entity, that holds or acquires an ownership interest in the legal entity and

(2) The name and taxpayer identification number of each legal entity in which the person or legal entity holds an ownership interest.

## Subpart C—Payment Eligibility

### § 1400.201 General provisions for determining whether a person or legal entity is actively engaged in farming.

(a) To be considered eligible to receive payments with respect to a particular farming operation, a person or legal entity must be actively engaged in farming with respect to such operation.

(b) Actively engaged in farming means, except as otherwise provided in this part, that the person or legal entity:

(1) Independently and separately makes a significant contribution to a farming operation of:

(i) Capital, equipment, or land, or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management;

(2) Has a share of the profits or losses from the farming operation commensurate with the person's or legal entity's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the person's or legal entity's claimed share of the farming operation.

(c) All of the following factors will be taken into consideration in determining if the person or legal entity is independently and separately contributing a significant amount of capital, equipment, or land, or a combination of capital, equipment, or land, to the farming operation:

(1) A separate and distinct interest in the land, crop, and livestock involved in the farming operation;

(2) The demonstration of separate and total responsibility for the interest in the land, crop, and livestock in the farming operation; and

(3) All funds and business accounts of the farming operation are separate from that of any other person and legal entity.

(d) In determining if the person or legal entity is independently and separately contributing a significant amount of active personal labor or active personal management, all of the following factors will be taken into consideration:

(1) The types of crops and livestock produced by the farming operation;

(2) The normal and customary farming practices of the area;

(3) The total amount of labor and management necessary for such a farming operation in the area; and

(4) Whether the person or legal entity receives compensation for the labor and management activities.

### § 1400.202 Persons.

(a) A person will be considered to be actively engaged in farming with respect to a farming operation if:

(1) The person independently and separately makes a significant contribution to a farming operation of:

(i) Capital, equipment, or land, or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management;

(2) Has a share of the profits or losses from the farming operation commensurate with the person's or legal entity's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the person's or legal entity's claimed share of the farming operation.

(b) If one spouse, or an estate of a deceased spouse, is determined to be actively engaged in farming as specified in paragraph (a) of this section, the other spouse is considered to have made a significant contribution, as specified in paragraph (a)(1)(ii) of this section, only to the same farming operation.

(c) If a farming operation is conducted by a person, and the capital, land, or equipment is contributed by the person, such capital, land, or equipment:

(1) To meet the requirements of paragraph (a)(1)(i) of this section, must be contributed directly by the person and must not be acquired as a result of a loan made to, guaranteed, co-signed, or secured by:

(i) Any other person, joint operation, or legal entity that has an interest in such farming operation;

(ii) Such person, joint operation, or legal entity by any other person, joint operation, or legal entity that has an interest in such farming operation or

(iii) Any other person, joint operation, or legal entity in whose farming operation such person, joint operation, or legal entity has an interest; and

(2) To meet the requirements of paragraphs (a)(2) and (a)(3) of this section, and if acquired as a loan made to, guaranteed, co-signed, or secured by the persons, joint operations, or legal entities, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.203 Joint operations.

(a) A member of a joint operation will be considered to be actively engaged in farming with respect to a farming operation if the member:

(1) Makes a significant contribution of:

(i) Capital, equipment, or land or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management, and that are:

(A) Performed on a regular basis,

(B) Identifiable and documentable, and

(C) Separate and distinct from such contributions of any other member of the farming operation;

(2) Has a share of the profits or losses from the farming operation commensurate with the member's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the member's claimed share of the farming operation.

(b) For a farming operation conducted by a joint operation in which the capital, land, or equipment is contributed by such joint operation, such capital, land, or equipment:

(1) To meet the requirements of paragraph (a)(1)(i) of this section, and if contributed directly by the joint operation and must not be acquired as a loan made to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or other joint operation that has an interest in such farming operation, including either joint operation's members;

(ii) Such joint operation by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or other joint operation in whose farming operation such joint operation has an interest, and

(2) To meet the requirements of paragraphs (a)(2) and (a)(3) of this section, and if acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations with an interest in the operation as defined, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

(c) If a joint operation separately makes a significant contribution of capital, equipment, or land, or a combination of capital, equipment, or land, and the joint operation meets the provisions of § 1400.201(b)(2) and (b)(3), the members of the joint operation who make a significant contribution of active personal labor, active personal

management, or a combination of active personal labor and active personal management to the farming operation as specified in paragraph (a)(1)(ii) of this section will be considered to be actively engaged in farming with respect to such farming operation.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.204 Limited partnerships, limited liability partnerships, limited liability companies, corporations, and other similar legal entities.

(a) A limited partnership, limited liability partnership, limited liability company, corporation, or other similar legal entity will be considered to be actively engaged in farming with respect to a farming operation if:

(1) The legal entity independently and separately makes a significant contribution to the farming operation of capital, equipment, or land, or a combination of capital, equipment, or land;

(2) Each partner, stockholder, or member with an ownership interest or their spouse with an ownership interest makes a contribution, whether compensated or not compensated, of active personal labor, active personal management, or a combination of active personal labor and active personal management to the farming operation; that are:

(i) Performed on a regular basis;

(ii) Identifiable and documentable; and

(iii) Separate and distinct from such contributions of any other partner, stockholder or member of the farming operation;

(3) The collective contribution of the partners, stockholders and members is significant and commensurate;

(4) The legal entity has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation; and

(5) The legal entity makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation.

(b) If any partner, stockholder, or member fails to meet the requirements in paragraph (a)(2) of this section, any program payment and benefit subject to this subpart provided to the legal entity will be reduced by an amount commensurate with the ownership share held by that partner, stockholder, or member in the legal entity.

(c) An exception to paragraph (b) of this section will apply if:

(1) At least 50 percent of the stock is held by partners, stockholders, or members that are actively providing labor or management and

(2) The partners, stockholders, or members are collectively receiving, directly or indirectly, total payments equal to or less than one payment limitation.

(d) For a farming operation conducted by a legal entity in which the capital, land, or equipment is contributed by the legal entity, such capital, land, or equipment:

(1) To meet the requirements of paragraph (a)(1) of this section, must be contributed directly by the legal entity and must not be acquired as a loan made to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or joint operation that has an interest in such farming operation, including the legal entity's members;

(ii) Such legal entity by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or joint operation in whose farming operation such legal entity has an interest, and

(2) To meet the requirements of paragraphs (a)(4) and (a)(5) of this section, and if acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations as defined, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.205 Trusts.

A trust will be considered to be actively engaged in farming with respect to a farming operation if:

(a) The trust independently and separately makes a significant contribution to the farming operation of capital, equipment, or land, or a combination of capital, equipment, or land;

(b) The income beneficiaries collectively make a significant contribution of active personal labor or active personal management, or a combination of active personal labor and active personal management to the farming operation. The combined interest of all the income beneficiaries providing active personal labor or active personal management, or a combination of active personal labor and active personal management, must be at least 50 percent;

(c) The trust has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation;

(d) The trust makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation;

(e) For a farming operation conducted by a trust in which the capital, land, or equipment is contributed by the trust, such capital, land, or equipment:

(1) To meet the requirements of paragraph (a) of this section, must be contributed directly by the trust and must not be acquired as a loan made to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or joint operation that has an interest in such farming operation, including the trust's income beneficiaries;

(ii) Such joint operation by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or joint operation in whose farming operation such trust has an interest, and

(2) To meet the requirements of paragraphs (c) and (d) of this section and if land, capital or equipment is acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations as defined, the loan must:

(i) Bear the prevailing interest rate; and

(ii) Have a repayment schedule considered reasonable and customary for the area.

(f) The trust has provided a tax identification number of the trust unless the trust is a revocable trust and the grantor is the sole income beneficiary; and

(g) The trust has provided a copy of the trust agreement to the county committee unless the trust is a revocable trust.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

**§ 1400.206 Estates.**

(a) For 2 program years after the program year in which a person dies, the person's estate will be considered to be actively engaged in farming if:

(1) The estate, as a legal entity, makes a significant contribution of either:

(i) Capital, equipment, or land or

(ii) A combination of capital, equipment, or land; and

(2) The personal representative or heirs of the estate collectively make a significant contribution of either:

(i) Active personal labor or active personal management or

(ii) The combination of active personal labor and active personal management; and

(3) The estate has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation;

(4) The estate makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation; and

(5) The representative of the estate has provided a tax identification number for the estate and a copy of a court order, will, or other legal document that identifies the heir(s) and tax identification number(s) of the heir(s).

(b) For a farming operation conducted by an estate in which the capital, land, or equipment is contributed by the estate, such capital, land, or equipment:

(1) To meet the requirements of paragraph (a) of this section, must be contributed directly by the estate and must not be acquired as a loan made

to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or joint operation that has an interest in such farming operation, including the estate's heirs;

(ii) Such joint operation by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or joint operation in whose farming operation such an estate has an interest; and

(2) To meet the requirements of paragraphs (c)(3)and (a)(4) of this section, and if land, capital or equipment is acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations as defined, the loan must:

(i) Bear the prevailing interest rate; and

(ii) Have a repayment schedule considered reasonable and customary for the area.

(c) After the period set forth in paragraph (a) of this section, the deceased person's estate will not be considered to be actively engaged in farming unless, on a case by case basis, the Deputy Administrator determines, for the purpose of obtaining program payments, that the estate has not been settled.

[≤[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

### § 1400.207 Landowners.

(a) A person or legal entity that is a landowner, including landowners with an undivided interest in land, making a significant contribution of owned land to the farming operation, will be considered to be actively engaged in farming with respect to such owned land, if the landowner:

(1) Receives rent or income for such use of the land based on the land's production or the operation's operating results;

(2) Has a share of the profits or losses from the farming operation commensurate with the landowner's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the landowner's claimed share of the farming operation.

(b) A landowner also includes a member of a joint operation if the joint operation holds title to land in the name of the joint operation and if the joint operation or its members submit adequate documentation to determine that, upon dissolution of the joint operation, the title to the land owned by the joint operation will revert to such member of such joint operation.

### § 1400.208 Family members.

(a) Notwithstanding the provisions of §§ 1400.201 through 1400.206, with respect to a farming operation conducted by persons, a majority of whom are family members, an adult family member who makes a significant contribution of active personal labor, active personal management, or a combination of active personal labor and active personal management will be considered to be actively engaged in farming if the adult family member meets the provisions in paragraph (b) of this section.

(b) An adult family member who elects to be considered actively engaged in farming under this section must:

(1) Have a share of the profits or losses from the farming operation commensurate with such person's contributions to the operation and

(2) Make contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming operation.

### § 1400.209 Sharecroppers.

(a) Notwithstanding the provisions of §§ 1400.201 through 1400.206 of this part, with respect to a person who is a sharecropper, such person will be considered to be actively engaged in farming if the sharecropper meets the provisions of paragraph (b) of this section.

(b) A sharecropper who elects to be considered actively engaged in farming under this section must:

(1) Make a significant contribution of active personal labor to the farming operation;

(2) Have a share of the profits or losses from the farming operation commensurate with such person's contribution to the operation; and

(3) Make a contribution to the farming operation that is at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming operation.

**§ 1400.210 Deceased and incapacitated persons.**

If the person dies or is incapacitated before a determination is made that the person is "actively engaged in farming," the representative of the deceased person's estate or the incapacitated person, or other person if necessary, must provide the determining authority information to verify that such person did make a conscious effort to and would have been determined to be actively engaged in farming if not for the person's death or incapacitation. If the person dies or is incapacitated after being determined to be "actively engaged in farming," the determining authority will allow such determination to be in effect for that program year or fiscal year, as applicable. However, the following year such person or the person's estate must meet all necessary requirements in order to be determined to be "actively engaged in farming" for that year.

**§ 1400.211 Persons and legal entities not considered to be actively engaged in farming.**

Any person or legal entity that does not satisfy all of the applicable provisions of §§ 1400.201 through 1400.210 and a landowner who rents land to a farming operation for cash or a crop share guaranteed as to the amount of the commodity will not be considered to be actively engaged in farming with respect to the farming operation.

**§ 1400.212 Growers of hybrid seed.**

The existence of a hybrid seed contract for a person or legal entity will not be taken into account when making an actively engaged in farming determination with respect to such person or legal entity. However, such person or legal entity must satisfy all other applicable provisions of this part.

**§ 1400.213 Military personnel.**

If a person is called to active duty in the military before a determination is made that the person is actively engaged in farming, the person may be considered to be actively engaged in farming if the determining authority determines that such person did make a conscious effort to, and would have been determined to be, actively engaged in farming if the person would not have been called to active duty. If the person is called to active duty after being determined to be actively engaged in farming, such determination will remain in effect for the program year.

## Subpart D—Cash Rent Tenants

**§ 1400.301 Eligibility.**

(a) Any tenant that is actively engaged in farming in accordance with the provisions of subpart C and conducts a farming operation in which the tenant rents the land for cash, for a crop share guaranteed as to the amount of the commodity, or by any arrangement in which the tenant does not compensate the landlord by cash or a crop share, and receives benefits, with respect to such land under a program specified in § 1400.1(a)(1) and (2) will not be eligible to receive any payment with respect to such cash-rented land unless the tenant independently makes a significant contribution to the farming operation of:

(1) Active personal labor or

(2) Significant contributions of both active personal management and equipment.

(b) If the equipment is leased by the tenant from:

(1) The landlord, then the lease must reflect the fair market value of the equipment leased with a payment schedule considered reasonable and customary for the area or

(2) The same person or legal entity that is providing hired labor to the farming operation, then the contracts for the lease of the equipment and for the hired labor must be two separate contracts.

(c) If the equipment is leased by the tenant from the landlord, or from the same person or legal entity that is providing hired labor to the farming operation, then the tenant must exercise complete control over the leased equipment during the entire current crop

year. Complete control is defined as exclusive access and use by the tenant.

(d) If the cash rent tenant is a joint operation, then each member or their spouse must make a significant contribution of active personal labor or active personal management as specified in § 1400.203(a)(1)(ii) to be considered eligible for the member's share of the program payments received by the joint operation on the cash rented land.

(e) If the cash rent tenant is a legal entity, then a significant contribution of active personal labor or active personal management must be made to the legal entity as specified in § 1400.204(a)(2) for the legal entity to be considered eligible for the program payments on the cash rented land.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 900, Jan. 7, 2010]

## Subpart E—Foreign Persons

### § 1400.401 Eligibility.

(a) Subject to the conditions set out in paragraphs (b) and (c) of this section, any person who is not a citizen of the United States or an alien lawfully admitted into the United States for permanent residence under the Immigration and Nationality Act (8 U.S.C. 1101–1778) will be ineligible to receive any type of loans or payments made available under Title I of the Food, Conservation, and Energy Act of 2008, the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714–714o), or subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3831–3836), or under any contract entered into under Title XII of that Act (16 U.S.C. 3801–3845), with respect to any commodity produced, or land set aside from production, on a farm that is owned or operated by such person, unless such person is an individual who is providing land, capital, and a substantial amount of personal labor in the production of crops on such farm. Likewise, and subject to the same conditions, such persons may be ineligible for payments under any other program which by its own regulations specifically provides for such an ineligibility and adopts these regulations.

(b)(1) A corporation or other legal entity will be ineligible to receive payments, loans, and benefits if more than 10 percent of the ownership of the legal entity is held by persons who are not citizens of the United States or lawful aliens unless each foreign person who is a stockholder or other type of member provides a substantial amount of active personal labor in the production of crops on a farm owned or operated by such a legal entity. However, upon the written request of the legal entity, the Deputy Administrator may make payments in an amount determined by the Deputy Administrator to be representative of the percentage interest of the legal entity that is owned by citizens of the United States and lawful aliens or foreign stockholders or other type of member who provide a significant contribution of active personal labor in the production of crops on a farm owned or operated by such legal entity.

(2) In determining whether more than 10 percent of the ownership of a legal entity is held by persons who are not citizens of the United States or by lawful aliens, the ownership interest will be the higher of the amount of such interest on:

(i) The date the applicable program contract or agreement is executed by the legal entity or

(ii) Any other date prior to the final harvest date that is determined and announced by the Deputy Administrator to be normal in the area for the applicable program crop.

(3) A corporation or other legal entity must inform the county committee of any increase in such ownership that occurs after the applicable program contract or agreement is executed.

(4) In the event of an increase in such ownership after a payment, loan, or benefit has been made, the legal entity will refund such payment, loan, or benefit.

(5) Where there is only one class of stock or other similar unit of ownership, a person's or legal entity's percentage share of the limited partnership, corporation, or other similar legal entity will be based upon the outstanding shares of stock or other similar unit of ownership held by the person or legal entity as compared to the

total outstanding shares of stock or other similar unit of ownership. If the limited partnership, corporation, or other similar legal entity has more than one class of stock or other unit of ownership, the percentage share of the limited partnership, corporation or other similar legal entity owned by a person or legal entity will be determined by the Deputy Administrator on the basis of market quotations. If market quotations are unavailable or so infrequent that they do not represent fair market value, such percentage share will be determined by the Deputy Administrator on the basis of all relevant factors affecting the fair market value of such stock or other unit of ownership, including the various rights and privileges that are attributed to each such class.

(c) A citizen of the United States, lawful alien, or legal entity that is not subject to this part who is in lawful possession, through a lease or otherwise, of a farm owned by a person or legal entity who is subject to this part may receive a payment, loan, and benefit without regard to this part.

[73 FR 79273, Dec. 29, 2008, as amended at 75 FR 19189, Apr. 14, 2010]

### § 1400.402 Notification.

(a) Any legal entity, whether foreign or domestic, that executes a program contract or agreement under which a payment, loan, or benefit may be available must provide written notification to the county committee in the county where the legal entity conducts its farming operation if:

(1) Any person, group of persons, legal entity, or group of legal entities holds more than a 10 percent interest in such legal entity; and

(2) Such person, group of persons, legal entity, or group of legal entities, in accordance with § 1400.401, are ineligible to receive a payment, loan, or benefit.

(b) Such written notification must include the name and social security number or taxpayer identification number of such a person or legal entity, if known, and of all persons and legal entities that hold an interest in the legal entity.

(c) The failure of the legal entity to provide this information will result in the ineligibility of the legal entity to receive any payment, loan, or benefit.

## Subpart F—Average Adjusted Gross Income Limitation

### § 1400.500 Applicability.

(a) For the 2009 through 2012 crop, program, or fiscal years, a person or legal entity, other than a joint venture or general partnership, will not be eligible to receive, directly or indirectly, certain program payments or benefits described in § 1400.1 if the average adjusted gross income of the person or legal entity exceeds the amounts in paragraphs (b) through (d) of this section for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by the Deputy Administrator.

(b) For 2009 through 2012 commodity programs set forth in § 1400.1, a person or legal entity with an average adjusted gross nonfarm income as defined in § 1400.3 that exceeds $500,000 will not be eligible to receive program payments or benefits as identified in § 1400.1.

(c) For 2009 through 2012 commodity programs set forth in § 1400.1, a person or legal entity that has an average adjusted gross farm income as defined in § 1400.3 that exceeds $750,000 will not be eligible to receive a direct payment and other payments made applicable by statute or regulation.

(d) For 2009 through 2012 conservation programs set forth in § 1400.1, a person or legal entity that has an average adjusted gross nonfarm income as defined in § 1400.3 that exceeds $1,000,000 will not be eligible to receive payments or benefits under conservation and related programs, and other programs made applicable by statute or regulation, unless:

(1) Not less than 66.66 percent of the of the average adjusted gross income of the person or legal entity is average adjusted gross farm income or

(2) This limitation may be waived on a case-by-case basis by the Administrator or NRCS Chief for the protection of environmentally sensitive land of special significance. Such a written waiver request must document that land within or adjacent to the producer's agricultural operation contains

critical resources such as, but not limited to, threatened, endangered, or at-risk species; historical or cultural resources; unique wetlands; or critical groundwater recharge areas. In addition, the waiver request must either:

(i) Show that use of conservation program funding by an individual producer is critical to the success of a project that benefits multiple producers in a community, watershed, or other geographic area or

(ii) Achieve enduring conservation treatment through use of a long-term agreement that is greater than 15 years in duration or through use of a deed restriction on the land.

(e) Determinations made under this subpart with regard to conservation programs will be based on the year for which the conservation program contract or agreement is approved and the determination will apply for the entire term of the subject agreement or contract.

(f) Vendors that receive payment for technical services provided in conjunction with programs made subject to this subpart by regulation or statute, but who are not beneficiaries of the program, are not subject to this subpart for services that are of the type that are also performed by the Federal Government in connection with such programs.

(g) Payments to an escrow agent, or other legal entity of similar capacity in which the recipient is maintaining temporary custody of the funds for eventual disbursement to an eligible program participant, are not subject to this subpart so long as the party ultimately receiving the payment is eligible under this subpart.

(h) Payments to States, counties, political subdivisions and agencies thereof, and Indian tribes as defined in § 1400.3 are not subject to this subpart.

### § 1400.501 Determination of average adjusted gross income.

(a) Except as otherwise provided in this subpart, average adjusted gross farm income of a person or legal entity includes income or benefits derived from or related to the following:

(1) Production of crops, specialty crops, and unfinished raw forestry products;

(2) The production of livestock, including but not limited to, cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry, fish and other aquaculture products used for food, honeybees, and products produced by, or derived from, livestock;

(3) The production of farm-based renewable energy;

(4) The sale, including the sale of easements and development rights, of farm, ranch, forestry land, water or hunting rights, or environmental benefits;

(5) The rental or lease of land or equipment, used for farming, ranching, or forestry operations, including water or hunting rights;

(6) The processing, packing, storing, shedding, and transporting of farm, ranch, and forestry commodities, including renewable energy;

(7) The feeding, rearing, or finishing of livestock;

(8) The sale of land that has been used for agriculture;

(9) Any payment or benefit, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;

(10) Payments and benefits authorized under any program made applicable to this subpart by statute or regulation;

(11) Any other activity related to farming, ranching, or forestry, as determined by the Deputy Administrator; and,

(12) Any income reported on the Schedule F or other schedule used by the person or legal entity to report income from farming, ranching, or forestry operations to the Internal Revenue Service.

(b) For the specific purpose of determining the average adjusted gross farm income under § 1400.500(d)(1), and in addition to § 1400.501(a), the average adjusted gross farm income of a person or legal entity includes income or benefits derived from the following:

(1) The sale of equipment to conduct farm, ranch, or forestry operations and

(2) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(c) Except as otherwise provided in this subpart, adjusted gross income means:

(1) For a person filing a separate tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the person for the applicable tax year;

(2) For a person filing a joint tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the applicable tax year unless a certified statement is provided by a certified public accountant or attorney specifying the manner in which such income would have been declared and reported if the persons had filed two separate returns and that this calculation is consistent with the information supporting the filed joint return;

(3) For a corporation, including a subchapter S corporation, the total reported "taxable income" as reported to the Internal Revenue Service plus the amount of the charitable contributions as reported on the final federal income tax return for the applicable tax year;

(4) For a tax exempt legal entity, the "unrelated business taxable income" of the legal entity as reported to the Internal Revenue Service on the final federal income tax return, less any other income CCC determines to be from non-commercial activities;

(5) For a limited liability company, limited partnership, limited liability partnership, or similar type of organization, the income from trade or business activities plus the amount of guaranteed payments to the members as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year; and

(6) For an estate or trust, the adjusted total income plus charitable deductions as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year, or the amount of net increase in the estate's or trust's value resulting from its business or investment interests.

(d) For purposes of applying this subpart and calculating the 3-year average referenced in §1400.500, that average will be for the adjusted gross income for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by CCC. For a legal entity that is not required to file a federal income tax return, or a person or legal entity that did not have taxable income in one or more tax years, the average will be the adjusted gross income, including losses, averaged for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by CCC. A new legal entity will have its adjusted gross income averaged only for those years of the base period for which it was in business; however, a new legal entity will not be considered "new" to the extent it takes over an existing operation and has any elements of common ownership or interests with the preceding legal entity, or with persons or legal entities with an interest in the "old" legal entity. When there is such commonality, income of the "old" legal entity will be averaged with that of the "new" legal entity for the base period.

### §1400.502 Compliance and enforcement.

(a) To comply with the average adjusted gross income limitation, a person or legal entity, including all interest holders in a legal entity, general partnership, or joint venture, must provide annually the following as required by CCC:

(1) A certification in the manner prescribed by CCC from a certified public accountant or attorney that the average adjusted gross income of the person or legal entity does not exceed the applicable limitation;

(2) A certification from the person or legal entity that the average adjusted gross income of the person or legal entity does not exceed the applicable adjusted gross income limitations;

(3) The relevant Internal Revenue Service documents and supporting financial data as requested by CCC. Supporting financial data may include State income tax returns, financial statements, balance sheets, reports prepared for or provided to another Government agency, information prepared for a private lender, and other credible information relating to the amount and source of the person's or legal entity's income; or

(4) Authorization for CCC to obtain tax data from the Internal Revenue Service for purposes of verification of compliance with this subpart.

(b)(1) All persons and legal entities are subject to an audit by FSA of any information submitted in accordance with this subpart. As a part of this audit, income tax returns may be requested, and if requested, must be supplied by all related persons and legal entities.

(2) In addition to any other requirement under any Federal statute, relevant Federal income tax returns and documentation must be retained a minimum of two years after the end of the calendar year corresponding to the year for which payments or benefits are requested.

(c) Failure to provide necessary and accurate information to verify compliance, or failure to comply with this subpart's requirements, will result in ineligibility for all program benefits subject to this subpart for the year or years subject to the request.

### § 1400.503 Commensurate reduction.

(a) Any program payment or benefit subject to this subpart provided to a legal entity, general partnership, or joint venture will be reduced by an amount commensurate with the direct and indirect ownership interest in the legal entity, general partnership, or joint venture of each person or legal entity determined to have an average adjusted gross income in excess of the applicable limitation under the standards provided elsewhere in this subpart for the direct recipient of such payments.

(b) Ownership interest in a legal entity will be reviewed to the fourth level of ownership, as specified in § 1400.105, to determine whether a commensurate reduction is applicable and the extent of such reduction. If an ownership interest is not held by a person in the fourth level of ownership in a legal entity, no payment or benefit will be made with respect to such interest.

## PART 1401—COMMODITY CERTIFICATES, IN KIND PAYMENTS, AND OTHER FORMS OF PAYMENT

Sec.

1401.1 Applicability.
1401.2 Payments in lieu of cash payments.
1401.3 Payments to persons with outstanding CCC loans.
1401.4 Commodity certificates.
1401.5 In kind payments.
1401.6 Assignments.
1401.7 Miscellaneous provisions.
1401.8 Subsequent holders.

AUTHORITY: 15 U.S.C. 714b and 714c; 7 U.S.C. 1445d.

SOURCE: 51 FR 36921, Oct. 16, 1986, unless otherwise noted. Redesignated at 53 FR 20290, June 3, 1988, and further redesignated at 61 FR 37575, July 18, 1996.

### § 1401.1 Applicability.

This part shall be applicable to payments and loans made in accordance with the programs administered by the Commodity Credit Corporation (CCC) or the Farm Service Agency (FSA) as determined and announced by the Secretary of Agriculture or a designee of the Secretary. The definitions of the terms applicable to 7 CFR part 713 set forth at § 713.3 also shall be applicable to this part, except that the term "commodity" shall mean any agricultural commodity.

### § 1401.2 Payments in lieu of cash payments.

(a) CCC will, in accordance with applicable program provisions, make payments in a form other than in cash to persons who otherwise are eligible to receive a cash payment from CCC. Further, subject only to statutory prohibition and notwithstanding any provisions of the contract to participate in a program administered by CCC or FSA, CCC may: at its option, make payments in a form other than in cash.

(b) As determined by CCC, payments in a form other than in cash may be made in the following manner:

(1) By delivery of a commodity to a person at a warehouse or other similar facility;

(2) By transfer of negotiable warehouse receipts;

(3) By the issuance of certificates which CCC shall redeem in accordance with this part;

(4) By the acquisition and use of commodities pledged as collateral for CCC price support loans;

(5) By the use of commodities owned by CCC; and

(6) By such other methods as CCC determines appropriate, including methods to enable the producer to receive payments in order to assure that the

producer receives the same total return as if the payments had been made in cash.

(c) The value of the payments made in any manner set forth in paragraph (b) shall be determined by CCC.

(d) Notwithstanding any other provision of this part, CCC may, with respect to producers who are members of a cooperative marketing association which has been determined in accordance with part 1425 of this title to be eligible to receive price support on behalf of its producer-members, enter into agreements with such producers and such cooperatives to facilitate the making of payments to such producers. Such agreements may include a provision which allows a producer to make available for the use of the cooperative the value of the non-cash payment which would otherwise be made to the producer.

### § 1401.3 Payments to persons with outstanding CCC loans.

(a) Persons with outstanding CCC loans who are eligible to receive payments from CCC, including a person authorized to receive a payment on behalf of another person, may be required to liquidate such loans in accordance with this section in order to be eligible to receive a payment authorized by § 1470.2.

(b) A person with an outstanding CCC loan must, unless otherwise agreed upon by the person and CCC, redeem and sell to CCC a quantity of the commodity pledged as collateral for a CCC loan, as determined by CCC, in an amount equal in value to the value of the payment which would otherwise be made to such person. If the person has more than one outstanding CCC loan, CCC may, by contract or otherwise, prescribe which loan collateral the person shall be required to redeem in order to receive payment. The purchase price shall be equal to the cost of liquidating the loan or the portion of the loan for which the quantity of the commodity sold to CCC is pledged as collateral, except that, in the case of a special producer storage loan or a farmer-owned reserve loan, the purchase price will not include the amount of any unearned advance storage payments received with respect to the redeemed collateral. After redemption and the subsequent sale to CCC of the commodity pledged as collateral for such CCC loan, CCC shall make available to the person a like quantity of the commodity.

### § 1401.4 Commodity certificates.

(a) *General.* CCC may issue commodity certificates as a form of payment. Commodity certificates will bear a dollar denomination. Such certificate may be transferred, exchanged for the inventory of CCC (including the receipt in accordance with paragraph (e) of this section of loan collateral by a person to whom a loan secured by such collateral is made): or exchanged for cash, as provided for in this section. Commodity certificates shall be subject to the provisions of this part, and to any terms, conditions and restrictions provided on the certificate, which are incorporated by reference herein.

(b) *Liens, encumbrances, and State law.* (1) The provisions of this section or the commodity certificates shall take precedence over any state statutory or regulatory provisions which are inconsistent with the provisions of this section or with the provisions of the commodity certificates.

(2) Commodity certificates shall not be subject to any lien, encumbrance, or other claim or security interest, except that of an agency of the United States Government arising specifically under Federal statute.

(3) The provisions of this paragraph (b) shall apply without regard to the identity of the holder of the certificate.

(c) *Transferability.* Any person may transfer a commodity certificate to any other person. However, any such transfer must be in the full amount of the certificate, and can be effected only by restrictive endorsement on the back of the certificate, showing the name of the transferee and the date of the transfer, and signed by the transferor. CCC will not honor any certificate bearing any endorsement to "bearer" or any other nonrestrictive endorsement, or otherwise transferred in a manner contrary to the regulations contained in this section. The person who submits a commodity certificate

to CCC shall endorse the certificate to CCC.

(d) *Exchange of commodity certificate for CCC-owned commodities*—(1) *General.* Except as otherwise provided in this paragraph and in paragraphs (f) and (g) of this section, any holder of a commodity certificate may exchange such certificate, by itself or together with other commodity certificates, for such commodities as are made available by CCC by endorsing and submitting the certificate to CCC. If a person submits commodity certificates for exchange in order that the person would be eligible to receive a quantity of a commodity which includes less than an entire unit in which the commodity is stored (e.g., less than an entire bale of cotton or an entire barrel of honey): (i) Such person may forfeit the partial unit of the commodity to CCC, or (ii) CCC may issue a check to such person for the partial unit of the commodity or permit such person to purchase the remainder of such unit at a price determined by CCC. A person may obtain information regarding commodities available for exchange and the procedure for exchange from Kansas City Commodity Office, FSA-USDA, Kansas City, MO 64141–0205.

(2) *Minimum quantities.* A holder of an amount of commodity certificates sufficient to acquire a carload lot, or other quantity as may be determined by CCC, may present such amount for exchange at any time on or before the expiration date of such certificates. A holder who is permitted to exchange the certificate for CCC-owned commodities but who does not possess commodity certificates in the amount specified in the preceding sentence may, not to exceed once during a calendar month, submit such certificates to CCC. CCC will, at CCC's option, pay such holder by check in the amount of the certificate or transfer to such holder title to commodities owned by CCC.

(3) *CCC-owned commodities stored by a person who submits commodity certificates to CCC.* CCC may require or permit holders of commodity certificates to exchange such certificates for commodities owned by CCC which are stored by such holder, without making such commodities or kinds of commodities available to other holders of commodity certificates.

(4) *Valuation.* Except as otherwise may be announced by CCC, CCC will determine the value of CCC-owned commodities made available to holders of commodity certificates.

(5) *Transfer of title.* Title to commodities owned by CCC which are transferred to a person who submits commodity certificates to CCC shall be transferred in store, except as may be determined and announced by CCC. The person who submits certificates to CCC shall be responsible for all costs incurred in transferring title to the commodity, except as specifically provided by CCC. The transfer of title to such commodities shall occur without regard to any State law or any claim of lien against the commodity or proceeds thereof which may be asserted by any creditor except agencies of the U.S. Government whose lien arises specifically under Federal statute.

(6) *Expiration date.* CCC may, at its option, discount or refuse to accept any commodity certificate presented for exchange after the expiration date stated on the certificate.

(e) *Use of commodity certificates to receive loan collateral*—(1) *General.* Except as otherwise provided in this paragraph and in paragraphs (f) and (g) of this section, any holder of a commodity certificate may use such certificate to receive commodities pledged as collateral for CCC loans made to such person, at any time on or before the expiration date stated on the certificate. A holder of a commodity certificate who wishes to receive a quantity of a commodity pledged by such person as collateral for a CCC loan in exchange for a certificate shall redeem and sell to CCC a quantity of the commodity equal in value to the dollar denomination of the certificate, as determined by CCC. The purchase price shall be equal to the cost of liquidating the loan or the portion of the loan for which the quantity of the commodity sold to CCC is pledged as collateral, except that, in the case of a special producer storage loan or a farmer-owned reserve loan, the purchase price will not include the amount of any unearned advanced storage payments received with respect to the redeemed loan collateral. Upon

submission of the certificate, which is endorsed to CCC, to the county FSA office which issued the loan, the holder of a commodity certificate will receive the quantity of the commodity which has been sold to CCC. Except as otherwise determined by CCC, if the holder of such certificate does not have commodities pledged as collateral for CCC loans equal in value to the dollar denomination of the certificate, as determined by CCC, CCC will, at CCC's option and after the producer has submitted the certificate, pay the difference to the person by check or in the form of a new commodity certificate.

(2) *Ineligible commodities.* No person may use a commodity certificate to receive a quantity of tobacco, peanuts, or extra long staple cotton pledged as collateral for a CCC loan. No person may, before August 1, 1986, use a commodity certificate to receive a quantity of upland cotton pledged as collateral for a CCC loan.

(f) *Cash redemption start date.* (1) The person to whom a generic certificate is issued which has a date entered in block D may submit such certificate, endorsed to CCC, at the issuing county FSA office for payment by check in the amount of the certificate on or after the date entered in block D through the expiration date of the certificate. Such person may not exchange the certificate for commodities owned by CCC, except as otherwise agreed upon between such person and CCC.

(2) The person to whom a generic certificate is issued which has an entry of "S/H" in block D may exchange such certificate for commodities owned by CCC.

(3) The person to whom a commodity specific certificate is issued which has a date entered in block D may submit such certificate, endorsed to CCC, to the Kansas City Commodity Office for the specific commodity entered in block C beginning on the date entered in block D through the expiration date of the certificate. Such certificate may not be exchanged for cash, except as otherwise agreed on by CCC.

(4) All other certificates may be transferred and exchanged as determined and announced by CCC.

(g) *"Generic" and commodity-specific commodity certificates*—(1) *General.* If a commodity certificate indicates that it is a "generic" certificate, such certificate may, subject to the provisions of paragraphs (a) through (f) of this section, be exchanged for any commodity made available by CCC or, as appropriate, used to receive a quantity of any commodity which serves as collateral for a CCC loan. If a certificate is not a "generic certificate", such certificate may be exchanged for the commodity specified on the certificate, except as may be determined and announced by CCC.

(2) *Cotton program payments.* Certificates issued as payments under the 1991 through 1995 upland cotton program, including payments issued in accordance with section 103B(a)(5)(B) of the Agricultural Act of 1949, may be exchanged for CCC-owned upland cotton only during such times as determined and announced by CCC.

(3) *Commodities not available in CCC inventory.* Notwithstanding any other provision of this section, if a person submits a commodity specific certificate to CCC in exchange for a quantity of such commodity and CCC determines it is not possible to make such commodity available, CCC may: (i) Require such person to exchange the commodity specific certificate for a generic certificate; or (ii) refuse to accept submission of such certificate until CCC is able to make available a quantity of the commodity specified on such certificate.

(h) CCC, at its option, may discount or refuse to accept any certificate made, transferred, or submitted in violation of this section.

(i) *Interest.* With respect to producers who receive commodity certificates in accordance with the wheat, feed grains, upland cotton and rice price support and production adjustment programs authorized by parts 1413 and 1421 of this title, a producer to whom the certificate is issued who exchanges such a certificate with CCC for cash in accordance with subsection (f) of this section shall receive interest with respect to such certificate for a 150 day period. Such interest shall be the rate of interest determined in accordance with part

1405 of this Title which is in effect on the date the certificate is issued.

[51 FR 36921, Oct. 16, 1986, as amended at 51 FR 43580, Dec. 3, 1986; 52 FR 45607, Dec. 1, 1987; 56 FR 361, Jan. 4, 1991]

### § 1401.5 In kind payments.

(a) Subject to the provisions of §§ 1470.2 and 1470.3, CCC may make payments in the form of commodities. Quantities of commodities made available as payment shall be based upon the value of the commodity, as determined by CCC. Such quantity may be adjusted by CCC to reflect the location, quality, and other similar factors which CCC determines to affect the value of the commodity.

(b) The transfer of title to commodities made available in accordance with paragraph (a) of this section shall be in store, except as determined by CCC, and shall be made without regard to any State law or any claim of lien against the commodity, or proceeds thereof, which may be asserted by any creditor except agencies of the U.S. Government whose lien arises specifically under Federal statute. The recipient of such commodities shall be responsible for all costs incurred in transferring title to the commodity, except as specifically provided by CCC.

### § 1401.6 Assignments.

Notwithstanding any other provision of this chapter, a payment made under this part may not be the subject of an assignment, except as determined and announced by CCC.

### § 1401.7 Miscellaneous provisions.

Except as determined by CCC, the following provisions of this title shall apply to this part:

(a) Part 13, Setoffs and Withholding.

(b) Part 707, Payments Due Persons Who Have Died, Disappeared, or Been Declared Incompetent.

(c) Part 718, Determination of Acreage and Compliance.

(d) Part 780, Appeal Regulations.

(e) Part 790, Incomplete Performance Based Upon Actions or Advice of an Authorized Representative of the Secretary.

(f) Part 791, Authority to Make Payments When There has been a Failure to Comply Fully with the Program.

(g) Part 795, Payment Limitation.

(h) Part 796, Denial of Program Eligibility for Controlled Substance Violations.

(i) Part 1403, Interest on Delinquent Debts.

(j) All other parts of the Code of Federal Regulations which are made applicable to this part.

### § 1401.8 Subsequent holders.

(a) *General.* A person who acquires a commodity certificate from another person shall be considered to be a "subsequent holder" of the certificate. Subsequent holders of certificates who purchased a commodity certificate on or before January 1, 1990 may, after the expiration date specified on the certificate, submit the certificate to CCC for a payment from CCC determined in accordance with paragraph (b) of this section. All certificates must be submitted after January 2, 1991 and on or before May 28, 1991. Certificates submitted after May 28, 1991 shall not be accepted for payment. Certificates shall be considered to be submitted as of the date of the postmark on the envelope containing the certificate. All certificates submitted for payment must be submitted with, and in accordance with, Form CCC–8. All certificates submitted to CCC for payment shall be retained by CCC.

(b) *Payment rates.* (1) Certificates with an expiration date of April 30, 1989 or earlier shall not, in any instance, be eligible for payment by CCC. Certificates which are submitted 18 months after the expiration date specified on the certificate shall not be accepted for payment by CCC.

(2) Persons who submit to CCC, in accordance with this section, certificates with an expiration date of May 31, 1989 or later shall receive a payment equal to 50 percent of the certificate's face value if such certificate is submitted within the period which:

(i) Begins 6 months and one day after the expiration date specified on the certificate and

(ii) Ends 18 months after such expiration date.

(3) Persons who submit to CCC in accordance with this section certificates with an expiration date of May 31, 1989 or later shall receive a payment equal

to 85 percent of the certificate's face value if such certificate is submitted within the period which:

(i) Begins the day after the expiration date specified on the certificate and

(ii) Ends 6 months after such expiration date.

(c) *Transitional rules*. In order to provide full benefits under this section to parties whose certificates may decline in value from the date of enactment of section 1122 of the Food, Agriculture, Conservation, and Trade Act of 1990 (November 28, 1990) until the implementation of the provisions of such section, persons who, by January 31, 1991, submit to CCC in accordance with this section certificates with expiration dates of May 31, 1989, June 30, 1989, May 31, 1990, and June 30, 1990, shall receive payments for such certificates as if they had been submitted on November 30, 1990.

(d) *Payment limit*. (1) No person, as defined in §719.2(r) of this title, shall receive a payment in excess of $1,000, except that any wholly-owned or wholly controlled entity, such as a corporation, shall be considered to be the same person as the person which owns or controls such entity. Any person who adopts or participates in adopting a scheme or device which is designed to evade this limitation or which has the effect of evading this limitation shall be ineligible to receive a payment under this section. Such acts include, but are not limited to:

(i) Concealing information which affects the application of this section;

(ii) Submitting false or erroneous information;

(iii) Creating fictitious entities for the purpose of evading the application of this section.

(2) No payment shall be paid to a person which is in excess of the amount which the person paid for the certificate.

(e) *Application*. In order to receive a payment under this section, a person must:

(1) Submit certificates with an expiration date of May 31, 1989, or later with a completed Form CCC–8 to CCC postmarked by May 28, 1991;

(2) Submit no earlier than January 2, 1991 all certificates and Forms CCC–8 to CCC by mail at the following address: CCC Expired Certificate Exchange, Attn: Claims and Collections Division, P.O. Box 419205, Kansas City, Missouri, 64141–6205;

(3) Submit evidence to CCC which establishes to the satisfaction of CCC:

(i) The date the subsequent holder purchased the certificates;

(ii) The price paid by the subsequent holder for the certificates; and

(iii) If requested by CCC, the name and address of the person from whom the subsequent holder purchased the certificates.

[56 FR 362, Jan. 4, 1991]

# PART 1402—POLICY FOR CERTAIN COMMODITIES AVAILABLE FOR SALE

Sec.

1402.1 General.
1402.2 Sales of inventory.
1402.3 Submission of offers, terms, and conditions.
1402.4 Information availability.
1402.5 Late payments.

AUTHORITY: 7 U.S.C. 7285, 15 U.S.C. 714b and 714c.

SOURCE: 71 FR 40642, July 18, 2006, unless otherwise noted.

## §1402.1 General.

To facilitate trade through usual and customary channels, facilities, and arrangements of trade and commerce, the Commodity Credit Corporation (CCC) will disseminate general sales offering information on the Farm Service Agency's (FSA) Commodity Operations Web site located on the Worldwide Web at *http://www.fsa.usda.gov/daco/default.htm*. The Web site will be reviewed and amended as necessary to reflect current general sales offering information. CCC will make regular amendments as necessary deleting or adding to the sales provisions or changing prices or methods of sales. The information posted at this Web site is for the purpose of public information and does not constitute an offer to sell by CCC or an invitation for offers to purchase from CCC. CCC may make its commodities available for sale without prior notification to storing warehouse operators. Information pertaining to opportunities to purchase commodities from CCC

will be published on the FSA Commodity Operations Web site when such opportunities are available.

### § 1402.2 Sales of inventory.

CCC will entertain offers from prospective buyers for the purchase of any commodities owned by CCC, including those commodities that are marketed through commercial, Internet-based marketing services. Various commodities owned by CCC may be offered for sale through commercial, Internet-based marketing services. Interested parties may submit requests for information related to Internet-based commodity sales to the Director, Warehouse and Inventory Division, Stop 0553, 1400 Independence Avenue, SW., Washington, DC 20250–9860.

### § 1402.3 Submission of offers, terms, and conditions.

Offers accepted by CCC will be subject to terms and conditions prescribed by CCC. These terms include, among other things, payment by wire transfer of funds, certified check or cashiers check before delivery of the commodity, removal of the commodity from CCC storage within a reasonable period of time, and in sales that require a commodity to be used for only a specific purpose, documentation that use of the commodity was for only that purpose.

### § 1402.4 Information availability.

The terms and conditions of sale with respect to commodities that are not sold through Internet-based marketing service are available online. Requests for terms and conditions may be addressed to the Director, Warehouse and Inventory Division, Stop 0553, 1400 Independence Avenue, SW., Washington, DC 20250–9860.

### § 1402.5 Late payments.

If payment is not received by CCC within the period specified in the sales contract, interest will be assessed by CCC. If a buyer fails to make arrangements for payment according to the provisions of the contract, CCC retains the right to terminate the sales contract. If CCC terminates the sales contract for default in whole or in part, CCC may offer the commodity for sale and the original party will be liable to CCC for any losses incurred and damages sustained as a result of the party's failure to timely remit payment for the commodity.

## PART 1403—DEBT SETTLEMENT POLICIES AND PROCEDURES

Sec.

1403.1 Applicability.
1403.2 Administration.
1403.3 Definitions.
1403.4 Demand for payment of debts.
1403.5 Collection by payment in full.
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1403.14 Prior provision of rights with respect to debt.
1403.15 Discharge of debts.
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1403.17 Referral of debts to Department of Justice.
1403.18 Referral of delinquent debts to IRS for tax refund offset.
1403.19 Reporting of discharged debts to IRS.
1403.20 Referral of debts to private collection agencies.
1403.21 Collection of 1988 and 1989 advance deficiency overpayments.

AUTHORITY: 15 U.S.C. 714b and 714c; 7 U.S.C. 1445b–2(b).

SOURCE: 54 FR 52878, Dec. 22, 1989, unless otherwise noted.

### § 1403.1 Applicability.

Except as may otherwise be provided by statute, this part sets forth the manner in which the Commodity Credit Corporation (CCC) will settle and collect debts by and against CCC.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66955, Dec. 27, 1991]

### § 1403.2 Administration.

The regulations in this part will be administered under the general supervision and direction of the Executive Vice President, CCC and the Administrator, Farm Service Agency (FSA).

**§ 1403.3 Definitions.**

The following definitions shall be applicable to this part:

*Administrative charges* means the additional costs of processing delinquent debts against the debtor, to the extent such costs are attributable to the delinquency. Such costs include, but are not limited to, costs incurred in obtaining a credit report, costs of employing commercial firms to locate debtor, costs of employing contractors for collection services, costs of selling collateral or property to satisfy the debt.

*Administrative offset* means deducting money payable or held by the United States Government, or any agency thereof, to satisfy in whole or in part a debt owed the Government, or any agency thereof.

*FSA* means the Farm Service Agency of the United States Department of Agriculture (USDA).

*Carrier* means a person or other entity, including but not limited to railroads, motor carriers, ocean carriers or piggyback enterprises, which provide transportation or other transportation-related services for compensation.

*Certified financial statement* means an account of the assets, liabilities, income and expenses of a debtor, executed in accordance with generally accepted accounting principles and attested to as accurate by the preparer, under penalty of perjury.

*CCC* means the Commodity Credit Corporation.

*Claim* means an amount of money or property which has been determined by CCC, after a notice of delinquency and a demand for the payment of the debt has been made by CCC, to be owed to CCC by any person other than a Federal agency.

*Credit reporting agency* means:

(1) A reporting agency as defined at 4 CFR 102.5(a), or

(2) Any entity which has entered into an agreement with USDA concerning the referral of credit information.

*Debt* means any amount owed to CCC or owed by CCC which has not been satisfied through payment or otherwise.

*Debt record* refers to the account, register, balance sheet, file, ledger, data file, or similar record of debts owed to CCC, FSA, or any other Government Agency with respect to which collection action is being pursued, and which is maintained in an FSA office.

*Delinquent debt* means:

(1) Any debt owed to CCC that has not been paid by the date specified in the applicable statute, regulation, contract, or agreement; or

(2) any debt that has not been paid by the date of an initial notification of indebtedness mailed or hand-delivered pursuant to § 1403.4.

*Discharged debt* means any debt, or part thereof, which CCC has determined is uncollectible.

*IRS* means the Internal Revenue Service.

*Late payment interest rate* means the amount of interest charged on delinquent debts and claims. The late payment interest rate shall be determined as of the date a debt becomes delinquent and shall be equal to the rate of interest assessed under the Prompt Payment Act.

*Person* means an individual, partnership, association, corporation, estate or trust, or other business enterprise or other legal entity and, whenever applicable, the Federal Government or a State government, or any agency thereof.

*Salary offset* means the deduction of money from the current pay account of a present or former Government employee payable by the United States Government to, or held by the Government for, such person to satisfy a debt that person owes the Government.

*Settlement* means any final disposition of a debt or claim.

*Shipment* means a carload, truckload, containerload, or other conveyance load of freight shipped from one location by one shipper for delivery. Such shipment must move in accordance with the terms of a commercial or ocean bill or lading, or other similar agreement between the carrier and CCC. In the case of export shipments, the agreement may also be between the carrier and a private voluntary organization, foreign government, or the Agency for International Development.

*System of records* means a group of any records under the control of CCC or FSA from which information is retrieved by the name of the individual, organization or other entity or by

some identifying number, symbol, or other identification assigned to the individual, organization or other entity.

*Withholding* means the taking of action to temporarily prevent the payment of some or all amounts to a debtor under one or more contracts or programs.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66955, Dec. 27, 1991]

### § 1403.4 Demand for payment of debts.

(a) When a debt is due CCC, an initial written demand for payment of such amount shall be mailed or hand-delivered to the debtor. If the debt is not paid in full by the date specified in the initial demand letter, or if a repayment schedule acceptable to CCC has not been arranged with the debtor, the initial demand may be followed by two subsequent written demands at approximately 30-day intervals. The initial or subsequent demand letters shall specify the following:

(1) The basis for and the amount of the debt determined to be due CCC, including the principal, applicable interest, costs and other charges;

(2) CCC's intent to establish an account on a debt record 30 days after the date of the letter, or other applicable period of time, if the debt is not paid within that time;

(3) The applicable late payment interest rate.

(i) If a late payment interest rate is specified in the contract, agreement or program regulation, the debtor shall be informed of that rate and the date from which the late payment interest has been accruing;

(ii) If a late payment interest rate is not specified in the contract, agreement or program regulation, the debtor shall be informed of the applicable late payment interest rate set out in § 1403.9.

(4) CCC's intent, if applicable, to collect the debt 30 days from the date of the initial demand letter, or other applicable period of time, by administrative offset from any CCC or FSA payments due or to become due to the debtor, and that the claim may be reported to other agencies of the Federal government for offset from any amounts due or to become due to the debtor;

(5) If not previously provided, the debtor's right to request administrative review by an authorized CCC official, and the proper procedure for making such request. If the request relates to the:

(i) Existence or amount of the debt, it must be made within 15 days from the date of the letter, unless a different time period is specified in the contract, agreement or program regulation;

(ii) Appropriateness of reporting to a credit reporting agency, it must be made within 30 days from the date of the letter; or

(iii) Appropriateness of referral to IRS for tax refund offset, it must be made within 60 days from the date of the letter.

(6) The debtor's right to a full explanation of the debt and to dispute any information in the records of CCC concerning the debt;

(7) That CCC maintains the right to initiate legal action to collect the amount of the debt;

(8) That if any portion of the debt remains unpaid or if a repayment schedule satisfactory to CCC has not been arranged 90 days after the due date, an additional interest rate shall be assessed on the unpaid balance of the debt as prescribed in § 1403.9(e);

(9) CCC's intent, if applicable, under § 1403.16, to report any delinquent debt to a credit reporting agency no sooner than 60 days from the date of the letter;

(10) CCC's intent, if applicable, under § 1403.18, to refer any delinquent debt to the IRS, no sooner than 60 days from the date of the letter, to be considered for offset against any tax refund due or to become due the debtor.

(b) When CCC deems it necessary to protect the Government's interest, written demand may be preceded by other appropriate actions.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66955, Dec. 27, 1991]

### § 1403.5 Collection by payment in full.

Except as CCC may provide in accordance with § 1403.6, CCC shall collect debts owed to the Government, including applicable interest, penalties, and administrative costs, in full, whenever feasible whether the debt is being collected by administrative offset or by

another method, including voluntary payment. If a debt is paid in one lump sum after the due date, CCC will impose late payment interest, as provided in § 1403.9, unless such interest is waived as provided in § 1403.10.

### § 1403.6 Collection by installment payments.

(a) Payments in installments may be arranged, at CCC's discretion, if a debtor furnishes satisfactory evidence of inability to pay a claim in full by the specified date. The size and frequency of installment payments shall:

(1) Bear a reasonable relation to the size of the debt and the debtor's ability to pay; and

(2) Normally be of sufficient size and frequency to liquidate the debt in not more than three years.

(b) Except as otherwise determined by CCC, no installment arrangement will be considered unless the debtor submits a certified financial statement which reflects the debtor's assets, liabilities, income, and expenses. The financial statement shall not be required to be submitted sooner than 15 business days following its request by CCC.

(c) All installment payment agreements shall be in writing and may require the payment of interest at the late payment interest rate in effect on the date such agreement is executed. The installment agreement shall specify all the terms of the arrangement and include provision for accelerating the debt in the event the debtor defaults. A confession of judgment provision may be included in the agreement.

(d) CCC may deem a repayment plan to be abrogated if the debtor fails to comply with its terms.

(e) If the debtor's financial statement or other information discloses the ownership of assets which are not encumbered, the debtor may be required to secure the payment of an installment note by executing a security agreement and financing agreement which provides CCC a security interest in the assets until the debt is paid in full.

(f) If the debtor owes more than one debt to CCC, CCC may allow the debtor to designate the manner in which a voluntary installment payment is to be applied. If the debtor does not designate the application of a voluntary installment or partial payment, the payment will be applied to such debts as determined by CCC.

### § 1403.7 Collection by administrative offset.

(a) The provisions of this section shall apply to all debts due CCC except as otherwise provided in this part and part 1404 of this Chapter. This section is not applicable to:

(1) CCC requests for administrative offset against money payable to a debtor from the Civil Service Retirement and Disability Fund and CCC requests for salary offset against a present or former employee of the Federal Government which shall be made in accordance with regulations at part 3 of this title;

(2) CCC requests for administrative offset against a Federal income tax refund payable to a debtor which shall be made in accordance with § 1403.18;

(3) Cases in which CCC must adjust, by increasing or decreasing, a payment which is to be paid under a contract in order to properly make other payments due by CCC;

(4) Any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by statute; and

(5) IRS Notices of Levy which shall be honored in accordance with IRS statutes and regulations.

(b) Debts due CCC may be collected by administrative offset from amounts payable by CCC when:

(1) The debtor has been provided written notification of the basis and amount of the debt and has been given an opportunity to make payment. Such written notification and opportunity includes notice of the right to pursue an administrative appeal in accordance with part 780 of this Title or any other applicable appeal procedures, if not previously provided;

(2) The debtor has been provided an opportunity to request to inspect and copy the records of CCC related to the debt;

(3) The debtor has been notified in writing that the debt may be collected by administrative offset if not paid; and

(4) The debt has not been delinquent for more than ten years or legal action

to enforce the debt has not been barred by an applicable period of limitation, whichever is later.

(c) Administrative offset shall also be effected against amounts payable by CCC:

(1) When requested or approved by the Department of Justice; or

(2) When a person is indebted under a judgment in favor of CCC.

(d) Debts due CCC from carriers for overcharges shall be offset against amounts due such carriers under freight bills involving shipments if:

(1) The carrier, without reasonable justification, has declined payment of the debt or has failed to pay the debt after being given a reasonable opportunity to make payment; and

(2) The period of limitation prescribed at 49 U.S.C. 11706(f) has not expired.

(e) Debts due CCC from carriers for loss or damage shall be offset against amounts due such carriers under freight bills involving shipments if:

(1) Timely demand for payment was made on the carrier;

(2) The carrier has declined payment of the debt without reasonable justification or has ignored the claim; and

(3) The period of limitation prescribed at 49 U.S.C. 11707(e) has not expired.

(f) Any overcharge or loss or damage debt due CCC on which the applicable period of limitation has run may be offset against any amounts owing by CCC to the carrier which are subject to a defense of limitation.

(g) A payment due any person may be offset when there is a breach of a contract or a violation of CCC program requirements, and offset is considered necessary by CCC to protect the financial interests of the Government.

(h) In the case of any procurement contract with CCC which provides for invoicing at the time of shipment with delivery to be made at designated destination points when:

(1) Payment is made to the contractor prior to receipt of evidence of delivery, and

(2) CCC thereafter determines that the Contractor is indebted to CCC because of losses sustained from shortage, damage to or deterioration of the commodity while in transit and prior to delivery, CCC may offset such indebtedness against amounts due and payable to the Contractor under any other contract with CCC providing the Contractor has not assigned the proceeds of such contract in accordance with part 1404 of this chapter.

(i) CCC may effect administrative offset against a payment to be made to a debtor prior to completion of the procedures required by (b)(1–3) of this section if:

(1) Failure to take the offset would substantially prejudice CCC's ability to collect the debt; and

(2) The time before the payment is to be made does not reasonably permit the completion of those procedures.

(j)(1) Debts due any agency other than CCC shall be offset against amounts payable by CCC to a debtor when an agency of the U.S. Government has submitted a written request for offset which is mailed or hand-delivered to the appropriate FSA State office, Kansas City Management Office or Kansas City Commodity Office. Such written request must:

(i) Bear the signature of an authorized representative of the requesting agency;

(ii) Include a certification that all requirements of the law and the regulations for collection of the debt and for requesting offset have been complied with;

(iii) State the name, address (including county), and, where legally available, the social security number or employer ID number of the debtor and a brief description of the basis of the debt, including identification of the judgment, if any.

(iv) State the amount of the debt separately as to principal, interest, penalties, and administrative costs. Interest, if any, shall be computed on a daily basis to a date shown in the request. The amount to be offset shall not exceed the principal sum owed by the debtor, plus interest computed in accordance with the request, and any late payment interest, penalties and administrative costs that have been assessed;

(v) Certify that the debtor has not filed for bankruptcy. If the debtor has filed for bankruptcy, a copy of the order of the bankruptcy court relieving

the agency from the automatic stay must be included; and

(vi) State the name, address, and telephone number of a contact person within the agency and the address to which payment should be sent.

(2) Unless prohibited by law, the head of an agency, or a designee, may defer or subordinate in whole or in part the right of the agency to recover through offset all or part of any indebtedness to such agency, or may withdraw a request for offset. Notice of such action must be sent to the appropriate FSA office.

(k)(1) After CCC has complied with the provisions of this part, CCC may request other agencies of the Government to offset amounts payable by them to persons indebted to CCC.

(2) In the case of a request to IRS for a tax refund offset, the provisions at § 1403.18 shall apply.

(l)(1) Debts shall be collected by offset in the following order of priority without regard to the date of the request for such collection:

(i) Debts to CCC.

(ii) Debts to other agencies of USDA as determined by CCC.

(iii) Debts to other government agencies as determined by CCC.

(2) In the case of multiple debts involving the same debtor, CCC may, at its discretion, deviate from the usual order of priority in applying recovered amounts to debts owed other agencies when considered to be in the Government's best interest. Such decision shall be made by CCC based on the facts and circumstances of the particular case.

(m)(1) No amounts payable to a debtor by CCC shall be paid to an assignee until there have been collected any amounts owed by the debtor except as provided in this subsection.

(2) A payment which is assigned in accordance with part 1404 of this Chapter by execution of Form CCC–36 shall be subject to offset for any debt owed to CCC or FSA without regard to the date notice of assignment was accepted by CCC or FSA.

(3) A payment which is assigned in accordance with part 1404 of this Chapter by execution of Form CCC–252 shall be offset:

(i) Against any debt of the assignor entered on the debt record of the applicable FSA office prior to the filing of such form with CCC or FSA, or

(ii) At anytime, regardless of the date of filing of such form with CCC or FSA, if the debt which is the basis for the offset arises under the same contract under which the payment is earned by the assignor.

(4) With respect to all other Federal agencies, offset shall be made of any amounts due any other Federal agency which are entered on the debt record of the appropriate FSA office prior to the date the notice of assignment was accepted by CCC or FSA.

(5) Any amount due and payable to the assignor which remains after deduction of amounts paid to the assignee shall be available for offset.

(n) Amounts recovered by offset for CCC and FSA debts but later found not to be owed to the Government shall be promptly refunded.

(o) The debtor shall be notified whenever any offset action has been taken.

(p) Offsets made pursuant to this section shall not deprive a debtor of any right he might otherwise have to contest the debt involved in the offset action either by administrative appeal or by legal action.

(q) Any action authorized by the provisions of this section may be taken:

(1) Against a debtor's pro rata share of payments due any entity which the debtor participates in, either directly or indirectly, as determined by CCC.

(2) When CCC determines that the debtor has established an entity, or reorganized, transferred ownership of, or changed in some other manner, their operation, for the purpose of avoiding the payment of the claim or debt.

(r) The amount to be offset shall not exceed the actual or estimated amount of the debt, including interest, administrative charges, and penalties, unless the Department of Justice requests that a larger specified amount be offset.

(s) Offset action will not be taken against payments when:

(1) The payment represents loan or purchase proceeds for a commodity which is subject to the rights of the holder of a prior valid enforceable lien. However, any amount that exceeds the

amount of the prior lien shall be available for offset.

(2) A debt has been discharged as provided in § 1403.15.

(3) The amount payable to the debtor is used to satisfy a prior lien on property pledged as collateral for a CCC loan or sold to CCC. However, any amount exceeding the amount of the prior lien shall be available for offset.

(4) CCC determines such action will unduly interfere with the administration of a CCC or FSA program.

(5) The debt has been delinquent for more than ten years or legal action to enforce the debt due CCC is barred by an applicable period of limitation, whichever is later.

(t)(1) Notwithstanding the provisions of paragraph (b) of this section and § 1403.4, with respect to debts which are based upon an unsettled CCC loan, offset action may be taken when the debtor has been:

(i) Provided written notification of the maturity date of the loan and the debtor has not repaid the loan by the maturity date or, in the case of a nonrecourse price support loan, has not repaid the loan or forfeited the loan collateral to CCC by the date specified by CCC;

(ii) Notified of CCC's intent to establish an account on a debt record 30 days after the maturity date, or other applicable period of time, if the loan is not settled in accordance with the loan agreement;

(iii) Notified of the right to pursue an administrative appeal in accordance with part 780 of this title if such an opportunity has not been previously provided;

(iv) Provided an opportunity to inspect and copy CCC records related to the debt; and

(v) Notified in writing that the debt may be collected by administrative offset if the loan is not repaid or, with respect to nonrecourse loans only, settled through forfeiture of the loan collateral.

(2) After a claim has been established by CCC with respect to a loan which has not been settled by the date specified in the loan agreement:

(i) In the event CCC takes possession of the collateral which is security for a nonrecourse of recourse loan made in accordance with parts 1421, 1427, 1434, or 1435 of this chapter, the value of such loan collateral shall be determined by CCC in accordance with the provisions of such parts which are used to determine the settlement value of the collateral. The value of such collateral shall be applied to the claim. Any amount remaining due on the claim must be paid by the debtor.

(ii) In the event CCC takes possession of the collateral which is the security for any other loan, the value of such collateral, as determined by CCC, less any costs incurred by CCC in taking possession and disposing of the collateral, shall be applied to the claim. Any amount remaining due on the claim must be paid by the debtor.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66955, Dec. 27, 1991; 60 FR 43706, Aug. 23, 1995]

### § 1403.8 Withholding.

(a) Withholding of a payment prior to the completion of an applicable offset procedure may be made from amounts payable to a debtor by CCC to ensure that the interests of CCC and the United States will be protected as provided in this section.

(b) A payment may be withheld to protect the interests of CCC or the United States only if CCC determines that:

(1) There has been a serious breach of contract or violation of program requirements and the withholding action is considered necessary to protect the financial interests of CCC;

(2) There is substantial evidence of violations of criminal or civil frauds statutes and criminal prosecution or civil frauds action is of primary importance to program operations of CCC;

(3) Prior experience with the debtor indicates that collection will be difficult if amounts payable to the debtor are not withheld;

(4) There is doubt that the debtor will be financially able to pay a judgment on the claim of CCC;

(5) The facts available to CCC are insufficient to determine the amount to be offset or the proper payee;

(6) A judgment on a claim of CCC has been obtained; or

(7) Such action has been requested by the Department of Justice.

(c) Except for debts due CCC or FSA, withholding action by CCC on amounts payable to debtors of other Government agencies may not be made unless requested by the Department of Justice.

[54 FR 52878, Dec. 22, 1989]

### § 1403.9 Late payment interest and administrative charges.

(a)(1) The provisions of this section are applicable to all persons whose debt to CCC becomes delinquent after January 1, 1990, unless the debtor and CCC agree otherwise.

(2) Late payment interest provisions of this section shall not apply:

(i) To debts owed by Federal agencies and State and local governments. Interest on debts owed by such entities shall be charged in accordance with applicable statutes or, if none are applicable, at the rate of interest charged by the U.S. Treasury for funds borrowed by CCC on the day the debt became delinquent;

(ii) If an applicable statute, regulation, agreement or contract either prohibits the charging of such interest or specifies the interest or charges applicable to the debt involved;

(iii) If the late payment interest is waived by CCC.

(b) CCC will assess late payment interest on the full amount of delinquent debts. For purposes of this section, the term "full amount of the delinquent debt" means the sum of the principal, accrued regular loan interest or accrued program interest, and any other charges which are otherwise due and owing to CCC on the delinquent debt at the time the late payment interest is assessed, except as provided in paragraphs (a)(2) and (d)(3) of this section.

(c) The late payment interest shall be expressed as an annual rate of interest which CCC charges on delinquent debts. The late payment interest rate shall be equal to the higher of the Treasury Department's current value of funds rate or the rate of interest assessed under the Prompt Payment Act, determined as of the date specified in paragraphs (d)(1) and (d)(2) of this section.

(d)(1) When a debt results from a statute, regulation, contract or other agreement with specific provisions for late payment interest and payment due date, late payment interest shall accrue on the amount of the debt from the first day the debt became delinquent, unless otherwise provided by statute.

(2) With respect to debts not resulting from a statute, regulation, contract or agreement containing specific provisions for late payment interest and payment due date, late payment interest shall begin to accrue from the date on which notice of the debt is first mailed or hand-delivered to the debtor, except that, with respect to debts resulting from price support loans, late payment interest shall begin to accrue from the date on which a claim is established.

(3) The rate of late payment interest initially assessed will be fixed for the duration of the indebtedness, except when a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. CCC may then set a new rate of interest which reflects the late payment interest rate in effect at the time the new agreement is executed. All charges which accrued, but which were not collected under the defaulted agreement, shall be added to the principal to be paid under a new repayment agreement.

(4) The late payment interest on delinquent debts will accrue on a daily basis.

(e)(1) Except as specified in paragraphs (a)(2) and (e)(2) of this section, an additional interest rate of three (3) percent per annum will be assessed on any portion of a debt which remains unpaid 90 days after the date described in paragraph (d)(1) or (d)(2) of this section, if no repayment schedule satisfactory to CCC has been agreed upon. Such rate will be assessed retroactively from the date late payment interest began to accrue and apply on a daily basis. Such rate shall continue to accrue until the delinquent debt has been paid.

(2) With respect to debts resulting from price support loans, an additional interest rate of three (3) percent per annum will be assessed on a portion of a debt which remains unpaid 60 days after the date on which a claim was established. Such rate will be assessed

retroactively from the date of claim establishment and apply on a daily basis. Such rate shall continue to accrue until the delinquent debt has been paid.

(f) CCC shall assess as administrative charges the additional costs of processing delinquent debts against the debtor, to the extent such costs are attributable to the delinquency. Such costs include, but are not limited to, costs incurred in obtaining a credit report, costs of employing commercial firms to locate debtor, costs of employing contractors for collection services, costs of selling collateral or property to satisfy the debt.

(g) When a debt is paid in partial or installment payments, payments will be applied first to administrative charges, second to additional interest assessed in accordance with paragraph (e) of this section and late payment interest, and third to outstanding principal.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66955, Dec. 27, 1991; 60 FR 43706, Aug. 23, 1995]

### § 1403.10 Waiver of late payment interest, additional interest and administrative charges.

(a) Except for debts resulting from price support loans, CCC shall waive the collection of late payment interest and administrative charges on a debt or any portion of a debt which is paid within 30 days after the date on which late payment interest began to accrue.

(b) CCC may waive the assessment and collection of all or a portion of the additional interest on debts which are appealed in accordance with 7 CFR part 780, or other applicable appeal procedures, from either the date of the appeal or the date of delinquency, as determined by CCC, until the date a final administrative determination is issued. However, with respect to CCC programs administered by the Foreign Agricultural Service, CCC shall waive the assessment and collection of additional interest on debts which are appealed in accordance with 7 CFR part 780, or other applicable appeal procedures, from the date of delinquency until 30 days after the date of the letter informing the appellant of the final administrative determination. The waiver provisions of the paragraph shall not apply during any period of delay due to:

(1) The appellant's request for a postponement of the scheduled hearing;

(2) The appellant's request for an additional time following the hearing to present additional information or a written closing statement; or

(3) The appellant's failure to timely present information to the reviewing authority.

(c) Assessment and collection of late payment interest, additional interest and administrative charges under this part may be waived by CCC in full, or in part, if it is determined that such action is in the best interest of CCC.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66956, Dec. 27, 1991]

### § 1403.11 Administrative appeal.

If the opportunity to appeal the determination has not previously been provided under part 24 or 780 of this title or any other appeal procedure, a debtor may obtain an administrative review under part 780 of this title, or other applicable appeal procedures, of CCC's determination concerning the existence or amount of a debt, if a request is filed with the authority who made the determination within 15 days of the date of CCC's initial demand letter, unless a longer period is specified in the initial demand letter.

[56 FR 66956, Dec. 27, 1991]

### § 1403.12 Additional administrative collection action.

Nothing contained in this part shall preclude the use of any other administrative or contractual remedy which may be available to CCC to collect debts owed to the Government.

[56 FR 66956, Dec. 27, 1991]

### § 1403.13 Contact with debtor's employing agency.

When a debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, CCC may contact the employing agency to arrange for payment of the debt by allotment or otherwise, in accordance with section

206 of Executive Order No. 11222, May 8, 1965, 30 FR 6469.

### § 1403.14 Prior provision of rights with respect to debt.

CCC will not provide an administrative appeal with respect to issues which were subject to administrative review at the debtor's request as provided under another statute or regulation before:

(a) Effecting administrative offset;

(b) Referring the debt to private collection or credit reporting agencies;

(c) Referring the debt to the Office of Personnel Management (OPM) for salary offset against the current pay of a present or former Government employee; or

(d) Referring the debt to IRS for tax refund offset.

### § 1403.15 Discharge of debts.

(a) Except as required by other applicable regulation or statute, a debt or part thereof owed CCC shall be discharged and the records and accounts on that debt closed in the following situations:

(1) When an obligation or part thereof is discharged in bankruptcy;

(2) When an obligation or part thereof is the subject of a final judgment entered by a court of competent jurisdiction which is adverse to CCC;

(3) When a debt or part thereof is compromised and paid, the amount of such compromise;

(4) When collection of a debt by administrative offset is barred in accordance with § 1403.7(s)(5).

(b) A debt or part thereof owed CCC may be discharged and the records and accounts on that debt closed when the Controller, CCC, has determined that such action is in the best interest of CCC.

(c) A claims official or claims officer may discharge a delinquent debt if such debt arises under the terms of the authority delegated to such official or officer in the following circumstances:

(1) The delinquent debt is owed by an entity which has been liquidated or dissolved and no legal remedy is feasible.

(2) The delinquent debt is owed by an individual who:

(i) Is declared legally insane or incompetent;

(ii) Possessed of no assets or other means of payment; and

(iii) Possessed of no reasonable prospects of being able to pay the debt in the future.

(3) The delinquent debt was incurred by an individual who is deceased, and from whose estate recovery cannot be made.

(d) Debts discharged in accordance with this section may be reported to the Internal Revenue Service pursuant to § 1403.19.

### § 1403.16 Referral of delinquent debts to credit reporting agencies.

(a) This section specifies the procedures that will be followed by CCC and the rights that will be afforded to farm producers when CCC reports delinquent debts to credit reporting agencies.

(b) Before disclosing information to a credit reporting agency in accordance with this part, CCC shall review the claim and determine that it is valid and delinquent.

(c) Before a debt may be referred to a credit reporting agency, the debtor must be notified, pursuant to § 1403.4, of CCC's intent to make such a report. Such notification shall include:

(1) CCC's intent to disclose to a credit reporting agency that the debtor is responsible for the debt, and that such disclosure will be made not less than 60 days after notification to such debtor.

(2) The information intended to be disclosed to the credit reporting agency under paragraph (g)(1) of this section.

(3) The debtor's right to enter a repayment agreement on the debt, including, at the discretion of CCC, installment payments, and that if such an agreement is reached, the debt will not be referred to a credit reporting agency.

(4) The debtor's right to review of this action in accordance with paragraph (i) of this section.

(d) The debtor shall be notified, in writing at the debtor's last known address, when CCC has reported any delinquent debt to a credit reporting agency.

(e)(1) CCC shall notify each credit reporting agency to which an original disclosure of delinquent debt information was made of any substantial

change in the condition or amount of the claim.

(2) CCC shall promptly verify or correct, as appropriate, information about the debt on request of a credit reporting agency. The records of the debtor shall reflect any correction resulting from such request.

(f) Information reported to a credit reporting agency on delinquent debts shall be derived from the system of records maintained by CCC.

(g) CCC shall limit delinquent debt information disclosed to credit reporting agencies to:

(1) The name, address, taxpayer identification number, and other information necessary to establish the identity of the debtor;

(2) The amount, status, and history of the claim; and

(3) The program under which the claim arose.

(h) Reasonable action shall be taken to locate a debtor for whom CCC does not have a current address before reporting delinquent debt information to a credit reporting agency.

(i)(1) Before disclosing delinquent debt information to a credit reporting agency, CCC shall, upon request of the debtor, provide for a review of the debt in accordance with § 1403.11. This review shall only consider defenses or arguments which were not available or could not have been available at any previous appeal proceeding permitted under § 1403.11.

(2) Upon receipt of a request for review within 30 days from the date of notice to the debtor of intent to refer delinquent debt information to a credit reporting agency, CCC shall suspend its schedule for disclosure to a credit reporting agency until a final decision regarding the appropriateness of disclosure to a credit reporting agency is made.

(3) Upon completion of the review, the reviewing official shall transmit to the debtor a written notification of the decision. If appropriate, the debtor shall be notified of the scheduled date on or after which the debt will be referred to the credit reporting agency. The debtor will also be notified of any changes from the initial notification in the information to be disclosed.

(j)(1) In accordance with guidelines established by the Executive Vice President, CCC, the responsible claims official shall report to credit reporting agencies delinquent debt information specified in paragraph (g) of this section.

(2) The agreements entered into by USDA and credit reporting agencies shall provide the necessary assurances to CCC that the credit reporting agencies to which information will be provided are in compliance with the provisions of all the laws and regulations of the United States relating to providing credit information.

(3) CCC shall not report delinquent debt information to credit reporting agencies when:

(i) The debtor has entered a repayment agreement covering the debt with CCC, and such agreement is still valid; or

(ii) CCC has suspended its schedule for disclosure of delinquent debt information pursuant to paragraph (i)(2) of this section.

(k) Disclosures made under this section shall be in accordance with the requirements of the Privacy Act, as amended (5 U.S.C. 552a).

(l) Notwithstanding the provisions of paragraphs (a) through (k) of this section, all commercial debts owed by debtors other than farm producers may be reported to credit reporting agencies.

[54 FR 52878, Dec. 22, 1989, as amended at 56 FR 66956, Dec. 27, 1991]

### § 1403.17 Referral of debts to Department of Justice.

Debts which cannot be collected in accordance with these regulations may be referred to the Department of Justice for collection action.

### § 1403.18 Referral of delinquent debts to IRS or tax refund offset.

CCC may refer legally enforceable delinquent debts to IRS to be offset against tax refunds due to debtors under 26 U.S.C. 6402, in accordance with the provisions of 31 U.S.C. 3720A and Treasury Department regulations.

### § 1403.19 Reporting discharged debts to IRS.

(a) In accordance with IRS regulations, CCC may report to IRS as discharged debts on IRS Form 1099–G only the amounts specified in paragraph (b) of this section.

(b) The following discharged debts may be reported to IRS:

(1) The amount of a debt discharged under a compromise agreement between CCC and the debtor, except for compromises made due to doubt about the Government's ability to prove its case in court for the full amount of the debt.

(2) The amount of a debt discharged by the running of the statutory period of limitation for collecting the debt by administrative offset specified in 31 U.S.C. 3716.

(3) The amount of a debt discharged by CCC in accordance with § 1403.15(b).

### § 1403.20 Referral of debts to private collection agencies.

If CCC's collection efforts have been unsuccessful after 90 days and the delinquent debt remains unpaid, CCC may refer the debt to a private collection agency for collection.

### § 1403.21 Collection of 1988 and 1989 advance deficiency overpayments.

(a) The provisions of this section set forth the policies and procedures for collection of 1988 and 1989 advance deficiency overpayments ("overpayments").

(b) The following definition shall be applicable to this section:

*Financial hardship* means that condition of a producer in which payment of the debt by lump sum would jeopardize the producer's ability to provide food, shelter, and medical care to his immediate family, or to continue the producer's farming operation, as determined by CCC.

(c) This section applies to collection of overpayments from those producers who are suffering financial hardship, as determined by CCC, and who also meet the following conditions, as determined by CCC:

(1) Who received an advance deficiency payment for the 1988 or 1989 crop of a commodity under part 1413 of this chapter;

(2) Who are required to provide a refund of at least $1,500 of such payment, as a result of the increase in market prices of the commodity;

(3) Who reside in a county, or in a county that is contiguous to a county where CCC has determined that farming, ranching, or aquaculture operations have been substantially affected as evidenced by a reduction in normal production for the county of at least 30 percent during two of the three crop years 1988, 1989, and 1990 by:

(i) A natural disaster designated by the Secretary of Agriculture;

(ii) A major disaster or emergency designated by the President under the Robert T. Stafford Disaster and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*);

(4) Where the total quantity of the 1988 or 1989 crop of the commodity that the producers were able to harvest is less than the result of multiplying 65 percent of the farm payment yield established CCC for the crop by the sum of the acreage planted for the harvest and the acreage prevented from being planted (because of the disaster or emergency referred to in paragraph (c)(3) of this section) for the crop; and

(5) Who have applied to the County Farm Service Agency Office which issued the advance deficiency payment, no later than May 31, 1991, for a determination of eligibility for the repayment provisions of this section.

(d) CCC shall assess interest on delinquent debts for 1988 or 1989 overpayments as follows:

(1) CCC shall establish a regional annual interest rate for each of 12 geographic regions, corresponding to the extent practicable, as determined by CCC, with the 12 geographic districts of the Farm Credit System.

(2) Each regional annual interest rate shall not exceed the average of the interest rates charged by Farm Credit System institutions within the region to high-risk borrowers on 1-year operating loans, as determined by CCC based upon information provided to CCC by the Farm Credit System.

(3) Interest shall accrue at the established regional annual interest rate for the region in which the debt arose, beginning November 28, 1990.

(e) CCC shall not offset, in each of the crop years 1990, 1991, and 1992, more than ⅓ of the farm program payments otherwise due a producer, as a result of the producer's delinquency in repaying the overpayment.

(f) CCC shall permit producers to repay the overpayment in three equal installments during each of the crop years 1990, 1991, and 1992, if the producers document to CCC that they have entered into agreements to obtain multiperil crop insurance policies for the 1991 and 1992 crop years.

[56 FR 32319, July 16, 1991]

# PART 1404—ASSIGNMENT OF PAYMENTS

Sec.
1404.1 General statement.
1404.2 Definitions.
1404.3 Payments which may be assigned.
1404.4 Execution of assignment form.
1404.5 [Reserved]
1404.6 Payment to the assignee.
1404.7 Misrepresentations.
1404.8 Liability of the Secretary or disbursing agents.
1404.9 OMB Control Numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 15 U.S.C. 714b and 714c; 16 U.S.C. 590h(g).

SOURCE: 54 FR 52883, Dec. 22, 1989, unless otherwise noted.

## § 1404.1 General statement.

This part sets forth the manner in which a person may assign a cash payment which is made by the Farm Service Agency (FSA) or the Commodity Credit Corporation (CCC). Such payments may only be assigned in the manner set forth in this part.

## § 1404.2 Definitions.

(a)(1) *Assignee* means any person, including any agency of the Federal Government, to whom an assignment of an FSA or CCC payment is made in accordance with this part.

(2) *Assignor* means any person who is the recipient of a payment from FSA or CCC who assigns the payment to another person in accordance with this part.

(3) *Payment* means a cash payment and excludes

(i) Any payment made in accordance with part 1470 of this title;

(i) Price support loan or purchase agreement proceeds; and

(iii) Any payments made in accordance with parts 1487, 1488, 1491, 1492, and 1493 of this title.

(b) The terms defined in parts 719, 1413, 1421 and 1427 shall also be applicable to this part.

## § 1404.3 Payments which may be assigned.

Except as otherwise provided in this part or in individual program regulations, contracts and agreements entered into by FSA or CCC, any payment due a person from FSA or CCC may be assigned.

[54 FR 52883, Dec. 22, 1989, as amended at 56 FR 361, Jan. 4, 1991]

## § 1404.4 Execution of assignment form.

(a)(1) The assignment of any FSA or CCC payment must be made by the execution of Form CCC–36 or Forms CCC–251 and CCC–252. Form CCC–36 is applicable to payments made under programs administered in accordance with 7 CFR parts 701, 704, 1413, 1430, 1468, 1472 and 1475. Such form is also applicable to any other program which is administered by a county ASC committee. Forms CCC–251 and 252 are applicable to all other CCC or FSA programs and contracts.

(2)(i) To be recognized by FSA or CCC, Form CCC–36 must be filed in the county FSA office prior to the time the county committee approves the making of the payment covered by the assignment. To be recognized by FSA or CCC, Forms CCC–251 and 252 must be filed with the FSA or CCC office from which the payment will be made prior to the making of the payment.

(ii) Form CCC–36 or Forms CCC–251 and 252 must be signed by both the assignor and the assignee.

(3) The assignor and the assignee shall promptly notify the appropriate FSA or CCC office of any change affecting the assignment.

(b) [Reserved]

[54 FR 52883, Dec. 22, 1989, as amended at 56 FR 361, Jan. 4, 1991]

### § 1404.5 [Reserved]

### § 1404.6 Payment to the assignee.

(a) The assignee shall be paid the smaller of the amount specified on Form CCC–36 or CCC–251 or the amount of the payment earned under the program or contract covered by the assignment. Any indebtedness owed by the assignor to CCC, FSA, or any other agency of the United States shall be subject to offset.

(b) Any indebtedness owed by the assignor to CCC or FSA shall be offset from any payment which is owed by CCC or FSA without regard to the date of filing of a Form CCC–36 with the applicable FSA or CCC office. Except as provided in paragraph (d) of this section, any indebtedness owed by the assignor to CCC or FSA shall be offset from any payment which is owed by CCC or FSA if such indebtedness was entered on the debt record of the applicable FSA or CCC office prior to the date of the filing of Forms CCC–251 and 252 with the applicable FSA or CCC office.

(c) Any indebtedness owed by the assignor to any agency of the United States other than CCC or FSA which was entered on the debt record of the applicable FSA or CCC office prior to the date of filing of the Form CCC–36 or Forms CCC–251 and 252 with such office shall be offset prior to the making of any payment to the assignee.

(d) Any indebtedness arising under a contract between the assignor and FSA or CCC which is the subject of the assignment shall be offset from the payment prior to the making of any payment to the assignee under such contract without regard to the date of the filing of Form CCC–36 or Forms CCC–251 and 252 with the appropriate FSA or CCC office.

### § 1404.7 Misrepresentations.

If FSA or CCC has reason to believe that any material misrepresentation was made by the assignor or the assignee in executing Forms CCC–36, CCC–251 or CCC–252, FSA or CCC shall give notice thereof to the assignor and the assignee. If, after investigation and opportunity for the assignor and assignee to be heard, FSA or CCC finds that any material misrepresentation was in fact made, FSA or CCC shall notify the assignor and the assignee of such finding, and void such assignment, and insofar as concerns FSA, CCC or any other agency of the United States, the assignment shall be of no effect.

### § 1404.8 Liability of the Secretary or disbursing agents.

Neither the United States, the CCC, the Secretary nor any disbursing agent shall be liable in any suit if payment is made to the assignor without regard to the existence of any assignment, and nothing contained herein shall be construed to authorize any suit against the United States, the CCC, the Secretary or any disbursing agent if payment is not made to the assignee, or if payment is made to only one of several assignees.

### § 1404.9 OMB Control Numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 35 and have been assigned OMB control number 0560–0004.

## PART 1405—LOANS, PURCHASES, AND OTHER OPERATIONS

Sec.

1405.1 Interest.
1405.2 Basic rule of fractions.
1405.3 Effect of changes in regulations.
1405.4 Delegations of authority.
1405.5 Notice and comment.
1405.6 Crop insurance requirement.
1405.7 Uruguay Round Agreements Act.
1405.8 Disqualification due to crop insurance violation.
1405.9 Commodity assessments.

AUTHORITY: 7 U.S.C. 1515; 7 U.S.C. 7416a; 7 U.S.C. 7991(e); 15 U.S.C. 714b and 714c.

SOURCE: 61 FR 37575, July 18, 1996, unless otherwise noted.

### § 1405.1 Interest.

(a) Except as may otherwise be determined by CCC as provided in individual program regulations, program contracts or such other means as deemed appropriate by CCC the rate of interest that is applicable to CCC loans shall be equal to the rate of interest charged by

the U.S. Treasury for funds borrowed by CCC on the date the loan is disbursed by CCC, plus 1 percent. This rate of interest shall be in effect until the earlier of the maturity of the loan or the next January 1.

(b) The rate of interest applicable to all CCC loans that are outstanding as of January 1 of any year shall be adjusted as of such date to equal the rate of interest charged by the U.S. Treasury for funds borrowed by CCC on such date, plus 1 percent. This rate shall be in effect until the earlier of the maturity of the loan or the next January 1. The rate of interest applicable to CCC loans as of January 1 of any year shall be announced by CCC by press release or other means.

### § 1405.2 Basic rule of fractions.

Fractions shall be rounded in accordance with the provisions of 7 CFR part 718.

### § 1405.3 Effect of changes in regulations.

Unless otherwise indicated, the regulations in effect in this chapter as of April 4, 1996, shall continue to apply to the 1991 through 1995 crops of agricultural commodities, to milk produced on or before May 1, 1996, and to contracts entered into prior to any amendments to this chapter after that date.

### § 1405.4 Delegations of authority.

The delegations of authority relating to the CCC programs and activities are set forth in the by-laws of CCC and in dockets approved by the CCC Board of Directors. Copies of the By-laws and the dockets may be obtained from the Secretary of CCC.

### § 1405.5 Notice and comment.

The level of loans, purchases and payments made in accordance with the programs set forth in this chapter shall be determined without regard to the notice and comment provisions of 5 U.S.C. 553.

### § 1405.6 Crop insurance requirement.

(a) To be eligible for any benefits or payments under 7 CFR part 1410 the producer must obtain at least the catastrophic level of insurance for each crop of economic significance in which the producer has an interest or provide a written waiver to the Secretary that waives any eligibility for emergency crop loss assistance in connection with the crop, if insurance is available in the county for the crop. In meeting this requirement, the producer may:

(1) Obtain at least the catastrophic level of crop insurance in all counties for each crop of economic significance in which the producer has an interest;

(2) Obtain at least the catastrophic level of crop insurance for some, but not all, crops of economic significance for which the producer has an interest, and sign a waiver; or

(3) Sign a waiver that waives any eligibility for crop loss assistance in connection with the producer's crop.

(b) *Crop of economic significance*. The term "crop of economic significance" means a crop that has contributed in the previous year, or is expected to contribute in the current crop year, 10 percent or more of the total expected value of all crops grown by the producer. However, notwithstanding the preceding sentence, if the total expected liability under the catastrophic risk protection endorsement is equal to or less than the administrative fee required for the crop, such crop will not be considered a crop of economic significance.

[61 FR 37575, July 18, 1996, as amended at 68 FR 32337, May 30, 2003]

### § 1405.7 Uruguay Round Agreements Act.

In the event the outlays by the United States for domestic support measures will exceed, in any required reporting period, the allowable levels under the Uruguay Round Agreements (as defined in section 2 of the Uruguay Round Agreements Act), CCC will, as determined by the Secretary of Agriculture, reduce the amount of payments and benefits to be made in any such reporting period, and/or collect a refund of payments or benefits previously made with respect to such reporting period, under parts 1412, 1413, 1421, 1427, 1430, 1434 and 1435 of this chapter in order to ensure that the level of domestic support provided by the United States complies with the

commitments of the United States in the Uruguay Round Agreements.

[67 FR 64751, Oct. 21, 2002]

### § 1405.8 Disqualification due to crop insurance violation.

(a) Section 515(h) of the Federal Crop Insurance Act (FCIA) provides that a person who willfully and intentionally provides any false or inaccurate information to the Federal Crop Insurance Corporation (FCIC) or to an approved insurance provider with respect to a policy or plan of FCIC insurance after notice and an opportunity for a hearing on the record, will be subject to one or more of the sanctions described in section 515(h)(3). In section 515(h)(3), the FCIA specifies that in the case of a violation committed by a producer, the producer may be disqualified for a period of up to 5 years from receiving any monetary or non-monetary benefit under a number of programs. The list includes, but is not limited to, benefits under:

(1) The FCIA.

(2) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq.*), including the Noninsured Crop Disaster Assistance Program under section 196 of that Act (7 U.S.C. 7333).

(3) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).

(4) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq*).

(5) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*).

(6) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*).

(7) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*).

(8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in prices of agricultural commodities.

(b) Violation determinations are made by FCIC. However, upon notice from FCIC to CCC that a producer has been found to have committed a violation to which paragraph (a) of this section applies, that person shall be considered ineligible for payments under the programs specified in paragraph (a) of this section that are funded by CCC for the same period of time for which, as determined by FCIC, the producer will be ineligible for crop insurance benefits of the kind referred to in paragraph (a)(1) of this section. Appeals of the determination of ineligibility will be administered under the rules set by FCIC.

(c) Other sanctions may also apply.

[68 FR 39448, July 2, 2003, as amended at 72 FR 63361, Nov. 8, 2007]

### § 1405.9 Commodity assessments.

(a) CCC will deduct from the proceeds of a marketing assistance loan an amount equal to the amount of an assessment otherwise required to be remitted to a State agency under a State statute by the producer of the commodity pledged as collateral for such loan or by the first purchaser of such commodity subject to the requirements of paragraph (b) of this section.

(1) The assessment will be collected in one of the following ways, as requested by the State, but not both:

(i) When the proceeds of the loan are disbursed; or

(ii) When the commodity pledged as collateral for the loan is forfeited to CCC, in which case CCC will collect from the producer the amount of the assessment submitted by CCC to the State.

(2) CCC will deduct from the proceeds of a marketing assistance loan an amount equal to the amount of an assessment otherwise authorized to be remitted to a federally authorized entity under a Federal statute by the producer of the commodity pledged as collateral for such loan or the first purchaser of such commodity in the manner agreed to by CCC and the entity to whom the Secretary of Agriculture has authorized to collect such assessments.

(b) CCC will collect commodity assessments authorized under a State statute when:

(1) The State entity has:

(i) Requested that the assessment be collected;

(ii) Identified whether the assessment is to be collected at the time the loan proceeds are disbursed or at the time the commodity is forfeited to CCC;

(iii) Identified the person who may enter into an agreement with CCC that sets forth the obligations of the State and CCC with respect to the collection of the assessment; and

(iv) Provided an opinion from the Office of the Attorney General to CCC that concludes the person signing the agreement may obligate the State to comply with the agreement and the provisions of Public Law 108–470 have been met.

(2) The agreement described in paragraph (c) of this section has been executed by the appropriate State official and CCC.

(c) CCC will enter into an agreement with an authorized State official to collect commodity assessments when the actions set forth in paragraphs (b)(1) and (2) of this section have been completed. Such agreement will contain the obligations and responsibilities of the State and CCC. All such agreements will include provisions that provide:

(1) The State will indemnify CCC for any costs incurred in the collection of the assessment including costs incurred with respect to resolution of disputes arising from the requested collection of the assessment but not for administrative costs incurred by CCC in the collection of the assessment;

(2) The State, in cases where an assessment has been collected two or more times with respect to the same quantity of the commodity subject to the assessment, will refund the amount of the excess collection to the producer.

(3) The agreement may be terminated by either party upon 30 days notice.

(4) The State, in cases where the marketing assistance loan is made by a cooperative marketing association or a designated marketing association approved by CCC, or any other similar entity that is approved by CCC, to obtain such a loan on behalf of its members may enter into individual arrangements with such entity to facilitate the collection of the assessment with the approval of CCC.

[70 FR 52285, Sept. 2, 2005, as amended at 75 FR 70812, Nov. 19, 2010]

## PART 1407—DEBARMENT AND SUSPENSION

Sec.
1407.1 Purpose.
1407.2 Nonprocurement debarment and suspension.
1407.3 Procurement debarment and suspension.

AUTHORITY: 15 U.S.C. 714b.

SOURCE: 64 FR 67471, Dec. 2, 1999, unless otherwise noted.

### § 1407.1 Purpose.

This part specifies the policies that CCC will follow in taking action to debar or suspend individuals or firms from participation in Federal nonprocurement and procurement activities.

### § 1407.2 Nonprocurement debarment and suspension.

(a) CCC will proceed under 7 CFR part 3017 when taking action to debar or suspend participants or potential participants in CCC's nonprocurement activities.

(b) The debarring and suspending official for nonprocurement actions taken by CCC shall be as follows: For actions initiated on behalf of CCC by the Foreign Agricultural Service (FAS), the Food and Nutrition Service (FNS), or the Agricultural Marketing Service (AMS), the debarring and suspending official will be the Vice President, CCC, who is the Administrator FAS, FNS, or AMS, respectively. For actions initiated on behalf of CCC by the Natural Resources Conservation Service (NRCS), the official will be the Vice President, CCC, who is the Chief, NRCS.

### § 1407.3 Procurement debarment and suspension.

CCC will proceed under this part when taking action to debar or suspend contractors with CCC or participants or potential participants in CCC's procurement activities. CCC will apply the provisions of 48 CFR part 409, subpart 409.4, in such actions, with the exception that the debarring and suspending official will be the Executive Vice President, CCC, or a designee.

## PART 1409—MEETINGS OF THE BOARD OF DIRECTORS OF COMMODITY CREDIT CORPORATION

Sec.
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AUTHORITY: Sec. 3(a), 90 Stat. 1244 (5 U.S.C. 552b), and sec. 4, 62 Stat. 1070, as amended (15 U.S.C. 714b).

SOURCE: 42 FR 14673, Mar. 16, 1977, unless otherwise noted.

### § 1409.1 General statement.

(a) It is the policy of Commodity Credit Corporation, under the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b) to make available to the public, to the fullest extent practicable, information regarding the decision process of the Board of Directors of Commodity Credit Corporation.

(b) This part sets forth the procedural requirements designed to provide the public with such information while continuing to protect the rights of individuals and to maintain the capabilities of Commodity Credit Corporation in carrying out its responsibilities under the statutes administered by Commodity Credit Corporation.

### § 1409.2 Definitions.

(a) The term *Board* means the Board of Directors of Commodity Credit Corporation.

(b) The term *Director* means an individual who is a member of the Board of Directors of Commodity Credit Corporation and includes the Secretary of Agriculture, who is by statute an ex-officio director and Chairman of the Board.

(c) The term *General Counsel* means the General Counsel or the Assistant General Counsel of Commodity Credit Corporation.

(d) The term *meeting* means the deliberations of at least five (quorum) Directors of the Board of Directors of Commodity Credit Corporation where such deliberations determine or result in the joint conduct or disposition of official Board business but shall not include deliberations for:

(1) Closing a portion or portions of a meeting or series of meetings as provided in § 1409.5 (a) and (b) of this part, or

(2) Calling a meeting at a date earlier than announced as provided in paragraph 1409.6(a)(2) of this part; or

(3) Changing the subject matter of a publicly announced meeting as provided in § 1409.6(b) of this part; or

(4) Determining whether or not to withhold from disclosure information pertaining to a meeting or portions of a meeting or series of meetings as provided in § 1409.5(b) of this part.

(e) The term *public observation* means the right of any member of the public to attend and observe, but not participate or interfere in any way in an open meeting of the Board, within the limits of reasonable and comfortable accommodations made available for such purpose by Commodity Credit Corporation.

### § 1409.3 Open meetings.

Every portion of every meeting of the Board of Directors will be open to public observation except as provided in §§ 1409.4 and 1409.5 of this part.

### § 1409.4 Exemptions.

(a) A portion or portions of a Board meeting may be closed to the public and any information pertaining to such meeting otherwise required by § 1409.3 of this part to be disclosed to the public may be withheld, where the Board determines that public disclosure of information to be discussed at such meetings is likely to—

(1) Disclose matters that are:

(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and

(ii) In fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and practice of Commodity Credit Corporation;

(3) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, 5 U.S.C. 552), provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or to an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy, or

(iv) Disclose the identity of a confidential source, and, in the case of a record compiled by a criminal enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would be likely to: (i) Lead to significant financial speculation in agricultural commodities or significantly endanger the stability of any financial institution; or

(ii) Significantly frustrate implementation of a proposed Board action except where the Board has already disclosed to the public the content or nature of its proposed action or where Commodity Credit Corporation is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern Commodity Credit Corporation's participation in a civil action or proceedings.

(b) Any Board meeting or portion thereof, which may be closed, or any information which may be withheld under paragraph (a) of this section, will not be closed or withheld, respectively, in any case where the Board finds the public interest requires otherwise.

**§ 1409.5 Closure of meetings.**

(a) *Procedure for closing a majority of the meetings.* (1) A majority of the meetings of the Board will be closed to the public pursuant to exemptions 4, 8, (9)(i) and 10 of § 1409.4(a) of this part. These meetings will include deliberations such as those relating to the levels of price support for various agricultural commodities, the allocation of quantities of commodities for export programs, and the interest rates for commodity loans and farm storage facility loans. Board meetings will be closed pursuant to exemptions 4, 8, (9)(i) and 10 when at least five Directors vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting. A copy of the vote, reflecting the vote of each Director on the question, will be made available to the public. The Board will, except to the extent that such information is exempt from disclosure under the exemptions in § 1409.4(a) of this part, provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof, at the earliest practicable time.

(2) The provisions of paragraph (b) of this section and § 1409.6, except § 1409.6(e), of this part will not apply to any meeting or portion thereof to which paragraph (a) of this section applies.

(b) *Procedure for closing other meetings.* (1) A separate vote of the entire membership of the Board will be taken with respect to each Board meeting a portion or portions of which are proposed to be closed to the public or any information which is proposed to be withheld from the public on the basis of one or more of the exemptions in § 1409.4(a) of this part. The vote of each Director will be recorded and no proxy shall be allowed.

(2) A portion or portions of a meeting may be closed on the basis of one or more of the exemptions in §1409.4(a) of this part only when at least five Directors vote to take such action.

(3) A single vote of the entire membership of the Board may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public or with respect to the withholding of any information concerning such series of meetings, on the basis of one or more of the exemptions in §1409.4(a) of this part. Each meeting in such series must involve the same particular matters and must be scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each Director participating in such vote will be recorded and no proxy vote shall be allowed.

(4) Whenever any person whose interests may be directly affected by a portion of a Board's meeting requests that the Board close such portion to the public on the basis of exemptions (5), (6), or (7) of §1409.4(a) of this part, the Board, upon the request of any one of its members, will vote whether or not to close such portion of the meeting. The vote of each Director participating in such vote will be recorded and no proxy shall be allowed.

(c) *General counsel's certification.* Before every Board meeting closed on the basis of one or more of the exemptions in §1409.4(a) of this part, the General Counsel will publicly certify that, in his opinion, the meeting may be closed to the public and shall state each relevant exemption.

**§ 1409.6 Notices to the public.**

(a)(1) The Secretary of the Board will make a public announcement at least one week before each Board meeting of (i) the time and place of the meeting, (ii) subject matter of the meeting, except to the extent that such information is exempt from disclosure under §1409.4(a) of this part, (iii) whether the meeting is to be open or closed to the public and (iv) the name and business telephone number of the Secretary of the Board.

(2) Notwithstanding paragraph (a)(1) of this section, less than one week advance public notice for a meeting may be given when at least five Directors determine by recorded vote that the Board business requires that a meeting be called at an earlier date, but in such case, announcement of the meeting will be made at the earliest practicable time.

(b)(1) When the Board votes on whether to close a portion or portions of a meeting or a series of meetings, or with respect to withholding any information concerning such meeting or series of meetings, in accordance with §1409.5(b) of this part, the Secretary of the Board will make available to the public a written copy of such vote reflecting the vote of each member on the question within one business day of such vote.

(2) If the Board votes to close a portion or portions of a meeting or a series of meetings in accordance with §1409.5(b) of this part, the Secretary of the Board will make available to the public within one business day of such vote, (i) a list of the names and affiliations of persons expected to be present at such closed portion or portions of the meeting or series of meetings and (ii) a full written explanation of the Board's action in closing the portion of portions of the meeting or series of meetings, unless such disclosure would reveal the information that the meeting itself was closed to protect.

(c) The time or place of a board meeting may be changed following the public announcement as required by paragraph (a)(1) of this section only if the Board publicly announces such change or changes at the earliest practicable time.

(d) The subject matter of a Board meeting or the determination of the Board to open or close a meeting or portions thereof to the public, may be changed following the public announcement as required by paragraph (a)(1) of this section only if (i) five Directors determine by recorded vote that Board business so requires and that no earlier announcement of the change was possible and (ii) the Board publicly announces such change and the vote of each Director upon such change at the earliest practicable time.

(e) The Secretary of the Board shall use all reasonable means to keep the

public promptly and fully informed of public announcements including the use of a bulletin board outside the office of the Secretary of the Board at the address indicated in §1409.8(b) of this part. Requests for information concerning Board meetings should be addressed to the Secretary of the Board.

(f) Immediately following each public announcement required by this section, the information provided in such public announcement will be submitted for publication in the FEDERAL REGISTER.

(g) The Board usually meets in room 200–A, Administration Building, United States Department of Agriculture, 14th Street and Independence Avenue, SW., Washington, DC. Each person interested in attending an open meeting of the Board should notify the Secretary of the Board at least one business day prior to the open meeting of their intention to attend the meeting. Any person who fails to do so may not be accommodated if there is insufficient space in the meeting room.

### §1409.7 Records retention.

(a) The Secretary of the Board will maintain the following records for each Board meeting, or portion thereof which is closed to the public pursuant to a vote under §1409.5 of this part:

(1) A copy of the General Counsel's certification required by §1409.5(c) of this part;

(2) A copy of a statement from the presiding officer which sets forth the time and place of the closed meeting or portion thereof and list of persons present; and

(3) A complete verbatim transcript or electronic recording adequate to record fully the proceedings of each Board meeting or portion of a meeting, except that in the case of a meeting or portion of a meeting closed to the public on the basis of exemptions (8), (9)(i) or (10) of §1409.4(a) of this part, the Secretary of the Board will maintain either a transcript, electronic recording, or a complete set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of actions taken and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll-call vote reflecting the vote of each member on the question. All documents considered in connection with any action will be identified in such minutes.

(b) The retention period for the records required by paragraph (a) of this section will be for a period of at least two years after the particular Board meeting, or until one year after the conclusion of any Board proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.

### §1409.8 Public inspection and copying of records; applicable fees.

(a) The Secretary of the Board will make promptly available to the public the transcript, electronic recording, transcription of the recording, or minutes of the discussion of any item on the agenda of a Board meeting, or any item of the testimony of any witness received at the meeting except for such item or items of such discussion or testimony as the Secretary of the Board determines to contain information which may be withheld on the basis of one or more of the exemptions in §1409.4(a) of this part.

(b) Requests for public inspection of electronic recording, transcripts or minutes of Board meetings shall be made to the Secretary of the Board of Directors of Commodity Credit Corporation, Room 218–W, Administration Building, United States Department of Agriculture, 14th Street and Independence Avenue, SW., Washington, DC 20250.

(c) The transcripts, minutes, or transcriptions of electronic recordings of a Board meeting will disclose the identity of each speaker, and will be furnished to any person at the actual cost of transcription or duplication.

### §1409.9 Report to Congress.

The Secretary of Agriculture will annually report to the Congress regarding the Board's compliance with the Government in the Sunshine Act, including a tabulation of the total number of open meetings, the total number of closed meetings, the reasons for closing such meetings and a description of any litigation brought against the Board pursuant to the Government in the

Sunshine Act, including any costs assessed against Commodity Credit Corporation in such litigation.

# SUBCHAPTER B—LOANS, PURCHASES, AND OTHER OPERATIONS

EDITORIAL NOTE: For FEDERAL REGISTER citations to regulations for previous program years not included in this volume, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

## PART 1410—CONSERVATION RESERVE PROGRAM

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AUTHORITY: 15 U.S.C. 714b and 714c; 16 U.S.C. 3801–3847.

SOURCE: 68 FR 24835, May 8, 2003, unless otherwise noted.

### § 1410.1 Administration.

(a) The regulations in this part will be implemented under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), the Administrator, Farm Service Agency (FSA), or a designee, or the Deputy Administrator, FSA. In the field, the regulations in this part will be implemented by the FSA State and county committees ("State committees" and "county committees," respectively).

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the provisions in this part unless specifically authorized by the Deputy Administrator.

(c) The State committee may take any action authorized or required by this part to be taken by the county committee, but which has not been taken by such committee, such as:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation of authority herein to a State or county committee shall preclude the Executive Vice President, CCC, the Administrator, FSA, or a designee, or the Deputy Administrator, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Data furnished by prospective participants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result

in program benefits being withheld or denied.

(f) Notwithstanding other provisions of this section, the Erodibility Index (EI), suitability of land for permanent vegetative or water cover, factors for determining the likelihood of improved water quality, and adequacy of the planned practice to achieve desired objectives shall be determined by the Natural Resource Conservation Service (NRCS) or other sources approved by CCC, in accordance with the Field Office Technical Guide (FOTG) of NRCS or other guidelines deemed appropriate by NRCS. In no case shall such determination compel CCC to execute a contract that CCC does not believe will serve the purposes of the program established by this part. Any approved technical authority shall utilize CRP guidelines established by CCC.

(g) CCC may consult with the Forest Service (FS), a State forestry agency, or other organizations as determined by CCC to be necessary for developing and implementing conservation plans that include tree planting as the appropriate practice or as a component of a practice.

(h) CCC may consult with the Cooperative State Research, Education, and Extension Service to coordinate a related information and education program as deemed appropriate to implement the Conservation Reserve Program (CRP).

(i) CCC may consult with the National Marine Fisheries Service, U.S. Fish and Wildlife Service (FWS), or State wildlife agencies for such assistance as is determined necessary by CCC to implement the CRP.

(j) Except as agreed by CCC and the participant together:

(1) The regulations in this part and others governing CRP as of September 30, 2008, will continue to govern contracts in effect as of that date (see 7 CFR part 1410 contained in the edition of 7 CFR parts 1200 to 1599 revised as of January 1, 2008); and

(2) Except as specified in paragraph (j)(1) of this section, this part will apply to all CRP contracts.

[68 FR 24835, May 8, 2003, as amended at 74 FR 30911, June 29, 2009]

## § 1410.2 Definitions.

(a) The definitions in part 718 of this chapter shall be applicable to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions shall be applicable to this part:

*Agricultural commodity* means:

(1) Any crop planted and produced by annual tilling of the soil or on an annual basis by one-trip planters,

(2) Sugarcane planted or produced in a State, or

(3) Alfalfa and other multi-year grasses and legumes grown in a rotation practice as approved by CCC.

*Annual rental payment* means, unless the context indicates otherwise, the annual payment specified in the CRP contract that, subject to the availability of funds, is made to a participant to compensate a participant for placing eligible land in CRP, including any incentive payments that are not specifically cost-shares.

*Beginning farmer or rancher* means, as determined by CCC, a person or entity who:

(1) Has not been a farm or ranch operator or owner for more than 10 years,

(2) Materially and substantially participates in the operation of the farm or ranch involved in the CRP contract modification, and

(3) If an entity, is an entity in which 50 percent of the members or stockholders of the entity meet the first two requirements of this definition.

*Commercial pond-raised aquaculture facility* means, as determined by CCC, any earthen facility from which $1,000 or more of freshwater food fish were sold or normally would have been sold during a calendar year.

*Conservation district* means a political subdivision of a State, Indian Tribe, or territory, organized pursuant to the State or territorial soil conservation district law, or Tribal law. The subdivision may be a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar legally constituted body.

*Conservation plan* means a record of the participant's decisions and supporting information for treatment of a

unit of land or water, and includes a schedule of operations, activities, and estimated expenditures needed to solve identified natural resource problems by devoting eligible land to permanent vegetative cover, trees, water, or other comparable measures.

*Conservation priority area* means an area designated with actual and adverse water quality, wildlife habitat, air quality, or other natural resource impacts related to agricultural production activities or to assist agricultural producers to comply with Federal and State environmental laws or to meet other conservation needs, such as for air quality, as determined by the Deputy Administrator.

*Conserving use* means a use of land with any rotation requirements as may be specified by the Deputy Administrator: for alfalfa and other multi-year grasses and legumes planted during 2002 through 2007; as summer fallow during 2002 through 2007; and in which the land was previously enrolled in the program (for which the contract expired during the period 2002 through 2007) and where the grass cover required by the CRP contract continues to be maintained as though still enrolled. Where the land use for a year qualifies as a "conserving use" under this definition, then, the land for that year shall, for purposes of eligibility under §1410.6(a)(1) be considered to have been planted to an "agricultural commodity."

*Considered planted* means: land devoted to a conserving use or land enrolled in the WBP during the crop year or during any of the 2 years preceding the crop year if the contract expired; cropland enrolled in CRP; or land for which the producer received insurance indemnity payment for prevented planting.

*Contour grass strip* means a vegetation area that follows the contour of the land that complies with the FOTG and a conservation plan developed under this part.

*Contract period* means the term of the contract which is not less than 10, nor more than 15 years.

*Cost-share payment* means the payment made by CCC to assist program participants in establishing the practices required in a contract.

*Cropland* means land defined as cropland in part 718 of this title, except for land in terraces that are no longer capable of being cropped.

*Cropped wetlands* means farmed wetlands and wetlands farmed under natural conditions.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, FSA, the CRP Program Manager, or a designee.

*Erodibility Index* (EI) is, as prescribed by CCC, used to determine the inherent erodibility (water or wind) of a soil.

*Farmed wetlands* means land defined as farmed wetlands in part 12 of this title.

*Federally-owned land* means land owned by the Federal Government or any department, instrumentality, bureau, or agency thereof, or any corporation whose stock is wholly owned by the Federal Government.

*Field* means a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, woodlands, other similar features, or crop-lines, as determined by CCC.

*Field Office Technical Guide* (FOTG) means the official USDA guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, animal resources, and cultural resources applicable to the local area for which it is prepared.

*Field windbreak, shelterbelt, and/or living snowfence* mean a vegetative barrier with a linear configuration composed of trees, shrubs, or other vegetation, as determined by CCC, that are designated as such in a conservation plan and that are planted for the purpose of reducing wind erosion, controlling snow, improving wildlife habitat, or conserving energy.

*Filter strip* means a strip or area of vegetation adjacent to a body of water the purpose of which is to remove nutrients, sediment, organic matter, pesticides, and other pollutants from surface runoff and subsurface flow by deposition, absorption, plant uptake, and other processes, thereby reducing pollution and protecting surface water and subsurface water quality and of a

width determined appropriate for the purpose by the Deputy Administrator.

*Highly Erodible Land* (HEL) means land determined to have an EI equal to or greater than 8 on the acreage offered.

*Infeasible to farm* means an area that is too small or isolated to be economically farmed, as determined by the Deputy Administrator.

*Indian tribe* means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landlord* means a person who rents or leases acreage to another person.

*Limited resource farmer or rancher* means:

(1) A person with direct or indirect gross farm sales of not more than $155,200 in each of the previous two calendar years preceding the year of enrollment (adjusted for inflation using Prices Paid by Farmer Index as compiled by the USDA National Agricultural Statistics Service), and

(2) A total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using U.S. Department of Commerce data).

*Local FSA office* means the FSA office serving the area in which the FSA records are located for the farm or ranch.

*Merchantable timber* means timber grown for commercial purposes on private non-industrial forest land on which the average tree has a trunk diameter of at least 6 inches measured at a point no less than 4.5 feet above the ground.

*Offer* means, unless the context indicates otherwise, if required by CCC, the per-acre rental payment requested by the owner or operator in such owner's or operator's request to participate in the CRP.

*Offeror* means an eligible person as determined by CCC who submits an offer of eligible acreage for enrollment into the CRP to enter into a CRP contract.

*Operator* means a person who is in general control of the farming operation on the farm, as determined by CCC.

*Payment period* means the 10- to 15-year contract period for which the participant receives an annual rental payment.

*Perennial crop* means a crop that is produced from the same root structure for two or more years, as determined by CCC.

*Permanent vegetative cover* means perennial stands of approved combinations of certain grasses, legumes, forbs, shrubs and trees with a life span of 10 or more years.

*Permanent wildlife habitat* means a vegetative cover with the specific purpose of providing habitat, food, or cover for wildlife and protecting other environmental concerns for the life of the contract.

*Pollinator* means an insect or other animal that carries pollen from one flower to another.

*Practice* means a conservation, wildlife habitat, or water quality measure with appropriate operations and management as agreed to in the conservation plan to accomplish the desired program objectives according to CRP and FOTG standards and specifications as a part of a conservation management system.

*Present value* means the value of a stream of future payments discounted by 5 percent in accordance with Office of Management and Budget Circular A–94 (revised January 2006), Discount Rates To Be Used in Evaluating Time-Distributed Costs and Benefits.

*Private non-industrial forest land* means, for purposes of § 1410.12, lands with existing tree cover that are owned by a private non-industrial forest landowner and which were damaged by hurricanes occurring in calendar year 2005.

*Private non-industrial forest landowner* means, for purposes of § 1410.12, an individual, group, association, corporation, Indian Tribe, other legal private entity, or State School Trust, owning non-industrial private forest land or who

receives concurrence from the landowner for making the claim in lieu of the owner, and for practice implementation and who holds a lease on the land for a minimum of 10 years. Corporations whose stocks are publicly traded or owners or lessees principally engaged in the primary processing of raw wood products are excluded from this definition. An owner of land leased to a lessee shall also be excluded who should be excluded under the previous sentence.

*Retired or retiring owner or operator* means an owner or operator of land enrolled in a CRP contract who has ended active labor in farming operations as a producer of agricultural crops or expects to do so within 5 years of the CRP contract modification.

*Riparian buffer* means a strip or area of vegetation adjacent to a river or stream of sufficient width as determined by the Deputy Administrator to remove nutrients, sediment, organic matter, pesticides, and other pollutants from surface runoff and subsurface flow by deposition, absorption, plant uptake, and other processes, thereby reducing pollution and protecting surface water and subsurface water quality, which are also intended to provide shade to reduce water temperature for improved habitat for aquatic organisms and supply large woody debris for aquatic organisms and habitat for wildlife.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Gender is not included as a covered group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

(1) American Indians or Alaskan Natives,

(2) Asians or Asian-Americans,

(3) Blacks or African Americans,

(4) Hispanics, and

(5) Native Hawaiians or other Pacific Islanders.

*Soil loss tolerance (T)* means the maximum average annual erosion rate specified in the FOTG that will not adversely impact the long-term productivity of the soil.

*State* means State agencies, departments, districts, county or city governments, municipalities or any other State or local government of the State.

*State school trust land* means land owned by a State with the explicit purpose of supporting public schools.

*State Technical Committee* means a committee established pursuant to part 610 of this chapter to provide information, analysis, and recommendations to the U.S. Department of Agriculture.

*State water quality priority areas* means any area so designated by the State committee, in consultation with the State Technical Committee, where agricultural pollutants contribute to water degradation or create the potential for failure to meet applicable water quality standards or the goals and requirements of Federal or State water quality laws. These areas may include areas designated under section 319 of the Federal Water Pollution Control Act (33 U.S.C. 1329) as water quality protection areas, sole source aquifers or other designated areas that result from agricultural nonpoint sources of pollution. Acreage in these areas may be determined eligible as conservation priority areas.

*Technical assistance* means assistance in regard to determining the eligibility of land and practices, implementing and certifying practices, ensuring contract performance, and providing annual rental rate surveys. The technical assistance provided in connection with CRP to owners or operators, as approved by CCC, includes technical expertise, information, and tools necessary for the conservation of natural resources on land; technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and, technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Violation* means an act by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible for all or a portion of cost-share, incentive, or annual contract payments.

*Water Bank Program (WBP)* means the program authorized by the Water Bank Act of 1970, as amended, in which eligible persons enter into 10-year agreements to preserve, restore, and improve wetlands.

*Water cover* means flooding of land by water either to develop or restore shallow water areas for wildlife or wetlands, or as a result of a natural disaster.

*Wellhead protection area* means the area designated by EPA or the appropriate State agency with an Environmental Protection Agency approved Wellhead Protection Program for water being drawn for public use, as defined for public use by the Safe Drinking Water Act, as amended.

*Wetland* means land defined as wetland in accordance with provisions of part 12 of this title.

*Wetlands farmed under natural conditions* means land defined as wetlands farmed under natural conditions in accordance with provisions of part 12 of this title.

*Wetlands Reserve Program (WRP)* means the program authorized by part 1467 of this chapter in which eligible persons enter into long-term agreements to restore and protect wetlands.

[68 FR 24835, May 8, 2003, as amended at 69 FR 26763, May 14, 2004; 71 FR 31917, Jun 2, 2006; 74 FR 30911, June 29, 2009; 75 FR 27168, May 14, 2010; 75 FR 44071, July 28, 2010]

### § 1410.3 General description.

(a) Under the CRP, CCC will enter into contracts with eligible participants to convert eligible land to a conserving use during the contract period in return for financial and technical assistance.

(b) A participant must obtain and adhere to a conservation plan prepared in accordance with CRP guidelines, as established and determined by CCC. A conservation plan for eligible acreage must be obtained by a participant and must be approved by the conservation district in which the lands are located unless the conservation district declines to review the plan, in which case the provider of technical assistance may take such further action as is needed to account for lack of such review.

(c) The objectives of the CRP are to cost-effectively reduce water and wind erosion, protect the Nation's long-term capability to produce food and fiber, reduce sedimentation, improve water quality, create and enhance wildlife habitat, and other objectives including, as appropriate, addressing issues raised by State, regional, and national conservation initiatives and encouraging more permanent conservation practices, such as, but not limited to, tree planting.

(d) Except as otherwise provided, a participant may, in addition to any payments under this part, receive cost-share assistance, rental or easement payments, tax benefits, or other payments from a State or a private organization in return for enrolling lands in CRP. However, a participant may not receive or retain CRP cost-share assistance if other Federal cost-share assistance is provided for such acreage under any law, as determined by the Deputy Administrator. Further, under no circumstances may the cost-share payments received under this part, or otherwise, exceed the cost of the practice, as determined by CCC.

[68 FR 24835, May 8, 2003, as amended at 74 FR 30912, June 29, 2009]

### § 1410.4 Maximum county acreage.

(a) Except as provided in paragraph (b) of this section, the maximum acreage that may be placed in the CRP and the WRP may not exceed 25 percent of the total cropland in the county; further, no more than 10 percent of the cropland may be subject, in the aggregate, to a CRP or WRP easement.

(b) The restrictions in paragraph (a) of this section may be waived by CCC as follows:

(1) If CCC determines that such action would not adversely affect the local economy of the county and that operators in the county are having difficulties complying with conservation plans implemented under part 12 of this title; or

(2) Cropland in a county enrolled under continuous signup provisions as

specified in § 1410.30 or § 1410.50 may be excluded from the restrictions in paragraph (a) of this section, as determined by CCC, provided that the county government concurs.

(c) These restrictions on participation shall be in addition to any other restriction imposed by law.

[68 FR 24835, May 8, 2003, as amended at 75 FR 44071, July 28, 2010]

### § 1410.5 Eligible persons.

(a) In order to be eligible to enter into a CRP contract in accordance with this part, a person must be an owner, operator, or tenant of eligible land and:

(1) If an operator of eligible land, seeking to participate without the owner, must have operated such land for at least 12 months prior to the close of the applicable signup period and must provide satisfactory evidence that such operator will be in control of such eligible land for the full term of the CRP contract period;

(2) If an owner of eligible land, must have owned such land for at least 12 months prior to the close of the applicable signup period, unless:

(i) The new owner acquired such land by will or succession as a result of the death of the previous owner;

(ii) The only ownership change in the 12-month period occurred due to foreclosure on the land and the owner of the land, immediately before the foreclosure, exercises a timely right of redemption from the mortgage holder in accordance with State law; or

(iii) As determined by the Deputy Administrator, the circumstances of the acquisition are such that present adequate assurance that the new owner of such eligible land did not acquire such land for the purpose of placing it in the CRP; or

(3) If a tenant, the tenant is a participant with an eligible owner or operator.

(b) Notwithstanding paragraph (a) of this section, under continuous signup provisions authorized by § 1410.30, an otherwise eligible person must have owned or operated, as appropriate, the eligible land for at least 12 months before submitting the offer.

(c) The provisions of this section do not apply to beginning or socially disadvantaged farmers or ranchers who are eligible participants in the Transition Incentives Program as specified in § 1410.64.

[68 FR 24835, May 8, 2003, as amended at 75 FR 27169, May 14, 2010]

### § 1410.6 Eligible land.

(a) In order to be eligible to be placed in the CRP, land must be one of the following:

(1) Cropland that is subject to a conservation plan and has been annually planted or considered planted, as defined in § 1410.2, to an agricultural commodity in 4 of the 6 crop years from 2002 through 2007, as determined by the CCC, provided further that field margins that are incidental to the planting of crops may also be considered qualifying cropland to the extent determined appropriate by the CCC; and is physically and legally capable of being planted in a normal manner to an agricultural commodity, as determined by the CCC; or

(2) Marginal pasture land, as determined by the CCC, that:

(i) Is determined to be suitable for use as a riparian buffer or is made eligible in a CREP for similar water quality purposes as determined by the CCC. A field or portion of a field of marginal pasture land may be considered to be suitable for use as a riparian buffer only if, as determined by CCC, it:

(A) Is located adjacent to permanent stream corridors excluding corridors that are considered gullies or sod waterways; and

(B) Is capable, when permanent grass, forbs, shrubs, or trees, are grown, or when planted with appropriate vegetation for the area, including vegetation suitable for wetland restoration or wildlife habitat, as determined appropriate by the CCC, of substantially reducing sediment and/or nutrient runoff that otherwise would be delivered to the adjacent stream or waterbody or for water quality purposes; or

(ii) [Reserved]

(3) Must be acreage enrolled in the CRP during the final year of the CRP contract provided the scheduled expiration date of the current CRP contract is before the effective date the new CRP contract, as determined by the CCC.

(b) Land qualifying under paragraphs (a)(1) or (a) (2) of this section must also meet one of the following criteria, to be eligible for a contract:

(1) Be a field or portion of a field determined to be suitable for use, as determined by the CCC, as a permanent wildlife habitat, filter strip, riparian buffer, contour grass strip, grass waterway, field windbreak, shelterbelt, living snowfence, other uses as determined by the CCC, land devoted to vegetation on salinity producing areas, including any applicable recharge area, or any area determined eligible for CRP based on wetland or wellhead protection area criteria. A field or portion of a field may be considered to be suitable for use as a filter strip or riparian buffer only if it, as determined by CCC:

(i) Is located adjacent to a stream, other waterbody of a permanent nature (such as a lake, pond, or sinkhole), or wetland; excluding such areas as gullies or sod waterways; and

(ii) Is capable, when permanent grass, forbs, shrubs or trees are grown, of substantially reducing sediment or nutrient runoff that otherwise would be delivered to the adjacent stream or waterbody;

(2) Be a field that has evidence of scour erosion caused by out-of-bank flows of water, as determined by CCC:

(i) In addition, such land must:

(A) Be expected to flood a minimum of once every 10 years; and

(B) Have evidence of scour erosion as a result of such flooding.

(ii) To the extent practicable, be the actual affected cropland areas of a field; however, the entire cropland area of an eligible field may be enrolled if:

(A) The size of the field is 9 acres or less; or

(B) More than one third of the cropland in the field is land that lies between the water source and the inland limit of the scour erosion.

(iii) Or, if the full field is not eligible for enrollment under this paragraph, be the cropland between the waterbody and inland limit of the scour erosion together with, as determined by the CCC, additional areas that would otherwise be unmanageable and would be isolated by the eligible areas.

(iv) Be planted to an appropriate tree species according to the FOTG, unless tree planting is determined to be inappropriate by NRCS, in consultation with the Forest Service, in which case the eligible cropland shall be devoted to another acceptable permanent vegetative cover in accordance with the FOTG;

(3) Be cropland that would facilitate a net savings in groundwater or surface water of the agricultural operation of the producer as determined by CCC;

(4) Be cropland in a portion of a field not enrolled in the CRP, if more than 50 percent of the remainder of the field is enrolled as a buffer practice, if the portion of the field not enrolled in the CRP will be enrolled as part of the buffer practice, and if as determined by CCC:

(i) The remainder of the field is infeasible to farm; and

(ii) The remainder of the field is enrolled at an annual payment rate not to exceed the maximum annual calculated soil rental rate;

(5) Be contributing to the degradation of water quality or posing an on-site or off-site environmental threat to water quality if such land remains in production;

(6) Be devoted to certain covers, as determined by the CCC, that are established and maintained according to the FOTG, provided such acreage is not required to be maintained as such under any life-span obligations, as determined by the CCC;

(7) Be non-irrigated or irrigated cropland that produces or serves as the recharge area, as determined by the CCC, for saline seeps, or acreage that is functionally related to such saline seeps, or where a rising water table contributes to increased levels of salinity at or near the ground surface;

(8) Have an EI of greater than or equal to 8 calculated by using the weighted average of the EI's of soil map units within the field;

(9) Be within a public wellhead protection area;

(10) Be within a designated conservation priority area;

(11) Be designated as a cropped wetland and appropriate associated acreage, as determined by the CCC;

(12) Be cropland that, as determined by the CCC, is associated with noncropped wetlands and would provide significant environmental benefits; or

(13) Notwithstanding paragraph (a)(1) of this section, be cropland devoted to a perennial crop, as determined by CCC; such cropland will only be eligible for continuous signup practices authorized by § 1410.30 and CREP practices authorized by § 1410.50(b).

(c) Notwithstanding paragraphs (a) and (b) of this section, land shall be ineligible for enrollment if, as determined by the CCC, land is:

(1) Federally-owned land unless the applicant has a lease for the contract period;

(2) Land on which the use of the land is restricted through deed or other restriction prior to enrollment in CRP prohibiting the production of agricultural commodities during any part of the contract term except for eligible land under paragraph (a)(2) and (3) of this section, as determined by CCC; or

(3) Land already enrolled in the CRP unless authorized by § 1410.6(a)(3), as determined by the CCC.

[68 FR 24835, May 8, 2003, as amended at 69 FR 26763, May 14, 2004; 75 FR 44071, July 28, 2010]

### § 1410.7 Duration of contracts.

(a) Except as provided in paragraphs (b) or (c) of this section, contracts under this part shall be for a term of 10 years.

(b) In the case of land devoted to riparian buffers, filter strips, restoration of wetlands, hardwood trees, shelterbelts, windbreaks, wildlife corridors, or other practices deemed appropriate by CCC under the original terms of a contract subject to this part or for land devoted to eligible practices under a contract modified under § 1410.10, the participant may specify the duration of the contract between 10 years and 15 years in length.

(c) All contracts shall expire on September 30 of the appropriate year.

### § 1410.8 Conservation priority areas.

(a) CCC may designate National conservation priority areas according to paragraph (c) of this section.

(b) Subject to CCC review, State FSA committees, in consultation with NRCS and the State Technical Committee, may designate conservation priority areas within guidelines established by the Deputy Administrator. Such designation must clearly define conservation and environmental objectives and provide analysis of how CRP can cost-effectively address such objectives. Generally, the total acreage of all conservation priority areas, in aggregate, shall not total more than 33 percent of the cropland in a State unless there are identified and documented extraordinary environmental needs, as determined by the Deputy Administrator.

(c) As determined by the Deputy Administrator, a region shall be eligible for designation as a priority area only if the region has actual significant adverse water quality, air quality, wildlife habitat, or other natural resource impacts related to activities of agricultural production, or if the designation helps agricultural producers to comply with Federal and State environmental laws.

(d) Conservation priority area designations shall expire after 5 years unless re-designated, except they may be withdrawn:

(1) At the request of the appropriate State water quality agency; or

(2) By the Deputy Administrator.

(e) In those areas designated as conservation priority areas, under this section, cropland is considered eligible for enrollment according § 1410.6(b)(10) based on identified environmental concerns. These concerns may include water quality, such as assisting agricultural producers to comply with nonpoint source pollution requirements, air quality, or wildlife habitat (especially for threatened and endangered species or those species that may become threatened and endangered), as determined by the Deputy Administrator.

### § 1410.9 Conversion to trees.

An owner or operator who has entered into a CRP contract prior to November 28, 1990, may elect to convert areas of highly erodible cropland, subject to such contract, that is devoted to permanent vegetative cover, from such cover to hardwood trees, (including alley cropping and riparian buffers

of hardwood trees, where permitted by CCC), windbreaks, shelterbelts, or wildlife corridors.

(a) For any contract modified under this section, the participant may elect to extend such contract in accordance with the provisions of § 1410.7(b).

(b) For any contract modified under this section in which such areas are converted to windbreaks, shelterbelts, or wildlife corridors, the owner must agree to maintain such plantings for a time period established by the Deputy Administrator at the time of the contract modification.

(c) CCC shall, as it determines appropriate, pay up to 50 percent of the eligible cost of establishing new conservation measures authorized under this section, except that the total cost-share paid under such contract, including cost-share assistance paid when the original cover was established, may not exceed the amount by which CCC would have paid had such land been originally devoted to such new conservation measures.

(d) For any contract modified under this section, the participant must participate in the Forest Stewardship Program (16 U.S.C. 2103a).

### § 1410.10 Restoration of wetlands.

(a) An owner or operator who entered into a CRP contract on land that is suitable for restoration to wetlands or that was restored to wetlands while under such contract, may, if approved by CCC, subject to any restrictions as may be imposed by law, apply to transfer such eligible acres subject to such contract that are devoted to an approved cover from the CRP to the WRP. Transferred acreage shall be terminated from the CRP effective the day a WRP easement is filed. Participants will receive a prorated CRP annual payment for that part of the year the acreage was enrolled in the CRP according to § 1410.42. Refunds of cost-share payments or applicable incentive payments need not be refunded unless specified by the Deputy Administrator.

(b) An owner or operator who has enrolled acreage in the CRP may, as determined and approved by CCC, restore suitable acres to wetlands with cost-share assistance provided that Federal cost-share assistance has not been received for wetland restoration on the same land. In addition to the cost-share limitation in § 1410.41, an additional one-time financial incentive may be provided to encourage restoration of the hydrology of the site.

### § 1410.11 Farmable Wetlands Program.

(a) In addition to other allowable enrollments, land may be enrolled in this program through the Farmable Wetlands Program (FWP) within the overall Conservation Reserve Program provided for in this part.

(b) As determined by CCC, eligible owners and operators may enroll land in FWP provided that the land:

(1) Is a wetland, including a converted wetland, as determined by CCC, that has been planted or considered planted to an agricultural commodity, as defined in § 1410.2, in 3 of the 10 most recent crop years and that does not exceed the size limitations of this section;

(2) Is enrolled to be a constructed wetland that is to be developed to receive flow from a row crop agriculture drainage system and is designed to provide nitrogen removal in addition to other wetland functions and that does not exceed the size limitations of this section;

(3) Was a commercial pond-raised aquaculture facility in any year during the period of calendar years 2002 through 2007; or

(4) Was cropped, after January 1, 1990, and before December 31, 2002, at least 3 of 10 crop years, was subject to the natural overflow of a prairie wetland, and does not exceed the size limitations of this section.

(c) In addition, land may be enrolled in FWP if the land is buffer acreage that provides protection for and is contiguous to land otherwise eligible under paragraphs (b)(1), (b)(2), or (b)(4) of this section, subject to other provisions of this section.

(d) Total enrollment in CRP under this section may not exceed 1 million acres. In addition, the maximum size of a land enrolled under this section may not exceed, as determined by CCC:

(1) 40 contiguous acres for land made eligible by paragraph (b)(1) of this section;

(2) 40 contiguous acres for land made eligible by paragraph (b)(2) of this section;

(3) 20 contiguous acres for land made eligible by paragraph (b)(4) of this section; or

(4) A suitable buffer as determined by the Deputy Administrator for lands added under paragraph (c) of this section.

(e) All participants subject to a CRP contract under this section must agree to establish and maintain, as appropriate, the practice described in paragraph (b) of this section to the maximum extent possible, as determined by CCC, in accordance with NRCS FOTG including, as appropriate, restoring the hydrology of the wetland and establishing vegetative cover (which may include emerging vegetation in water and bottomland hardwoods, cypress, and other appropriate tree species in shallow water areas), as determined by CCC.

(f) Offers for contracts under this section must be submitted under continuous signup provisions as authorized in § 1410.30.

(g) Except as otherwise determined by CCC, all other requirements of this part apply to enrollments under this section, and CCC may add such other requirements or conditions as it deems necessary. Such additional conditions include, but are not limited to, payment limitations, adjusted gross income limitations, and limitations on the amount of acreage that can be enrolled in any one county.

[74 FR 30912, June 29, 2009]

### § 1410.12 Emergency Forestry Program.

(a) In addition to other allowable enrollments, certain non-industrial private forest land located in Presidential- or Secretarial-declared primary disaster counties that suffered damage from hurricanes in calendar year 2005 may be enrolled through the Emergency Forestry Conservation Reserve Program (EFCRP) provided for in this section.

(b) Owners and/or operators may enroll non-industrial private forest land, as defined in § 1410.2, in the CRP provided that the private non-industrial forest land:

(1) Has merchantable timber (timber on land on which the average tree has a trunk diameter of at least six inches measured at a point no less than four and one-half feet above the ground); and

(2) Has experienced a loss of 35 percent or more of merchantable timber in a 2005 calendar year hurricane-affected county due to 2005 hurricanes.

(c) The provisions of § 1410.4 do not apply to this section.

(d) Any overall acreage enrollment limit imposed on CRP shall not apply to acreage enrolled under this section.

(e) All participants subject to a CRP contract entered into pursuant to this section must agree:

(1) To restore the land, through site preparation and planting of, to the maximum extent practicable, native species or similar species as existing prior to hurricane damages as may be specified in the contract, and comply with other requirements as may be specified in the contract;

(2) To establish temporary vegetative cover; and

(3) That the contract term shall be for a period of 10 years, during which time standing timber may not be harvested from the enrolled land except as may be approved by CCC in the conservation plan as part of the normal maintenance of the forest land.

(f) Offers for contracts under this section shall be submitted under continuous signup provisions as authorized in § 1410.30.

(g) In evaluating contract offers to which this section applies, different factors, as determined by CCC, may be considered for priority purposes. These include but are not limited to soil erosion prevention, water quality improvement, wildlife habitat restoration, and mitigation of economic loss.

(h) In return for a contract entered into under this paragraph, a participant may opt for:

(1) Annual rental payments authorized by § 1410.42, except that the payment rate shall be equal to:

(i) The average rental rate for CRP contracts in the county in which the land is actually located; or

(ii) In the case where no CRP contracts are enrolled in a county, the average rental rate will be the CRP rate

applicable to a nearby similarly-situated county.

(2) In lieu of the annual payments provided for in paragraph (h)(1) of this section, lump sum payment equal to the present value of the total amount of annual rental payments that would otherwise be paid under paragraph (h)(1) of this section.

(i) Cost-share assistance authorized under §1410.40 may be reduced by the value of salvaged timber or timber products which are removed to prepare the site for replanting.

(j) The provisions of §1410.7(c), which concern enrollment limits, do not apply to contracts to which this section applies.

(k) To avoid duplicate payments, participants under this section are not eligible to receive EFCRP funding for land on which the participant has or will receive funding under any other program that covers the same expenses.

(l) All other requirements of this part shall apply to enrollments under this section.

[71 FR 31917, Jun 2, 2006]

### §§ 1410.13–1410.19 [Reserved]

### § 1410.20 Obligations of participant.

(a) All participants subject to a CRP contract must agree to:

(1) Carry out the terms and conditions of such CRP contract;

(2) Implement the conservation plan, which is part of such contract, in accordance with the schedule of dates included in such conservation plan unless the Deputy Administrator determines that the participant cannot fully implement the conservation plan for reasons beyond the participant's control, and CCC agrees to a modified plan. However, a contract will not be terminated for failure to establish an approved vegetative or water cover on the land if, as determined by the Deputy Administrator:

(i) The failure to plant or establish such cover was due to excessive rainfall, flooding, or drought;

(ii) The land subject to the contract on which the participant could practicably plant or establish to such cover is planted or established to such cover; and

(iii) The land on which the participant was unable to plant or establish such cover is planted or established to such cover after the wet or drought conditions that prevented the planting or establishment subside;

(3) Establish temporary vegetative cover either when required by the conservation plan or, as determined by the Deputy Administrator, if the permanent vegetative cover cannot be timely established;

(4) Comply with part 12 of this title;

(5) Not allow grazing, harvesting, or other commercial use of any crop from the cropland subject to such contract except for those periods of time approved in accordance with instructions issued by the Deputy Administrator;

(6) Establish and maintain the required vegetative or water cover and the required practices on the land subject to such contract and take other actions that may be required by CCC to achieve the desired environmental benefits and to maintain the productive capability of the soil throughout the contract period;

(7) Comply with noxious weed laws of the applicable State or local jurisdiction on such land;

(8) Control on land subject to such contract all weeds, insects, pests and other undesirable species to the extent necessary to ensure that the establishment and maintenance of the approved cover as necessary or may be specified in the CRP conservation plan and to avoid an adverse impact on surrounding land, taking into consideration water quality, wildlife, and other needs, as determined by the Deputy Administrator; and

(9) Be jointly and severally responsible, if the participant has a share of the payment greater than zero, with the other contract participants in compliance with the provisions of such contract and the provisions of this part and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the CRP contract and this part.

### § 1410.21 Obligations of the Commodity Credit Corporation.

CCC shall, subject to the availability of funds:

(a) Share up to 50 percent of the cost with participants of establishing eligible practices specified in the conservation plan at the levels and rates of cost-sharing determined in accordance with the provisions of this part; and

(b) Pay to the participant for a period of years not in excess of the contract period an annual rental payment, including applicable incentive payments, in such amounts as may be specified in the CRP contract.

### § 1410.22 CRP conservation plan.

(a) The producer shall obtain a CRP conservation plan that complies with CCC guidelines and is approved by the conservation district for the land to be entered in the CRP. If the conservation district declines to review the CRP conservation plan, or disapproves the conservation plan, such approval may be waived by CCC.

(b) The practices and management activities included in the CRP conservation plan and agreed to by the participant must cost-effectively reduce erosion necessary to maintain the productive capability of the soil, improve water quality, protect wildlife or wetlands, protect a public well head, or achieve other environmental benefits as applicable. The producer must undertake management activities on the land as needed throughout the term of the CRP contract to implement the conservation plan.

(c) If applicable, a tree planting plan shall be developed and included in the CRP conservation plan. Such tree planting plan may allow up to 3 years to complete plantings if 10 or more acres of hardwood trees are to be established.

(d) If applicable, the CRP conservation plan shall address the goals included in the conservation priority area designation authorized under § 1410.8.

(e) All CRP conservation plans and revisions of such plans shall be subject to the approval of CCC.

(f) Mid-cover management shall be conducted according to an approved conservation plan as part of the CRP contractual obligation such as light discing and burning as determined by the Deputy Administrator.

[68 FR 24835, May 8, 2003, as amended at 74 FR 30912, June 29, 2009]

### § 1410.23 Eligible practices.

(a) Eligible practices are those practices specified in the conservation plan that meet all standards needed to cost-effectively:

(1) Establish permanent vegetative or water cover, including introduced or native species of grasses and legumes, forest trees, and permanent wildlife habitat;

(2) Meet other environmental benefits, as applicable, for the contract period; and

(3) Accomplish other purposes of the program.

(b) Water cover is eligible cover for purposes of paragraph (a) of this section only if approved by the Deputy Administrator for purposes such as the enhancement of wildlife or the improvement of water quality. Such water cover shall not include ponds for the purpose of watering livestock, irrigating crops, or raising aquiculture for commercial purposes.

### §§ 1410.24–1410.29 [Reserved]

### § 1410.30 Signup.

Offers for contracts shall be submitted only during signup periods as announced periodically by the Deputy Administrator, except that CCC may hold a continuous signup for land to be devoted to particular uses, as CCC deems necessary. Generally, continuous signup is limited to those offers that would otherwise rank highly under § 1410.31(b) and may include high priority practices such as filter strips, riparian buffers, shelterbelts, field windbreaks, and living snow fences, grass waterways, shallow water areas for wildlife, salt-tolerant vegetation, and practices to benefit certain approved public wellhead protection areas.

### § 1410.31 Acceptability of offers.

(a) Except as provided in paragraph (c) of this section, producers may submit offers for the amounts they are willing to accept as rental payments to

enroll their acreage in the CRP. The offers may, to the extent practicable, be evaluated on a competitive basis in which the offers selected will be those where the greatest environmental benefits relative to cost are generated, and provided that the offer is not in excess of the maximum acceptable payment rate established by the Deputy Administrator for the for the area offered. Acceptance or rejection of any offer, however, shall be in the sole discretion of the CCC and offers may be rejected for any reason as determined needed to accomplish the goals of the program.

(b) In evaluating contract offers, different factors, as determined by CCC, may be considered from time to time for priority purposes to accomplish the goals of the program. Such factors may include, but are not limited to:

(1) Soil erosion;

(2) Water quality (both surface and ground water);

(3) Wildlife benefits;

(4) Soil productivity;

(5) Likelihood that enrolled land will remain in non-agriculture use beyond the contract period, considering, for example, tree planting, permanent wildlife habitat, or commitments by a participant to a State or other entity to extend the conservation plan;

(6) Air quality; and

(7) Cost of enrolling acreage in the program.

(c) Notwithstanding paragraph (b) of this section, when all other appropriate factors are equivalent, CCC may give preference to offers from residents of the county or contiguous county where the offered land is located.

(d) Acreage determined eligible for continuous signup, as provided in § 1410.30, may be automatically accepted in the program if the:

(1) Land is eligible under § 1410.6, as determined by the Deputy Administrator;

(2) A producer is eligible under § 1410.5; and

(3) A producer accepts either the maximum payment rate CCC is willing to offer to enroll the acreage in the program or a lesser rate.

[68 FR 24835, May 8, 2003, as amended at 75 FR 44071, July 28, 2010]

**§ 1410.32 CRP contract.**

(a) In order to enroll land in the CRP, the participant must enter into a contract with CCC.

(b) The CRP contract is comprised of:

(1) The terms and conditions for participation in the CRP;

(2) The CRP conservation plan; and

(3) Any other materials or agreements determined necessary by CCC.

(c)(1) In order to enter into a CRP contract, the producer must submit an offer to participate as provided in § 1410.30;

(2) An offer to enroll land in the CRP shall be irrevocable for such period as is determined and announced by CCC. The producer shall be liable to CCC for liquidated damages if the applicant revokes an offer during the period in which the offer is irrevocable as determined by the Deputy Administrator. CCC may waive payment of such liquidated damages if CCC determines that the assessment of such damages, in a particular case, is not in the best interest of CCC and the program.

(d) The CRP contract must, within the dates established by CCC, be signed by:

(1) The producer; and

(2) The owners of the cropland to be placed in the CRP and other eligible participants, if applicable.

(e) The Deputy Administrator is authorized to approve CRP contracts on behalf of CCC.

(f) CRP contracts may be terminated by CCC before the full term of the contract has expired if:

(1) The owner loses control of or transfers all or part of the acreage under contract and the new owner does not wish to continue the contract;

(2) The participant voluntarily requests in writing to terminate the contract and obtains the approval of CCC according to terms and conditions as determined by CCC;

(3) The participant is not in compliance with the terms and conditions of the contract;

(4) Acreage is enrolled in another Federal, State or local conservation program;

(5) The CRP practice fails or is not established after a certain time period, as determined by the Deputy Administrator, and the cost of restoring the

practice outweighs the benefits received from the restoration;

(6) The CRP contract was approved based on erroneous eligibility determinations; or

(7) CCC determines that such a termination is needed in the public interest.

(g)(1) Contracts for land enrolled in CRP before January 1, 1995, that have been continuously in effect may be unilaterally terminated by all CRP participants on a contract except for contract acreage:

(i) Located within a certain distance determined appropriate by the applicable FOTG of a perennial stream, or other permanent waterbody to reduce pollution and to protect surface and subsurface water quality;

(ii) On which a CRP easement is filed;

(iii) That is considered to be a wetland by USDA according to part 12 of this title;

(iv) Located within a wellhead protection area;

(v) That is subject to frequent flooding, as determined by the Deputy Administrator;

(vi) That may be required to serve as a wetland buffer according to the FOTG to protect the functions and values of a wetland; or

(vii) On which there exist one or more of the following practices, installed or developed as a result of participation in the CRP or as otherwise required by the conservation plan:

(A) Grass waterways;

(B) Filter strips;

(C) Shallow water areas for wildlife;

(D) Bottom land timber established on wetlands;

(E) Field windbreaks; and

(F) Shelterbelts.

(2) With respect to terminations under this paragraph:

(i) Any land for which an early termination is sought by the participant must have an EI of 15 or less;

(ii) The termination shall become effective 60 days from the date the participant submits notification to CCC of the participant's desire to terminate the contract;

(iii) Acreage terminated under this provision is eligible to be re-offered for CRP during future signup periods, provided that the acreage otherwise meets the current eligibility criteria; and

(iv) Participants must meet conservation compliance requirements of part 12 of this title to the extent applicable to other land.

(h) Except as allowed and approved by CCC where the new owner of land enrolled in CRP is a Federal agency that agrees to abide by the terms and conditions of the terminated contract, the participant in a contract that has been terminated must refund all or part of the payments made with respect to the contract plus interest thereon, as determined by CCC, and shall pay liquidated damages as provided for in the contract. CCC may permit the amount to be repaid to be reduced to the extent that such a reduction will not impair the purposes of the program. Further, a refund of all payments need not be required from a participant who is otherwise in full compliance with the CRP contract when the land is purchased by or for the United States, as determined by CCC.

### § 1410.33 Contract modifications.

(a) As agreed between CCC and the participant, a CRP contract may be modified in order to:

(1) Decrease acreage in the CRP;

(2) Permit the production of an agricultural commodity under extraordinary circumstances during a crop year on all or part of the land subject to the CRP contract as determined by the Deputy Administrator;

(3) Facilitate the practical administration of the CRP;

(4) During the final year of the CRP contract's term, facilitate a transition of land subject to the contract from a retired or retiring owner or operator to a beginning or socially-disadvantaged farmer or rancher for the purpose of returning some or all of the land into production using sustainable grazing or crop production methods; provided that for this purpose "sustainable grazing and crop production methods" will be considered, as determined by the Deputy Administrator, to be methods that would be designed as part of an overall plan defined on an ecosystem level to be useful in the creation of integrated systems of plant and animal production practices that have a site specific application that would:

(i) Meet human needs for food and fiber;

(ii) Enhance the environment and the natural resource base;

(iii) Use nonrenewable resources efficiently; and

(iv) Sustain the economic viability of farming operation; or

(5) Accomplish the goals and objectives of the CRP, as determined by the Deputy Administrator.

(b) CCC may modify CRP contracts to add, delete, or substitute practices when, as determined by the Deputy Administrator:

(1) The installed practice failed to adequately provide for the desired environmental benefit through no fault of the participant; or

(2) The installed measure deteriorated because of conditions beyond the control of the participant; and

(3) Another practice will achieve at least the same level of environmental benefit.

(c) Offers to extend contracts may be made as allowed by law.

(d) CCC may terminate a CRP contract if the participant agrees to such termination and CCC determines such termination to be in the public interest.

[68 FR 24835, May 8, 2003, as amended at 75 FR 27169, May 14, 2010]

### §§ 1410.34–1410.39 [Reserved]

### § 1410.40 Cost-share payments.

(a) Cost-share payments shall be made available upon a determination by CCC that an eligible practice, or an identifiable unit thereof, has been established in compliance with the appropriate standards and specifications.

(b) Except as otherwise provided for in this part, cost-share payments may be made only for the cost-effective establishment or installation of an eligible practice, as determined by CCC.

(c) Except as provided in paragraph (d) of this section, cost-share payments shall not be made to the same owner or operator on the same acreage for any eligible practices that have been previously established, or for which such owner or operator has received cost-share assistance from any Federal agency.

(d) Except as provided for under § 1410.9(c), cost-share payments may be authorized for the replacement or restoration of practices for which cost-share assistance has been previously allowed under the CRP, only if:

(1) Replacement or restoration of the practice is needed to achieve adequate erosion control, enhance water quality, wildlife habitat, or increase protection of public wellheads; and

(2) The failure of the original practice was due to reasons beyond the control of the participant.

(e) The cost-share payment made to a participant shall not exceed the participant's actual contribution to the cost of establishing the practice and the amount of the cost-share may not be an amount that, when added to such assistance from other sources, exceeds the cost of the practices.

(f) CCC shall not make cost-share payments with respect to a CRP contract if any other Federal cost-share assistance has been, or is being, made with respect to the establishment of the cover crop on land subject to such contract.

(g) CCC may make cost-share payments for thinning of existing tree stands to benefit wildlife habitat and other resource conditions on enrolled land, as determined by CCC.

[68 FR 24835, May 8, 2003, as amended at 74 FR 30912, June 29, 2009]

### § 1410.41 Levels and rates for cost-share payments.

(a) As determined by the Deputy Administrator, CCC shall not pay more than 50 percent of the actual or average cost of establishing eligible practices specified in the conservation plan. CCC may allow cost-share payments for maintenance costs, consistent with the provisions of § 1410.40 and CCC may determine the period and amount of such cost-share payments.

(b) The average cost of performing a practice may be determined by CCC based on recommendations from the State Technical Committee. Such cost may be the average cost in a State, a county, or a part of a State or county, as determined by the Deputy Administrator.

(c) Except as otherwise provided, a participant may, in addition to any

payment under this part, receive cost-share assistance, rental payments, or tax benefits from a State or a private organization in return for enrolling lands in CRP. However, as provided under § 1410.40(f), a participant may not receive or retain CRP cost-share assistance if other Federal cost-share assistance is provided for such acreage, as determined by the Deputy Administrator. Further, under no circumstances may the cost-share payments received under this part, or otherwise, exceed the cost of the practice, as determined by CCC.

### § 1410.42 Annual rental payments.

(a) Subject to the availability of funds, annual rental payments shall be made in such amount and in accordance with such time schedule as may be agreed upon and specified in the CRP contract.

(b) Annual rental payments, except for land accepted that was formerly enrolled under the WBP, include a payment based on a weighted average soil rental rate or marginal pastureland rental rate, as appropriate, and an incentive payment as a portion of the annual payment of certain practices, as determined by the Deputy Administrator. Payments for land accepted that was formerly enrolled under the WBP are limited to annual rental payments received under the WBP.

(c) The annual rental payment shall be divided among the participants on a single contract as agreed to in such contract.

(d) The maximum amount of rental payments that a person or legal entity may receive, directly or indirectly, under CRP for any fiscal year must not exceed $50,000. The regulations in part 1400 of this chapter will be applicable for determining whether the limit has been exceeded.

(e) In the case of a contract succession, annual rental payments shall be divided between the predecessor and the successor participants as agreed to among the participants and approved by CCC. If there is no agreement among the participants, annual rental payments shall be divided in such manner deemed appropriate by the Deputy Administrator and such distribution may be prorated based on the actual days of ownership of the property by each party.

(f) CCC shall, when appropriate, prepare a schedule for each county that shows the maximum soil rental rate CCC may pay which may be supplemented to reflect special contract requirements. As determined by the Deputy Administrator, such schedule will be calculated based on the relative productivity of soils within the county using NRCS data and local FSA average cash rental estimates. The schedule will be available in the local FSA office and, as determined by the Deputy Administrator, shall indicate, when appropriate, that:

(1) Offers of contracts by producers who request rental payments greater than the schedule for their soil(s) will be rejected;

(2) Offers of contracts submitted under continuous signup authorized at § 1410.30 may be accepted without further evaluation when the requested rental rate is less than or equal to the calculated weighted soil rental rate, based on the three predominant soils listed; and

(3) Otherwise qualifying offers shall be ranked competitively based on factors established under § 1410.31 of this part in order to provide the most cost-effective environmental benefits, as determined by the Deputy Administrator.

(g) Additional financial incentives may be provided to producers who offer contracts expected to provide especially high environmental benefits, as determined by the Deputy Administrator.

[68 FR 24835, May 8, 2003, as amended at 74 FR 30912, June 29, 2009]

### § 1410.43 Method of payment.

Except as provided in § 1410.50, payments made by CCC under this part may be made in cash or other methods of payment in accordance with part 1401 of this chapter, unless otherwise specified by CCC.

### § 1410.44 Average adjusted gross income.

(a) Benefits under this part will not be available to persons or legal entities whose average adjusted gross income exceeds $1,000,000 or as further specified in part 1400 subpart F of this chapter.

(b) The limit specified in paragraph (a) of this section may be waived as specified in part 1400 subpart F of this chapter.

[74 FR 30912, June 29, 2009]

### §§ 1410.45–1410.49 [Reserved]

### § 1410.50 Enhancement programs.

(a) For contracts to which a State, political subdivision, or agency thereof, has succeeded in connection with an approved conservation reserve state enhancement program, payments shall be made in the form of cash only. The provisions that limit the amount of payments per year that a person may receive under this part shall not be applicable to payments received by such State, political subdivision, or agency thereof in connection with agreements entered into under such enhancement programs carried out by such State, political subdivision, or agency thereof that has been approved for that purpose by CCC.

(b) CCC may enter into other conservation reserve enhancement program agreements in accordance with terms deemed appropriate by CCC, with a State, political subdivision, or agency thereof, to use the CRP to cost-effectively further specific conservation and environmental objectives of that State and the nation.

### § 1410.51 Transfer of land.

(a)(1) If a new owner or operator purchases or obtains the right and interest in, or right to occupancy of, the land subject to a CRP contract, as determined by the Deputy Administrator, such new owner or operator, upon the approval of CCC, may become a participant to a new CRP contract with CCC for the transferred land.

(2) For the transferred land, if the new owner or operator becomes a successor to the existing CRP contract, the new owner or operator shall assume all obligations of the CRP contract of the previous participant.

(3) If the new owner or operator is approved as a successor to a CRP contract with CCC, then, except as otherwise determined appropriate by the Deputy Administrator:

(i) Cost-share payments shall be made to the past or present participant who established the practice; and

(ii) Annual rental payments to be paid during the fiscal year when the land was transferred shall be divided between the new participant and the previous participant in the manner specified in § 1410.42.

(b) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a CRP contract and the new owner or operator does not become a successor to such contract within 60 days, or such other time as the Deputy Administrator determines to be appropriate, of such transfer, such contract shall be terminated with respect to the affected portion of such land and the original participant:

(1) Forfeits all rights to any future payments for that acreage;

(2) Shall refund all previous payments received under the contract by the participant or prior participants, plus interest, except as otherwise specified by the Deputy Administrator. The provisions of § 1410.32(h) shall apply.

(c) Federal agencies acquiring property, by foreclosure or otherwise, that contains CRP contract acreage cannot be a party to the contract by succession. However, through an addendum to the CRP contract, if the current operator of the property is one of the contract participants, such operator may, as permitted by CCC, continue to receive payments under such contract if:

(1) The property is maintained in accordance with the terms of the contract;

(2) Such operator continues to be the operator of the property; and

(3) Ownership of the property remains with such federal agency.

### § 1410.52 Violations.

(a)(1) If a participant fails to carry out the terms and conditions of a CRP contract, CCC may terminate the CRP contract.

(2) If the CRP contract is terminated by CCC in accordance with this paragraph:

(i) The participant shall forfeit all rights to further payments under such

contract and refund all payments previously received together, plus interest; and

(ii) Pay liquidated damages to CCC in an amount as specified in the contract.

(b) If the Deputy Administrator determines such failure does not warrant termination of such contract, the Deputy Administrator may authorize relief as the Deputy Administrator deems appropriate.

(c) CCC may reduce a demand for a refund under this section to the extent CCC determines that such relief would be appropriate and will not deter the accomplishment of the goals of the program.

(d) Crop insurance purchase requirements in part 1405 of this chapter apply to contracts executed in accordance with this part.

[68 FR 24835, May 8, 2003, as amended at 69 FR 26763, May 14, 2004]

### § 1410.53 Executed CRP contract not in conformity with regulations.

If, after a CRP contract is approved by CCC, it is discovered that such CRP contract is found to contain material errors of fact or is not in conformity with this part, these regulations will prevail, and CCC may, at its sole discretion, terminate or modify the CRP contract, effective immediately or at a later date as CCC determines appropriate.

[74 FR 30912, June 29, 2009]

### § 1410.54 Performance based upon advice or action of the Department.

The provisions of § 718.8 of this chapter relating to performance based upon the action or advice of an authorized representative of the Department shall be applicable to this part, and may be considered as a basis to provide relief to persons subject to sanctions under this part to the extent that relief is otherwise required by this part.

### § 1410.55 Access to land under contract.

(a) Any representative of the U.S. Department of Agriculture, or designee thereof, shall, for purposes related to this program, be provided by the offeror or participant as the case may be, with access to land that is:

(1) The subject of an application for a contract under this part; or

(2) Under contract or otherwise subject to this part.

(b) For land identified in paragraph (a) of this section, the participant or producer shall provide such representatives with access to examine records for the land to determine land classification, erosion rates, or other purposes and to determine whether it is in compliance with the terms and conditions of the CRP contract.

### § 1410.56 Division of payments and provisions about tenants and sharecroppers.

(a) Payments received under this part shall be divided as specified in the applicable contract and CCC shall ensure that producers who would have an interest in acreage being offered receive treatment that is equitable, as determined by the Deputy Administrator. CCC may refuse to enter into a contract when there is a disagreement among persons seeking enrollment as to a person's eligibility to participate in the contract as a tenant and there is insufficient evidence to indicate whether the person seeking participation as a tenant does or does not have an interest in the acreage offered for enrollment in the CRP.

(b) CCC may remove an operator or tenant from a CRP contract when:

(1) The operator or tenant requests in writing to be removed from the CRP contract;

(2) The operator or tenant files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by applicable bankruptcy laws;

(3) The operator or tenant dies during the contract period and the administrator of the estate fails to succeed to the contract within a period of time determined by the Deputy Administrator; or

(4) A court of competent jurisdiction orders the removal from the CRP contract of the operator or tenant and such order is received by FSA, as determined by the Deputy Administrator.

(c) In addition to paragraph (b) of this section, tenants shall maintain their tenancy throughout the contract

period in order to remain on a contract. Tenants who fail to maintain tenancy on the acreage under contract, including failure to comply with applicable State law, may be removed from a contract by CCC. CCC shall assume the tenancy is being maintained unless notified otherwise by a party to contract.

### § 1410.57 Payments not subject to claims.

Subject to part 1403 of this chapter, any cost-share or annual payment or portion thereof due any person under this part shall be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

### § 1410.58 Assignments.

Participants may assign the right to receive such cash payments, in whole or in part, as provided in part 1404 of this chapter.

### § 1410.59 Appeals.

(a) Except as provided in paragraph (b) of this section, a participant or person seeking participation may appeal or request reconsideration of an adverse determination in accordance with the administrative appeal regulations at parts 11 and 780 of this title.

(b) Determinations by NRCS assigned to make such determination for the Deputy Administrator may be appealed in accordance with procedures established under part 614 of this title or otherwise established by NRCS.

### § 1410.60 Scheme or device.

(a) If CCC determines that a person has employed a scheme or device to defeat the purposes of this part, or any part, of any program, payment otherwise due or paid such person during the applicable period may be required to be refunded with interest thereon as determined appropriate by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of cost-share assistance or annual rental payments, or obtaining a payment that otherwise would not be payable.

(c) A new owner or operator or tenant of land subject to this part who succeeds to the contract responsibilities shall report in writing to CCC any interest of any kind in the land subject to this part that is retained by a previous participant. Such interest shall include a present, future, or conditional interest, reversionary interest, or any option, future or present, on such land, and any interest of any lender in such land where the lender has, will, or can legally obtain, a right of occupancy to such land or an interest in the equity in such land other than an interest in the appreciation in the value of such land occurring after the loan was made. Failure to fully disclose such interest shall be considered a scheme or device under this section.

### § 1410.61 Filing of false claims.

If CCC determines that any participant has knowingly supplied false information or has knowingly filed a false claim, such participant shall be ineligible for payments under this part with respect to the program year in which the false information or claim was filed and the contract may be terminated, in which case a full refund of all prior payments may be demanded. False information or false claims include, but are not limited to, claims for payment for practices that do not comply with the conservation plan. Any amounts paid under these circumstances shall be refunded, together plus with interest as determined by CCC, and any amounts otherwise due to the participant shall be withheld. The remedies provided for in this section shall be in addition to any and all other remedies, criminal and/or civil, that may apply.

### § 1410.62 Miscellaneous.

(a) Except as otherwise provided in this part, in the case of death, incompetency, or disappearance of any participant, any payments due under this part shall be paid to the participant's successor(s) under part 707 of this title.

(b) Unless otherwise specified in this part, payments under this part shall be subject to the requirements of part 12 of this title concerning highly erodible land and wetland conservation and payments.

(c) Any remedies permitted CCC under this part shall be in addition to any other remedy, including, but not limited to, criminal remedies, or actions for damages in favor of CCC, or the United States, as may be permitted by law; provided further the Deputy Administrator may add to the contract such additional terms as needed to enforce these regulations that shall be binding on the parties and may be enforced to the same degree as provisions of these regulations.

(d) Absent a scheme or device to defeat the purpose of the program, when an owner loses control of CRP acreage due to foreclosure and the new owner chooses not to continue the contract in accordance with §1410.51, refunds shall not be required from any participant on the contract to the extent that the Deputy Administrator determines that forgiving such repayment is appropriate in order to provide fair and equitable treatment.

(e) Cropland enrolled in CRP shall be classified as cropland for the time period enrolled in CRP and, after the time period of enrollment, may be removed from such classification upon a determination by the county committee that such land no longer meets the definition in part 718 of this title.

(f) Research projects may be submitted by the State committee and authorized by the Deputy Administrator to further the purposes of CRP. The research projects must include objectives that are consistent with this part, provide economic and environmental information, not adversely affect local agricultural markets, and be conducted and monitored by a bona fide research entity, as determined by the Deputy Administrator.

(g) As determined by CCC, incentives may be authorized to foster opportunities for Indian tribes and beginning, limited resource, and socially disadvantaged farmers and ranchers and to enhance long-term environmental goals.

(h) As determined by CCC, consistent with the purposes of CRP, the development of habitat for, and use of conservation practices for, native and managed pollinators may be authorized.

[68 FR 24835, May 8, 2003, as amended at 75 FR 27169, May 14, 2010; 75 FR 44071, July 28, 2010]

### §1410.63 Permissive uses.

(a) Unless otherwise specified by the Deputy Administrator, no uses of any kind are authorized on designated CRP acreage during the contract period.

(b) Commercial shooting preserves may be operated on CRP acreage provided:

(1) The commercial shooting preserve is licensed by a State agency such as the State fish and wildlife agency or State department of natural resources;

(2) The commercial shooting preserve is operated in a manner consistent with the applicable State agency rules governing commercial shooting preserves;

(3) CRP cover is maintained according to the conservation plan; and

(4) No barrier fencing or boundary limitations exist that prohibit wildlife access to or from the CRP acreage unless required by State law.

(c) The following activities may be permitted, as determined by CCC, on CRP enrolled land insofar as they are consistent with the conservation purposes of the program including timing, frequency, and duration as provided in an approved CRP conservation plan that identifies appropriate vegetative management requirements:

(1) Managed harvesting, including harvest of biomass, but only in exchange for a payment reduction as determined by CCC and in accordance with harvest frequency and timing of harvesting activities outside the official nesting and broodrearing season only as identified in an approved CRP conservation plan;

(2) Routine grazing, but only in exchange for a payment reduction as determined by CCC and in accordance with appropriate vegetative management requirements and stocking rates for the land, grazing frequency, and grazing periods outside the official nesting and broodrearing season only as identified in an approved CRP conservation plan;

(3) Prescribed grazing to control invasive species, but only in exchange

for a payment reduction as determined by CCC and in accordance with appropriate vegetative management requirements and stocking rates for the land, grazing frequency, and grazing periods outside the official nesting and broodrearing season only as identified in an approved CRP conservation plan;

(4) Harvesting, grazing, or other commercial use of the forage on the land in response to a drought or other emergency, but only in exchange for a payment reduction as determined by CCC;

(5) Wind turbines on CRP land installed in numbers and locations as determined appropriate by CCC considering the location, size, and other physical characteristics of the land, the extent to which the land contains wildlife and wildlife habitat, and the purposes of CRP, but only in exchange for a payment reduction as determined by CCC;

(6) Spot grazing, if necessary for control of weed infestation, and not to exceed a 30-day period according to an approved conservation plan, but only in exchange for a payment reduction as determined by CCC;

(7) Forestry maintenance such as pruning, thinning, and timber stand improvement on lands converted to forestry use, but only in accordance with a conservation plan, and only in exchange for a payment reduction as determined by CCC; and

(8) The sale of carbon, water quality, or other environmental credits, as determined appropriate by CCC.

[68 FR 24835, May 8, 2003, as amended at 69 FR 26763, May 14, 2004; 75 FR 44071, July 28, 2010]

### § 1410.64 Transition Incentives Program.

(a) To be eligible for the Transition Incentives Program, the retired or retiring owner or operator must, except as specified in paragraph (f) of this section:

(1) Have land that is expiring under an existing CRP contract with a 50 percent or greater interest as provided at § 1410.42 (c);

(2) Sell or lease (under a qualifying nonrevocable lease of at least 5 years in length) expiring CRP land to a beginning or socially disadvantaged farmer or rancher who will return some or all of the land to production using sustainable grazing or crop production methods;

(3) Modify the CRP contract in accordance with § 1410.33(a)(4);

(4) Allow the beginning or socially disadvantaged farmer or rancher to begin the organic certification process under the Organic Foods Production Act of 1990 during the last year of the contract, if requested by that farmer or rancher;

(5) Allow the beginning or socially disadvantaged farmer or rancher to develop a conservation plan for the land; and

(6) Allow the beginning or socially disadvantaged farmer or rancher to install conservation practices and initiate land improvements that are consistent with the conservation plan during the last year of the contract.

(b) To be eligible for participation in the Transition Incentives Program, the beginning or socially disadvantaged farmers or ranchers must:

(1) Certify that they meet the definition in § 1410.2 of either a beginning farmer or rancher or a socially disadvantaged farmer or rancher;

(2) Obtain and implement a conservation plan; and

(3) Implement sustainable grazing or crop production in compliance with the conservation plan by the time specified in the plan.

(c) Eligible beginning or socially disadvantaged farmers or ranchers will be eligible immediately to reenroll partial field conservation practices in CRP, in accordance with the conservation plan and the provisions of this part, following the expiration of the CRP contract of the qualified retired or retiring owner or operator, provided that the beginning or socially disadvantaged farmer or rancher has control of the property and meets all other qualifying conditions of CRP, as specified in this part.

(d) Eligible beginning or socially disadvantaged farmers or ranchers will be eligible to enroll land in the Conservation Stewardship Program or the Environmental Quality Incentives Program, as specified in parts 1470 and 1466 of this chapter, provided that their offer to enroll otherwise meets all program conditions, and provided that the CRP

contract of the retired or retiring owner or operator has expired and the beginning or socially disadvantaged farmer or rancher has sufficient control of the property.

(e) As an incentive for selling or leasing land to a beginning or socially disadvantaged farmer or rancher who is not a family member, CCC will pay 2 years of additional CRP annual rental payments at the same contract rate to a retired or retiring owner or operator. The retired or retiring owner or operator must certify that the beginning or socially disadvantaged farmer or rancher is not a family member.

(f) Subject to all other program conditions, incentive payments may be allowed for contracts that have already expired if:

(1) The contract expired on or after June 18, 2008, and contract modification began on or before September 30, 2010;

(2) The transfer to the beginning or socially disadvantaged farmer or rancher will occur after the contract modification; and

(3) All other program conditions are otherwise met.

(g) Eligible retired or retiring owner or operator and eligible beginning or socially disadvantaged farmer or rancher must agree to be jointly and severally responsible, if the participant has a share of the payment greater than zero, with the other Transition Incentive Program agreement participants in compliance with the provisions of such Transition Incentive Program agreement and the provisions of this part and for any payment adjustments that may be required for violations of any of the terms or conditions of the Transition Incentive Program agreement and this part.

[75 FR 27169, May 14, 2010]

# PART 1412—DIRECT AND COUNTER-CYCLICAL PROGRAM AND AVERAGE CROP REVENUE ELECTION PROGRAM FOR THE 2008 AND SUBSEQUENT CROP YEARS

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## Subpart A—General Provisions

### § 1412.1 Applicability, statutory changes, interest, and contract provisions.

This part governs: How base acres and farm program payment yields are established or adjusted for the purpose of calculating direct and counter-cyclical payments for wheat, corn, grain sorghum, barley, oats, upland cotton, rice, peanuts, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, pulse crops, and other designated oilseeds as determined and announced by the Commodity Credit Corporation (CCC), for the years 2008 through 2012; the month when producers on a farm may enter into annual Direct and Counter-cyclical Program (DCP) or Average Crop Revenue Election (ACRE) program contracts with CCC for each of the years 2008 through 2012, as applicable; and the peanut crop acreage bases and yields in order to receive 2008 through 2012 direct and counter-cyclical payments. Payments otherwise provided for in this part are subject to changes made by statute in rates, conditions, and eligibility notwithstanding any contract made under this part. However, any such modification may, as determined by the Deputy Administrator, allow producers the opportunity to withdraw from the contract. Also, if any refund comes due to CCC under this part, interest will be due from the date of the CCC disbursement except as determined by the Deputy Administrator. The provisions of this section will apply notwithstanding any other provision of this or any other part. In order to receive payment under this part a participant must comply with the regulations in this part and any additional requirements imposed by the program contract.

### § 1412.2 Administration.

(a) The program is administered under the general supervision of the Executive Vice-President, CCC, and will be carried out by Farm Service Agency (FSA) State and county committees (State and county committees).

(b) State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations of this part.

(c) The State committee may take any action required by the regulations of this part that the county committee has not taken. The State committee will also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in

accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No provision or delegation to a State or county committee will preclude the Executive Vice President, or the Deputy Administrator, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(e) The Deputy Administrator has the authority in individual cases to authorize State and county committees to waive or modify deadlines (except statutory deadlines) and other nonstatutory requirements, in cases where lateness or failure to meet such other requirements does not adversely affect operation of the program. Producers and participants have no right to seek an exception under this provision. The Deputy Administrator's refusal to consider cases or circumstances or decisions not to exercise this discretionary authority under this provision will not be considered an adverse decision and is not appealable.

(f) A representative of CCC may execute the FSA forms entitled "Direct and Counter-Cyclical Program Contract" and "Average Crop Revenue Election Program Contract" only under the terms and conditions determined and announced by the Executive Vice President, CCC. Any contract that is not executed in accordance with such terms and conditions, including any purported execution prior to or after the dates authorized by the Executive Vice President, CCC, is null and void and will not be considered to be a contract between CCC and the operator or any other producer on the farm.

### § 1412.3 Definitions.

The definitions set forth in this section are applicable for all purposes of administering the DCP. The terms defined in part 718 of this title and part 1400 of this chapter are also applicable, except where those definitions conflict with the definitions set forth in this section.

Where there is a conflict or a difference in definitions specified in this part and those that apply to the Average Crop Revenue Election (ACRE) program specified in subpart G of this part, the regulations of subpart G of this part will apply to the ACRE program.

*ACRE guarantee price* means the simple average, as determined by CCC, of the national average market prices of the covered commodity or peanuts for the most recent two crop years preceding the relevant current crop year. For example, for the 2009 program the relevant crop year is the 2009 crop year. Therefore, for the 2009 program, the ACRE guarantee price for the covered commodity or peanuts is equal to the simple average of the national average market prices of the covered commodity or peanuts for the 2007 and 2008 crops.

*ACRE plug yield* means the resulting yield determined by taking the applicable NASS county average yield for the covered commodity or peanuts, by practice if applicable, and multiplying it by 95 percent. The ACRE plug yield may be used by a farm in establishing an initial benchmark farm yield or reporting actual production in accordance with instructions issued by the Deputy Administrator. The ACRE plug yield is also used on a farm for a covered commodity or peanuts in a year where there are no acres of the covered commodity or peanuts planted. The ACRE plug yield may be found on the FSA Web site at: *http://www.fsa.usda.gov/dcp/* by clicking "ACRE County Yields." ACRE plug yields are used in benchmark farm yields. If the National Agricultural Statistical Service (NASS) data is not available for a particular practice of a covered commodity or peanuts from which an ACRE plug yield can be established, the Deputy Administrator may establish an ACRE plug yield for the practice of the covered commodity or peanuts based a computation of multiplying 95 percent times the yield determined based on production data available from FSA farm records in the county, or in the event sufficient records do not exist, another data source determined appropriate by the Deputy Administrator.

*ACRE price* means the higher of the following, as determined by CCC, for the covered commodity or peanuts:

(1) The national average price received by producers during the 12-month marketing year (as defined in this part) for the relevant current crop of the covered commodity or peanuts (the relevant current crop for a program year is the corresponding crop for commodity for that year—for example, the current crop for the 2009 program is the 2009 crop), or

(2) 70 percent of the marketing assistance loan rate for the relevant current crop of the commodity under 7 U.S.C. 8731–8757.

*Actual farm production* means all of a farm's harvested and appraised production, including grazed acres, of a covered commodity or peanuts. Appraisals must be performed by appraisers acceptable to FSA. Appraisals performed according to the Non-Insured Crop Disaster Assistance Program (NAP) or crop insurance guidelines are generally deemed acceptable to FSA for DCP and ACRE Program purposes.

*Actual farm revenue* means the per acre amount computed by multiplying the actual farm yield, which is a per acre amount, of a covered commodity or peanuts times the ACRE price for the relevant current crop year. The relevant current crop year for these and other purposes is the crop year that corresponds to the calendar year in which the relevant program year ends. Therefore, for the 2009 contract or 2009 program, the relevant crop year would be the 2009 crop (that is, the crop considered to be the crop for the 2009 crop year).

*Actual farm yield* means for the relevant current crop year, the per acre amount determined by dividing the actual farm production of a covered commodity or peanuts by the farm's total planted and considered planted acres of the covered commodity or peanuts.

*Actual State yield* means the State's per acre amount for the relevant current crop year for a commodity determined by dividing the actual production in the State of the covered commodity or peanuts by the total planted acres of the covered commodity or peanuts in the State.

*Actual State revenue* means the per acre amount for a covered commodity or peanuts determined for the relevant current crop year by multiplying the actual State yield by the covered commodity or peanuts times the ACRE price.

*Average Crop Revenue Election (ACRE)* means the program authorized by section 1105 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 8715) according to subpart G of this part. Participation in the ACRE program requires a two-step process by the producer, specifically step 1 an election according to subpart G of this part followed by step 2 enrollment according to this part.

*Average yield per planted acre* means the actual farm production of a covered commodity or peanuts for a year divided by the farm's planted acres.

*Base acres* means the number of acres established with respect to a covered commodity and peanuts on a farm pursuant to sections 1101 and 1302 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7911) as in effect on September 30, 2007, subject to any adjustment in accordance with subpart B of this part.

*Benchmark farm yield* means, except as otherwise provided, a per acre yield for a covered commodity or peanuts computed using the Olympic average of the average yield per planted acre for the farm for the commodity for the 5 most recent crop years. The term "Olympic average" means that the highest and lowest per acre yields for the 5 years will be eliminated and the remaining annual entries will be averaged. CCC may make such adjustments as it deems necessary to create a fair yield for the farm so as to ensure the integrity of the ACRE Program. For purposes of determining a benchmark farm yield, yields on planted acres only will be considered except to the extent that the farm does not have a sufficient history to make a fair yield determination in which case a yield may be assigned by CCC.

*Benchmark State yield* means for a covered commodity or peanuts a per acre yield computed using the Olympic average of the average yield per planted acre for the State for the commodity for the 5 most recent crop

years. To the extent practicable, it will be calculated using data from NASS. The benchmark State yield is used in determining the State ACRE guarantee. CCC may make such adjustments in these yields as it deems necessary to provide for a fair yield and to ensure the integrity of the program.

*Commercial agricultural production* means the propagation and raising of agricultural products for commercial sale or barter having gross receipts or sales annually in excess of $1,000. The term includes pastures and land devoted to approved conserving uses.

*Considered planted* means acreage approved as prevented planted in accordance with § 718.103 of this title or the acreage considered planted to a covered commodity pursuant to § 1412.48.

*Contract* means the CCC-approved standard, uniform forms and appendixes specified by CCC that constitute the agreement for participation in the Direct and Counter-Cyclical Program or ACRE program, as applicable.

*Contract period* means the compliance period set out for the contract for the particular program year. The program year is designated in item 1 of the contract. Contracts for different program years will be referenced by their program year. Thus, for example, a reference to the "2009 contract" means the contract for the 2009 program year and the relevant current crop for a program year is the corresponding crop for that commodity. Therefore, the relevant current crop for the 2009 program is, with respect to a particular commodity, the 2009 crop. References to the "contract" period refer to the compliance period for the particular program year. The compliance periods for the various program years are as follows:

(1) For the 2009 contract (and therefore for the 2009 program), the period that begins on October 1, 2008 and ends on September 30, 2009;

(2) For the 2010 contract, the period that begins on October 1, 2009 and ends on September 30, 2010;

(3) For the 2011 contract, the period that begins on October 1, 2010 and ends on September 30, 2011;

(4) For the 2012 contract, the period that begins on October 1, 2011 and ends on September 30, 2012.

*Contract year* means the particular year of the particular contract based on the compliance period for the contract. The compliance year will run from October 1 to the following September 30 and will have the same name as the corresponding fiscal year. For example, the 2009 contract year will be October 1, 2008, through September 30, 2009, and that year will be considered, too, the 2009 crop year. The contract for the 2009 crop year will be considered the contract for the 2009 crop. The same references will apply to all other years.

*Counter-cyclical payment* means a payment made to eligible producers on a farm in accordance with subpart E of this part for covered commodities and peanuts.

*Covered commodity* means wheat, corn, grain sorghum, barley, oats, upland cotton, long grain rice, medium grain rice, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, pulse crops, and other oilseeds as determined by the Secretary.

*Crop year* means the relevant contract year. For example, the 2009 crop year is the year that runs from October 1, 2008, through September 30, 2009, and references to payments for that year refer to payments made under contracts with the compliance year that runs during those dates.

*DCP cropland* means DCP cropland as defined in part 718 of this title.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, FSA, or a designee.

*Developed* means:

(1) Land has been approved by the local government for uses other than commercial agricultural uses; and

(2) Construction activity has begun to install any aspect of the development, for example utilities or roadways.

*Direct payment* means a payment made to eligible producers on a farm for peanuts and covered commodities in accordance with subpart E of this part.

*Double-cropping* means for covered commodities and peanuts, notwithstanding the meaning in § 1412.47(e) for fruits and vegetables, the planting of a

covered commodity or peanuts for harvest in a crop year, in cycle with another covered commodity or peanuts on the same acres for harvest in the same crop year in counties that have been determined to be areas where there is determined to be substantial, successful and long-term double cropping of the crop and where the producer has followed customary production techniques and planting deadlines as determined by CCC (that is, using techniques and deadlines used by the majority of farmers in the region to double crop the particular crops involved). In a county determined capable of supporting such double-cropping the covered commodities or peanuts, as determined by CCC, both an initial crop and a subsequent crop will be considered planted or prevented planted acres for the purpose of Subpart G of this part. Notwithstanding any of the provisions of §718.103, in those instances where the subsequently planted or approved prevented planted covered commodity or peanuts cannot be recognized as double-cropped acreage under this definition, the subsequently planted covered commodity or peanuts will not be considered planted or prevented planted for any purpose.

*Dry peas* means Austrian, wrinkled seed, yellow, Umatilla, and green, excluding peas grown for the fresh, canning, or frozen market.

*Effective price* means the price calculated by the Secretary in accordance with §1412.53 for covered commodities and peanuts to determine whether counter-cyclical payments are required to be made under that section for a crop year.

*Excess base acres* means the number of base acres of covered commodities and peanuts on the farm that exceed the farm's total DCP cropland.

*Farm ACRE guarantee* means, for a crop year of a covered commodity or peanuts, the per acre producer-paid crop insurance premium (if any) added to the result of multiplying the benchmark farm yield, which is a per acre amount, times the ACRE guarantee price. The farm ACRE guarantee is used in determining whether a farm is eligible for ACRE payments for a covered commodity or peanuts.

*Fiscal year* means the year running from October 1 to the following September 30 and will be designated by the same calendar year in which it ends. For example, the 2009 fiscal year ends September 30, 2009.

*Harvested* means the producer has removed the crop from the field by hand, mechanically, or by grazing of livestock. The crop is considered harvested once it is removed from the field and placed in or on a truck or other conveyance or is consumed by livestock through the act of grazing. Crops normally placed in a truck or other conveyance and taken off the crop acreage, such as hay, are considered harvested when in the bale, whether removed from the field or not.

*Initial crop* means acreage of a covered commodity or peanuts planted or approved as prevented planted for harvest as peanuts, grain, or lint. The initial crop includes reseeded or replanted crop acreage.

*Limited resource farmer* means, as determined in accordance with §1412.51, a farmer or rancher who meets both of the following criteria:

(1) The person did not have, counting both direct and indirect interests, total gross farm sales for all farms in which that person has an interest of not more than the triggering level in both of the two calendar years that precede the calendar year in which the contract year begins. The triggering level is an indexed number that was originally set at $100,000. Beginning in October 2004, that number has been adjusted for inflation using the Prices Paid by the Farmer Index compiled by NASS. The triggering level for the DCP or ACRE contract will be the indexed number (*see http://www.lrftool.sc.egov.usda.gov/tool.asp*) as adjusted for the fiscal year that begins on the first day of the contract period.

(2) The person's total household income is at or below the national poverty level for a family of 4 or less than 50 percent of county median household income in each of the two most recent calendar years ending before the end of the program year, as CCC determines using U.S. Commerce Department Data.

*Marketing year* means the 12-month period beginning in the calendar year

the crop is normally harvested as follows:

(1) Barley, oats, and wheat: June 1–May 31;

(2) Canola, flax and rapeseed, lentils, and dry edible peas: July 1–June 30;

(3) Upland cotton, peanuts, and rice: August 1–July 31; and

(4) Corn, grain sorghum, soybeans, sunflowers, safflower, mustard, crambe, sesame, and chickpeas: September 1–August 31.

*Medium grain rice* means medium and short grain rice.

*Minimum and maximum guarantee* means, with respect to the State ACRE guarantee for each of the 2010 through 2012 crop years, the adjusted amounts that assure that the State ACRE guarantee for a program year for a covered commodity or peanuts will not decrease or increase more than 10 percent from the announced State ACRE guarantee for the preceding program year.

*National loan rate* means the loan rate established as specified in §1421.9 of this chapter.

*Oilseeds* means a crop of soybeans, sunflower seed, rapeseed, canola, crambe, safflower, flaxseed, mustard seed, sesame seed, or, if determined and announced by CCC, another oilseed.

*Payment acres* means:

(1) Except as provided for in paragraph (2) of this definition, 85 percent of the base acres of a covered commodity or peanuts on a farm in accordance with §1412.71 or subpart B of this part, as applicable, for which direct or counter-cyclical or ACRE payments are made.

(2) For each of the 2009 through 2011 crop years, 83.3 percent of the base acres for a covered commodity or peanuts on a farm in accordance with §1412.71 or subpart B of this part, as applicable, for which direct or ACRE payments are made.

*Payment yield* means:

(1) For peanuts, the yield established pursuant to section 1302 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7911) as in effect on September 30, 2007.

(2) For covered commodities, the yield established in accordance with subpart C of this part for a farm for a covered commodity.

(3) For designated oilseeds or pulse crops, the yield established in accordance with subpart C of this part for a farm for a crop of a designated oilseed and pulse crop.

*Per acre producer-paid crop insurance premium* means the insurance premiums paid by all producers of a farm for insurance on a covered commodity or peanuts, provided that at least some of the insured crop acreage is subject to a DCP contract and ACRE contract, divided by the total acres of the covered commodity or peanuts covered by the insurance; regardless of whether or not all of the acres insured are included on the farm's reported acreage for other programs, or are subject to a DCP contract and ACRE contract. Fees for catastrophic risk protection plan of insurance coverage or noninsured crop disaster assistance program coverage are not per acre producer-paid crop insurance premiums. Example: Producers A, B, and C have an interest in barley on a farm and the farm is enrolled in ACRE. Producers A and B paid crop insurance premiums totaling $800 on 100 insured barley acres. Regardless of how many acres of barley are planted, the per acre producer-paid crop insurance premium for barley is equal to $8.

*Planted acres for a State* means for:

(1) Corn, sorghum, barley, oats, and wheat, the sum of harvested acres in a State, as reported by NASS and the sum of failed acres in a State, as reported by producers to FSA.

(2) All other crops, the sum of planted acres in a State, as reported by NASS.

(3) Crops where NASS data is not available, the planted acres as determined by CCC using other sources.

*Planted and considered planted (P&CP)* means with respect to an acreage amount, the sum of the planted and prevented planted acres approved by the FSA county committee on the farm for a crop. For the purposes of this part P&CP is limited to initially planted or prevented plant crop acreage, except for crops planted in an approved double-cropping sequence. Replacement crop acreage is not included as P&CP.

*Processing* means with respect to uses of a crop, non-fresh intended uses of crops enrolled in the project referred to

in § 1412.48 for crops being grown pursuant to a contract for canning, pickling, frozen, juice, dry edible bean or pea, or such other uses deemed by CCC not to be fresh intended uses of crops mentioned in § 1412.48.

*Pulse crop* means dry peas, lentils, small chickpeas, and large chickpeas. Pulse crop bases will not generate direct payments and may only create counter-cyclical payments for the 2009 and subsequent crop years.

*Replacement crop* means the planting or approved prevented planting of any crop for harvest following the failed planting or prevented planted acreage of a covered commodity or peanuts not in a recognized double-cropping sequence (as specified in this section). Replacement crops that are covered commodities or peanuts are not eligible for planted and considered planted credit under this part and cannot generate payments under this part.

*Reseeded or replanted crop* means the second planting of a covered commodity or peanut crop on the same acreage after the first planting of that same crop has failed.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Gender is not included as a covered group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

(1) American Indians or Alaskan Natives,

(2) Asians or Asian-Americans,

(3) Blacks or African-Americans,

(4) Hispanics or Hispanic-Americans, and

(5) Native Hawaiians or other Pacific Islanders.

*State ACRE guarantee* means the per acre amount for the crop which is 90 percent of the benchmark State yield times the ACRE guarantee price, subject to the minimum and maximum guarantee specified in these regulations.

*Subdivided* means land has been approved or designated by the local government, or a unit thereof, for development or use as something other than commercial agricultural production or other non-agricultural use.

*Supportive and necessary contractual documents* means those documents including, but not limited to, those items substantiating the DCP contract such as leases, deeds, signatures of contract participants, owners, operators, and other tenant signatures, as determined by the Secretary.

*Target price* means, for peanuts, the price per ton; and for covered commodities, the price per bushel (or other appropriate unit in the case of upland cotton, rice, and other oilseeds) used to determine the payment rate for counter-cyclical payments.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19191, Apr. 14, 2010]

### § 1412.4 Appeals.

A participant may obtain reconsideration and review of any adverse determination made under this part in accordance with the appeal regulations found at parts 11 and 780 of this title.

## Subpart B—Establishment of Base Acres for a Farm for Covered Commodities

### § 1412.21 Election of base acres.

(a) Subject to adjustments in paragraph (b) of this section, base acres for covered commodities and peanuts are as defined in § 1412.3.

(b) No later than April 1, 2009, owners on a farm may establish base acres for pulse crops.

(1) Subject to the limitations in accordance with paragraph (d) of this section and § 1412.24, the base acres for pulse crops are equal to the sum of the following:

(i) The 4-year average of the acreage planted or prevented planted to the pulse crops during each of the 1998 through 2001 crop years for harvest, grazing, haying, silage, or other similar purposes, as determined by the Secretary, plus

(ii) The 4-year average of the acreage prevented from being planted to covered commodities during each of the

1998 through 2001 crop years, for reasons beyond the control of the producer, as determined by the Deputy Administrator.

(c) Subject to paragraph (d) of this section, the total acreage of a pulse crop on the farm calculated in accordance with paragraph (b) of this section must not exceed:

(1) The total acreage of cropland on the farm minus

(2) The total acreage for all covered commodities, peanut, and other pulse crops determined in accordance with paragraphs (a) and (b) of this section.

(d) If the calculation in paragraph (c) of this section results in a negative number, the pulse crop acreage on the farm for that crop year will be zero for the purposes of determining the 4-year average, in accordance with paragraph (b) of this section. Further, no prevented planning credit or other base credit may be allowed for a pulse crop for any planting activity for which base credit was allowed or will be allowed for another commodity.

(e) If the acreage planted or prevented from being planted was devoted to a different covered commodity in the same crop year (other than a covered commodity or pulse crops produced under an established practice of double-cropping), the owner may select the commodity to be used for base purposes for that crop year in determining the 4-year average, but may not select both the initial commodity and subsequent commodity.

(f)(1) An owner may increase the eligible acres of pulse crops on a farm by reducing the acreage of covered commodities and peanuts determined in accordance with paragraphs (a) and (b) of this section for one or more covered commodities on an acre-for-acre basis, except that the total base acres for pulse crops on the farm may not exceed the four-year average of pulse crops determined under paragraph (b) of this section.

(2) For the purpose of determining a 4-year average acreage for a farm under this section, any crop year in which a pulse crop was not planted or prevented planted will be excluded.

### § 1412.22 Failure to make pulse crop election.

If an owner fails to make an election for establishing pulse crop base acres on a farm by April 1, 2009, in accordance with § 1412.21, that owner will be deemed to have made the election to determine all base acres for all covered commodities and peanuts on the farm as set forth in § 1412.21.

### § 1412.23 Base acres and Conservation Reserve Program.

(a) Subject to paragraphs (b) and (c) of this section, eligible producers may, at the beginning of each fiscal year, adjust the base acres for covered commodities and peanuts with respect to the farm by the number of production flexibility contract acres or base acres protected by a Conservation Reserve Program contract entered into under section 1231 of the Food Security Act of 1985 (1985 Farm Bill, Pub. L. 99–198) that expired, was voluntarily terminated, or was early released on or after September 30, 2007.

(b) The total base acreage on a farm must not exceed the limitation of § 1412.24.

(c) Adjustments to base acreage on a farm in accordance with this section must be completed by no later than June 1 of the fiscal year following the fiscal year the conservation reserve program contract expired or was voluntarily terminated.

(d) For the fiscal year in which an adjustment to base acres under this section is made, the owner of the farm may elect to receive either direct payments and counter-cyclical payments or ACRE payments, as applicable, with respect to the base acres added to the farm under this section or a prorated payment under the conservation reserve contract, but not both.

### § 1412.24 Limitation of total base acreage on a farm.

(a) The sum of the following must not exceed the total DCP cropland acreage on the farm, plus approved double-cropped acreage for the farm:

(1) The sum of all base acres established for the farm in accordance with this part, plus

(2) Any cropland acreage on the farm enrolled in a Conservation Reserve

Program contract in accordance with part 1410 of this chapter, plus

(3) Any cropland acreage on the farm enrolled in a wetland reserve program contract in accordance with part 1467 of this chapter, plus

(4) Any other acreage on the farm enrolled in a Federal conservation program for which payments are made in exchange for not producing an agricultural commodity on the acreage.

(b) The Deputy Administrator will give the owner of the farm the opportunity to select the covered commodity base acres or peanut base acres, against which the reduction required in this section will be made.

(c) In applying paragraph (a) of this section, CCC will take into account the practice of double cropping on a farm, as determined by CCC.

## Subpart C—Establishment of Yields for Direct and Counter-Cyclical Payments

### § 1412.31 Direct payment yields for covered commodities, except pulse crops.

(a) The direct payment yield for each covered commodity, except pulse crops, will be the payment yield established for the commodity for the farm in accordance with the regulations for covered commodities at part 1412 of this chapter in effect on January 1, 2008 (see 7 CFR part 1412, revised as of January 1, 2008).

(b) [Reserved]

### § 1412.32 Direct payment yield for designated oilseed and pulse crops.

(a) The direct payment yield for designated oilseeds for which a yield was not established by September 30, 2007, and pulse crops for the farm will be determined by multiplying the weighted average yield per planted acre for the crop on the farm, as determined in accordance with paragraph (b) of this section, times the ratio resulting from:

(1) The national average yield for the crop for the 1981 through 1985 crop years, as determined by CCC, divided by

(2) The national average yield for the crop for the 1998 through 2001 crop years, as determined by CCC.

(b)(1) The yield per planted acre for such designated oilseed for which a yield was not established by September 30, 2007, and for pulse crops on the farm, to be used for direct payment purposes, is calculated as follows:

(i) The sum of the production of the crop for the 1998 through 2001 crop years, as determined in accordance with paragraph (b)(2) of this section; divided by

(ii) The sum of the total planted acres of the crop for the 1998 through 2001 crop years.

(2) The production of the crop for each of the 1998 through 2001 crop years will be the higher of the following, except in a year in which the acreage planted to the crop was zero, in which case the production for the crop for such year will be zero:

(i) The total production for the applicable year based on the production evidence submitted in accordance with § 1412.34; or

(ii) The amount equal to the product of:

(A) The total planted acres for the crop, times

(B) 75 percent of the harvested average county yield for that crop determined, where practicable, by calculating the weighted 4-year average of the National Agricultural Statistics Service (NASS) harvested acreage yields for the crop using the 1998 through 2001 crop years.

(3) The NASS harvested acreage yield to be used in paragraph (b)(2) of this section will be based on:

(i) NASS harvested irrigated yield for the crop, if available, for producers who irrigated the crop in the applicable years;

(ii) NASS harvested non-irrigated yield for the crop, if available, for producers who did not irrigate the crop in the applicable years; or

(iii) NASS harvested blended yield for all acreage, regardless of whether or not the acres were irrigated or non-irrigated, for all crops in all counties for which the yields in paragraphs (b)(3)(i) and (ii) of this section are unavailable.

(4) If NASS harvested acreage yield data is not available, the Deputy Administrator will assign a yield to be

used in paragraph (b)(2)(ii)(B) of this section.

### § 1412.33 Payment yield for counter-cyclical payments for covered commodities.

The counter-cyclical payment yield for covered commodities on the farm will be equal to the counter-cyclical payment yield established for the covered commodity on the farm that was effective September 30, 2007. Counter cyclical payment yields for designated oilseeds or eligible pulse crops for which direct payment yields were not established as of September 30, 2007, will be equal to the direct payment yield established in accordance with §§ 1412.32 or 1412.34, as applicable.

### § 1412.34 Submitting production evidence for establishing direct payment yields for oilseeds and pulse crops.

(a)(1) Reports of production evidence must be submitted when the owner elects to establish a direct payment yield for designated oilseeds for which a yield was not established by September 30, 2007, and pulse crops for the farm in accordance with § 1412.32.

(2) Producer or third-party certification will not be accepted as proof of production evidence.

(3) Reports of production evidence for designated oilseeds for which a yield was not established by September 30, 2007, and for pulse crops must be provided to the county committee of the county where the farm is administratively located, by farm and crop in such manner as required by CCC on a CCC-approved standard, uniform form designated by CCC.

(b)(1) When disposition of production has been through commercial channels, CCC may require the producer to furnish documentary evidence in order to verify the information provided on the report of production. Acceptable evidence may include, but is not limited to, such items as:

(i) Production approved by the county committee for Loan Deficiency Payments;

(ii) Commercial receipts;

(iii) Settlement sheets;

(iv) Warehouse ledger sheets;

(v) Elevator receipts or load summaries, supported by other evidence showing disposition, such as sales documents;

(vi) Evidence from harvested or appraised acreage, approved for FCIC or multi-peril crop insurance loss adjustment settlement; or

(vii) Other production evidence determined acceptable by the Deputy Administrator.

(2) Such production evidence must show:

(i) The producer's name,

(ii) The commodity,

(iii) The buyer or name of storage facility,

(iv) The date of transaction or delivery, and

(v) The quantity.

(c) When production of a designated oilseed for which a yield was not established by September 30, 2007, and pulse crops has been disposed of through noncommercial channels, then 75 percent of the county average yield as determined in accordance with § 1412.32(b)(4) will be used.

(d) CCC may verify the production evidence submitted with records on file at the warehouse, gin, or other entity which received or may have received the reported production.

### § 1412.35 Incorrect or false production evidence of oilseeds and pulse crops.

(a) If production evidence submitted in accordance with § 1412.34 is false or incorrect, as determined by the county committee, the county committee will determine whether the owner or producer submitting the production evidence for a farm acted in good faith or took action to defeat the purpose of the program.

(b)(1) If the county committee determines the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence did not act in good faith or took any action to defeat or undermine the purpose of the program, the county committee will:

(i) Require a refund of all direct and counter-cyclical payments earned for the farm for the first year such payments were made;

(ii) For designated oilseeds or pulse crops, reduce both the direct and counter-cyclical payment yields to 75

percent of the county average yield as determined in accordance with §1412.32(b)(4). That yield will then be reduced by the applicable direct payment yield factor in accordance with §1412.32(a)(1); and

(iii) Subject to paragraph (a)(2)(i) of this section, regarding the first year of payments, require a refund of an amount equal to the following for designated oilseeds or pulse crops for each year the false, incorrect, or unacceptable yield was used to make payments under the contract:

(A) The sum of the direct and counter-cyclical payments made using the false, incorrect or unacceptable evidence, minus

(B) The sum of the direct and counter-cyclical payments that would have been made based on the yields established in paragraph (b)(1)(ii) of this section.

(2) Notwithstanding paragraph (b)(1) of this section, if the county committee determines that the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence did not act in good faith or took action to defeat the purpose of the program, the Deputy Administrator may take further action, including but not limited to, any or all of the following:

(i) Make a further yield reduction for part or all of the designated oilseeds or pulse crops on the farm;

(ii) Make further payment reductions or refunds;

(iii) Determine that the owner or producer who submitted the evidence is ineligible for participation in future contracts unless the Deputy Administrator determines otherwise; or

(iv) Take other legal action.

(c) If the county committee determines the production evidence submitted is false, incorrect, or unacceptable, and the owner or producer who submitted the evidence acted in good faith and did not take action to defeat the purpose of the program, the county committee will:

(1) Correct the counter-cyclical yield for the applicable covered commodity or peanuts to equal the yield that would have been calculated in accordance with §1412.33 based on accurate production evidence; and

(2) Require a refund of an amount equal to the following for each covered commodity and peanuts for each year the false, incorrect, or unacceptable yield was used to make payments under the contract:

(i) The sum of the direct and counter-cyclical payments made using the false, incorrect, or unacceptable evidence, minus

(ii) The sum of the direct and counter-cyclical payments that would have been made based on the yields established in paragraph (c)(1) of this section.

## Subpart D—Direct and Counter-Cyclical Program and ACRE Program Contract Terms and Enrollment Provisions for Covered Commodities and Peanuts 2008 through 2012

### §1412.41 Direct and counter-cyclical program contract or ACRE program contract.

(a) Except as specified in subpart G of this part, the following provisions apply to DCP and ACRE program contracts:

(1) With respect to fiscal year 2008 payments, CCC will, through the date announced by CCC, entertain offers for DCP contracts by eligible producers of covered commodities and peanuts. With respect to fiscal year 2009 payments, CCC will entertain offers by eligible producers for an annual DCP or ACRE program contract through August 14, 2009. With respect to fiscal years 2010 through 2012 payments, CCC will annually allow offers for a DCP or ACRE program contract by eligible producers on a farm having base acres with respect to a covered commodity or peanuts, through June 1 of each such fiscal year.

(2)(i) Eligible producers must execute and submit a DCP or ACRE program contract and furnish supportive and necessary contractual documents to the county FSA office where the records for the program farm are administratively maintained not later than August 14, 2009, for 2009 fiscal year contracts and not later than June 1 of the applicable year for 2010 through 2012 fiscal year contracts.

(ii) Except as may otherwise be provided in statute for 2008, enrollment is not allowed after September 30 of the fiscal year in which the direct and counter-cyclical payments or ACRE program payments are requested.

(3) Under no circumstances will enrollment be permitted except as specified in this section. Contracts will not be approved unless all producers sharing in contract acreage with more than a zero share have submitted all applicable contracts and documentation necessary to make such approval, as determined by the Deputy Administrator. For those producers with an interest but a zero share of contract acreage, the contract will not be approved before all producers have signed the contract or furnished supportive and necessary contractual documents (such as cash leases in lieu of signing for a zero share). A contract not having all requisite signatures of producers having more than a zero share of contract acreage on or before the enrollment deadline will not be considered submitted to CCC for any purpose and will not be acted on or approved. Those contracts enrolled by a producer by the date specified in paragraph (a)(2)(i) of this section that were not signed by other producers according to this section will be deemed withdrawn and will not be approved. Producers on a farm are solely responsible for ensuring that enrollment occurs.

(4) Eligible producers who elect to enter into a contract with CCC must enroll all base acres on the farm. Enrollment of fewer than all base acres on the farm is not allowed.

(b) Eligible producers may withdraw from a contract at any time by the enrollment date specified in paragraph (a)(2)(i) of this section provided all signatories to the contract, including CCC, agree to the withdrawal in writing. DCP contracts enrolled prior to the decision of producers on a farm to elect the ACRE option for a fiscal year are considered withdrawn as specified in §1412.72. Producers electing the ACRE option according to §1412.72(d) must subsequently decide whether or not to enroll the farm in an ACRE program contract in accordance with the rules of this part.

(c) All contracts expire on September 30 of the fiscal year of the contract unless:

(1) Withdrawn in accordance with paragraph (b) of this section;

(2) Terminated in accordance with paragraphs (d) or (e) of this section; or

(3) Terminated at an earlier date by mutual consent of all parties, including CCC.

(d) A transfer or change in the interest of an owner or producer in the farm or in acreage on the farm subject to a contract will result in the termination of the contract and a refund of all direct and counter-cyclical and ACRE payments issued for the farm. The contract termination will be effective on the date of the transfer or change. Successors to the interest in the farm or crops on the farm subject to the contract may enroll the farm in a new contract and assume all obligations under the contract, only after all payments previously issued for the farm have been refunded to CCC.

(e) In the event a farm reconstitution is completed of a properly enrolled farm or farms in accordance with part 718 of this title, FSA will issue notices to the operator and owners of record on a farm that all producers with an interest in the base acres on the farm must sign a new DCP or ACRE program contract and provide supporting documentation such as leases and other contractual supportive documents not later than September 30 of the fiscal year direct and counter-cyclical or ACRE program payments are requested, after receiving written notification by the county committee indicating the reconstitution is completed. It is the responsibility of the operator and owners on a farm that producers with an interest in base acres are notified of the reconstitution and requirement for a new contract. If all producers have not signed the new contract by September 30, then no producers on the contract will be eligible for a direct or counter-cyclical payment or ACRE program payment for that farm for the year the contract was terminated.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19191, Apr. 14, 2010]

**§ 1412.42 Eligible producers.**

(a) Producers eligible to enter into a contract are:

(1) An owner of a farm who assumes all or a part of the risk of producing a crop;

(2) A producer, other than an owner, on a farm with a share-rent lease for such farm, regardless of the length of the lease, if the owner of the farm enters into the same contract;

(3) A producer, other than an owner, on a farm who cash rents such farm under a lease expiring on or after September 30 of the year of the contract in which case the owner is not required to enter into the contract;

(4) A producer, other than an owner, on a farm who cash rents such farm under a lease expiring before September 30 of the year of the contract. The owner of such farm must also enter into the same contract; or

(5) An owner of an eligible farm who cash rents such farm and the lease term expires before September 30 of the year of the contract, if the tenant declines to enter into a contract for the applicable year. In the case of an owner covered by this paragraph, direct and counter-cyclical payments will not begin under the contract until the lease held by the tenant ends.

(b) A minor child will be eligible to enter into a contract only if one of the following conditions exist:

(1) The right of majority has been conferred upon the minor by court proceedings or statute;

(2) A guardian has been appointed to manage the minor's property and the applicable program documents are executed by the guardian; or

(3) A bond is furnished under which a surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

(c) The owner of the farm may be considered the "producer" if there is no other producer, but the owner could have shared in the crop had a crop been produced, but only if the farm otherwise meets all the requirements for payment.

**§ 1412.43 Reconstitutions.**

Farms will only be reconstituted in accordance with part 718 of this title.

**§ 1412.44 Notification of base acres.**

The operator and owners of record of a farm will be notified in writing of the number of base acres eligible for enrollment in a contract, unless such operator or owners of record of a farm requests in writing not to be furnished with the notice. The operator and owners of record are responsible for notifying all other producers of a farm of the notice.

**§ 1412.45 Reducing or terminating base acreage.**

(a)(1) Subject to the limitation in paragraph (a)(2) of this section, a permanent reduction of all or a portion of a farm's base acreage will be allowed when all owners of the farm execute and submit a written request for such reduction on a CCC-approved standard, uniform form designated by CCC to the FSA county office where the records for the farm are administratively maintained.

(2) A permanent reduction of all or a portion of a farm's base acres to negate or reduce a program violation is not allowed.

(b) When base acres on a farm are converted to a non-agricultural commercial or industrial use, the total base acres on the farm will be reduced accordingly regardless of the submission of a request for such reduction.

(c) The base acres of covered commodities and peanuts on a farm will be proportionately reduced when it is determined that the land has been subdivided and developed for multiple residential units or other nonfarming uses if, in the judgment of the county committee, the size of the tracts and the density of the subdivision is such that the land is unlikely to return to the previous agricultural use, unless either of the following applies:

(1) The producers on the farm demonstrate that the land remains devoted to commercial agricultural production or is likely to be returned to the previous agricultural use and such land has not been divided from the farm with a farm reconstitution performed according to part 718 of this title or

(2) A properly constituted or reconstituted farm contains sufficient land that has not yet been subdivided and developed for multiple residential units

or other nonfarming uses, and the producers on the farm demonstrate that the land remains devoted to commercial agricultural production or is likely to be returned to the previous agricultural use.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19191, Apr. 14, 2010]

### § 1412.46 Succession-in-interest.

(a) A succession in interest to a DCP or ACRE program contract is required if there has been a change in the operation of a farm, such as:

(1) A sale of land;

(2) A change of operator or producer, including a change in a partnership that increases or decreases the number of partners or changes who are partners;

(3) A foreclosure, bankruptcy, or involuntary loss of the farm;

(4) A change in producer shares to reflect changes in the producer's share of the crop(s) that were originally approved on the contract; or

(5) An other change determined by the Deputy Administrator to be a succession that will not adversely affect nor defeat the purpose of the program.

(b) A succession in interest to the contract is not permitted if CCC determines that the change:

(1) Results in a violation of the landlord-tenant provisions specified in § 1412.55; or

(2) Adversely affects or otherwise defeats the purpose of the program.

(c) If a producer who is entitled to receive direct and counter-cyclical payments dies, becomes incompetent, or is otherwise unable to receive the payment, CCC will make the payment in accordance with part 707 of this title.

(d) A producer or owner of an enrolled farm must inform the county committee of changes in interest in base acres on the farm not later than:

(1) August 1 of the fiscal year in which the change occurs if the change requires a reconstitution be completed in accordance with part 718 of this title or

(2) September 30 of the fiscal year in which the change occurs if the change does not require a reconstitution be completed in accordance with part 718 of this title.

(e) In any case in which either a direct or counter-cyclical payment has previously been made to a predecessor, such payment will not be paid to the successor, unless such payment has been refunded in full by the predecessor, in accordance with § 1412.41(d).

(f) The failure of the party eligible to succeed to the contract to do so will be considered a contract violation.

### § 1412.47 Planting flexibility.

(a) Any crop may be planted and harvested on base acreage on a farm, except as limited elsewhere in this section. Any crop may be planted on DCP cropland in excess of the base acreage on a farm.

(b) Base acreage may be hayed or grazed at any time.

(c) Planting perennial fruits, vegetables (except mung beans, and pulse crops), or wild rice, as determined by the Deputy Administrator, is prohibited on base acreage of a farm enrolled in a DCP or ACRE program contract. Harvesting non-perennial fruits, vegetables (except mung beans and pulse crops), or wild rice, as determined by the Deputy Administrator, is prohibited on base acreage of a farm enrolled in a DCP or ACRE program contract.

(d) Notwithstanding the provisions of paragraph (c) of this section, perennial fruits, vegetables, and wild rice may be planted on base acreage of a farm enrolled in a contract, and non-perennial fruits, vegetables, and wild rice may be harvested on base acreage of a farm enrolled in a contract if:

(1) A producer double-crops fruits, vegetables, or wild rice with a covered commodity or peanuts in any region described in paragraph (e) of this section, in which case direct and counter-cyclical payments will not be reduced for the planting or harvesting of the fruit, vegetable, or wild rice;

(2) The farm has a history of planting fruits, vegetables, or wild rice, as determined by CCC, in which case the payment acres for the farm will be reduced on an acre-for-acre basis; or

(3) The producer has a history of planting a specific fruit, specific vegetable, or wild rice, as determined by

CCC, the producer may plant and harvest the specific fruit, specific vegetable, or wild rice for which the producer has a planting history, subject to the following:

(i) The acreage harvested must not exceed the simple average of the sum of acreage of the specific fruit, specific vegetable, or wild rice planted for harvest by the producer during the crop years 1991 through 1995 or 1998 through 2001, as designated by the producer, excluding any year in which the specific fruit, specific vegetable, or wild rice was not planted; and

(ii) The payment acres for the farm will be reduced on an acre-for-acre basis.

(e) Double-cropping for purposes of this section means planting for harvest fruits, vegetables, or wild rice on the same acres in cycle with a covered commodity or peanuts planted and harvested for peanuts, grain, or lint in a 12-month period under normal growing conditions for the region and being able to repeat the same cycle in the following 12-month period. For purposes of this part, the following counties have been determined to be regions having a history of double-cropping covered commodities or peanuts with fruits, vegetables, or wild rice. State committees have established the following counties as regions within their respective States:

Alabama

Baldwin, Barbour, Butler, Chambers, Chilton, Clarke, Covington, Cullman, Geneva, Greene, Houston, Jackson, Jefferson, Lee, Madison, Mobile, Montgomery, Randolph, Sumter, Talladega, Walker, and Washington.

Alaska

None.

Arizona

Cochise, Graham, Greenlee, LaPaz, Maricopa, Mohave, Pima, Pinal, and Yuma.

Arkansas

Ashley, Benton, Clay, Craighead, Crawford, Cross, Faulkner, Franklin, Greene, Independence, Jackson, Jefferson, Lee, Lincoln, Logan, Lonoke, Mississippi, Phillips, Pulaski, St. Francis, Sebastian, Woodruff, and Yell.

California

Alameda, Amador, Butte, Colusa, Contra Costa, Fresno, Glenn, Imperial, Kern, Kings, Madera, Merced, Riverside, Sacramento, San Benito, San Joaquin, Santa Clara, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Yolo, and Yuba.

Caribbean Office

None.

Colorado

Otero.

Connecticut

None.

Delaware

All counties.

Florida

All counties except Monroe.

Georgia

All counties.

Hawaii

None.

Idaho

None.

Illinois

Bureau, Calhoun, Cass, Clark, Crawford, DeKalb, Edgar, Effingham, Gallatin, Iroquois, Jersey, Kankakee, Lawrence, LaSalle, Lee, Madison, Marion, Mason, Monroe, Randolph, St. Clair, Tazewell, Union, Vermilion, White, and Whiteside.

Indiana

Allen, Bartholemew, Daviess, Gibson, Hamilton, Jackson, Johnson, Knox, LaGrange, Lake, LaPorte, Madison, Marion, Martin, Miami, Posey, Ripley, Shelby, Sullivan, Vandenberg, and Warrick.

Iowa

Kossuth, Mitchell, Palo Alto, and Winnebago.

Kansas

None.

Kentucky

Daviess.

Louisiana

Avoyelles, Franklin, Grant, Morehouse, Rapides, Richland, and West Carroll.

Maine

None.

Maryland

Baltimore, Calvert, Caroline, Carroll, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester.

Massachusetts

None.

Michigan

None.

Minnesota

Blue Earth, Brown, Carver, Chippewa, Cottonwood, Dakota, Dodge, Faribault, Fillmore, Freeborn, Goodhue, Houston, Kandiyohi, Le Sueur, Martin, McLeod, Meeker, Mower, Nicollet, Olmsted, Pope, Redwood, Renville, Rice, Scott, Sibley, Steele, Swift, Waseca, Wabasha, Watonwan, and Winona.

Mississippi

Adams, Calhoun, Carroll, Coahoma, Covington, DeSoto, George, Humphreys, Jefferson Davis, Lowndes, Madison, Marshall, Monroe, Montgomery, Prentiss and Rankin.

Missouri

Barton, Butler, Cape Girardeau, Dade, Dunklin, Jasper, Lawrence, Mississippi, New Madrid, Newton, Pemiscot, Ripley, Scott, and Stoddard.

Montana

None.

Nebraska

None.

Nevada

None.

New Hampshire

None.

New Jersey

Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Salem, Somerset, Sussex, and Warren.

New Mexico

Chaves, Curry, Dona Ana, Eddy, Hidalgo, Lea, Luna, Quay, Roosevelt, San Juan, and Sierra.

New York

Cayuga, Genesee, Livingston, Monroe, Ontario, Orange, Orleans, Suffolk, Wayne, and Wyoming.

North Carolina

Beaufort, Bertie, Bladen, Brunswick, Cabarrus, Camden, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Stokes, Tyrell, Union, Wake, Warren, Washington, Wayne, Wilkes, Wilson, and Yadkin.

North Dakota

None.

Ohio

Champaign, Clermont, Fulton, Lucas, Miami, Morgan, Muskingum, Scioto, and Stark.

Oklahoma

Adair, Alfalfa, Beckham, Blaine, Bryan, Caddo, Canadian, Carter, Cherokee, Cleveland, Cotton, Custer, Delaware, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Haskell, Hughes, Jackson, Jefferson, Kay, Kingfisher, Kiowa, LeFlore, Logan, Love, McClain, McIntosh, Major, Marshall, Mayes, Muskogee, Noble, Nowata, Okmulgee, Osage, Pawnee, Payne, Pittsburg, Pottawatomie, Roger Mills, Rogers, Sequoyah, Stephens, Tillman, Tulsa, Wagoner, Washita, Woods, and Woodward.

Oregon

Morrow and Umatilla.

Pennsylvania

Adams, Bucks, Centre, Chester, Clinton, Columbia, Cumberland, Delaware, Franklin, Indiana, Lancaster, Montgomery, Montour, Northumberland, Schuylkill, Synder, Union, and York.

Puerto Rico

None.

Rhode Island

None.

South Carolina

All counties.

South Dakota

None.

Tennessee

Bledsoe, Cannon, Chester, Cocke, Coffee, Crockett, Dickson, Dyer, Fayette, Gibson, Giles, Greene, Grundy, Hardeman, Haywood, Jefferson, Knox, Lake, Lauderdale, Lawrence, Lincoln, Madison, Maury, McNairy, Obion, Overton, Pickett, Putnam, Rhea, Robertson, Rutherford, Sumner, Unicoi, VanBuren, Warren, Washington, Wayne, White, Williamson, and Wilson.

Texas

Atascosa, Bailey, Baylor, Brooks, Cameron, Castro, Cochran, Cottle, Dallam, Dawson, Deaf Smith, Dimmit, Duval, Floyd, Foard, Frio, Gaines, Hale, Hartley, Haskell, Hidalgo, Hockley, Jim Wells, Kleberg, Knox, Lamb, LaSalle, Lubbock, Lynn, Maverick, Medina, Moore, Parmer, Presidio, San Patricio, Sherman, Starr, Swisher, Terry, Uvalde, Webb, Willacy, Wilson, Yoakum, and Zavala.

Utah

None.

Vermont

None.

Virginia

Accomack, Albemarle, Alleghany, Amelia, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Brunswick, Buchanan, Buckingham, Campbell, Caroline, Carroll, Charles City, Charlotte, Chesapeake, Chesterfield, Clarke, Craig, Culpeper, Cumberland, Dickenson, Dinwiddie, Essex, Fairfax, Fauquier, Floyd, Fluvanna, Franklin, Frederick, Giles, Gloucester, Goochland, Grayson, Greene, Greensville, Halifax, Hanover, Henrico, Henry, Highland, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Lee, Loudoun, Louisa, Lunenburg, Madison, Mathews, Mecklenburg, Middlesex, Montgomery, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Patrick, Pittsylvania, Powhatan, Prince Edward, Prince George, Prince William, Pulaski, Rappahannock, Richmond, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Southampton, Spotsylvania, Stafford, Suffolk, Surry, Sussex, Tazewell, Virginia Beach, Warren, Washington, Westmoreland, Wise, Wythe, and York.

Washington

Yakima.

West Virginia

None.

Wisconsin

Adams, Calumet, Columbia, Dane, Dodge, Fond du Lac, Green, Green Lake, Iowa, Kenosha, Milwaukee, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Trempealeau, Walworth,

Washington, Waukesha, Waushara, and Winnebago.

Wyoming

None.

(f) Any acreage reduction required by paragraph (d) of this section will be applied beginning with the covered commodity or peanuts with lowest direct payment amount per acre until the acreage reduction amount is satisfied. Producers may agree to adjust the acre reduction between covered commodities and peanuts on the farm, only to the extent the total acre reduction amount does not change for the farm, and all producers affected by the adjustment agree to the adjustment in writing.

(g) For the purposes of this part, fruits, vegetables, and wild rice planted on base acreage of a farm under a DCP or ACRE program contract:

(1) Will be considered harvested at the time of planting, unless the producer pays a fee to cover the cost of a farm visit, in accordance with part 718 of this title, to verify that the fruit, vegetable, or wild rice has been destroyed before harvest, as determined by the Deputy Administrator, or

(2) Will not be considered as planted to a fruit, vegetable, or wild rice when reported by a producer on the farm with an intended use of green manure or forage, as determined by the Deputy Administrator, and a fee to cover the cost of a farm visit is paid by the producer, in accordance with part 718 of this title, to verify that the crop has not been harvested.

(h) Unless otherwise specifically included as a covered commodity in accordance with this part, fruits and vegetables include but are not limited to all nuts except peanuts, certain fruit-bearing trees and: Acerola (barbados cherry), antidesma, apples, apricots, aragula, artichokes, asparagus, atemoya (custard apple), avocados, babaco papayas, bananas, beans (except soybeans, mung, adzuki, faba, and lupin), beets—other than sugar, blackberries, blackeye peas, blueberries, bok spare choy, boysenberries, breadfruit, broccoflower, broccolo-cavalo, broccoli, brussel sprouts, cabbage, cailang, caimito, calabaza, carambola (star fruit), calaboose, carob, carrots, cascadeberries, cauliflower, celeriac, celery, chayote, cherimoyas (sugar apples), canary melon, cantaloupes, cardoon, casaba melon, cassava, cherries, chinese bitter melon, chicory, chinese cabbage, chinese mustard, chinese water chestnuts, chufes, citron, citron melon, coffee, collards, cowpeas, crabapples, cranberries, cressie greens, crenshaw melons, cucumbers, currants, cushaw, daikon, dasheen, dates, dry edible beans, dunga, eggplant, elderberries, elut, endive, escarole, etou, feijoas, figs, gai lien, gailon, galanga, genip, gooseberries, grapefruit, grapes, guambana, guavas, guy choy, honeydew melon, huckleberries, jackfruit, jerusalem artichokes, jicama, jojoba, kale, kenya, kiwifruit, kohlrabi, kumquats, leeks, lemons, lettuce, limequats, limes, lobok, loganberries, longon, loquats, lotus root, lychee (litchi), mandarins, mangos, marionberries, mar bub, melongene, mesple, mizuna, mongosteen, moqua, mulberries, murcotts, mushrooms, mustard greens, nectarines, ny Yu, okra, olallieberries, olives, onions, opo, oranges, papaya, paprika, parsnip, passion fruits, peaches, pears, peas, all peppers, persimmon, persian melon, pimentos, pineapple, pistachios, plantain, plumcots, plums, pomegranates, potatoes, prunes, pummelo, pumpkins, quinces, radiochio, radishes, raisins, raisins (distilling), rambutan, rape greens, rapini, raspberries, recao, rhubarb, rutabaga, santa claus melon, salsify, saodilla, sapote, savory, scallions, shallots, shiso, spinach, squash, strawberries, suk gat, swiss chard, sweet corn, sweet potatoes, tangelos, tangerines, tangos, tangors, taniers, taro root, tau chai, teff, tindora, tomatillos, tomatoes, turnips, turnip greens, watercress, watermelons, white sapote, yam, and yam yu choy.

### § 1412.48 Planting Transferability Pilot Project.

(a) Notwithstanding § 1412.47, for each of the 2009 and subsequent crop years, the Planting Transferability Pilot Project (Project) will permit, in accordance with the limitations and provisions of this section only, the planting of certain crops in certain States on base acres without violating the DCP or ACRE contract. Base acres on

farms participating in the Project will be reduced an acre (or portion thereof) for every acre (or portion thereof) planted in the Project, for the year in which the farm is participating in the Project.

(b) Producers interested in participating in the Project must first be enrolled in either a DCP or ACRE program contract and submit an offer for participation in the Project accompanied by a copy of the contract mentioned in paragraph (f) of this section no later than March 1 of the fiscal year in which participation in the Project is desired. At the conclusion of the signup period, CCC will determine if it received more offers than the acreage limitation paragraph (e) of this section allows. If the offers exceed the acreage limitation in the State, CCC will conduct a lottery style selection process and approve offers for participation in the Project that will ensure that the number of base acres eligible for each year under the Project are not exceeded. In the event that CCC cannot approve an offer in its entirety, at CCC's discretion, CCC may give the producers the opportunity to enroll less acres in the Project. CCC will also notify producers of the results of the selection process. Under no circumstances can producers challenge either the selection process itself or the results via administrative appeal. Producers in each of the States mentioned in this section can elect to participate in the Project with their offer as accepted by CCC, or, if CCC elects to offer approval of part of an offer, participate with their offer as reduced by CCC, or the producers can elect not to participate in the Project.

(c) Signup for the Project will be conducted as announced by the Deputy Administrator.

(d) Under the Project, crops permitted on DCP base acres are cucumbers, green peas, lima beans, pumpkins, snap beans, sweet corn, and tomatoes. These crops eligible for participation in this Project must be grown for processing.

(e) The States and the number of base acres eligible during each crop year for the Project under paragraph (a) of this section are:

(i) 9,000 acres in Illinois,

(ii) 9,000 acres in Indiana,

(iii) 1,000 acres in Iowa,

(iv) 9,000 acres in Michigan,

(v) 34,000 acres in Minnesota,

(vi) 4,000 acres in Ohio, and

(vii) 9,000 acres in Wisconsin.

(f) To be eligible to participate in the Project, producers on a farm must do all of the following for the commodity specified in paragraph (d) of this section:

(i) Enter into a contract to produce the commodity for processing;

(ii) Agree to produce the crop as part of a program of crop rotation on the farm to achieve agronomic and pest and disease management benefits;

(iii) Report acreage and production of the crop according to §1412.66 and provide evidence of disposition of the crop; and

(iv) File a notice of loss according to §1412.67, if the crop is either prevented from being planted or is impacted by disaster after planting.

(g) If base acres are recalculated while a farm is participating in this Project, the planting and production of a crop of a commodity specified in paragraph (d) of this section on base acres for which a temporary reduction was made under this section will be considered to be the same as the planting and production of the covered commodity or peanuts that was reduced.

(h) Reports will be prepared for Congress to periodically evaluate the supply and price of fresh and processed fruits and vegetables and evaluate if producers of fresh fruits and vegetables are being negatively impacted or existing production capacities are being supplanted.

(i) If DCP payments were issued prior to enrollment in this Project, the participants acknowledge that for the particular year of participation in the Project according to this section, DCP payments will be based on temporarily reduced base acres.

(j) In the event an ACRE program contract was approved either before or after enrollment in this Project according to this section, the ACRE program contract participants acknowledge that for the particular year of participation in the Project according to this section, ACRE payments will be

based on the temporarily reduced base acres.

### § 1412.49 Apportionment of long and medium grain rice.

(a) Rice base acres are established pursuant to section 1101 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7911) in effect on September 30, 2007, specified in § 1412.3.

(b) Owners will designate the rice base acres in paragraph (a) of this section into two categories:

(i) Long grain rice, and

(ii) Medium grain rice. Medium grain rice includes short grain rice.

(c) Owners on a farm will elect rice base acres according to paragraph (b) of this section, based on the 4-year average of the percentages of:

(i) Acreage planted on the farm to long grain rice and medium grain rice during the 2003 through 2006 crop years, plus

(ii) Any acreage on the farm that producers were prevented from planting to long grain and medium grain rice during the 2003 through 2006 crop years because of drought, flood, other natural disaster, or other condition beyond the control of the producers.

(d) If long grain or medium grain rice was not planted on the farm in one or more years during the 2003 through 2006 crop years, the percentages of acreage planted in the applicable State to long grain and medium grain rice will be substituted for the "not planted" years on the farm in paragraph (c) of this section.

(e) If an election is not made according to this section, the percentages of acreage planted in the applicable State to long grain and medium grain rice will be used in determining the base acres required in paragraph (b) of this section for the farm.

(f) The purpose of this section is to determine long grain rice base and medium grain rice base on the farm. This section will not increase or decrease the:

(i) Number of base acres on the farm;

(ii) Number of payment acres on the farm; or

(iii) Payment yield on the farm from that for rice under sections 1101 and 1102 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7911, 7912), as in effect on September 30, 2007, subject to any adjustment required in this part.

### § 1412.50 Matters of general applicability.

These regulations and CCC's interpretation of the regulations and internal agency directives issued to State and county FSA offices are matters of general applicability and are not individually appealable in administrative appeals according to §§ 11.3 and 780.5 of this title. Additionally, these rules and any decisions of CCC and FSA that are not based on facts derived from an individual participant's application, contract, or file, including but not limited to, decisions of whether or not to conduct a lottery, lottery selection process and results, signup deadlines, direct payment rates, counter-cyclical payment rates, or any other generally applicable payment rate or rates, national average market prices, determinations of production of crops produced in a State or States, actual State yields, benchmark State yields, program guarantee price or prices, or determinations of CCC regarding the percentage of acreage of a crop in State that is irrigated or non-irrigated, or any other similar determination that is made by CCC or FSA for use in all similarly situated applications, are not appealable under part 11 or part 780 of this title. The only extent by which the matters referenced in this section, and like similar generally applicable matters, are reviewable administratively in an appeal forum is whether FSA's or CCC's decision to apply the generally applicable matter is factually accurate and in conformance with the regulations in this part.

## Subpart E—Financial Considerations Including Sharing Payments

### § 1412.51 Limitation of payments.

(a) The provisions of part 1400 of this chapter apply to this part. Payments under this part will not exceed the amounts specified in part 1400 of this chapter. As determined under that part, no person may receive more than $40,000 in direct payments or $65,000 in counter-cyclical payments with respect

to any contract or crop year. For ACRE participants, no person may receive more than in ACRE and counter-cyclical payments and direct payments combined, more than the sum of:

(1) $65,000 and

(2) The amount of the reduction in direct payments required by the ACRE contract.

(b) The amount of 2008 direct and counter-cyclical payments for a farm will not exceed the maximum amount that would have been paid based on the number of persons as determined in accordance with part 1400 of this chapter on the farm as of May 22, 2008.

(c) Except as provided in this section, notwithstanding any other provision of this part, for the 2009 and subsequent crops, a producer on a farm will not receive direct payments, counter-cyclical payments, or ACRE payments if the sum of the base acres of covered commodities and peanuts on the farm is 10 acres or less. The 10-acre limitation of this subsection will not apply to a farm that is at least 50 percent owned by a socially disadvantaged farmer or rancher (as defined in section 355(e) of the Consolidated Farm and Rural Development Act (7 U.S.C. 2003 (e))) or a limited resource farmer or rancher, as defined by the Secretary. If such farm is owned by a legal entity, such as a corporation, at least 50 percent of the ownership interest in the entity must be socially disadvantaged or limited resource farmers or ranchers.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19191, Apr. 14, 2010]

### § 1412.52 Direct payment provisions.

(a) For 2008 through 2012 contracts, a final direct payment will be made to eligible producers on a farm enrolled in a contract with respect to covered commodities and peanuts for which payment yields and base acres are established on or after October 1 of the fiscal year following the fiscal year of the contract in which the direct payment was earned.

(b) For 2008 through 2011 contracts, at the option of the producer, 22 percent of the direct payment for the farm with respect to covered commodities and peanuts for which payment yields and base acres are established will be paid in any month from December through September of the fiscal year of the contract, as requested by the producer, as an advance direct payment. Advance direct payments are not available for the 2012 crop year. For any participant on the contract to receive an advance direct payment, all producers sharing in the direct payments for the farm must:

(1) Be in compliance with all requirements of the contract and the requirements in this part at the time of the advance payment;

(2) Sign the DCP or ACRE program contract designating payment shares and provide supporting and necessary contractual documentation. If all producers on the farm have not signed the contract designating payment shares in accordance with this paragraph, the contract will not be considered approved and no contract participant will be eligible for any payment for that farm for that contract. FSA has no obligation or responsibility to obtain signatures or requisite documents for DCP or ACRE program contract participants; and

(3) Comply with the provisions of parts 12 and 1400 of this title.

(c) If a producer declines to accept, or is determined to be ineligible for all or any part of the producer's share of the direct payment computed for the farm in accordance with the provisions of this section:

(1) The payment or portions thereof will not become available to or for any other producer and

(2) The producer must refund to CCC any amounts representing payments that exceed the payments determined by CCC to have been earned under the program authorized by this part. Part 1403 of this chapter is applicable to all unearned payments.

(d) The payment rates used to calculate direct payments with respect to covered commodities and peanuts on a farm enrolled in a contract are:

(1) Wheat—$0.52/bu.

(2) Corn—$0.28/bu.

(3) Grain sorghum—$0.35/bu.

(4) Barley—$0.24/bu.

(5) Oats—$0.024/bu.

(6) Upland cotton—$0.0667/lb.

(7) Long grain rice—$2.35/cwt.

(8) Medium grain rice—$2.35/cwt.

(9) Soybeans—$0.44/bu.

(10) Other oilseeds—$0.80/cwt.

(11) Peanuts—$36.00/ton.

(e) For 2008 through 2012 contracts, subject to the limitations of § 1412.51 and part 1400 of this chapter, the final direct payment amount to be paid to participants on a farm enrolled in a contract with respect to the covered commodities or peanuts for which payment yields and base acres are established is equal to the product of:

(1) The payment rate specified in paragraph (d) of this section, multiplied by

(2) The relevant payment acres of the covered commodity or peanuts on the farm enrolled in a contract, minus any acre reduction in accordance with § 1412.76(g), multiplied by

(3) The payment yield for the covered commodity or peanuts on the farm enrolled in a contract as determined in accordance with §§ 1412.31 and 1412.32, minus

(4) Any reduction calculated in accordance with subpart F of this part, minus

(5) Any advance payment received in accordance with paragraph (b) of this section.

(f)(1) The payment of any amount due any participant on a farm enrolled in a contract will be made only after all participants subject to the contract are determined to be in full compliance with the contract and the requirements of this part.

(2) A producer on a farm enrolled in a contract may receive a payment amount due without respect to the payment eligibility of other producers on the farm if all the following apply:

(i) The contract participant is in compliance with all contractual provisions;

(ii) The participant is in full compliance with the contract and the requirements in this part;

(iii) The payment of such amount does not affect adversely nor defeat the purpose of the program, as determined by the Deputy Administrator; and

(iv) The payment is approved by the Deputy Administrator.

### § 1412.53 Counter-cyclical payment provisions.

(a) For the 2008 through 2012 contracts, except as provided in subpart G of this part, a counter-cyclical payment will be made to eligible participants on a farm enrolled in a DCP contract with respect to covered commodities and peanuts for which payment yield and base acres are established:

(1) Only if the effective price for the covered commodity or peanuts, as determined in accordance with paragraph (b) of this section, is less than the target price of the covered commodity or peanuts, respectively, as determined in accordance with paragraph (c) of this section and

(2) As soon as practical, as determined by the Deputy Administrator, after the end of the 12-month marketing year for the covered commodity or peanuts, as applicable.

(b) For the purposes of paragraphs (a) and (g) of this section, the effective price for a covered commodity or peanuts, respectively, is equal to the sum of the following:

(1) The higher of:

(i) The national average market price received by producers during the 12-month marketing year for the covered commodity or peanuts, as applicable, as determined by the Secretary, or

(ii) For the 2008 and 2009 crop years the following rates:

(A) Wheat—$2.75/bu.

(B) Corn—$1.95/bu.

(C) Grain sorghum—$1.95/bu.

(D) Barley—$1.85/bu.

(E) Oats—$1.33/bu.

(F) Upland cotton—$0.52/lb.

(G) Long grain rice—$6.50/cwt.

(H) Medium grain rice—$6.50/cwt.

(I) Soybeans—$5.00/bu.

(J) Other oilseeds—$9.30/cwt.

(K) Dry Peas—$5.40/cwt. (2009 crop only).

(L) Lentils—$11.28/cwt. (2009 crop only).

(M) Small Chickpeas—$7.43/cwt. (2009 crop only).

(N) Large Chickpeas—$11.28/cwt. (2009 crop only).

(O) Peanuts—$355.00/ton.

(iii) For the 2010 through 2012 crop years the following rates:

(A) Wheat—$2.94/bu.

(B) Corn—$1.95/bu.

(C) Grain sorghum—$1.95/bu.

(D) Barley—$1.95/bu.

(E) Oats—$1.39/bu.

(F) Upland cotton—$0.52/lb.

(G) Long grain rice—$6.50/cwt.
(H) Medium grain rice—$6.50/cwt.
(I) Soybeans—$5.00/bu.
(J) Other oilseeds—$10.09/cwt.
(K) Dry Peas—$5.40/cwt.
(L) Lentils—$11.28/cwt.
(M) Small Chickpeas—$7.43/cwt.
(N) Large Chickpeas—$11.28/cwt.
(O) Peanuts—$355.00/ton.

(2) The direct payment rate for the covered commodity as provided in §1412.52(d).

(c) For the purposes of paragraphs (a) and (g) of this section, the target prices are as follows:

(1) For the 2008 and 2009 crop years (except as indicated):
(i) Wheat—$3.92/bu.
(ii) Corn—$2.63/bu.
(iii) Grain sorghum—$2.57/bu.
(iv) Barley—$2.24/bu.
(v) Oats—$1.44/bu.
(vi) Upland cotton—$0.7125/lb.
(vii) Long grain rice—$10.50/cwt.
(viii) Medium grain rice—$10.50/cwt.
(ix) Soybeans—$5.80/bu.
(x) Other oilseeds—$10.10/cwt.
(xi) Peanuts—$495.00/ton.
(xii) Dry peas—$8.32/cwt. (2009 crop only).
(xiii) Lentils—$12.81/cwt. (2009 crop only).
(xiv) Small chickpeas—$10.36/cwt. (2009 crop only).
(xv) Large chickpeas—$12.81/cwt. (2009 crop only).

(2) For each of the 2010 through 2012 crop years, the target prices are as follows:
(i) Wheat—$4.17/bu.
(ii) Corn— $2.63/bu.
(iii) Grain sorghum—$2.63/bu.
(iv) Barley—$2.63/bu.
(v) Oats—$1.79/bu.
(vi) Upland cotton—$0.7125/lb.
(vii) Long grain rice—$10.50/cwt.
(viii) Medium grain rice—$10.50/cwt.
(ix) Soybeans—$6.00/bu.
(x) Other oilseeds—$12.68/cwt.
(xi) Peanuts—$495.00/ton
(xii) Dry peas—$8.32/cwt.
(xiii) Lentils—$12.81/cwt.
(xiv) Small chickpeas—$10.36/cwt.
(xv) Large chickpeas—$12.81/cwt.

(d) The payment rate used to calculate counter-cyclical payments with respect to covered commodities and peanuts for which payment yields and base acres are established on a farm enrolled in a contract is equal to the result of:

(1) The target price of the covered commodity or peanuts as determined in accordance with paragraph (c) of this section, minus

(2) The effective price of the covered commodity or peanuts as determined in accordance with paragraph (b) of this section.

(e) For 2008 through 2012 DCP contracts, when counter-cyclical payments are required in accordance with paragraph (a) of this section, subject to the limitation in accordance with §1412.51 and part 1400 of this chapter, the final counter-cyclical payment amount to be paid to producers on a farm enrolled in a contract with respect to the covered commodities or peanuts for which payment yields and base acres are established is equal to the product of:

(1) The payment rate determined in accordance with paragraph (d) of this section, multiplied by

(2) The relevant payment acres of the covered commodity or peanuts, as applicable, minus any acre reduction in accordance with §1412.47(g), multiplied by

(3) The payment yield for the covered commodity or peanuts on the farm enrolled in a contract as determined in accordance with §1412.33, minus

(4) Any reduction calculated in accordance with subpart F of this part that was not satisfied by a reduction in the direct payments for the farm calculated in accordance with §1412.52(e), minus

(5) Any partial payment received in accordance with paragraphs (f) or (g) of this section.

(f) For 2008 through 2012 DCP contracts, partial counter-cyclical payments will be paid, at the request of the producer, if the Secretary determines that a counter-cyclical payment for the covered commodity or peanuts, respectively, will be required in accordance with paragraph (a)(1) of this section. The first partial counter-cyclical payment will:

(1) Be calculated in accordance with paragraphs (e)(1) through (4) of this section;

(2) Be an amount determined by the Secretary not to exceed 40 percent of the projected counter-cyclical payment

for the covered commodity or peanuts, respectively; and

(3) Be made after completion of the first 180 days of the marketing year for that crop;

(g) To the extent practicable, the final partial payment will be made beginning on October 1 of the fiscal year starting in the same calendar year as the end of the marketing year for that crop.

(1) If a producer declines to accept, or is determined to be ineligible for all or any part of the producer's share of the counter-cyclical payment computed for the farm in accordance with the provisions of this section:

(i) The payment or portions thereof will not become available for any other producer and

(ii) The producer will refund to CCC any amounts representing payments that exceed the payments determined by CCC to have been earned under the program authorized by this part. Part 1403 of this chapter is applicable to all unearned payments.

(2)(i) The payment of any amount due any producer on a farm enrolled in a contract will be made only after all the producers subject to the contract are determined to be in full compliance with the contract and the requirements in this part.

(ii) A participant on a farm enrolled in a contract may receive a payment amount due without regard to the eligibility of other participants on the enrolled and in compliance with contract farm if:

(A) The participant is in full compliance with the contract and the requirements in this part;

(B) The payment of such amount does not adversely affect or defeat the purpose of the program, as determined by the Deputy Administrator, or designee; and

(C) The payment is approved by the Deputy Administrator, or designee.

(h) The participants on a farm who receive any advance counter-cyclical payment must refund the portion of such advance payments that exceeds the actual counter-cyclical payment actually earned for the covered commodity or peanuts, as applicable.

[68 FR 24835, May 8, 2003, as amended at 74 FR 6352, Feb. 9, 2009; 75 FR 19192, Apr.14, 2010]

**§ 1412.54 Sharing of contract payments.**

(a) Each eligible producer on a farm will be given the opportunity to annually enroll in a DCP or ACRE program contract, as applicable, and receive payments determined to be fair and equitable as agreed to by all the producers on the farm and approved by the county committee.

(b) Each producer leasing a farm must provide a copy of their written lease to the county committee and, in the absence of a written lease, must provide to the county committee a complete written description of the terms and conditions of any oral agreement or lease. An owner's or landlord's signature, as applicable, affirming a zero share on a contract may be accepted as evidence of a cash lease between the owner or landlord and tenant, as applicable, as determined by CCC. Such signature or signatures, if entered on the contract to satisfy the requirement of furnishing a written lease, must be entered on the contract no later than as prescribed in § 1412.41.

(c) When base acres are leased on a share basis, neither the landlord nor the tenant will receive 100 percent of the contract payment for the farm.

(d) CCC will approve a contract for enrollment and approve the division of payment when all of the following apply:

(1) The landlords, tenants, and sharecroppers sign the contract and agree to the payment shares shown on the contract;

(2) CCC determines that the interests of tenants and sharecroppers are being protected; and

(3) CCC determines that the payment shares shown on the contract do not circumvent either the provisions of this part or the provisions of part 1400 of this chapter.

(e) For the 2008 crop year only:

(1) A lease will be considered to be a cash lease if the lease provides for only a guaranteed cash payment for a specified amount or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).

(2) If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or

the interest such producer would have had if the crop had been produced, or combination thereof, such agreement will be considered to be a share lease.

(3) If a lease provides for the greater of a determinable guaranteed amount or determinable share of the crop or crop proceeds, such agreement will be considered a share lease.

(4) If the lease is a cash lease, the landlord is not eligible for direct or counter-cyclical payments. The leasing of grazing or haying privileges is not considered cash leasing.

(f) For the 2009 through 2012 crop years:

(1) A lease will be considered to be a cash lease if the lease provides for only a guaranteed cash payment for a specified amount, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).

(2) If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such producer would have had if the crop had been produced, or combination thereof, such agreement will be considered to be a share lease.

(3) If a lease provides for the greater of a determinable guaranteed amount or determinable share of the crop or crop proceeds, such agreement will be considered a cash lease.

(4) If the lease is a cash lease, the landlord is not eligible for direct, counter-cyclical, or ACRE program payments. The leasing of grazing or haying privileges is not considered cash leasing.

### § 1412.55 Provisions relating to tenants and sharecroppers.

(a) Neither direct nor counter-cyclical nor ACRE program payments will be made by CCC if:

(1) The landlord or operator has adopted a scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program. If any of such conditions occur or are discovered after payments have been made, all or any such part of the payments as the State committee may determine must be refunded to CCC; or

(2) The landlord terminated a lease in violation of state law as determined by a state court.

(b) [Reserved]

## Subpart F—Contract Violations and Reduction in Payments

### § 1412.61 Contract violations.

(a) Except as provided in paragraphs (b) and (c) of this section, violations of contract requirements will result in the termination of the contract. Upon such termination, all producers subject to the contract forfeit all rights to receive direct, counter-cyclical, and ACRE program payments on the farm for the contract and must refund all payments received, plus interest, to run from the date of the CCC disbursement, as determined in accordance with part 1403 of this chapter.

(b)(1) If there is a violation of § 1412.47 and CCC determines that a violation is not serious enough to warrant termination of the contract under paragraph (a) of this section, payments may be made to the producers specified on the contract, but in an amount that is reduced by an amount equal to the sum of:

(i) The per-acre market value of the fruits, vegetables, and wild rice, as determined by the State Committee, times the number of acres in violation, plus

(ii) The direct, counter-cyclical, and ACRE program payments for each such acre.

(2) Producers must protect land enrolled in DCP from weeds, including noxious weeds, and erosion, including providing sufficient cover if determined necessary by the county committee. The first violation of this provision will result in a reduction in the direct payments for the farm by an amount equal to three times the cost of maintenance of the acreage, but not to exceed 50 percent of the total direct payments for the farm. The second violation of this provision will result in a reduction in the direct payments for the farm by an amount equal to three times the cost of maintenance of the acreage, not to exceed the total direct payments for the farm. For the 2009 and subsequent crop years, a third violation of this provision will result in a

complete reduction of all payments under the DCP or ACRE program contract.

(c) If there is a violation of § 1412.66 due to an inaccurate report of either acreage or production and CCC determines that the violation was not a knowing and willing falsification or misrepresentation by producers on the contract under paragraph (a) of this section, payments may be made to the producers specified on the contract based on determined acreage and production.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### § 1412.62 Fruit, vegetable, and wild rice acreage reporting violations.

(a)(1) If an acreage report of fruits, vegetables, or wild rice planted on base acreage of a farm enrolled in DCP or the ACRE program is inaccurate but within tolerance as provided in paragraph (b) of this section and CCC determines the producer made a good faith effort to comply with the provisions of this section, the producers must accept a reduction in the direct, counter-cyclical, and ACRE program payments for each such acre.

(2) If an acreage report of fruits, vegetables, or wild rice planted on base acreage of a farm enrolled in DCP is inaccurate and exceeds the tolerance as provided in paragraph (b) of this section, but CCC determines the producer made a good faith effort to comply with the provisions of this section, the producers must accept a reduction in the direct, counter-cyclical, and ACRE program payments for the farm in an amount equal to the sum of:

(i) The direct, counter-cyclical, and ACRE program payments in such year for each such acre, plus

(ii) Twice the average dollar value of the direct payment for the covered commodity and peanut base acres reduced because of the fruit, vegetable, and wild rice plantings on such acre, multiplied by the total number of acres in violation.

(3) The contract will be terminated if an acreage report of fruits, vegetables, or wild rice planted on base acres of a farm enrolled in DCP or ACRE program is inaccurate, and the county committee determines the producer did not make a good faith effort to comply with the provisions of this section. Upon such termination, producers subject to such contract must:

(i) Forfeit all rights to receive direct, counter-cyclical, and ACRE program payments for the farm;

(ii) Refund all direct, counter-cyclical, and ACRE program payments received for the farm under the contract, plus interest as determined in accordance with part 1403 of this chapter; and

(iii) Be determined to be ineligible for all program benefits according to part 718 of this title.

(b) For the purposes of this section, tolerance is the amount by which the determined acreage may differ from the reported acreage and still be considered in compliance with program requirements. Tolerance for fruits, vegetables, and wild rice plantings is 5 percent of the reported fruit, vegetable, and wild rice acreage, not to exceed 50 acres.

### § 1412.63 Contract liability.

All signatories to a DCP or ACRE program contract are jointly and severally liable for contract violations and resulting repayments and penalties.

### § 1412.64 Inaccurate representation, misrepresentation, and scheme or device.

(a) Producers must report and certify program matters accurately. Errors in reporting may impact eligibility or extent of eligibility. Benefits under this part will be based on the most correct information available. Producers are responsible for refunding, with interest from the date of the CCC disbursement, any program benefits that were paid based on incorrect program information.

(b) For those cases in which FSA determines that an inaccurate representation or certification is a misrepresentation or scheme or device, such person will be ineligible to receive DCP or ACRE payments and will have the person's interest in all contracts terminated if it is determined that such person has done any of the following:

(1) Adopted any scheme or device that tends to defeat the purpose of this part;

(2) Made any fraudulent representation;

(3) Misrepresented any fact affecting a DCP, ACRE program, or determination made pursuant to part 1400 of this chapter; or

(4) Violated or been determined ineligible under § 1400.5 of this chapter.

(c) Any remedies taken by FSA or CCC in accordance with this section will be in addition to any other civil or other remedies that may be available, including, but not limited to, those provided in part 1400 of this chapter.

### § 1412.65 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person will be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this chapter apply to contract payments.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this chapter.

### § 1412.66 Acreage and production reports.

(a) As a condition of eligibility for payments under this part, the operator or owner must accurately submit a report of all cropland acreage on the farm in accordance with part 718 of this title.

(b) As a condition of eligibility for payments under this part, producers enrolled in the Project according to § 1412.48 and those seeking payments under subpart G of this part, must accurately submit a report of production, no later than the acreage reporting date for the crop in the year immediately following the crop year of the reported crop acreage, for each crop either enrolled in the Project according to § 1412.48 or for each covered commodity or peanuts on a farm enrolled in an ACRE program contract for which an acreage report greater than zero acres was filed according to paragraph (a) of this section. At the discretion of CCC, the report of production must be accompanied by documentation acceptable to CCC. The report must include the date harvest was completed. Records of production acceptable to CCC may include those specified in:

(1) Commercial receipts, settlement sheets, warehouse ledger sheets, or load summaries of the crop that was sold or otherwise disposed of through commercial channels provided the records are reliable or verifiable as determined by CCC; and

(2) Such documentary evidence such as contemporaneous measurements, truck scale tickets, and contemporaneous diaries, as is necessary in order to verify the information provided if the crop has been fed to livestock or otherwise disposed of other than through commercial channels, provided the records are reliable or verifiable as determined by CCC. If the crop will be disposed of through retail sales, such as roadside stands, u-pick, etc. and the producer will not be able to certify acceptable records of production, the producer must request an appraisal of the crop acreage prior to harvest.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### § 1412.67 Notices of loss.

(a) If a notice of loss for prevented planting under a policy or plan of insurance or pursuant to part 1437 of this chapter has not already been filed, at least one producer having a share of a crop intended to be planted pursuant to § 1412.48 or a having a share of a crop of a covered commodity or peanuts on a farm enrolled in the ACRE program must provide a notice of loss for prevented planting to CCC in the administrative FSA office for the farm, within 15 calendar days after the final planting date.

(b) For a prevented planting notice filed in accordance with this section, the notice of loss must include:

(1) Total acreage intended to be planted to the crop in the administrative county;

(2) Total acreage planted by the producer to the crop in the administrative county;

(3) Whether a purchase, delivery, or arrangement for purchase or delivery

was made for seed, chemicals, fertilizer, *etc.;* and

(4) When land preparation measures, for example, cultivation, were completed, and what has been done or will be done with the acreage, for example, abandoned, replanted, *etc.*

(c) A notice of loss provided beyond the time specified in paragraph (a) of this section may be considered timely filed if, at the discretion of CCC, provided at such time to permit an authorized CCC representative the opportunity to:

(1) Verify the information on the notice of loss by inspection of the specific acreage or crop involved; and

(2) Determine, based on information obtained by inspection of the specific acreage or crop involved, that an eligible cause of loss, as opposed to other circumstance, caused the claimed prevented planting,.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### § 1412.68 Compliance with highly erodible land and wetland conservation provisions.

The provisions of part 12 of this title apply to this part.

### § 1412.69 Controlled substance violations.

The provisions of part 718 of this title apply to this part.

## Subpart G—Average Crop Revenue Election (ACRE) Program

### § 1412.71 Administration.

(a) All of the provisions of this part apply to this subpart. To the extent that there is a conflict with the provisions of this part and subpart G of this part, the provisions of subpart G of this part apply.

(b) [Reserved]

### § 1412.72 Availability and election of alternative approach.

(a) As an alternative to receiving counter-cyclical payments under § 1412.53, and in exchange for a 20-percent reduction in direct payments under § 1412.52, as well as 30-percent reduction in established marketing assistance loan rates with respect to all covered commodities and peanuts on a farm, during each of the 2009, 2010, 2011, and 2012 crop years, as applicable, depending on the year the producer initially elects the ACRE option, producers, including owners, on a farm will have until August 14, 2009 to make an irrevocable election to instead receive ACRE program payments, computed in accordance with the regulations of this part, for the 2009 crop year through and including the 2012 crop year. During each of the 2010, 2011, and 2012, crop years, as applicable, depending on the year the producer initially elects the ACRE option, producers, including owners, on a farm will have until June 1, or such earlier date as may be determined and announced at the discretion of the Deputy Administrator, of 2010, 2011, and 2012, as applicable, to make an irrevocable election to instead receive ACRE program payments, computed in accordance with the regulations of this part, for the initial crop year for which the election is made through and including the 2012 crop year.

(b) If producers elect the ACRE option for a farm in accordance with paragraphs (a) and (d) of this section, any DCP contract enrolled prior to a timely election in a fiscal year will be considered withdrawn according to § 1412.41(b). The producers must still choose whether or not to enroll the ACRE elected farm in an ACRE program contract. DCP payments issued for the fiscal year of such election, including advance and partial program payments, must be refunded. No payments will be made available to participants under an ACRE program contract until such time as refunds have been remitted and enrollment has occurred as provided in this part, unless the Deputy Administrator determines to collect the refund instead by a setoff against the ACRE payment. Under no circumstances will election be construed to be an intent to enroll or an enrollment in the ACRE program.

(c) If a marketing assistance loan (including marketing assistance loans that have been repaid or immediately repaid) or loan deficiency payment has been computed prior to election of the ACRE option, the persons electing the ACRE option:

(1) Acknowledge that such marketing assistance loan (including any loan repayments) and loan deficiency payments will be recomputed based on reduced marketing assistance loan rates,

(2) Agree to immediately refund to CCC the difference in the amount of marketing assistance loan (including loan repayments) and loan deficiency payments as a result of the ACRE election.

(d) Eligible producers, including owners, on a farm electing ACRE participation by:

(1) August 14, 2009, will be considered to have irrevocably elected the ACRE option for the 2009, 2010, 2011, and 2012 crop years and, if applicable, withdrew prior enrolled 2009 DCP contracts according to § 1412.41(b);

(2) June 1 of:

(i) 2010, or such earlier date determined and announced at the discretion of the Deputy Administrator, will be considered to have irrevocably elected the ACRE option for the 2010, 2011, and 2012 crop years and, if applicable, withdrew prior enrolled 2010 DCP contracts according to § 1412.41(b);

(ii) 2011, or such earlier date determined and announced at the discretion of the Deputy Administrator, will be considered to have irrevocably elected the ACRE option for the 2011 and 2012 crop years and, if applicable, withdrew prior enrolled 2011 DCP contracts according to § 1412.41(b); or

(iii) 2012, or such earlier date determined and announced at the discretion of the Deputy Administrator, will be considered to have irrevocably elected the ACRE option for the 2012 crop year and, if applicable, withdrew prior enrolled 2012 DCP contracts according to § 1412.41(b).

(e) If all of the producers on a farm fail to make an election under paragraphs (a) and (d), make different elections under paragraph (a), or fail to timely elect as required by paragraph (d), all of the producers on the farm will be deemed to have not made the ACRE election option and instead, provided DCP contract enrollment was previously made pursuant to this part, receive counter-cyclical payments under § 1412.53 for all covered commodities and peanuts on the farm, and to otherwise not have made the election described in paragraph (a), for the applicable crop years.

(f) Eligible producers on a farm who elect the ACRE option according to this section are making the irrevocable election for all of the farm as constituted on the date of election irrespective of whether the same producers are present on the farm in subsequent years and irrespective of whether there is a change of ownership. That is, the producer election is binding on the farm, not just the producers on the farm at the time of the election. An election is for the entire farm and not for part of a farm. If the total number of planted and considered planted acres to all covered commodities and peanuts of the producers on the farm exceeds the total base acreage of the farm that is enrolled pursuant to this part, the producers on the farm may choose which commodity or commodities the ACRE option will apply to under this section. Although the election according to paragraph (b) of this section is irrevocable, for a farm enrolled as specified in this part, each year following the election by the final acreage reporting date for the crop the producers on a farm already having the ACRE option elected may choose the commodity or commodities the ACRE option will apply to under this section.

(g) "Timely elected" under this section means all requisite signatures of eligible producers on a farm are entered on the election form and accompanied by supportive and necessary contractual documents according to § 1412.3.

(h) Unless an earlier date is determined and announced at the discretion of the Deputy Administrator, the election deadline for the ACRE option is August 14, 2009, for the 2009 election period and June 1 in each of the 2010, 2011, and 2012 fiscal years as specified in § 1412.72(d) and there is no late file election period. The enrollment deadlines specified in this part and § 1412.41 apply to enrollments of farms under DCP contracts or ACRE program contracts. For election of ACRE in a fiscal year, all requisite signatures and supportive documentary evidence must be furnished by August 14, 2009, for the 2009 election period and June 1 in each of the 2010, 2011, and 2012 fiscal years, or

such earlier date determined and announced at the discretion of the Deputy Administrator. ACRE elections will not be construed to be ACRE contract enrollments. Participants must enroll in an ACRE contract to participate in ACRE following election.

(i) Under no circumstances will the ACRE election option be permitted except as provided in this section. ACRE elections will not be approved unless all producers, including owners, on a farm at time of election have signed the form electing the option. The ACRE election will not be approved before all producers, including owners, on a farm have signed the ACRE election form. A producer's signature with other producers on a DCP contract enrolled prior to the submission of an election form will not be deemed evidence of the producer's agreement with those other producers with regard to election. An election of the ACRE option not having all requisite signatures of producers on a farm by the election deadline of the year in which election is made will not be considered submitted to CCC for the purpose of election in that fiscal year and will not be acted on or approved. In all cases, it is the responsibility of the operator and owners of a farm to submit all requisite signatures of producers necessary for election.

(j) Except as provided in paragraph (k) of this section, electing the ACRE option is irrevocable. Eligible producers may not withdraw an ACRE election option at any time. The provisions of §1412.41(b) do not apply to ACRE elections.

(k) Any producer with an interest in a farm having made the ACRE election according to this section may unilaterally revoke the election for all of the farm if the election and revocation are both filed by the producer prior to the election deadline established for the initial year of election. The revocation must be submitted in writing to CCC no later than close of business on the date of the election deadline of the initial year of election. There are no late file provisions available for revocation of the ACRE election. No other revocations of the ACRE election will be permitted under this part in order to comply with the irrevocability mandated in law. Accordingly, relief provisions in part 718, subpart D, of this title are not applicable to revocation of the ACRE election.

(l) In the event an ACRE election is revoked according to paragraph (k) of this section, the ACRE program contract, if enrolled, will be considered likewise withdrawn according to §1412.41(b) and any and all payments issued under such contract must be refunded according to part 1403 of this chapter.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### §1412.73 Sharing of ACRE payments.

(a) Each eligible producer on a farm will be given the opportunity to elect the ACRE option and receive payments determined to be fair and equitable as agreed to by all producers on the farm and approved by the county committee.

(b) The provisions of §1412.54(f) regarding the classification of leases apply to ACRE.

(c) Shares of ACRE payments will be determined based on shares recorded on the report of acreage filed in accordance with §1412.66. Each eligible producer having a share of covered commodities or peanuts planted or considered planted on a farm enrolled under an ACRE program contract must do both of the following to be eligible for their share of an ACRE payment:

(1) Unless otherwise already enrolled on the ACRE program contract with a share of base acres on the farm, sign the ACRE program contract during the contract period.

(2) Have the producer's share recorded on report of acreage filed in accordance with part 718 of this title and §1412.66 of this part.

(d) In a case where a producer has failed to sign an ACRE program contract for the producer's reported share of covered commodities or peanuts planted or considered planted on a farm enrolled in accordance with this subpart, that producer's share will not receive any consideration for payment and will not generate any payment to

the producer or to any other producer on the farm.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### § 1412.74 Prior enrollment in DCP.

(a) If a farm was enrolled in a DCP contract according to subpart D of this part in a crop year prior to the time in which the producer elected the ACRE option according to § 1412.72:

(1) The ACRE election option in such crop year will be considered a request to have the DCP contract withdrawn for that crop year. To participate in an annual ACRE program contract following election, the farm must be enrolled under an ACRE program contract by the producers according to this part. The election will in no way be construed by CCC to be an enrollment.

(2) All direct and counter-cyclical payments issued to any participant on that farm must be refunded to CCC.

(b) [Reserved]

### § 1412.75 Notice of Election.

(a) CCC will provide notice to operators and owners of record regarding the opportunity to make each of the elections described in § 1412.72. The notice will include information:

(1) On the opportunity of the producers on a farm to make the election and

(2) Regarding the manner in which the election must be made and the time periods and manner in which notice of the election must be submitted to the CCC.

(b) CCC will provide the notice mentioned in paragraph (a) of this section to the operator and owners of record. The operator and owners are responsible for notifying all producers on the farm of the information contained in the notice.

### § 1412.76 Payments.

In the case of producers on a farm who make an election to receive ACRE payments for any of the 2009 through 2012 crop years for all covered commodities and peanuts and where enrollment according to this part has subsequently occurred, and where all other eligibility provisions have been satisfied, CCC will make ACRE payments available to the producers on a farm in accordance with this subpart. For each of the 2009 through 2012 crop years, as applicable when enrollment has occurred following election, CCC will make ACRE payments beginning October 1, or as soon as practicable thereafter, after the end of the applicable marketing year for the covered commodity or peanuts.

(a) CCC will make ACRE payments available to the producers on a farm for each crop year if the farm was enrolled according to this part following the election and:

(1) The actual State revenue for the crop year for the covered commodity or peanuts in the State determined under paragraph (c) of this section is less than

(2) The ACRE program guarantee for the crop year for the covered commodity or peanuts in the State determined under paragraph (d) of this section.

(b) Provided that the farm is enrolled following election and all other eligibility provisions are met, CCC will make ACRE payments available to the producers on a farm in a State for a crop year only if (as determined by CCC):

(1) The actual farm revenue for the crop year for the covered commodity or peanuts, as determined under paragraph (h) of this section is less than

(2) The farm ACRE benchmark revenue for the crop year for the covered commodity or peanuts, as determined under paragraph (i) of this section.

(c) The amount of the actual State revenue for a crop year of a covered commodity or peanuts will equal the product obtained by multiplying the average actual State yield for each planted acre for the crop year for the covered commodity or peanuts determined under paragraph (c)(1) of this section and the national average market price for the crop year for the covered commodity or peanuts determined under paragraph (c)(2) of this section.

(1) The average actual State yield for each planted acre for a crop year for a covered commodity or peanuts in a State will equal, as determined by CCC,

(i) The quantity of the covered commodity or peanuts that is produced in

the State during the crop year, divided by

(ii) The number of acres that are planted to the covered commodity or peanuts in the State during the crop year and

(2) The national average market price for a crop year for a covered commodity or peanuts in a State will equal the greater of

(i) The national average market price received by producers during the 12-month marketing year for the covered commodity or peanuts, as determined by the Secretary, or

(ii) The established marketing assistance loan rate for the covered commodity or peanuts as reduced according to § 1412.72.

(d) The ACRE program guarantee for a crop year for a covered commodity or peanuts in a State will equal 90 percent of the product obtained by multiplying

(1) The average benchmark State yield for each planted acre for the crop year for the covered commodity or peanuts in a State determined under paragraph (e) of this section and

(2) The ACRE program guarantee price for the crop year for the covered commodity or peanuts determined under paragraph (f) of this section.

(i) In the case of each of the 2010 through 2012 crop years, the ACRE program guarantee for a crop year for a covered commodity or peanuts in paragraph (d) of this section will not decrease or increase more than 10 percent from the guarantee for the preceding crop year. The increase or decrease in the state revenue guarantee for a covered commodity or peanuts will be applicable to all ACRE program participants in a State, regardless of the year the participant first elected ACRE or enrolled.

(ii) [Reserved]

(e) The average benchmark State yield for each planted acre for a crop year for a covered commodity or peanuts in a State is equal to the average yield per planted acre for the covered commodity or peanuts in the State for the most recent 5 crop year yields, excluding each of the crop years with the highest and lowest yields, using National Agricultural Statistics Service data to the extent possible.

(1) If CCC cannot establish the average benchmark State yield for each planted acre for a crop year for a covered commodity or peanuts in a State in accordance with this paragraph or if the yield determined is an unrepresentative average yield for the State (as determined by the CCC), CCC will assign a benchmark State yield for each planted acre for the crop year for the covered commodity or peanuts in the State on the basis of:

(i) Previous average yields for a period of 5 crop years, excluding each of the crop years with the highest and lowest yields or

(ii) Average benchmark State yields for planted acres for the crop year for the covered commodity or peanuts in similar States.

(2) [Reserved]

(f) The ACRE program guarantee price for a crop year for a covered commodity or peanuts in a State is the simple average of the national average market price received by producers of the covered commodity or peanuts for the most recent 2 crop years, as determined by CCC.

(g) In the case of a State in which at least 25 percent of the acreage planted to a covered commodity or peanuts in the State is irrigated and at least 25 percent of the acreage planted to the covered commodity or peanuts in the State is not irrigated, CCC will calculate a separate ACRE program guarantee for the irrigated and non-irrigated areas of the State for the covered commodity or peanuts.

(h) The amount of the actual farm revenue for a crop year for a covered commodity or peanuts will equal the amount determined by multiplying:

(1) The actual yield for the covered commodity or peanuts of the producers on the farm and

(2) The national average market price for the crop year for the covered commodity or peanuts.

(i) The farm ACRE benchmark revenue for the crop year for a covered commodity or peanuts will equal the sum obtained by adding:

(1) The amount determined by multiplying

(i) The average yield per planted acre for the covered commodity or peanuts of the producers on the farm for the

most recent 5 crop years, excluding each of the crop years with the highest and lowest yields and

(ii) The ACRE program guarantee price for the applicable crop year for the covered commodity or peanuts in a State and

(2) The amount of the per acre crop insurance premium required to be paid by the producers on the farm for the applicable crop year for the covered commodity or peanuts on the farm.

(j) If ACRE payments are required to be paid for any of the 2009 through 2012 crop years of a covered commodity or peanuts under this section, the amount of the ACRE payment to be paid to the producers on the farm for the crop year under this section will be equal to the product obtained by multiplying:

(1) The lesser of—

(i) The difference between—

(A) The ACRE program guarantee for the crop year for the covered commodity or peanuts in the State and

(B) The actual State revenue from the crop year for the covered commodity or peanuts in the State and

(ii) 25 percent of the ACRE program guarantee for the crop year for the covered commodity or peanuts in the State;

(2)(i) For each of the 2009 through 2011 crop years, 83.3 percent of the acreage planted or considered planted to the covered commodity or peanuts for harvest on the farm in the crop year and

(ii) For the 2012 crop year, 85 percent of the acreage planted or considered planted to the covered commodity or peanuts for harvest on the farm in the crop year; and

(3) The quotient obtained by dividing—

(i) The average yield per planted acre for the covered commodity or peanuts of the producers on the farm for the most recent 5 crop years, excluding each of the crop years with the highest and lowest yields, by

(ii) The benchmark State yield for the crop year.

### § 1412.77 Transfer of land and succession-in-interest.

(a) Land subject to an ACRE election will continue to be subject to the election even if there is a transfer of land or change in interest of any producer on the farm. If a new owner or operator or producer purchases or obtains the right and interest in, or right to occupancy of, the land subject to an ACRE election option, such new owner or operator or producer, upon the approval of CCC, may choose to become a participant to a new ACRE program contract with CCC with respect to such transferred land in accordance with § 1412.41.

(b) A succession in interest to an ACRE program contract may be permitted if there has been a change in the operation of a farm such as:

(1) A sale of land;

(2) A change of operator or producer, including a change in a partnership that increases or decreases the number or changes who are partners;

(3) A foreclosure, bankruptcy, or involuntary loss of the farm;

(4) A change in the producer shares to reflect changes in the producer's share of the crop(s) that were originally approved on the contract; or

(5) Another change as otherwise determined by the Deputy Administrator by which the succession will not adversely affect nor defeat the purpose of the program.

(c) A succession in interest to an ACRE program contract is not permitted if CCC determines that the change:

(1) Is not for all the time remaining under the ACRE program contract;

(2) Results in a violation of the landlord-tenant provisions specified in § 1412.55; or

(3) Adversely affects or otherwise defeats the purpose of the program.

(d) The provisions of § 1412.46(c) and (d) apply to ACRE participation.

(e) In any case in which a payment or payments have previously been made to a predecessor, such payment will not be paid to the successor, unless such payment has been refunded in full by the predecessor, in accordance with § 1412.41(d).

(f) Producers who have reported a share interest on an acreage report of covered commodities and peanuts planted or prevented from being planted on a farm are not automatically considered successors. In accordance with § 1412.73, such producers who have not already signed the ACRE program

contract have until the end of the contract period to sign the ACRE program contract or that share will not receive payment consideration.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19192, Apr. 14, 2010]

### § 1412.78 Violations.

(a)(1) If a participant fails to carry out the terms and conditions of an ACRE contract, CCC may terminate the ACRE contract.

(2) If the ACRE contract is terminated by CCC in accordance with this paragraph:

(i) The participant will forfeit all rights to further payments under such contract and refund all payments previously received together with interest;

(ii) Pay liquidated damages to CCC in such amount as specified in such contract.

(iii) The acreage is ineligible for further DCP and ACRE participation from the time of termination through the end of the contract period regardless of the reason or reasons for such termination; and

(b) If the Deputy Administrator determines such failure does not warrant termination of such contract, the Deputy Administrator may authorize relief as the Deputy Administrator deems appropriate. Participants are not entitled to either relief or even the consideration of relief under this paragraph. Relief under this paragraph is solely discretionary by the Deputy Administrator.

(c) CCC may reduce a demand for a refund under this section to the extent CCC determines that such relief would be appropriate and will not deter the accomplishment of the goals of the program.

[73 FR 79289, Dec. 29, 2008, as amended at 75 FR 19193, Apr. 14, 2010]

### § 1412.79 Executed ACRE contract not in conformity with regulations.

If, after an ACRE contract is approved by CCC, it is discovered that such ACRE contract is not in conformity with the provisions of this part, the provisions of this part will prevail.

### § 1412.80 Division of program payments and provisions relating to tenants and sharecroppers.

(a) Payments received under this subpart will be divided in the manner specified in the applicable contract or agreement and CCC will ensure that producers, who would have an interest in acreage being offered, receive treatment that CCC deems to be equitable, as determined by the Deputy Administrator. CCC may refuse to enter into a contract when there is a disagreement among persons seeking enrollment as to a person's eligibility to participate in the contract as a tenant and there is insufficient evidence to indicate whether the person seeking participation as a tenant does or does not have an interest in the acreage offered for enrollment in ACRE.

(b) CCC may remove an operator or tenant from an ACRE contract when the operator or tenant:

(1) Requests, in writing to be removed from the ACRE contract;

(2) Files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by the provisions of applicable bankruptcy laws;

(3) Dies during the contract period and the Administrator of the estate fails to succeed to the contract within a period of time determined by the Deputy Administrator; or

(4) Is the subject of an order of a court of competent jurisdiction requiring the removal from the ACRE contract of the operator or tenant and such order is received by FSA, as determined by the Deputy Administrator.

(c) In addition to the provisions in paragraph (b) of this section, tenants must maintain their tenancy throughout the contract period in order to remain on a contract. Tenants who fail to maintain tenancy on the acreage under contract, including failure to comply with provisions under applicable State law, may be removed from a contract by CCC. CCC will assume the tenancy is being maintained unless notified otherwise by a ACRE participant specified in the applicable contract.

# PART 1413—COMMODITY INCENTIVE PAYMENT PROGRAMS

## Subpart A—Durum Wheat Quality Program

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## Subparts B–C [Reserved]

AUTHORITY: 7 U.S.C. 8788 and 15 U.S.C. 714.

SOURCE: 75 FR 41965, July 20, 2010, unless otherwise noted.

## Subpart A—Durum Wheat Quality Program

### § 1413.101 Applicability.

(a) This subpart establishes the terms and conditions under which the Durum Wheat Quality Program (DWQP) as authorized by section 1613 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) will be administered.

(b) This program will operate only to the extent appropriated funding is available.

(c) Subject to available funding, eligible producers of durum wheat will be partially compensated for the cost of purchasing and applying fungicides to a crop of durum wheat to control Fusarium head blight on acres accurately certified as planted to durum wheat. "Available funding" requires that there be a specific appropriation for the program that applies to a particular crop for which the producer seeks compensation under this program.

### § 1413.102 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Application period* means the dates established by the Deputy Administrator for Farm Programs for producers to apply for program benefits.

*CCC* means the Commodity Credit Corporation.

*Crop year* means the calendar year in which the wheat was harvested or intended to be harvested. For example, a reference to the 2010 crop year of wheat means wheat that when planted was intended for harvest in calendar year 2010.

*Durum wheat* means all varieties of white (amber) durum wheat as defined in the U.S. Standards for Wheat (7 CFR part 810, subpart M) including, but not limited to, hard amber durum wheat and amber durum wheat.

*Flowering stage* means the period of time during the wheat growth stage, after the head emergence has completed and prior to milk development in the kernel.

*State committee, county committee or county office* means the respective FSA committee or office.

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

*USDA* means the United States Department of Agriculture.

### § 1413.103 Administration.

(a) DWQP will be administered under the general supervision of the Executive Vice President, CCC (Administrator, Farm Service Agency (FSA)), or a designee, and will be carried out in the field by FSA State and county committees and FSA employees.

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart, except as specified in paragraph (e) of this section.

(c) The State FSA committee will take any action required by the provisions of this subpart that the county FSA committee has not taken. The State FSA committee will also:

(1) Correct, or require a county FSA committee to correct, any action taken by such county FSA committee that is

not in compliance with the provisions of this subpart.

(2) Require a county FSA committee to not take an action that is not in compliance with the provisions of this subpart.

(d) No provision or delegation to a State or county FSA committee will preclude the Administrator, Deputy Administrator, or a designee from determining any question arising under the program in this subpart, or from reversing or modifying any determination made by a State or county FSA committee.

(e) The Deputy Administrator may authorize State and county FSA committees to waive or modify non-statutory program requirements of this subpart in cases where failure to meet such requirements does not adversely affect operation of the program in this subpart. Producers have no right to seek an exception under this provision. The Deputy Administrator's refusal to consider cases or circumstances or decision not to exercise this discretionary authority under this provision will not be considered an adverse decision and is not appealable.

**§ 1413.104 Eligibility.**

(a) To be considered eligible for DWQP payments, the person or entity must have a share in the treated wheat crop on those acres planted to durum wheat on which an eligible fungicide was applied, as certified on the application, have incurred the cost of acquiring and applying eligible fungicide, and meet the requirements in paragraph (b) of this section.

(b) To be eligible for benefits, a person or entity must be a:

(1) Citizen of the United States;

(2) "Lawful alien" as defined in § 1400.3 of this chapter;

(3) Partnership of citizens of the United States; or

(4) Corporation, limited liability corporation, or other farm organizational structure organized under State law.

(c) A minor child is eligible to apply for DWQP payments if all the eligibility requirements of this subpart are met and the requirements in part 1400 of this chapter that apply to minor children are met.

(d) A person or entity determined to be a foreign person under part 1400 of this title is not eligible to receive benefits under this subpart, unless that person provides land, capital, and a substantial amount of active personal labor in the production of crops on such farm.

(e) State and local governments and their political subdivisions and related agencies are not eligible for DWQP payments.

(f) To be considered an eligible fungicide under this subpart, the fungicide must be:

(1) Registered with the U.S. Environmental Protection Agency, as required under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), unless exempt from FIFRA requirements;

(2) In compliance with State pesticide regulations, if applicable, in the State in which benefits are being requested; and

(3) Applied specifically to control Fusarium head blight on acres certified as planted by the producer to durum wheat for the applicable crop year.

(g) CCC will provide program benefits to reimburse eligible costs for a maximum of one fungicide treatment, including application cost, during the flowering stage, to a crop of durum wheat per crop year. Multiple or additional fungicide treatments, beyond a single treatment, to the same crop of wheat are not eligible for benefits.

**§ 1413.105 [Reserved]**

**§ 1413.106 Application process.**

(a) To apply for DWQP payment, the producer must submit, to the FSA county office that maintains the producer's farm records for the agricultural operation, a completed application as specified in paragraph (c) of this section, including any supporting documentation required by FSA, and a report of acreage.

(b) The producer must submit a completed application for payment and required supporting documentation to the administrative FSA county office during the relevant, for the crop, application period announced by FSA which will end no later than September 15 of

the crop year in which the fungicide was applied to a crop of durum wheat.

(c) A complete application includes all of the following:

(1) An application form provided by FSA;

(2) Certification of the total number and location of acres planted to durum wheat on which an eligible fungicide was applied specifically to control Fusarium head blight;

(3) Certification of the date durum wheat, on which an eligible fungicide was applied specifically to control Fusarium head blight, was planted;

(4) Certification of the type of eligible fungicide applied to acres certified as planted to durum wheat;

(5) Certification of the date eligible fungicide was applied to acres certified as planted to durum wheat;

(6) Documentation providing adequate proof, as determined by FSA, of the producer's actual cost of purchasing and applying eligible fungicide to acres certified as planted to durum wheat for one treatment; and

(7) Any other documentation as determined by FSA to be necessary to make a determination of eligibility of the producer.

(d) The producer requesting benefits under this program certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information provided is subject to verification by FSA.

(e) Data furnished by the producer will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

### § 1413.107 Availability of funds.

(a) The 2008 Farm Bill authorizes up to $10 million to be appropriated for each of the 2009 through 2012 fiscal years for DWQP. Payments will not be made for claims for a particular crop year until after the application deadline, which is September 15 of that crop year, for the crop for which payment for the fungicide application is sought and only if funds are made available through an appropriation.

(b) In the event that approval of all eligible applications for fungicide treatments for a particular crop would result in expenditures in excess of the amounts appropriated for that crop year, the FSA Deputy Administrator will prorate the funds by a national factor to reduce the total expected payments to the amount made available by the Secretary. FSA will prorate the payments in such manner as it determines appropriate and reasonable.

(c) Claims that are unpaid or paid at a reduced rate for a crop year for any reason will not be carried forward for payment under other funds for later crop years, unless provided for by law and approved by the Deputy Administrator. Such unpaid claims will be considered, as to any unpaid amount, void and nonpayable.

### § 1413.108 Payment calculation.

(a) Subject to the availability of DWQP funds, the payment to an eligible producer will be the result of adding (adjusted for the producer's share of the crop):

(1) The lesser of:

(i) The result of multiplying the number of acres certified by the producer as planted to durum wheat on which an eligible fungicide was applied, during the flowering stage, times the per acre national fungicide acquisition payment rate as set by the Deputy Administrator; or

(ii) Fifty percent of the producer's actual cost of purchasing eligible fungicide for acres certified as planted to durum wheat and treated for the applicable crop year in a manner that would otherwise generate a payment under paragraph (a)(1)(i) of this section; plus

(2) The result of multiplying the number of acres certified as planted to durum wheat on which an eligible fungicide was applied during the flowering stage, times the State application per-acre payment rate set by the State committee, with such application payment not to exceed 50 percent of the actual application cost certified to by the producer.

(b) The national fungicide acquisition payment rate set by the Deputy Administrator will be based on 50 percent of the national average cost of eligible fungicide (only including the cost

of the chemical itself), applied to one acre of durum wheat for the applicable crop year.

(c) The State application payment rate set by the State committee will be based on 50 percent of the State average cost of applying an eligible fungicide to one acre of durum wheat for the applicable crop year.

### § 1413.109 Refunds, joint and several liability.

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to comply with any requirement or condition for payment in the application or this subpart, must be refunded to CCC.

(b) A refund required as specified in this section will be due with interest from the date of CCC disbursement and otherwise determined in accordance with paragraph (d) of this section and late payment charges as provided in part 1403 of this chapter.

(c) Persons signing an application for payment as having an interest in an operation will be jointly and severally liable for any refund and related charges found to be due as specified in this section.

(d) Interest will be applicable to any refunds required as specified in parts 792 and 1403 of this title. Such interest will be charged at the rate that the U.S. Department of the Treasury charges CCC for funds, and will accrue from the date CCC made the erroneous payment to the date of repayment.

(e) CCC may waive the accrual of interest if it determines that the cause of the erroneous determination was not due to any action of the person, or was beyond the control of the person committing the violation. Any waiver is at the discretion of CCC alone.

### § 1413.110 Misrepresentation and scheme or device.

(a) In addition to other penalties, sanctions, or remedies as may apply, a producer will be ineligible for payment through the DWQP if the producer is determined by CCC to have:

(1) Adopted any scheme or device that tends to defeat the purpose of the program,

(2) Made any fraudulent representation, or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this subpart to any producer engaged in a misrepresentation, scheme, or device, must be refunded with interest together with such other sums as may become due and all charges including interest will run from the date of disbursement of the CCC funds. Any producer engaged in acts prohibited by this section and any producer receiving payment as specified in this subpart will be jointly and severally liable with other persons or producers involved in such claim for payment for any refund due as specified in this section and for related charges. The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

### § 1413.111 Miscellaneous provisions.

(a) *Other interests.* Any payment to any producer under this part will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government.

(b) *Assignments.* Any producer entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 1404 of this chapter.

(c) *Offsets.* CCC may offset or withhold any amount due to CCC from any benefit provided under this subpart in accordance with the provisions of part 1403 of this chapter and part 792 of this title.

(d) *Violations of highly erodible land and wetland conservation provisions.* The provisions of part 12 of this title apply to this subpart. That part sets out certain conservation requirements as a general condition for farm benefits.

(e) *Violations regarding controlled substances.* The provisions of § 718.6 of this title, which generally limit program payment eligibility for persons who have engaged in certain offenses with respect to controlled substances, will apply to this part.

### § 1413.112 Appeals.

(a) *Appeals*. Appeal regulations set forth at parts 11 and 780 of this title apply to determinations made under this subpart.

(b) *Determinations not eligible for administrative review or appeal*. CCC determinations and policies that are not limited to a specific individual producer's application are not to be construed to be individual program eligibility determinations or adverse decisions and are, therefore, not subject to administrative review or appeal under 7 CFR part 11 or part 780 of this title (but nothing in the regulations for this program will limit the ability of the National Appeals Division to decide its own jurisdiction under part 11). Such determinations include, but are not limited to, application periods, deadlines, crop years, prices, general statutory or regulatory provisions that apply to similarly situated producers, national average payment prices, and payment factors established by CCC for DWQP for which this subpart applies or similar matters requiring CCC determinations.

### § 1413.113 Deceased individuals or dissolved entities.

(a) Payment may be made for an eligible application on behalf of an eligible producer who is now a deceased individual or is a dissolved entity if a representative who currently has authority to enter into a contract on behalf of the producer signs the application for payment.

(b) Legal documents showing proof of authority to sign for the deceased individual or dissolved entity must be provided.

(c) If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

### § 1413.114 Records and inspections.

(a) Any producer receiving DWQP payments, or any other legal entity or person who provides information for the purposes of enabling a producer to receive a DWQP payment, must:

(1) Maintain any books, records, and accounts supporting the information for 3 years following the end of the year during which the request for payment was submitted, and

(2) Allow authorized representatives of USDA and the U.S. Government Accountability Office, during regular business hours, to inspect, examine, and make copies of such books or records, and to enter the farm and to inspect and verify all applicable acreage in which the producer has an interest for the purpose of confirming the accuracy of information provided by or for the producer.

(b) [Reserved]

## Subparts B–C [Reserved]

## PART 1415—GRASSLANDS RESERVE PROGRAM

Sec.

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AUTHORITY: 16 U.S.C. 3838n–3838q.

SOURCE: 75 FR 73925, Nov. 29, 2010, unless otherwise noted.

### § 1415.1 Purpose.

(a) The purpose of the Grassland Reserve Program (GRP) is to assist landowners and operators in protecting grazing uses and related conservation values by conserving and restoring grassland resources on eligible private

lands through rental contracts, easements, and restoration agreements.

(b) GRP emphasizes:

(1) Supporting grazing operations;

(2) Maintaining and improving plant and animal biodiversity; and

(3) Protecting grasslands and shrublands from the threat of conversion to uses other than grazing.

**§ 1415.2 Administration.**

(a) The regulations in this part set forth policies, procedures, and requirements for program implementation of GRP, as administered by the Natural Resources Conservation Service (NRCS) and the Farm Service Agency (FSA). The regulations in this part are administered under the general supervision and direction of the NRCS Chief and the FSA Administrator. These two agency leaders:

(1) Concur in the establishment of program policy and direction, development of the national allocation formula, and development of broad national ranking criteria;

(2) Use a national allocation formula to provide GRP funds to NRCS State Conservationists and FSA State Executive Directors that emphasizes support for grazing operations, biodiversity of plants and animals, and grasslands under the greatest threat of conversion to uses other than grazing. The national allocation formula may also include additional factors related to improving program implementation, as determined by the NRCS Chief and the FSA Administrator. The allocation formula may be modified periodically to change the emphasis of any factor(s) in order to address a particular natural resource concern, such as the precipitous decline of a population of a grassland-dependent bird(s) or animal(s);

(3) Ensure the national, State, and local-level information regarding program implementation is made available to the public;

(4) Consult with USDA leaders at the State level and other Federal agencies with the appropriate expertise and information when evaluating program policies and direction; and

(5) Authorize NRCS State Conservationists and FSA State Executive Directors to determine how funds will be used and how the program will be implemented at the State level.

(b) At the State level, the NRCS State Conservationist and the FSA State Executive Director are jointly responsible for:

(1) Determining how funds will be used and how the program will be implemented at the State level to achieve the program purposes;

(2) Identifying State priorities for project selection based on input from the State Technical Committee;

(3) Identifying Department of Agriculture (USDA) employees at the field level responsible for implementing the program by considering the nature and extent of natural resource concerns throughout the State and the availability of human resources to assist with activities related to program enrollment;

(4) Developing, with advice from the State Technical Committee, program outreach materials at the State and local levels to help ensure landowners, operators, and tenants of eligible land are aware and informed that they may be eligible for the program;

(5) Approving conservation practices eligible for cost-share and cost-share rates;

(6) Developing GRP management plans and restoration agreements, when applicable;

(7) Administering and enforcing the terms of easements and rental contracts unless this responsibility is transferred to an eligible entity as provided in § 1415.17 and § 1415.18; and

(8) Developing, with advice from the State Technical Committee, criteria for ranking eligible land consistent with national criteria and program objectives and State priorities.

(c) The funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS and FSA to implement GRP.

(d) Subject to funding availability, the program may be implemented in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(e) The NRCS Chief or the FSA Administrator may modify or waive a

provision of this part if he or she deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the conservation purposes and sound administration of GRP. This authority cannot be further delegated. No provision of this part, which is required by law, may be waived.

(f) No delegation in this part to lower organizational levels will preclude the NRCS Chief or the FSA Administrator from determining any issue arising under this part or from reversing or modifying any determination arising from this part.

(g) The USDA Forest Service may hold GRP easements on properties adjacent to USDA Forest Service land, with the consent of the landowner.

(h) Program participation is voluntary.

(i) Applications for participation will be accepted on a continual basis at local USDA Service Centers. Eligible entities wishing to enter into a cooperative agreement under § 1415.17 in order to purchase, own, write, and hold easements may apply on a continuous basis to the NRCS State Conservationist. The NRCS State Conservationist and FSA State Executive Director will establish cut-off periods to rank and select applications for participation. These cut-off periods will be available in program outreach material provided by the local USDA Service Center. Once funding levels have been exhausted, unfunded eligible applications will remain on file until they are funded or the applicant chooses to be removed from consideration.

(j) The services of third parties as provided for in part 652 of this title may be used to provide technical services to participants.

### § 1415.3 Definitions.

*Activity* means an action other than a conservation practice that is included as a part of a GRP management or conservation plan that has the effect of alleviating problems or improving treatment of the resources, including ensuring proper management or maintenance of the functions and values restored, protected, or enhanced through an easement or rental contract.

*Administrator* means the Administrator of FSA or the person delegated authority to act for the Administrator.

*Applicant* means a person, legal entity, joint operator, or Indian Tribe who applies to participate in the program.

*Chief* means the Chief of NRCS or designee.

*Biological diversity* means the variety and variability among living organisms and the ecological complexes in which they live.

*Commodity Credit Corporation* is a government-owned and operated entity that was created to stabilize, support, and protect farm income and prices. The CCC is managed by a Board of Directors, subject to the general supervision and direction of the Secretary of Agriculture, who is an ex-officio director and chairperson of the Board. The CCC provides the funding for GRP, and FSA and NRCS administer GRP on its behalf.

*Common grazing practices* means those grazing practices, including those related to forage and seed production, common to the area of the subject ranching or farming operation. Included are routine management activities necessary to maintain the viability of forage or browse resources that are common to the locale of the subject ranching or farming operation.

*Conservation district* means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar name.

*Conservation plan* means a record of the GRP participants' decisions and supporting information that will be developed to address resource concerns in addition to grazing land uses. The conservation plan will describe the implementation and maintenance of GRP management and conservation practices directly related to any additional land eligibility criteria under which the land is enrolled. Additional land eligibility criteria may include, but is

not limited to, significant animal or plant habitat and historical or archeological resources.

*Conservation practice* means a specified treatment, such as a vegetative, structural, or land management practice, that is planned and applied according to NRCS Field Office Technical Guide (FOTG) standards and specifications.

*Conservation values* means those natural resource attributes that sustain and enhance ecosystem functions and values of the grassland area including, but not limited to, habitat for grassland and shrubland dependent plants and animals, native plant and animal biodiversity, soil erosion control, forage production, and air and water quality protection.

*Cost-share payment* means the payment made by USDA to a program participant or vendor to achieve the restoration, enhancement, and protection goals in accordance with the GRP restoration plan component of the restoration agreement.

*Dedicated account* means a dedicated fund of the eligible entity held in a separate account for the management, monitoring, and enforcement of conservation easements and that cannot be used for other purposes.

*Easement* means a conservation easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys certain rights, title, and interests in a property to the United States, an eligible entity, or both for the purpose of protecting the grassland and other conservation values of the property. Under GRP, the property rights are conveyed by a conservation easement deed.

*Easement area* means the land encumbered by an easement.

*Easement payment* means the consideration paid to a landowner for an easement conveyed to the United States, an eligible entity, or both under GRP.

*Eligible entity* means, for the purposes of entering into a cooperative agreement under 16 U.S.C. 3838q(d), an agency of State or local government, an Indian Tribe, or a nongovernmental organization that has the relevant experience necessary, as appropriate for the application, to administer an easement on grassland, land that contains forbs, or shrubland; has a charter that describes a commitment to conserving ranchland, agricultural land, or grassland for grazing and conservation purposes; and has the resources necessary to effectuate the purposes of the charter.

*Enhancement* means to increase or improve the viability of grassland and grazing resources, including habitat for declining species of grassland dependent birds and animals.

*Farm Service Agency* is an agency of the Department of Agriculture.

*FSA State Executive Director* means the FSA employee authorized to implement GRP and direct and supervise FSA activities in a State, Caribbean Area, or the Pacific Islands Area.

*Field Office Technical Guide* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Fire pre-suppression* means activities as outlined in a GRP management plan such as the establishment and maintenance of firebreaks and prescribed burning to prevent or limit the spread of fires.

*Forb* means any herbaceous plant other than those in the grass family.

*Functions and values of grasslands and shrublands* means ecosystem services provided, including domestic animal productivity, biological productivity, plant and animal richness and diversity, fish and wildlife habitat (including habitat for pollinators and native insects), water quality and quantity benefits, aesthetics, open space, and recreation.

*Grantor* means the landowner who is transferring land rights to the United States or an eligible entity, or both through an easement.

*Grassland* means land on which the vegetation is dominated by grasses, grass-like plants, shrubs, or forbs, including shrubland, land that contains forbs, pastureland, and rangeland, and improved pastureland and rangeland.

*GRP management plan* means the document developed by NRCS that describes the implementation of the grazing management system consistent with the prescribed grazing standard contained in the FOTG. The GRP management plan will include a description of the grazing management system, permissible and prohibited activities, any associated restoration plan or conservation plan, if applicable, and a description of USDA's right of ingress and egress.

*Grazing value* means the financial worth of the land as used for grazing or forage production. The term is used in the calculation of compensation for rental contracts and easements. For easements, this value is determined by NRCS through an appraisal process or a market survey process. For rental contracts, FSA determines the grazing value based upon an administrative process.

*Historical and archeological resources* mean resources that are:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*);

(2) Formally determined eligible for listing the National Register of Historic Places by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and Keeper of the National Register in accordance with section 106 or the NHPA);

(3) Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101(b)(1)(B) of the NHPA) or the Tribal Register of Historic Places (designated under section 101(d)(1)(C) of the NHPA); or

(4) Included in the SPHO or THPO inventory with written justification as to why it meets National Register of Historic Places criteria.

*Improved rangeland or pastureland* means grazing land permanently producing naturalized forage species that receives varying degrees of periodic cultural treatment to enhance forage quality and yields and is primarily harvested by grazing animals.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landowner* means a person, legal entity, or Indian Tribe having legal ownership of land and those who may be buying eligible land under a purchase agreement. The term landowner may include all forms of collective ownership including joint tenants, tenants-in-common, and life tenants. The term landowner includes Indian Tribes. State governments, local governments, and nongovernmental organizations that qualify as eligible entities are not eligible as landowners.

*Legal entity* means an entity created under Federal or State law and that: (1) Owns land or an agricultural commodity, product, or livestock; or (2) produces an agricultural commodity, product, or livestock.

*Maintenance* means work performed to keep the applied conservation practice functioning for the intended purpose during its life span. Maintenance includes work to manage and prevent deterioration, repair damage, or replace the practice to its original condition if one or more components fail.

*Native* means a species that is indigenous and is a part of the original fauna or flora of the area.

*Natural Resources Conservation Service* is an agency of the Department of Agriculture.

*NRCS State Conservationist* means the NRCS employee authorized to implement GRP and direct and supervise NRCS activities in a State, Caribbean Area, or the Pacific Islands Area.

*Naturalized* means an introduced, desirable forage species that is ecologically adapted to the site and can perpetuate itself in the community without cultural treatment. The term naturalized does not include noxious weeds.

*Nesting season* means the time of year that grassland dependent birds in significant decline in the local area build nests or otherwise find a place of refuge for purposes of reproduction.

*Nongovernmental organization* means any organization that:

(1) Is organized for, and at all times since, the formation of the organization, and has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986;

(2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code; and

(3) Is described—

(i) In section 509(a)(1) or 509(a)(2) of that Code, or

(ii) Is described in section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

*Participant* means a person, legal entity, joint operation, or Indian Tribe who is accepted to participate in GRP through a rental contract or option agreement to purchase an easement.

*Pastureland* means grazing lands comprised of introduced or domesticated native forage species that are used primarily for the production of livestock. These lands receive periodic renovation and cultural treatments, such as tillage, aeration, fertilization, mowing, and weed control, and may be irrigated. This term does not include lands that are in rotation with crops.

*Permanent easement* means an easement that lasts in perpetuity or for the maximum duration allowed under the law of a State.

*Private land* means land that is not owned by a governmental entity and includes Tribal lands.

*Purchase price* means the amount paid to acquire an easement under a cooperative agreement between NRCS and an eligible entity. It is the fair market value of the easement.

*Rangeland* means a land cover or use category with a climax or potential plant cover composed principally of native grasses, grass-like plants, forbs, or shrubs suitable for grazing and browsing, and introduced forage species that are managed like rangeland. Rangeland includes lands re-vegetated naturally or artificially when routine management of that vegetation is accomplished mainly through manipulation of grazing. This term includes areas where introduced hardy and persistent grasses are planted and such practices as deferred grazing, burning, chaining, and rotational grazing are used with little or no chemicals or fertilizer being applied. Grasslands, savannas, many wetlands, some deserts, and tundra are considered to be rangeland. Certain communities of low forbs and shrubs, such as mesquite, chaparral, mountain shrub, and pinyon juniper are also included as rangeland.

*Rental contract* means the legal document that specifies the obligations and rights of a participant in GRP, including the annual rental payments to be provided to the participant for the length of the contract to maintain or restore grassland functions and values under GRP.

*Restoration* means implementing any conservation practice, system of practices, or activities to restore functions and values of grasslands and shrublands. The restoration may re-establish grassland functions and values on degraded land, or on land that has been converted to another use.

*Restoration agreement* means an agreement between the program participant and NRCS or eligible entity to carry out activities and conservation practices necessary to restore or improve the functions and values of that land. A restoration agreement will include a restoration plan.

*Restoration plan* is the portion of the restoration agreement that includes the schedule and conservation practices and activities to restore the functions and values of grasslands and shrublands, including protection of associated streams, ponds, and wetlands. The restoration plan incorporates the requirement that program participants will maintain GRP-funded conservation practices and activities for their expected lifespan as described in the plan.

*Right of enforcement* means a property interest in the easement the Chief may exercise on behalf of the United States under specific circumstances in order to enforce the terms of the conservation easement. The right of enforcement provides that the Chief has the right to inspect and enforce the easement if the eligible entity fails to uphold the easement or attempts to

transfer the easement without first securing the consent of the Secretary.

*Secretary* means the Secretary of the Department of Agriculture.

*Shrubland* means land where the dominant plant species is shrubs, which are plants that are persistent, have woody stems, and a relatively low growth habit.

*Significant decline* means a decrease of a species population to such an extent that it merits conservation priority as determined by the State Conservationist, in consultation with the State Technical Committee.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

*Tribal land* means:

(1) Land held in trust by the United States for individual Indians or Indian Tribes; or

(2) Land, the title to which is held by individual Indians or Indian Tribes subject to Federal restrictions against alienation or encumbrance; or

(3) Land which is subject to rights of use, occupancy, and benefit of certain Indian Tribes; or

(4) Land held in fee title by an Indian, Indian family, or Indian Tribe.

*USDA* means the Department of Agriculture and its agencies and offices, as applicable.

**§ 1415.4 Program requirements.**

(a) Except as provided for under § 1415.17, only landowners may submit applications for easements. For rental contracts, applicants must own or provide written evidence of control of the property for the duration of the rental contract.

(b) The easement or rental contract will require that the area be maintained in accordance with GRP goals and objectives for the term of the easement or rental contract, including the conservation, protection, enhancement, and if necessary, restoration of the grassland functions and values.

(c) All participants in GRP are required to implement a GRP management plan approved by NRCS. When an eligible entity holds the GRP easement, NRCS will develop GRP management plans with eligible entities. In cases where a participant receives ranking points on the basis of resource concerns other than grazing land concerns, all such resource concerns will be addressed in an applicable conservation plan.

(d) The easement or rental contract must grant USDA or its representatives a right of ingress and egress to the easement or rental contract area. For easements, this access is legally described by the conservation easement deed and the GRP management plan. Access to rental contract areas is identified in the GRP management plan.

(e) Easement participants are required to convey unencumbered title that is acceptable to the United States and provide consent or subordination agreements from each holder of a security or other interest in the land. The landowner must warrant that the easement granted the United States or eligible entity is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by USDA.

(f) Landowners are required to use a standard GRP conservation easement deed developed by USDA or developed by an eligible entity and approved by USDA under § 1415.17 of this part. The easement grants development rights, title, and interest in the easement area in order to protect grassland and other conservation values.

(g) The program participant must comply with the terms of the easement or rental contract, and comply with all terms and conditions of the GRP management plan and any associated conservation plan or restoration agreement.

(h) Easements and rental contracts allow, consistent with their terms and the program purposes, the following activities as outlined in the GRP management plan:

(1) Common grazing practices, including maintenance and necessary conservation practices and activities (*e.g.*, prescribed grazing; upland wildlife habitat management; prescribed burning; fencing, watering, and feeding necessary for the raising of livestock; and related forage and seed production) on the land in a manner that is consistent with maintaining the viability

of grassland, forb, and shrub species common to the locality;

(2) Haying, mowing, or harvesting for seed production subject to appropriate restrictions, as determined by the State Conservationist, during the nesting season for birds in the local area that are in significant decline, or are conserved in accordance with Federal or State law;

(3) Fire pre-suppression, rehabilitation, and construction of firebreaks;

(4) Grazing related activities, such as fencing and livestock watering facilities;

(5) Facilities for power generation through renewable sources of energy production provided the scope and scale of the footprint of the facility and associated infrastructure is consistent with program purposes as determined by USDA through analysis of the potential site-specific environmental effects; and

(6) Other activities that USDA determines the manner, number, intensity, location, operation, and other features associated with the activity will not adversely affect the grassland resources or related conservation values protected under an easement or rental contract. This includes infrastructure development along existing right-of-ways where the easement deed allows the landowner to grant right-of-ways when it is determined by NRCS that granting such right-of-ways are in the public interest, that grassland resources and related conservation values will not be adversely impacted, and the landowner agrees to a restoration plan for the disturbed area as developed by NRCS, but at no cost to NRCS. This also includes undeveloped, passive, recreational uses such as hiking, camping, bird watching, hunting, and fishing as long as such uses, as determined by the grantee, do not impair the grazing uses and other conservation values.

(i) Easement and rental contracts prohibit the following activities:

(1) The production of crops (other than hay), orchards, vineyards, or other agricultural commodity that is inconsistent with maintaining grazing land and related conservation values; and

(2) Except as permitted under a restoration plan, the conduct of any other activity that would be inconsistent with maintaining grazing uses and related conservation values protected under an easement or rental contract.

(j) Rental contracts may be terminated by USDA without penalty or refund if the original participant dies, is declared legally incompetent, or is otherwise unavailable during the contract period.

(k) Participants, with the agreement of USDA, may convert a rental contract to an easement, provided that funds are available and the project meets conditions established by USDA. Land cannot be enrolled in both a rental contract option and an easement enrollment option at the same time. The rental contract will be terminated prior to the date the easement is recorded in the local land records office.

(l) Rental contract participants are required to suspend any existing cropland base and allotment history for the land under another program administered by the Secretary.

(m) Easement participants are required to eliminate any existing cropland base and allotment history for the land under another program administered by the Secretary.

### § 1415.5 Land eligibility.

(a) GRP is available on privately owned lands, which include private and Tribal land. Publicly owned land is not eligible.

(b) Land is eligible for funding consideration if the State Conservationist determines that the land is:

(1) Grassland, land that contains forbs or shrubland (including improved rangeland and pastureland) for which grazing is the predominant use; or

(2) Located in an area that has been historically dominated by grassland, forbs, or shrubland, and the State Conservationist, with advice from the State Technical Committee, determines that it is compatible with grazing uses and related conservation values, and

(i) Could provide habitat for animal or plant populations of significant ecological value if the land is retained in its current use or is restored to a natural condition,

(ii) Contains historical or archeological resources, or

(iii) Would address issues raised by State, regional, and national conservation priorities.

(c) Incidental lands, in conjunction with eligible land, may also be considered for enrollment to allow for the efficient administration of an easement or rental contract. Incidental lands may include relatively small areas that do not specifically meet the eligibility requirements, but as a part of the land unit, may contribute to grassland functions and values and related conservation values, or its inclusion may increase efficiencies in land surveying, easement management, and monitoring by reducing irregular boundaries.

(d) Land will not be enrolled if the functions and values of the grassland are already protected under an existing contract, easement, or deed restriction, or if the land already is in ownership by an entity whose purpose is to protect and conserve grassland and related conservation values. This land becomes eligible for enrollment in GRP if the existing contract, easement, or deed restriction expires or is terminated, and the grassland values and functions are no longer protected.

(e) Land on which gas, oil, earth, or other mineral rights exploration has been leased or is owned by someone other than the applicant may be offered for participation in the program. However, if an applicant submits an offer for an easement project, USDA will assess the potential impact that the third party rights may have upon the grassland resources. USDA reserves the right to deny funding for any application where there are exceptions to clear title on the property.

### § 1415.6 Participant eligibility.

To be eligible to participate in GRP, an applicant, except as otherwise described in § 1415.17:

(a) Must be a landowner for easement participation or be a landowner or have control of the eligible acreage being offered for rental contract participation;

(b) Agree to provide such information to USDA that is necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes;

(c) Meet the Adjusted Gross Income requirements in 7 CFR part 1400 of this title, unless exempted under part 1400 of this title;

(d) Meet the conservation compliance requirements found in part 12 of this title; and

(e) Comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, as amended) and 3 CFR parts 25 and 170.

### § 1415.7 Application procedures.

(a) Applicants, except as otherwise described under § 1415.17, may submit an application through a USDA Service Center for participation in GRP. Applications may be submitted throughout the year.

(b) By filing an application for participation, the applicant consents to a USDA representative entering upon the land offered for enrollment for purposes of assessing the grassland functions and values and for other activities that are necessary for USDA to make an offer of enrollment. Generally, the applicant will be notified prior to a USDA representative entering upon their property.

(c) Applicants submit applications that identify the duration of the easement or rental contract for which they seek to enroll their land. Rental contracts may be for the duration of 10-years, 15-years, or 20-years; easements may be permanent in duration or for the maximum duration authorized by State law.

### § 1415.8 Establishing priority for enrollment of properties.

(a) USDA, at the national level, will provide to NRCS State Conservationists and FSA State Executive Directors, national guidelines for establishing State-specific ranking criteria for selection of applications for funding.

(b) NRCS State Conservationists and FSA State Executive Directors, with advice from State Technical Committees, establish criteria to evaluate and rank applications for easement and rental contract enrollment, including

applications from eligible entities under § 1415.17, following the guidance established in paragraph (a) of this section.

(c) Ranking criteria will emphasize support for:

(1) Grazing operations;

(2) Protection of grassland, land that contains forbs, and shrubland at the greatest risk from the threat of conversion to uses other than grazing;

(3) Plant and animal biodiversity; and

(4) In ranking parcels offered by eligible entities, these additional criteria will also be considered—

(i) Leveraging of non-Federal funds, and

(ii) Entity contributions in excess of 50 percent of the purchase price, as defined in § 1415.3.

(d) When funding is available, NRCS State Conservationists and FSA State Executive Directors will periodically select for funding the highest ranked applications, including applications from entities under § 1415.17, based on applicant and land eligibility and the State-developed ranking criteria.

(e) NRCS State Conservationists and FSA State Executive Directors may establish separate ranking pools to address, for example, specific conservation issues raised by State, regional, and national conservation priorities.

(f) The NRCS State Conservationist and FSA State Executive Director, with advice from the State Technical Committee, may emphasize enrollment of unique grasslands or specific geographic areas of the State.

(g) The NRCS State Conservationist and the FSA State Executive Director, with advice from the State Technical Committee, will select applications for funding.

(h) If available funds are insufficient to accept the highest ranked application, and the applicant is not interested in reducing the acres offered to match available funding, the State Conservationist or State Executive Director may select a lower ranked application that can be fully funded.

(i) Land enrolled in a Conservation Reserve Program (CRP) contract that is within one year of the scheduled expiration date will receive a priority for enrollment. To receive this priority, the following criteria must be met:

(1) The land must be eligible as defined in § 1415.5;

(2) USDA, with advice from the State Technical Committee, must determine it is of high ecological value and under significant threat of conversion to uses other than grazing;

(3) The land must be offered for easement or 20-year rental contract enrollment;

(4) Expired CRP land enrolled under this priority will not exceed 10 percent of the total number of acres accepted for national enrollment in GRP in any year; and

(5) This priority applies only up to 12 months before the scheduled expiration of the CRP contract.

(j) USDA will manage the program nationally to ensure that, to the extent practicable, 60 percent of funds are used for the purchase of easements, either directly or through cooperative agreements with eligible entities as set forth in § 1415.17 and 40 percent of funds are used for rental contracts.

### § 1415.9 Enrollment of easements and rental contracts.

(a) Based on the priority ranking, NRCS or FSA, as appropriate, will notify applicants in writing of their tentative acceptance into the program for either rental contract or conservation easement options. The letter notifies the applicant of the intent to continue the enrollment process unless otherwise notified by the applicant. Enrollment under cooperative agreements is described under § 1415.17.

(b) An offer of tentative acceptance into the program neither binds USDA to acquire an easement or enter into a rental contract, nor binds the applicant to convey an easement, enter into a rental contract, or agree to restoration activities.

(c) Offer of enrollment will be through either:

(1) An agreement to purchase an easement presented by NRCS to the applicant which will describe the easement, the easement terms and conditions, and other terms and conditions that may be required by NRCS; or

(2) A rental contract will be presented by FSA to the applicant which

will describe the contract area, the contract terms and conditions, and other terms and conditions that may be required by FSA.

(d) For rental contracts, land will be considered to be enrolled in GRP once an FSA representative approves the GRP rental contract. FSA may withdraw the offer before approval of the contract due to lack of available funds or other reasons.

(e) For easements, after the option agreement to purchase an easement is executed by NRCS and the participant, the land will be considered enrolled in GRP. NRCS will proceed with the development of the GRP management plan, conservation or restoration plan if applicable, and various easement acquisition activities, which may include conducting a legal survey of the easement area, securing necessary subordination agreements, procuring title insurance, and conducting other activities necessary to record the easement or implement GRP.

(f) Prior to closing an easement, NRCS may withdraw the land from enrollment at any time due to lack of available funds, title concerns, or other reasons.

### § 1415.10 Compensation for easements and rental contracts acquired by the Secretary.

(a) The Chief will not pay more than the fair market value of the land, less the grazing value of the land encumbered by the easement.

(b) To determine this amount, the Chief will pay as compensation the lowest of:

(1) The fair market value of the land encumbered by the easement as determined by the Chief using—

(i) The Uniform Standards of Professional Appraisal Practice, or

(ii) An area-wide market analysis or market survey;

(2) The amount corresponding to a geographical cap, as determined by the State Conservationist, with advice from the State Technical Committee; or

(3) An offer made by the landowner.

(c) For 10-, 15-, and 20-year rental contracts, the participant will receive not more than 75 percent of the grazing value in an annual payment for the length of the contract, as determined by FSA. As provided by the regulations at part 1400 of this title, payments made under one or more rental contracts to a person or legal entity, directly or indirectly, may not exceed, in the aggregate, $50,000 per year.

(d) In order to provide for better uniformity among States, the NRCS Chief and FSA Administrator may review and adjust, as appropriate, State or other geographically based payment rates for rental contracts.

(e) Easement or rental contract payments received by a participant will be in addition to, and not affect, the total amount of payments that the participant is otherwise eligible to receive under other USDA programs.

(f) Easement payments will be made in a single payment to the landowner unless otherwise requested by the landowner.

(g) USDA may accept and use contributions of non-Federal funds to support the purposes of the program. These funds are available to USDA without further appropriation and until expended, to carry out the program.

(h) USDA recognizes that environmental benefits will be achieved by implementing conservation practices and activities funded through GRP, and that ecosystem credits may be gained as a result of implementing activities compatible with the purposes of a GRP easement, rental contract, or associated restoration agreement. USDA asserts no direct or indirect interest in these credits except:

(1) In the event the participant sells or trades credits arising from GRP funded activities, USDA retains the authority to ensure that the requirements for GRP rental contracts, easements, or restoration agreements are met and maintained consistent with this part; and

(2) If activities required under an ecosystem credit agreement may affect land covered under a GRP rental contract, easement, or restoration agreement, participants are required to obtain an assessment from USDA about the compatibility of the activity prior to entering into such agreements.

**§ 1415.11 Restoration agreements.**

(a) Restoration agreements are only authorized to be used in conjunction with easements and rental contracts. NRCS, in consultation with the program participant, determines if the grassland resources are adequate to meet the participant's objectives and the purposes of the program, or if a restoration agreement is needed. Such a determination is also subject to the availability of funding. USDA may condition participation in the program upon the execution of a restoration agreement depending on the condition of the grassland resources. When the functions and values of the grassland are determined adequate by NRCS, a restoration agreement is not required. However, if a restoration agreement is required, NRCS will set the terms of the restoration agreement. The restoration plan component of the restoration agreement identifies conservation practices and activities necessary to restore or improve the functions and values of the grassland to meet both USDA and the participant's objectives and purposes of the program. If the functions and values of the grassland decline while the land is subject to a GRP easement or rental contract through no fault of the participant, the participant may enter into a restoration agreement at that time to improve the functions and values with USDA approval and when funds are available.

(b) The NRCS State Conservationist, with advice from the State Technical Committee and in consultation with FSA, determines the conservation practices and activities and the cost-share percentages, not to exceed statutory limits available under GRP. A list of conservation practices and activities approved for cost-share assistance under GRP restoration plans is available to the public through the local USDA Service Center. NRCS may work through the local conservation district with the program participant to determine the terms of the restoration plan. The conservation district may assist NRCS with determining eligible conservation practices and activities and approving restoration agreements.

(c) Only approved conservation practices and activities are eligible for cost-sharing. Payments under the GRP restoration agreements may be made to the participant of not more than 50 percent for the cost of carrying out the conservation practices or activities. As provided by the regulations at part 1400 of this chapter, payments made under one or more restoration agreements to a person or legal entity, directly or indirectly, may not exceed, in the aggregate, $50,000 per year.

(d) The participant is responsible for the operation and maintenance of conservation practices in accordance with the restoration agreement.

(e) All conservation practices must be implemented in accordance with the FOTG.

(f) Technical assistance is provided by NRCS, or an NRCS approved third party.

(g) If the participant is receiving cost-share for the same conservation practice or activity from another conservation program, USDA will adjust the GRP cost-share rate proportionately so that the amount received by the participant does not exceed 100 percent of the costs of restoration.

(h) The participant cannot receive cost-share from more than one USDA cost-share program for the same conservation practice or activity on the same land.

(i) Cost-share payments may be made only upon a determination by a qualified individual approved by the NRCS State Conservationist that an eligible restoration practice has been established in compliance with appropriate standards and specifications.

(j) Conservation practices and activities identified in the restoration plan may be implemented by the participant or other designee.

(k) Cost-share payments will not be made for conservation practices or activities implemented or initiated prior to the approval of a rental contract or easement acquisition unless a written waiver is granted by the NRCS State Conservationist or FSA State Executive Director, as appropriate, prior to installation of the practice.

(l) Upon transfer of an easement with a restoration agreement to an eligible entity as described in § 1415.18, the entity will be responsible for administration of the agreement and providing

funds for payment of any costs associated with the completion of the restoration agreement. The eligible entity may, with participant consent, revise an existing restoration agreement or develop a new restoration agreement. Restoration plans must be consistent with the GRP management plan or any associated conservation plan as described in § 1415.4.

(m) Cooperating entities under § 1415.17 will be responsible for development, administration, and implementation costs of restoration plans.

### § 1415.12 Modifications to easements and rental contracts.

(a) After an easement has been recorded, no substantive modification will be made to the easement. Modifications that would not result in acquisition or divestiture of additional property rights may be made.

(b) State Conservationists may approve modifications for restoration agreements and GRP management plans or conservation plans where applicable, as long as the modifications do not affect the provisions of the easement and meet program objectives.

(c) USDA may approve modifications to rental contracts, including corresponding changes to conservation plans, GRP management plans, and restoration plans to facilitate the practical administration and management of the enrolled area so long as the modification will not adversely affect the grassland functions and values for which the land was enrolled.

### § 1415.13 Transfer of land.

(a) Any transfer of the property prior to an applicant's acceptance into the program will void the offer of enrollment, unless at the option of the State Conservationist or State Executive Director, as appropriate, an offer is extended to the new landowner and the new landowner agrees to the same easement or rental contract terms and conditions.

(b) After acreage is accepted in the program, for easements with multiple payments, any remaining easement payments will be made to the original participant unless NRCS receives an assignment of proceeds.

(c) Future annual rental payments will be made to the successor participant.

(d) The new landowner is responsible for complying with the terms of the recorded easement, and the contract successor is responsible for complying with the terms of the rental contract and for assuring completion of all activities and practices required by any associated restoration agreement. Eligible cost-share payments will be made to the new participant upon presentation that the successor assumed the costs of establishing the practices.

(e) With respect to any and all payments owed to participants, the United States bears no responsibility for any full payments or partial distributions of funds between the original participant and the participant's successor. In the event of a dispute or claim on the distribution of cost-share payments, USDA may withhold payments, without the accrual of interest, pending an agreement or adjudication on the rights to the funds.

(f) The rights granted to the United States in an easement will apply to any of its agents or assigns. All obligations of the participant under the GRP conservation easement deed also bind the participant's heirs, successors, agents, assigns, lessees, and any other person claiming under them.

(g) Rental contracts may be transferred to another landowner, operator, or tenant that acquires an interest in the land enrolled in GRP. The successor must be determined by FSA to be eligible to participate in GRP and must assume full responsibility under the contract. FSA may require a participant to refund all or a portion of any financial assistance awarded under GRP, plus interest, if the participant sells or loses control of the land under a GRP rental contract, and the new landowner, operator, or tenant is not eligible to participate in the program or declines to assume responsibility under the contract.

### § 1415.14 Misrepresentation and violations.

(a) The following provisions apply to violations of rental contracts:

(1) Rental contract violations, determinations, and appeals are handled in

accordance with the terms of the rental contract;

(2) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part may not be entitled to rental contract payments and must refund to CCC all payments, plus interest, in accordance with part 1403 of this title; and

(3) In the event of a violation of a rental contract, the participant will be given notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as CCC may allow. Failure to correct the violation may result in termination of the rental contract.

(b) The following provisions apply to violations of easement deeds:

(1) Easement violations are handled under the terms of the easement deed;

(2) Upon notification of the participant, NRCS has the right to enter upon the easement area at any time to monitor compliance with the terms of the GRP conservation easement deed or remedy deficiencies or violations;

(3) When NRCS believes there may be a violation of the terms of the GRP conservation easement deed, NRCS may enter the property without prior notice; and

(4) The participant will be liable for any costs incurred by the United States as a result of the participant's negligence or failure to comply with the easement terms and conditions.

(c) USDA may require the participant to refund all or part of any payments received by the participant under the program contract or agreement.

(d) In addition to any and all legal and equitable remedies available to the United States under applicable law, USDA may withhold any easement payment, rental payment, or cost-share payments owing to the participant at any time there is a material breach of the easement covenants, rental contract, or any contract. Such withheld funds may be used to offset costs incurred by the United States in any remedial actions or retained as damages pursuant to court order or settlement agreement.

(e) Under a GRP conservation easement, the United States will be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

### § 1415.15 Payments not subject to claims.

Any cost-share, rental, or easement payment or portion thereof due any person under this part will be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

### § 1415.16 Assignments.

(a) Any person entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

(b) If a participant that is entitled to a payment dies, is declared legally incompetent, or is otherwise unable to receive the payment, or is succeeded by another person who renders or completes the required performance, such a participant may be eligible to receive payment in such a manner as USDA determines is fair and reasonable in light of all the circumstances.

### § 1415.17 Cooperative agreements.

(a) NRCS may enter into cooperative agreements which establish terms and conditions under which an eligible entity will use funds provided by NRCS to own, write, and enforce a grassland protection easement.

(b) To be eligible to receive GRP funding, an eligible entity must demonstrate:

(1) A commitment to long-term conservation of agricultural lands, ranch land, or grassland for grazing and conservation purposes;

(2) A capability to acquire, manage, and enforce easements;

(3) Sufficient number of staff dedicated to monitoring and easement stewardship;

(4) The availability of funds; and

(5) For nongovernmental organizations, the existence of a dedicated account and funds for the purposes of easement management, monitoring, and enforcement of each easement held by the eligible entity.

(c) NRCS enters into a cooperative agreement with those eligible entities selected for funding. Once a proposal is selected by the State Conservationist, the eligible entity must work with the appropriate State Conservationist to finalize and sign the cooperative agreement, incorporating all necessary GRP requirements. The cooperative agreement addresses:

(1) The interests in land to be acquired, including the form of the easement deeds to be used and terms and conditions;

(2) The management and enforcement of the interests acquired;

(3) The responsibilities of NRCS;

(4) The responsibilities of the eligible entity on lands acquired with the assistance of GRP;

(5) The parcels accepted by the State Conservationist, landowners' names, addresses, location map(s), and other relevant information in an a attachment to the cooperative agreement;

(6) The allowance of parcel substitution upon mutual agreement of the parties;

(7) The manner in which violations are addressed;

(8) The right of the Secretary to conduct periodic inspections to verify the eligible entity's enforcement of the easements;

(9) The manner in which the eligible entity will evaluate and report the use of funds to the Secretary;

(10) The eligible entity's agreement to assume the costs incurred in administering and enforcing the easement, including the costs of restoration and rehabilitation of the land as specified by the owner and eligible entity. The entity will also assume the responsibility for enforcing the GRP management plan or conservation plan, as applicable. The eligible entity must incorporate any required plan into the conservation easement deed by reference or otherwise;

(11) The source of funding. The eligible entity may include a charitable donation or qualified conservation contribution (as defined by section 170(h) of the Internal Revenue Code of 1986) from the landowner as part of the entity's share of the purchase price;

(12) The schedule of payments to an eligible entity, as agreed to by NRCS and the eligible entity;

(13) GRP funds may not be used for expenditures such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other related administrative and transaction costs incurred by the entity;

(14) NRCS may provide a share of the purchase price of an easement under the program. The eligible entity will be required to provide a share of the purchase price at least equivalent to that provided by NRCS. The Federal share will be no more than 50 percent of the purchase price, as defined in §1415.3;

(15) The eligible entity's succession plan, which describes how its successors or assigns will hold, manage, and enforce the interests in land acquired in the event that the eligible entity is no longer able to fulfill its obligations under the cooperative agreement entered into with NRCS; and

(16) Other requirements deemed necessary by NRCS to protect the interests of the United States.

(d) Easements funded under the cooperative agreement option will be in perpetuity, except where State law prohibits a permanent easement, and will require that the easement area be maintained in accordance with GRP goals and objectives for the term of the easement.

(e) The entity may use its own terms and conditions in the conservation easement deed, but a conservation easement deed template used by the eligible entity will be submitted to the Chief within 30 days of the signing of the cooperative agreement. The conservation easement deed templates will be reviewed and approved by the Chief. NRCS reserves the right to require additional specific language or to remove language in the conservation easement deed to protect the interests of the United States.

(1) In order to protect the public investment, the conveyance document must contain a right of enforcement. NRCS will specify the terms for the right of enforcement clause to read as set forth in the GRP cooperative agreement. This right is a vested property right and cannot be condemned or terminated by State or local government;

(2) The eligible entity will acquire, hold, manage, and enforce the easement. The eligible entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities if approved by NRCS;

(3) Prior to closing, NRCS must sign an acceptance of the conservation easement, concurring with the terms of the conservation easement and accepting its interest in the conservation easement deed;

(4) All conservation easement deeds acquired with GRP funds must be recorded in the appropriate land records. Proof of recordation will be provided to NRCS by the eligible entity; and

(5) The conservation easement deed must include an indemnification clause requiring the participant (grantor) to indemnify and hold harmless the United States from any liability arising from or related to the property enrolled in GRP.

**§ 1415.18 Easement transfer to eligible entities.**

(a) NRCS may transfer title of ownership to an easement to an eligible entity to hold and enforce an easement if:

(1) The Chief determines that transfer will promote protection of grassland, land that contains forbs, or shrubland;

(2) The owner authorizes the eligible entity to hold and enforce the easement; and

(3) The eligible entity agrees to assume the costs incurred in administering and enforcing the easement, including the costs of restoration or rehabilitation of the land as specified by the owner and the eligible entity, and the entity assumes responsibility for enforcing the GRP management plan or conservation plan, as applicable, as approved by NRCS.

(b) NRCS has the right to conduct periodic inspections to verify the eligible entities enforcement of the easement, which includes the terms and requirements set forth in the GRP management plan and any associated restoration or conservation plan for any easements transferred pursuant to this section.

(c) An eligible entity that seeks to hold and enforce an easement will apply to the NRCS State Conservationist for approval.

(d) The Chief may approve an application if the eligible entity:

(1) Has relevant experience necessary, as appropriate for the application, to administer an easement on grassland, land that contains forbs, or shrublands;

(2) Has a charter that describes the commitment of the eligible entity to conserving ranch land, agricultural land, or grassland for grazing and conservation purposes;

(3) Possesses the human and financial resources necessary, as determined by the Chief, to effectuate the purposes of the charter;

(4) Has sufficient financial resources to carry out easement administrative and enforcement activities;

(5) Presents proof of a dedicated fund for enforcement as described in §1415.17(b)(5), if the entity is a nongovernmental organization; and

(6) Presents documentation that the landowner has concurred in the transfer.

(e) The Chief or his or her successors and assigns, will retain a right of enforcement in any transferred GRP funded easement, which provides the Secretary the right to inspect the easement for violations and enforce the terms of this easement through any and all authorities available under Federal or State law, in the event that the eligible entity fails to enforce the terms of the easement, as determined by NRCS.

(f) Should an easement be transferred pursuant to this section, all warranties and indemnifications provided for in the deed will continue to apply to the United States. Upon transfer of the easement, the easement holder will be responsible for enforcement of the GRP management plan, as approved by NRCS, and implementation of any associated conservation or restoration plans and costs of such restoration as agreed to by the landowner and entity.

(g) Due to the Federal interest in the GRP easement, GRP-funded easements cannot be condemned.

**§ 1415.19 Appeals.**

(a) Applicants or participants may obtain a review of any administrative

determination concerning eligibility for participation utilizing the administrative appeal regulations provided in parts 614 and 780 of this title.

(b) Before a person may seek judicial review of any administrative action concerning eligibility for program participation under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for the purposes of judicial review, no decision will be a final agency action except a decision of the NRCS Chief or the FSA Administrator, as applicable, under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by NRCS in determining property value are considered confidential information, and will only be disclosed as determined at the sole discretion of NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by NRCS in furtherance of its Federally held property rights are under the jurisdiction of the Federal District Courts and are not subject to review under administrative appeal regulations.

### § 1415.20 Scheme or device.

(a) If it is determined by USDA that a participant has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid to such participant during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by USDA.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for cost-share practices, rental contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A participant who succeeds to the responsibilities under this part will report in writing to USDA any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

# PART 1416—2006 EMERGENCY AGRICULTURAL DISASTER ASSISTANCE PROGRAMS

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### Subpart I—2005 Catfish Grant Program

1416.800 General.

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SOURCE: 72 FR 6437, Feb. 12, 2007, unless otherwise noted.

## Subpart A—General Provisions for 2006 Emergency Agricultural Disaster Assistance Programs

### § 1416.1 Applicability.

(a) This part establishes the terms and conditions under which the following programs will be administered under Title III of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 for producers affected by the 2005 hurricanes listed in § 1416.2:

(1) Livestock Compensation Program (LCP);

(2) Livestock Indemnity Program II (LIP II);

(3) Citrus Disaster Program (Citrus Disaster);

(4) Fruit and Vegetable Disaster Program (Fruit and Vegetable Disaster);

(5) Tropical Fruit Disaster Program (Tropical Fruit);

(6) Nursery Disaster Program (Nursery);

(7) 2005 Hurricane Tree Assistance Program (Hurricane TAP);

(8) Catfish Grant Program (Catfish Grants).

(b) The amount that may be expended for payments under subparts B through I of this part shall not exceed the amounts authorized in Title III of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006.

(c) To be eligible for payments under these programs, producers must comply with all applicable provisions under subparts B through I of this part.

### § 1416.2 Eligible counties, hurricanes, and disaster periods.

(a) Except as provided in paragraph (c) of this section, the Commodity Credit Corporation (CCC) will provide assistance under the programs listed in § 1416.1 to eligible producers who have suffered certain losses due to 2005 hurricanes Katrina, Ophelia, Rita, or Wilma, or a related condition, in the counties provided in paragraph (d) of this section. CCC funds for the programs in subparts B through I of this part are made available under the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006.

(b) The "Disaster Period" is the time period in which losses occurred that may be considered eligible for the programs under subparts B, C, H and I of this part.

(c) The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 provides that no producer receives duplicative payments under the programs in subparts B through I of this part and any other Federal program for the same loss. Under the regulations at 7 CFR part 760, Subpart E, eligible livestock owners and contract growers were provided benefits for certain livestock deaths that occurred as a result of 2005 hurricanes Dennis, Katrina, Ophelia, Rita, or Wilma in many of the same counties as provided in paragraph (d) of this section. The benefits provided under 7 CFR part 760, Subpart E, are significantly greater than the benefits to be provided under Subpart C of this part. Accordingly, to ensure the statutory requirement that no producer receives duplicative payments under the program in Subpart C of this section and any other Federal program for the same loss, eligible livestock under the program in Subpart C of this section shall be limited

to catfish and crawfish in any county listed in paragraph (d) of this section that was an eligible county under 7 CFR 760.101.

(d) Counties are eligible for emergency disaster assistance under this Act if they received a Presidential designation or Secretarial declaration or are counties contiguous to such counties. Accordingly, the following counties are eligible:

| State | County | Disaster period | | | |
|---|---|---|---|---|---|
| | | Katrina | Ophelia | Rita | Wilma |
| Alabama | Baldwin | 8/29/05–10/28/05 | | | |
| Alabama | Bibb | 8/29/05–10/28/05 | | | |
| Alabama | Blount | 8/29/05–10/28/05 | | | |
| Alabama | Butler | 8/29/05–10/28/05 | | | |
| Alabama | Chilton | 8/29/05–10/28/05 | | | |
| Alabama | Choctaw | 8/29/05–10/28/05 | | | |
| Alabama | Clarke | 8/29/05–10/28/05 | | | |
| Alabama | Colbert | 8/29/05–10/28/05 | | | |
| Alabama | Conecuh | 8/29/05–10/28/05 | | | |
| Alabama | Covington | 8/29/05–10/28/05 | | | |
| Alabama | Cullman | 8/29/05–10/28/05 | | | |
| Alabama | Dallas | 8/29/05–10/28/05 | | | |
| Alabama | Escambia | 8/29/05–10/28/05 | | | |
| Alabama | Fayette | 8/29/05–10/28/05 | | | |
| Alabama | Franklin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Alabama | Geneva | 8/29/05–10/28/05 | | | |
| Alabama | Greene | 8/29/05–10/28/05 | | | |
| Alabama | Hale | 8/29/05–10/28/05 | | | |
| Alabama | Jefferson | 8/29/05–10/28/05 | | | |
| Alabama | Lamar | 8/29/05–10/28/05 | | | |
| Alabama | Lauderdale | 8/29/05–10/28/05 | | | |
| Alabama | Lawrence | 8/29/05–10/28/05 | | | |
| Alabama | Limestone | 8/29/05–10/28/05 | | | |
| Alabama | Lowndes | 8/29/05–10/28/05 | | | |
| Alabama | Marengo | 8/29/05–10/28/05 | | | |
| Alabama | Marion | 8/29/05–10/28/05 | | | |
| Alabama | Marshall | 8/29/05–10/28/05 | | | |
| Alabama | Mobile | 8/29/05–10/28/05 | | | |
| Alabama | Monroe | 8/29/05–10/28/05 | | | |
| Alabama | Morgan | 8/29/05–10/28/05 | | | |
| Alabama | Perry | 8/29/05–10/28/05 | | | |
| Alabama | Pickens | 8/29/05–10/28/05 | | | |
| Alabama | St. Clair | 8/29/05–10/28/05 | | | |
| Alabama | Shelby | 8/29/05–10/28/05 | | | |
| Alabama | Sumter | 8/29/05–10/28/05 | | | |
| Alabama | Tuscaloosa | 8/29/05–10/28/05 | | | |
| Alabama | Walker | 8/29/05–10/28/05 | | | |
| Alabama | Washington | 8/29/05–10/28/05 | | | |
| Alabama | Wilcox | 8/29/05–10/28/05 | | | |
| Alabama | Winston | 8/29/05–10/28/05 | | | |
| Arkansas | Ashley | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Chicot | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Columbia | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Crittenden | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Desha | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Lafayette | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |

| State | County | Disaster period | | | |
|---|---|---|---|---|---|
| | | Katrina | Ophelia | Rita | Wilma |
| Arkansas | Lee | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Miller | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Phillips | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | St. Francis | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Arkansas | Union | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Florida | Bay | 8/24/05–10/23/05 | | | |
| Florida | Brevard | | | | 10/23/05–12/22/05 |
| Florida | Broward | 8/24/05–10/23/05 | | | 10/23/05–12/22/05 |
| Florida | Calhoun | 8/24/05–10/23/05 | | | |
| Florida | Charlotte | | | | 10/23/05–12/22/05 |
| Florida | Collier | 8/24/05–10/23/05 | | | 10/23/05–12/22/05 |
| Florida | De Soto | | | | 10/23/05–12/22/05 |
| Florida | Escambia | 8/24/05–10/23/05 | | | |
| Florida | Franklin | 8/24/05–10/23/05 | | | |
| Florida | Glades | | | | 10/23/05–12/22/05 |
| Florida | Gulf | 8/24/05–10/23/05 | | | |
| Florida | Hardee | | | | 10/23/05–12/22/05 |
| Florida | Hendry | | | | 10/23/05–12/22/05 |
| Florida | Highlands | | | | 10/23/05–12/22/05 |
| Florida | Hillsborough | | | | 10/23/05–12/22/05 |
| Florida | Holmes | 8/24/05–10/23/05 | | | |
| Florida | Indian River | | | | 10/23/05–12/22/05 |
| Florida | Jackson | 8/24/05–10/23/05 | | | |
| Florida | Lee | | | | 10/23/05–12/22/05 |
| Florida | Liberty | 8/24/05–10/23/05 | | | |
| Florida | Manatee | | | | 10/23/05–12/22/05 |
| Florida | Martin | | | | 10/23/05–12/22/05 |
| Florida | Miami-Dade | 8/24/05–10/23/05 | | | 10/23/05–12/22/05 |
| Florida | Monroe | 8/24/05–10/23/05 | | | 10/23/05–12/22/05 |
| Florida | Okaloosa | 8/24/05–10/23/05 | | | |
| Florida | Okeechobee | | | | 10/23/05–12/22/05 |
| Florida | Orange | | | | 10/23/05–12/22/05 |
| Florida | Osceola | | | | 10/23/05–12/22/05 |
| Florida | Palm Beach | | | | 10/23/05–12/22/05 |
| Florida | Polk | | | | 10/23/05–12/22/05 |
| Florida | St. Lucie | | | | 10/23/05–12/22/05 |
| Florida | Santa Rosa | 8/24/05–10/23/05 | | | |
| Florida | Sarasota | | | | 10/23/05–12/22/05 |
| Florida | Volusia | | | | 10/23/05–12/22/05 |
| Florida | Wakulla | 8/24/05–10/23/05 | | | |
| Florida | Walton | 8/24/05–10/23/05 | | | |
| Florida | Washington | 8/24/05–10/23/05 | | | |
| Louisiana | Acadia | 8/29/05–10/23/05 | | 9/23/05–11/22/05 | |
| Louisiana | Allen | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Ascension | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Assumption | 8/29/05–10/28/05 | | | |

| | | | | | |
|---|---|---|---|---|---|
| Louisiana | Avoyelles | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Beauregard | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Bienville | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Bossier | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Caddo | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Calcasieu | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Caldwell | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Cameron | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Catahoula | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Claiborne | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Concordia | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | De Soto | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | East Baton Rouge | 8/29/05–10/28/05 | | | |
| Louisiana | East Carroll | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | East Feliciana | 8/29/05–10/28/05 | | | |
| Louisiana | Evangeline | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Franklin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Grant | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Iberia | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Iberville | 8/29/05–10/28/05 | | | |
| Louisiana | Jackson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Jefferson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Jefferson Davis | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Lafayette | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Lafourche | 8/29/05–10/28/05 | | | |
| Louisiana | La Salle | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Lincoln | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Livingston | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Madison | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Morehouse | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Natchitoches | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Orleans | 8/29/05–10/28/05 | | | |
| Louisiana | Ouachita | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Plaquemines | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Pointe Coupee | 8/29/05–10/28/05 | | | |
| Louisiana | Rapides | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Red River | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Richland | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Sabine | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | St. Bernard | 8/29/05–10/28/05 | | | |
| Louisiana | St. Charles | 8/29/05–10/28/05 | | | |
| Louisiana | St. Helena | 8/29/05–10/28/05 | | | |
| Louisiana | St. James | 8/29/05–10/28/05 | | | |
| Louisiana | St. John the Baptist | 8/29/05–10/28/05 | | | |
| Louisiana | St. Landry | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | St. Martin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | St. Mary | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | St. Tammany | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Tangipahoa | 8/29/05–10/28/05 | | | |
| Louisiana | Tensas | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |

| State | County | Disaster period | | | |
|---|---|---|---|---|---|
| | | Katrina | Ophelia | Rita | Wilma |
| Louisiana | Terrebonne | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Union | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Vermilion | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Vernon | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | Washington | 8/29/05–10/28/05 | | | |
| Louisiana | Webster | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | West Baton Rouge | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | West Carroll | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Louisiana | West Feliciana | 8/29/05–10/28/05 | | | |
| Louisiana | Winn | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Adams | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Alcorn | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Amite | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Attala | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Benton | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Bolivar | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Calhoun | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Carroll | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Chickasaw | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Choctaw | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Claiborne | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Clarke | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Clay | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Coahoma | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Copiah | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Covington | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | De Soto | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Forrest | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Franklin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | George | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Greene | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Grenada | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Hancock | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Harrison | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Hinds | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Holmes | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Humphreys | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Issaquena | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Itawamba | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Jackson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Jasper | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Jefferson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Jefferson Davis | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Jones | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Kemper | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lafayette | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |

| | | | | | |
|---|---|---|---|---|---|
| Mississippi | Lamar | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lauderdale | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lawrence | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Leake | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lee | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Leflore | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lincoln | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Lowndes | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Madison | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Marion | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Marshall | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Monroe | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Montgomery | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Neshoba | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Newton | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Noxubee | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Oktibbeha | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Panola | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Pearl River | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Perry | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Pike | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Pontotoc | 8/29/05–10/28/05 | | | |
| Mississippi | Prentiss | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Quitman | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Rankin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Scott | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Sharkey | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Simpson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Smith | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Stone | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Sunflower | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Tallahatchie | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Tate | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Tippah | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Tishomingo | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Tunica | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Union | 8/29/05–10/28/05 | | | |
| Mississippi | Walthall | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Warren | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Washington | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Wayne | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Webster | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Wilkinson | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Winston | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Yalobusha | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Mississippi | Yazoo | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| North Carolina | Beaufort | | 9/11/05–11/10/05 | | |
| North Carolina | Bladen | | 9/11/05–11/10/05 | | |
| North Carolina | Brunswick | | 9/11/05–11/10/05 | | |
| North Carolina | Carteret | | 9/11/05–11/10/05 | | |

| State | County | Disaster period | | | |
|---|---|---|---|---|---|
| | | Katrina | Ophelia | Rita | Wilma |
| North Carolina | Columbus | | 9/11/05–11/10/05 | | |
| North Carolina | Craven | | 9/11/05–11/10/05 | | |
| North Carolina | Currituck | | 9/11/05–11/10/05 | | |
| North Carolina | Dare | | 9/11/05–11/10/05 | | |
| North Carolina | Duplin | | 9/11/05–11/10/05 | | |
| North Carolina | Hyde | | 9/11/05–11/10/05 | | |
| North Carolina | Jones | | 9/11/05–11/10/05 | | |
| North Carolina | Lenoir | | 9/11/05–11/10/05 | | |
| North Carolina | New Hanover | | 9/11/05–11/10/05 | | |
| North Carolina | Onslow | | 9/11/05–11/10/05 | | |
| North Carolina | Pamlico | | 9/11/05–11/10/05 | | |
| North Carolina | Pender | | 9/11/05–11/10/05 | | |
| North Carolina | Pitt | | 9/11/05–11/10/05 | | |
| North Carolina | Sampson | | 9/11/05–11/10/05 | | |
| North Carolina | Tyrell | | 9/11/05–11/10/05 | | |
| North Carolina | Washington | | 9/11/05–11/10/05 | | |
| South Carolina | Horry | | 9/11/05–11/10/05 | | |
| Tennessee | Fayette | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Tennessee | Giles | 8/29/05–10/28/05 | | | |
| Tennessee | Hardeman | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Tennessee | Hardin | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Tennessee | Lawrence | 8/29/05–10/28/05 | | | |
| Tennessee | McNairy | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Tennessee | Shelby | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Tennessee | Wayne | 8/29/05–10/28/05 | | | |
| Texas | Anderson | | | 9/23/05–11/22/05 | |
| Texas | Angelina | | | 9/23/05–11/22/05 | |
| Texas | Austin | | | 9/23/05–11/22/05 | |
| Texas | Brazoria | | | 9/23/05–11/22/05 | |
| Texas | Cass | 8/29/05–10/28/05 | | 9/23/05–11/22/05 | |
| Texas | Chambers | | | 9/23/05–11/22/05 | |
| Texas | Cherokee | | | 9/23/05–11/22/05 | |
| Texas | Fort Bend | | | 9/23/05–11/22/05 | |
| Texas | Galveston | | | 9/23/05–11/22/05 | |
| Texas | Gregg | | | 9/23/05–11/22/05 | |
| Texas | Grimes | | | 9/23/05–11/22/05 | |
| Texas | Hardin | | | 9/23/05–11/22/05 | |
| Texas | Harris | | | 9/23/05–11/22/05 | |
| Texas | Harrison | | | 9/23/05–11/22/05 | |
| Texas | Henderson | | | 9/23/05–11/22/05 | |
| Texas | Houston | | | 9/23/05–11/22/05 | |
| Texas | Jasper | | | 9/23/05–11/22/05 | |
| Texas | Jefferson | | | 9/23/05–11/22/05 | |
| Texas | Leon | | | 9/23/05–11/22/05 | |
| Texas | Liberty | | | 9/23/05–11/22/05 | |
| Texas | Madison | | | 9/23/05–11/22/05 | |

| | | | | | |
|---|---|---|---|---|---|
| Texas | Marion | | | 9/23/05–11/22/05 | |
| Texas | Matagorda | | | 9/23/05–11/22/05 | |
| Texas | Montgomery | | | 9/23/05–11/22/05 | |
| Texas | Morris | | | 9/23/05–11/22/05 | |
| Texas | Nacogdoches | | | 9/23/05–11/22/05 | |
| Texas | Newton | | | 9/23/05–11/22/05 | |
| Texas | Orange | | | 9/23/05–11/22/05 | |
| Texas | Panola | | | 9/23/05–11/22/05 | |
| Texas | Polk | | | 9/23/05–11/22/05 | |
| Texas | Rusk | | | 9/23/05–11/22/05 | |
| Texas | Sabine | | | 9/23/05–11/22/05 | |
| Texas | San Augustine | | | 9/23/05–11/22/05 | |
| Texas | San Jacinto | | | 9/23/05–11/22/05 | |
| Texas | Shelby | | | 9/23/05–11/22/05 | |
| Texas | Smith | | | 9/23/05–11/22/05 | |
| Texas | Trinity | | | 9/23/05–11/22/05 | |
| Texas | Tyler | | | 9/23/05–11/22/05 | |
| Texas | Upshur | | | 9/23/05–11/22/05 | |
| Texas | Walker | | | 9/23/05–11/22/05 | |
| Texas | Waller | | | 9/23/05–11/22/05 | |
| Texas | Wharton | | | 9/23/05–11/22/05 | |

### § 1416.3 Administration.

(a) These programs are administered under the general supervision of the Administrator, Farm Service Agency (FSA), or Executive Vice President of CCC.

(b) CCC representatives do not have authority to modify or waive any of the provisions of the regulations of subparts B through I of this part.

(c) The State FSA committee shall take any action required by the regulations of subparts B through H of this part that the county FSA committee has not taken. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in accordance with the regulations of subparts B through H of this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with subparts B through H of this part.

(d) No provision or delegation to a State or county FSA committee shall preclude the Executive Vice President, CCC, FSA Deputy Administrator for Farm Programs (Deputy Administrator), or a designee of such, from determining any question arising under the program or from reversing or modifying any determination made by a State or county FSA committee.

### § 1416.4 Definitions.

The following definitions apply to the programs in subparts B through H of this part. The definitions in parts 718 and 1400 of this chapter shall also apply, except where they conflict with the definitions in this section.

*Application period* means the date established by the Deputy Administrator for producers to apply for program benefits.

*Bush* means a thick densely branched woody shrub grown in the ground for the production of an annual crop for commercial market for human consumption.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*Crop insurance* means an insurance policy reinsured by the Federal Crop Insurance Corporation under the Federal Crop Insurance Act, as amended.

*Farming operation* means a business enterprise engaged in producing agricultural products.

*Owner* means one who had legal ownership of the trees, bushes, vines, or livestock for which benefits are being requested under subparts B through H, on the day such plant or livestock perished or suffered losses due to an eligible hurricane.

*Tier* means the geographic bands of damage generally correlating to the severity of damage caused by the maximum sustained winds of the applicable hurricanes.

*Tree* means a tree (including a Christmas tree, ornamental tree, nursery tree, and potted tree).

*Vine* means a perennial plant grown under normal conditions from which an annual fruit crop is produced for commercial market for human consumption, such as grape, kiwi, or passion fruit that has a flexible stem supported by climbing, twining, or creeping along a surface.

### § 1416.5 Application for payment.

(a) A producer who applies for any program under subparts B through H of this part shall submit an application and required supporting documentation to the county FSA office serving the county where the eligible loss occurred; or in the case of LCP, where the eligible livestock were physically located on the applicable date.

(b) The application must be filed during the application period announced by the Deputy Administrator.

(c) Payments may be made for eligible losses suffered by an eligible producer who is now deceased or is a dissolved entity if a representative who currently has authority to enter into a contract for the producer signs the application for payment. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

(d) Data furnished by the applicant will be used to determine eligibility for

program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

(e) A minor child shall be eligible to apply for program benefits so long as all eligibility requirements are met and one of the following conditions exists:

(1) The right of majority has been conferred upon the minor by court proceedings or statute;

(2) A guardian has been appointed to manage the minor's property, and the applicable program documents are executed by the guardian; or

(3) A bond is furnished under which a surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

### § 1416.6 Limitations on payments and other benefits.

(a) A producer may receive no more than $80,000 under LCP, subpart B of this part.

(b) A producer may receive no more than $80,000 under LIP–II, subpart C of this part.

(c) A single producer may receive no more than $80,000 total combined payments from subpart D of this part, the Citrus Disaster Program, subpart E of this part, the Fruit and Vegetable Program, subpart F of this part, the Tropical Fruit Program, and subpart G of this part, the Nursery Program.

(d) Limits per person for payments made under subpart I of this part for Catfish Grants will be $80,000 per producer. This limit shall be enforced by the State administering the grant program.

(e) An individual or entity whose adjusted gross income is in excess of $2.5 million, as determined under part 1400 of this title, shall not be eligible to receive benefits under this part, except for TAP and Catfish Grants.

(f) As a condition to receive benefits under this part, a producer must have been in compliance with the provisions of parts 12 and 718 of this title for the 2005 crop year and must not otherwise be barred from receiving benefits under any law.

(g) An individual or entity determined to be a foreign person under part 1400 of this title shall not be eligible to receive benefits under this part.

(h) In addition to limitations provided in each subpart of this part, producers cannot receive duplicate benefits under this part and any other Federal programs for the same loss, including but not limited to the following:

(1) Crop insurance indemnity payments under 7 CFR Part 400;

(2) The Noninsured Crop Disaster Assistance Program, part 1437 of this chapter;

(3) Part 701 of this title, the Emergency Conservation Program;

(4) The Hurricane Indemnity Program, subpart C of part 760 of this title.

(i) An applicant's actual loss or actual costs incurred because of losses due to an eligible hurricane must equal or exceed the benefit requested under this part.

### § 1416.7 Insurance requirements.

For the Citrus, Fruit and Vegetable, Tropical Fruit and Nursery Disaster Programs:

(a) Payment rates for producers who did not have crop insurance or coverage under the Noninsured Crop Disaster Assistance Program (NAP) will be 5 percent less than the rates received by producers who did have crop insurance or NAP coverage.

(b) Eligible producers who elected to not purchase crop insurance on an insurable crop, or to sign up for NAP that was available on an uninsurable crop for which benefits are received under these programs, must purchase such coverage for the next available coverage period in the form of:

(1) Crop insurance that is, at a minimum, at least at the catastrophic level on that crop, although producers required to purchase a citrus policy may purchase a fruit or tree policy; or

(2) NAP coverage.

(c) If a producer who is required to purchase crop insurance or NAP for the applicable year fails to do so, the producer must refund any disaster payment made under these programs. Required refunds will be serviced as a claim under part 1403 of this chapter.

### § 1416.8 Appeals.

The appeal regulations set forth at parts 11 and 780 of this title apply to

determinations made pursuant to subparts B through H of this part.

### § 1416.9 Offsets, assignments, and debt settlement.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any producer shall be made without regard to questions of title under State law and without regard to any claim or lien against the commodity, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at parts 792 and 1403 of this title apply to payments made under subparts B through H of this part.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this chapter.

### § 1416.10 Records and inspections thereof.

Producers receiving payments under the programs in subparts B through H or any other person who furnishes information for the purposes of enabling such producer to receive a payment under subparts B through H of this part shall maintain any books, records, and accounts supporting any information so furnished for 3 years following the end of the year during which the application for payment was filed. Producers receiving payments or any other person who furnishes such information to CCC shall permit authorized representatives of USDA and the General Accounting Office during regular business hours to inspect, examine, and to allow such persons to make copies of such books or records, and to enter upon, inspect and verify all applicable livestock and acreage in which the applicant has an interest for the purpose of confirming the accuracy of the information provided by the applicant.

### § 1416.11 Refunds; joint and several liability.

In the event there is a failure to comply with any term, requirement, or condition for payment or assistance arising under subparts B through H of this part, and if any refund of a payment to CCC shall otherwise become due in connection with this part, all payments made in regard to such matter shall be refunded to CCC together with interest and late-payment charges as provided for in part 792 of this title.

## Subpart B—Livestock Compensation Program

### § 1416.100 Applicability.

This subpart sets forth the terms and conditions applicable to the Livestock Compensation Program (LCP).

### § 1416.101 Definitions.

The following definitions apply to this subpart.

*Adult beef bulls* means male bovine animals that were at least 2 years old and used for breeding purposes on the beginning date of the applicable disaster period.

*Adult beef cows* means female bovine animals that had delivered one or more offspring before the beginning date of the disaster period. A first-time bred beef heifer shall also be considered an adult beef cow if it was pregnant on the beginning date of the disaster period.

*Adult buffalo and beefalo bulls* means male animals of those breeds that were at least 2 years old and used for breeding purposes on the beginning date of the disaster period.

*Adult buffalo and beefalo cows* means female animals of those breeds that had delivered one or more offspring before the beginning date of the applicable disaster period. A first-time bred buffalo or beefalo heifer shall also be considered to be an adult buffalo or beefalo cow if it was pregnant on the beginning date of the disaster period.

*Adult dairy bulls* means male bovine animals of a breed used for producing milk for human consumption that were at least 2 years old and used for breeding dairy cows on the beginning date of the disaster period.

*Adult dairy cows* means female bovine animals used for the purpose of providing milk for human consumption that had delivered one or more offspring before the beginning date of the disaster period. A first-time bred dairy heifer shall also be considered an adult dairy cow if it was pregnant on the beginning date of the disaster period.

*Agricultural operation* means a farming operation.

*Application* means the "2005 Hurricanes Livestock Compensation Program Application" form.

*Disaster period* means the applicable disaster period as set forth in § 1416.2.

*Equine animal* means a domesticated horse, mule or donkey.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats.

*Non-adult beef cattle* means male, female or neutered male bovine animals that weighed 500 pounds or more on the beginning date of the disaster period, but do not meet the definition of adult beef cows or bulls.

*Non-adult buffalo/beefalo* means male, female or neutered male animals of those breeds that weighed 500 pounds or more on the beginning date of the disaster period, but do not meet the definition of an adult buffalo or beefalo cow or bull.

*Non-adult dairy cattle* means male, female or neutered male bovine livestock, of a breed used for the purpose of providing milk for human consumption, that weighed 500 pounds or more on the beginning date of the disaster period, but do not meet the definition adult dairy cows or bulls.

*Poultry* means domesticated chickens, turkeys, ducks and geese. Poultry will be further delineated by sex, age and purpose of production, as determined by CCC.

*Sheep* means domesticated, ruminant mammals of the genus *Ovis*.

*Swine* means domesticated omnivorous pigs, hogs, and boars. Swine will be further delineated by sex and weight as determined by CCC.

### § 1416.102 Eligible livestock and producers.

(a) To be considered eligible, livestock must meet all the following conditions:

(1) Be adult or non-adult dairy cattle, beef cattle, buffalo, beefalo, equine, poultry, elk, reindeer, sheep, goats, swine or deer;

(2) Been physically located in an eligible county on the beginning date of the disaster period;

(3) Been maintained for commercial use as part of a farming operation on the beginning date of the disaster period; and

(4) Not have been produced and maintained for reasons other than commercial use as part of a farming operation. Such excluded uses include, but are not limited to wild free roaming animals or animals used for recreational purposes, such as pleasure, hunting, pets, or for show.

(b) To be considered an eligible livestock producer, a producer must have:

(1) Owned or cash-leased, but not both for the same livestock, eligible livestock on the beginning date of the disaster period; and

(2) Suffered a loss of feed:

(i) From produced or purchased forage or feedstuffs which was:

(A) Damaged or destroyed by an eligible hurricane; and

(B) Physically located in an eligible county; and

(C) Intended for use as feed for only the livestock found eligible under paragraph (a) of this section.

(ii) The value of such loss, as determined by CCC, equals or exceeds the amount calculated according to § 1416.104(a).

### § 1416.103 Application process.

(a) Applicants must submit to CCC:

(1) A completed application in accordance with § 1416.5;

(2) Adequate proof, as determined by CCC, that the feed lost:

(i) Was for the claimed eligible livestock;

(ii) Occurred as a direct result of the eligible hurricane during the disaster period; and

(iii) Had a value, as determined by CCC, equal to or greater than the amount calculated in accordance with § 1416.104(a); and

(iv) Any other supporting documentation as determined by CCC to be necessary to make a determination of eligibility of the applicant. Supporting documents include, but are not limited to: verifiable purchase records; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Agency

records; National Guard records; written contracts; production records; Internal Revenue Service records; property tax records; private insurance documents; sales records, and similar documents.

(b) [Reserved]

### § 1416.104 Payment calculation.

(a) LCP payments are calculated by multiplying the national payment rate for each livestock category, as provided in paragraph (c) of this section, by the number of eligible livestock in each category. The national payment rate represents the cost of the amount of corn needed to maintain the specific livestock for 30 days, as determined by CCC. Adjustments shall be applied in accordance with paragraph (b) of this section and § 1416.105;

(b) The LCP payment calculated in accordance with paragraph (a) of this section shall be reduced by the amount the applicant received for the specific livestock under the Feed Indemnity Program in accordance with subpart D of part 760 of this title.

(c) The eligible livestock categories are:

(1) Adult beef cows or bulls;

(2) Non-adult beef cattle;

(3) Adult buffalo or beefalo cows or bulls;

(4) Non-adult buffalo or beefalo;

(5) Adult dairy cows or bulls;

(6) Non-adult dairy cattle;

(7) Goats;

(8) Sheep;

(9) Equine;

(10) Reindeer;

(11) Elk;

(12) Poultry; and

(13) Deer.

### § 1416.105 Availability of funds.

(a) In the event that the total amount of eligible claims submitted under this subpart and subpart I of this part exceeds $95 million, each payment shall be reduced by a uniform national percentage, as determined by CCC,

(b) Such payment reduction shall be applied after the imposition of per-person payment limitations as provided in § 1416.6.

## Subpart C—Livestock Indemnity Program II

### § 1416.200 Applicability.

(a) This subpart sets forth the terms and conditions applicable to the Livestock Indemnity Program II (LIP–II).

(b) Eligible livestock owners and contract growers will be compensated in accordance with § 1416.205 for eligible livestock deaths that occurred in eligible counties as a direct result of an eligible hurricane during the disaster period.

### § 1416.201 Definitions.

The following definitions are applicable for all purposes of administering LIP–II.

*Adult beef bull* means a male bovine animal that was at least 2 years old and used for breeding purposes before it died.

*Adult beef cow* means a female bovine animal that had delivered one or more offspring before dying. A first-time bred beef heifer shall also be considered an adult beef cow if it was pregnant at the time it died.

*Adult buffalo and beefalo bull* means a male animal of those breeds that were at least 2 years old and used for breeding purposes before it died.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring before dying. A first-time bred buffalo or beefalo heifer shall also be considered an adult buffalo or beefalo cow if it was pregnant at the time it died.

*Adult dairy bull* means a male bovine animal of a breed used for producing milk for human consumption that was at least 2 years old and used for breeding dairy cows before it died.

*Adult dairy cow* means a female bovine animal used for the purpose of providing milk for human consumption that had delivered one or more offspring before dying. A first-time bred dairy heifer shall also be considered an adult dairy cow if it was pregnant at the time it died.

*Agricultural operation* means a farming operation.

*Application* means the "2005 Hurricanes Livestock Indemnity Program II Application" form.

*Buck* means a male goat.

*Catfish* means catfish grown as food for human consumption by a commercial operator on private property in water in a controlled environment.

*Contract* means, with respect to contracts for the handling of livestock, a written agreement between a livestock owner and another individual or entity setting the specific terms, conditions and obligations of the parties involved regarding the production of livestock or livestock products.

*Controlled environment* means an environment in which everything that can practicably be controlled with structures, facilities, growing media (including but not limited to water and nutrients) by the producer, is in fact controlled by the producer.

*Crawfish* means crawfish grown as food for human consumption by a commercial operator on private property in water in a controlled environment.

*Disaster period* means the applicable disaster period as set forth in §1416.2.

*Doe* means a female goat.

*Equine animal* means a domesticated horse, mule or donkey.

*Ewe* means a female sheep.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats. Goats will be further delineated by sex (bucks and does) and age (kids).

*Kid* means a goat less than 1 year old.

*Lamb* means a sheep less than 1 year old.

*Non-adult beef cattle* means male, female or neutered male bovines that do not meet the definition of adult beef cows or bulls. Non-adult beef cattle is further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time they died.

*Non-adult buffalo or beefalo* means a male, female or neutered male animal of those breeds that do not meet the definition of adult buffalo/beefalo cow or bull. Non-adult buffalo or beefalo is further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time of death.

*Non-adult dairy cattle* means male, female, or neutered male bovine livestock, of a breed used for the purpose of providing milk for human consumption, that do not meet the definition of adult dairy cows or bulls. Non-adult dairy cattle is further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time they died.

*Poultry* means domesticated chickens, turkeys, ducks and geese. Poultry will be further delineated by sex, age and purpose of production, as determined by CCC.

*Ram* means a male sheep.

*Sheep* means domesticated, ruminant mammals of the genus *Ovis*. Sheep will be further delineated by sex (rams and ewes) and age (lambs).

*Swine* means domesticated omnivorous pigs, hogs, and boars. Swine will be further delineated by sex and weight as determined by CCC.

### §1416.202 Eligible owners and contract growers.

(a) To be considered eligible, a livestock owner must have had legal ownership of the eligible livestock, as provided in §1416.203(a), on the day the livestock died.

(b) To be considered eligible, a contract grower on the day the livestock died must have had:

(1) A written agreement with the owner of eligible livestock setting the specific terms, conditions and obligations of the parties involved regarding the production of livestock; and

(2) Control of the eligible livestock, as provided in §1416.203(b), on the day the livestock died.

### §1416.203 Eligible livestock.

(a) To be considered eligible livestock for eligible livestock owners, livestock:

(1) In any county provided in §1416.2(d) that was an eligible county in accordance with 7 CFR 760.101, must meet all the following:

(i) Be catfish or crawfish as defined in §1416.201;

(ii) Died in an eligible county as a direct result of an applicable hurricane during the disaster period;

(iii) Been maintained for commercial use as part of a farming operation on the day they died; and

(iv) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, including but not limited to wild free roaming animals or animals used for recreational purposes,

such as pleasure, hunting, pets, or for show.

(2) In any county provided in §1416.2(d) that was not an eligible county according to 7 CFR 760.101, must meet all the following:

(i) Be adult or non-adult dairy cattle, beef cattle, buffalo, beefalo, catfish, crawfish, equine, sheep goats, swine, poultry or deer;

(ii) Died in an eligible county as a direct result of an applicable hurricane during the disaster period;

(iii) Been maintained for commercial use as part of a farming operation on the day they died; and

(iv) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, including but not limited to wild free roaming animals or animals used for recreational purposes, such as pleasure, hunting, pets, or for show.

(b) To be considered eligible livestock for eligible contract growers, livestock must meet all the following:

(1) Be poultry as defined in §1416.201;

(2) Died in an eligible county provided in §1416.2(d) that was not an eligible county as provided in 7 CFR 760.101;

(3) Died as a direct result of an eligible hurricane during the applicable disaster period as set forth in §1416.2;

(4) Been maintained for commercial use as part of a farming operation on the day they died; and

(5) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, including but not limited to wild free roaming animals or animals used for recreational purposes, such as pleasure, hunting, pets, or for show.

(c) No producer may receive duplicative payments under this subpart and any other Federal program for the same loss. Except catfish and crawfish, livestock that died in any county set forth in §1416.2(d) that was an eligible county under §760.101 of this title are not eligible livestock under this subpart.

### §1416.204 Application process.

(a) Applicants must submit to CCC a completed application in accordance with §1416.5, a copy of their grower contract if the applicant is a contract grower, and other supporting documents necessary for determining the eligibility of the applicant. Supporting documents must show: Evidence of loss; current physical location of livestock in inventory; and physical location of claimed livestock at the time of death.

(b) Applicants must provide adequate proof that the death of the eligible livestock occurred in an eligible county as a direct result of an eligible hurricane during the disaster period. The quantity and kind of livestock that died as a direct result of the eligible hurricane may be documented by: Purchase records; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Agency records; National Guard records; written contracts; production records, Internal Revenue Service records; property tax records; private insurance documents; and other similar verifiable documents, as determined by CCC.

(c) Certifications of livestock deaths by third parties may be accepted only if both the following conditions are met:

(1) The livestock owner or livestock contract grower, as applicable, certifies in writing:

(i) That there is no other documentation of death available;

(ii) The number of livestock, by category determined by the Deputy Administrator, were in inventory at the time the applicable hurricane occurred;

(iii) Other details necessary for CCC to determine the certification acceptable; and

(2) The third party provides their telephone number, address, and a written statement containing:

(i) Specific details about their knowledge of the livestock deaths;

(ii) Their affiliation with the livestock owner;

(iii) The accuracy of the deaths claimed by the livestock owner; and

(iv) Other details necessary for CCC to determine the certification acceptable.

**§ 1416.205 Payment calculation.**

(a) Under this subpart, separate payment rates are established for eligible livestock owners and eligible livestock contract growers in accordance with paragraphs (b) and (c) of this section. LIP–II payments are calculated by multiplying the national payment rate for each livestock category, as determined in paragraphs (b) and (c) of this section, by the number of eligible livestock in each category, as provided in paragraphs (f), (g) and (h) of this section. Adjustments shall be applied in accordance with paragraphs (d) and (e) of this section and § 1416.206.

(b) The LIP–II national payment rate for eligible livestock owners is based on 30 percent of the average fair market value of the livestock.

(c) The LIP–II national payment rate for eligible livestock contract growers is based on 30 percent of the average income loss sustained by the contract grower with respect to the dead livestock.

(d) The payment calculated for eligible livestock owners shall be reduced by the amount the applicant received for the specific livestock under:

(1) Subpart E of Part 760 of this title, the Livestock Indemnity Program;

(2) Subpart G of Part 760 of this title, the Aquaculture Program; and

(3) Part 1437 of this chapter, the Noninsured Crop Disaster Assistance Program.

(e) The payment calculated for eligible livestock contract growers shall be reduced by the amount the applicant received for the specific livestock:

(1) Under the Livestock Indemnity Program under Subpart E of Part 760 of this title; and

(2) From the party who contracted with the producer to grow the livestock for the loss of income from the dead livestock.

(f) The categories of eligible livestock in any county provided in § 1416.2(d) that was not an eligible county according to 7 CFR 760.101 for eligible livestock contract growers are as follows:

(1) Chickens, layers, roasters;
(2) Chickens, broilers, pullets;
(3) Chickens, chicks;
(4) Turkeys, toms, fryers, roasters;
(5) Turkeys, poults;
(6) Ducks;
(7) Ducks, ducklings;
(8) Geese, goose; and
(9) Geese, gosling.

(g) The categories of eligible livestock in any county provided in § 1416.2(d) that was not an eligible county according to 7 CFR 760.101 for eligible livestock owners are as follows:

(1) Adult beef cows;
(2) Adult beef bulls;
(3) Non-adult beef cattle;
(4) Adult buffalo or beefalo cows;
(5) Adult buffalo or beefalo bulls;
(6) Non-adult buffalo/beefalo;
(7) Adult dairy cows;
(8) Adult dairy bulls;
(9) Non-adult dairy cattle;
(10) Swine, sows, boars, barrows, gilts over 150 pounds;
(11) Swine, sows, boars, barrows, gilts 50 to 150 pounds;
(12) Swine, feeder pigs under 50 pounds;
(13) Goats, bucks;
(14) Goats, does;
(15) Goats, kids;
(16) Sheep, rams;
(17) Sheep, ewes;
(18) Sheep, lambs;
(19) Deer;
(20) Chickens, layers, roasters;
(21) Chickens, broilers, pullets;
(22) Chickens, chicks;
(23) Turkeys, toms, fryers, roasters;
(24) Turkeys, poults;
(25) Ducks;
(26) Ducks, ducklings;
(27) Geese, goose;
(28) Geese, gosling;
(29) Catfish;
(30) Crawfish; and
(31) Equine.

(h) The categories of eligible livestock in any county provided in § 1416.2(d) that was an eligible county according to 7 CFR 760.101 for eligible livestock owners are as follows:

(1) Catfish; and
(2) Crawfish.

**§ 1416.206 Availability of funds.**

(a) In the event that the total amount of eligible claims submitted by eligible livestock owners under this subpart exceeds $30 million, each payment to eligible livestock owner shall be reduced by a uniform national percentage, as determined by CCC.

(b) Such payment reduction shall be applied after the imposition of the applicable per-person payment limitations in § 1416.6.

## Subpart D—Citrus Disaster Program

### § 1416.300 Applicability.

This subpart sets forth the terms and conditions applicable to the Citrus Disaster Program.

### § 1416.301 Definitions.

*Citrus* means eligible citrus types that are those listed within the Risk Management Agency (RMA) Florida Citrus Fruit Crop Provisions.

*Grove* means contiguous acreage of the same citrus crop.

### § 1416.302 Eligible crops and producers.

(a) A producer must be an owner, operator, landlord, tenant, or sharecropper who shares in the risk of producing the citrus crop and is entitled to share in the crop available for marketing from the farm or would have shared had the crop been produced. Producers that did not market citrus in both 2004 and 2005 are not eligible, except producers with groves that will be of fruit-bearing age for 2006, but were too immature to producer marketable fruit in 2004 or 2005.

(b)(1) Citrus producers will be reimbursed on a per-acre basis for each eligible grove. Payment will be based on the severity of destruction as determined by the paths of the storms and damage estimates by CCC considering levels of loss correlating to the severity of damage caused by maximum sustained winds of the hurricane. The levels of damage that will determine payment rates are as follows:

Tier I—75 percent or greater crop loss and associated tree damage.
Tier II—50 to 74 percent crop loss and associated tree damage/loss.
Tier III—35 to 49 percent crop loss and associated tree damage/loss.
Tier IV —15 percent and greater associated tree damage only.

(2) Citrus producers who suffered citrus crop production losses and associated fruit-bearing tree damage, including related cleanup and rehabilitation costs, must provide to CCC a certified statement on a CCC-approved form of the level of destruction, the number of acres in the disaster-affected grove, and the geographic location of the losses.

(c) If the actual level of loss is greater than the level of loss associated with the tier based on the location of the grove, the applicant may submit documentation to CCC to request the grove be placed in the next lower-numbered tier which represents a greater level of loss and a higher payment rate. Regardless of the level of loss incurred, the grove can only be placed in the next lower-numbered tier.

(d) If the actual level of loss is less than the tier associated with the location band for the grove, the producer shall certify to the lower loss level, which must be 15 percent or more, on the application and a lower payment rate will be used by CCC based upon the tier rate associated with the lower loss level.

### § 1416.303 Application process.

(a) Producers wishing to receive benefits must submit a completed application and report of acreage identifying the geographic location and number of acres in the disaster-affected area to their local FSA Service Center at the time an application for payment is being filed according to § 1416.5.

(b) Applicants must certify and provide adequate proof that the losses and expenses incurred to eligible citrus crops were a direct result of the hurricane, in accordance with § 1416.2.

### § 1416.304 Payment calculations.

(a) Payments will be calculated by multiplying the number of net acres in each tier times the applicable payment rate, as determined by CCC, times the producer's share of the loss. The number of net acres is determined by subtracting drainage ditches, canals, and other such land uses from the citrus acres planted in the grove. The following table provides the applicable payment rates for producers with crop insurance or NAP coverage and those without coverage:

| | Producers with insurance or NAP coverage | Producers without insurance or NAP coverage |
|---|---|---|
| Tier I | $1,500 | $1,425 |
| Tier II | 1,000 | 950 |
| Tier III | 600 | 570 |
| Tier IV | 100 | 95 |

(b) The percentages of the payment for citrus crops that are subject to the payment limitation and AGI provisions are:

Tier I—55 percent
Tier II —60 percent
Tier III—64 percent
Tier IV—0 percent

(c) The percentages of the payment for citrus crops that are not subject to the payment limitation and AGI provisions are:

Tier I—45 percent
Tier II—40 percent
Tier III—36 percent
Tier IV—100 percent

### § 1416.305 Availability of funds.

(a) In the event that the total amount of eligible claims submitted by eligible citrus producers under this subpart and subparts E, F, and G of this part exceeds $95 million, each payment to an eligible citrus producer shall be reduced by a uniform national percentage, as determined by CCC.

(b) Such payment reduction shall be applied after imposition of applicable per person payment limitation as provided in § 1416.6.

## Subpart E—Fruit and Vegetable Disaster Program

### § 1416.400 Applicability.

This subpart sets forth the terms and conditions applicable to the Fruit and Vegetable Disaster Program.

### § 1416.401 Definitions.

*Other than plasticulture* means conventional row-cropped fruits and vegetables, and those crops that are double cropped on a previous crop's or season's plastic.

*Plasticulture* means production practices where the soil has been bedded, fumigated, fertilized, an irrigation system installed, and covered with plastic mulch.

*Specialty crop* means any commercially grown fruit or vegetable eligible for crop insurance or NAP coverage.

### § 1416.402 Eligible fruit and vegetable producers.

(a) Producers of fruits and vegetables utilizing "plasticulture", and "other than plasticulture" production practices are eligible for assistance. Producer must be an owner, operator, landlord, tenant, or sharecropper who shares in the risk of producing the crop and is entitled to share in the crop available for marketing from the farm or would have shared had the crop been produced. Payments will be made on a per-acre basis, and are based on tiers and the severity of destruction as specified for citrus crops and the type of production practice.

(b) Producers must have at least a 35 percent loss in production, or a 15 percent or more associated crop damage. Producers must also document that the necessary materials and procedures were followed to produce vegetables using plasticulture or other than plasticulture.

(c)(1) Fruit and vegetable producers will be reimbursed on a per-acre basis for eligible acreage. Payment will be based on the severity of destruction as determined by the paths of the storms and damage estimates developed by CCC. Estimates take into account levels of loss generally correlating to the severity of damage caused by maximum sustained winds of the applicable hurricanes. The levels of damage that will determine payment rates are as follows:

Tier I—75 percent or greater crop and/or yield loss
Tier II—50 to 74 percent crop and/or yield loss
Tier III—35 to 49 percent crop and/or yield loss

Tier IV—15 percent or more crop and/or field damage

(2) Fruit and vegetable producers who suffered crop production losses and associated crop damage, including related cleanup, must provide to CCC a certified statement on a CCC approved form of the level of destruction, the number of the disaster affected acres, and the geographic location of the losses.

(d) If the actual level of loss is greater than the tier associated with the location of the acreage, the applicant may submit documentation to CCC to request the acreage be placed in the next lower-numbered tier which represents a greater level of loss and a higher payment rate.

(e) If the actual level of loss is less than the tier associated with the location of the acreage, the producer shall certify to the lower loss level on the application and a lower payment rate will be used by CCC based upon the tier rate associated with the lower loss level.

**§ 1416.403 Application process.**

(a) Producers wishing to receive benefits must submit a completed application and report of acreage identifying the geographic location and number of acres in the disaster-affected area to their local FSA Service Center at the time an application for payment is being filed according to § 1416.5.

(b) Applicants must certify and provide adequate proof that the losses and expenses incurred to eligible fruit and vegetable crops were a direct result of the applicable disaster, as set forth in § 1416.2.

**§ 1416.404 Payment calculations.**

(a) Payments will be calculated by multiplying the number of net acres in each tier times the applicable payment rate, as determined by CCC, times the producer's share of the loss. The number of net acres is determined by subtracting drainage ditches, canals, and other such land uses from the planted fruit and vegetable acres. The following table provides the applicable payment rates for producers with crop insurance or NAP coverage and those without coverage:

| | Producers with insurance or NAP coverage | | Producers without insurance or NAP coverage | |
|---|---|---|---|---|
| | Plasticulture | Other than plasticulture | Plasticulture | Other than plasticulture |
| Tier I | $3,750 | $1,125 | $3,560 | $1,070 |
| Tier II | 2,500 | 750 | 2,375 | 710 |
| Tier III | 1,500 | 450 | 1,425 | 425 |
| Tier IV | 250 | 75 | 235 | 70 |

(b) The percentage of the payment for fruit and vegetable crops that are subject to the payment limitation and AGI provisions are:

Tier I—94.6667 percent
Tier II—94 percent
Tier III—93.3333 percent
Tier IV—0 percent

(c) The percentage of the payment for fruit and vegetable crops that are not subject to the payment limitation and AGI provisions are:

Tier I—5.3333 percent
Tier II—6 percent
Tier III—6.6667 percent
Tier IV—0 percent

(d) In addition to the prohibition in § 1416.6(g) a producer may not receive duplicate benefits under this subpart and subpart H of this part, the 2005 Hurricanes Tree Assistance Program.

**§ 1416.405 Availability of funds.**

(a) In the event that the total amount of eligible claims submitted by eligible fruit and vegetable producers under this subpart and subparts D, F, and G exceeds $95 million, each payment to an eligible fruit and vegetable producer shall be reduced by a uniform national percentage, as determined by CCC.

(b) Such payment reduction shall be applied after imposition of applicable per person payment limitation as provided in § 1416.6.

## Subpart F—Tropical Fruit Disaster Program

### § 1416.500 Applicability.

This subpart sets forth the terms and conditions applicable to the Tropical Fruit Disaster Program.

### § 1416.501 Definitions.

*Tropical Fruit* means carambola, longan, lychee, and mangos for disaster program purposes.

### § 1416.502 Eligibility requirements.

(a) Eligible Tropical Fruit producers must have incurred 50 percent or greater loss in commercial production.

(b) Only those acres of the four eligible fruits located in Tier I or II as designated under § 1416.2 shall be considered for payment under this subpart.

### § 1416.503 Application process.

(a) Producers wishing to receive benefits must submit a completed application and report of acreage identifying the geographic location and number of acres in the disaster-affected area to their local FSA Service Center at the time an application for payment is being filed as provided in § 1416.5. Applications will not be accepted after such date as announced by FSA. Applications for assistance are available at local FSA Service Centers.

(b) Applicants must certify and provide adequate proof that the losses and expenses incurred to eligible tropical fruit crops were a direct result of the applicable disaster, as set forth in § 1416.2.

### § 1416.504 Payment calculation.

(a) Payments are calculated by multiplying the number of affected acres by the payment rate times the producer's share of the crop. The payment rate for insured or NAP covered tropical fruit is a flat rate of $5000 per acre. The rate for uninsured or acreage without NAP coverage is $4750 per acre. The total payment is subject to the limitations in § 1416.6.

(b) In addition to the prohibition in § 1416.6(g), producers cannot receive duplicate benefits under this subpart and subpart H of this part, Hurricane TAP, for the same loss.

### § 1416.505 Availability of funds.

(a) In the event that the total amount of eligible claims submitted by eligible tropical fruit producers under this subpart and subparts D, E, and G exceeds $95 million, each payment to an eligible tropical fruit producer shall be reduced by a uniform national percentage, as determined by CCC.

(b) Such payment reduction shall be applied after imposition of applicable per person payment limitation as provided in § 1416.6.

## Subpart G—Nursery Disaster Program

### § 1416.600 Applicability.

This subpart sets forth the terms and conditions applicable to the Nursery Disaster Program.

### § 1416.601 Eligibility requirements.

(a) Commercial ornamental nursery and fernery producers are eligible for assistance for inventory losses for each nursery or fernery operation and cleanup costs. For a nursery to be considered a commercial nursery, it must be certified by the appropriate state agency. Eligible producers include producers of the following types of nursery stock and such stock as announced by CCC:

(1) Deciduous shrubs, broadleaf evergreens, coniferous evergreens, shade and flowering trees.

(2) Stock for use as propagation in a commercial ornamental nursery operation.

(3) Fruit or nut seedlings grown for sale as seed stock for commercial orchard operations growing fruit or nuts.

(b) Eligible nursery inventory does not include:

(1) Edible varieties.

(2) Plants produced for reforestation purposes or for the purpose of producing a crop for which RMA does not provide insurance, or for which CCC does not provide assistance under NAP.

(c) Losses will be determined on an individual-nursery basis. Production

loss from one nursery will not be offset by production from another nursery operated by the same applicant.

**§ 1416.602 Application process.**

(a) Producers wishing to receive benefits must submit a completed application and report of acreage identifying the geographic location, number of acres in the disaster-affected area, the inventory value before the hurricane, and the inventory value after the hurricane to their local FSA Service Center at the time an application for payment is being filed as provided in § 1416.5. The value of the inventory is the producer's wholesale price list, less the maximum customer discount they provide, not to exceed the prices in RMA's "Eligible Plant List and Price Schedule."

(b) Applicants must certify and provide adequate proof that the losses and expenses incurred to eligible nursery crops were a direct result of the applicable hurricane during the disaster period.

**§ 1416.603 Payment calculations.**

(a) Payments are calculated by multiplying the difference between the beginning and ending inventory value times 25 percent times the producer's share of the loss. The payment for production loss is subject to the payment limitation and AGI provisions.

(b) Producers are also eligible for a payment of $250 per acre for debris removal and associated costs from hurricane damage if they can document that these costs were equal to or greater than $250 per acre. None of the payment for cleanup is subject to the payment limitation and AGI provisions.

(c) In addition to the prohibition of § 1416.6(g), producers cannot receive duplicate benefits under this subpart and subpart H of this part, the Hurricane TAP, for the same loss.

**§ 1416.604 Availability of funds.**

(a) In the event that the total amount of eligible claims submitted by eligible nursery producers under this subpart and subparts D, E, and F exceeds $95 million, each payment to an eligible nursery producer shall be reduced by a uniform national percentage, as determined by CCC.

(b) Such payment reduction shall be applied after imposition of applicable per person payment limitation as provided in § 1416.6.

## Subpart H—[Reserved]

## Subpart I—2005 Catfish Grant Program

**§ 1416.800 General.**

(a) CCC will administer a limited program to provide assistance to catfish producers in eligible counties. Under the Catfish Grant Program, CCC will provide grants to the State governments of States where eligible counties are located. The amount of each grant will be based on the total value of the catfish feed loss suffered in every eligible county in the subject state as determined by CCC. Available grant funds under this subpart and funds under subpart B of this part will be uniformly prorated to ensure that available funding is not exceeded. Catfish producers in eligible counties who suffered at least a 30-day catfish feed loss may be eligible for these funds. Among other conditions of these grants, assistance provided by a State under such a grant to an applicant shall not exceed $80,000, except for general partnerships and joint ventures, in which case assistance shall not exceed $80,000 times the number of members that constitute the general partnership or joint venture.

(b) No producer may receive duplicate payments under this subpart and any other Federal programs for the same loss.

# PART 1421—GRAINS AND SIMILARLY HANDLED COMMODITIES—MARKETING ASSISTANCE LOANS AND LOAN DEFICIENCY PAYMENTS FOR 2008 THROUGH 2012

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AUTHORITY: 7 U.S.C. 7231–7237 and 7931–7936; 15 U.S.C. 714b and 714c, and Public Law 110–246.

## Subpart A—General

SOURCE: 67 FR 63511, Oct. 11, 2002, unless otherwise noted.

### § 1421.1 Applicability and interest.

(a) The regulations of this subpart are applicable to the 2008 through 2012 crops of barley, small chickpeas, corn, grain sorghum, lentils, oats, dry peas, peanuts, rice, wheat, wool, mohair, oilseeds and other crops designated by Commodity Credit Corporation (CCC). Additionally, large chickpeas are authorized for coverage for the 2009 through 2012 crop years. These regulations specify the general provisions under which marketing assistance loans (MAL) and loan deficiency payments (LDP) will be administered by CCC. Additional terms and conditions are in the note and security agreement and the loan deficiency payment application that must be executed by a producer to receive marketing assistance loans and LDPs. In any case in which money must be refunded to CCC in connection with this part, interest will be due to run from the date of disbursement of the sum to be refunded. This will apply, unless waived by the Deputy Administrator, irrespective of any other rule.

(b)(1) The basic loan rates, the schedule of premiums and discounts, and forms applicable to the marketing assistance and loan deficiency payment programs for the commodities specified in paragraph (a) of this section are available in Farm Service Agency (FSA) State and county offices. The forms for use in these programs will be prescribed by CCC.

(2) Loan deficiency payments shall be available for unshorn pelts, hay and silage.

(c) Marketing assistance loans and loan deficiency payments will not be available for any commodity produced on land owned or otherwise in the possession of the United States if such land is occupied without the consent of the United States.

(d) Producers who produced eligible loan commodities are eligible for marketing assistance loans or loan deficiency payments.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32422, June 6, 2006; 74 FR 15649, Apr. 7, 2009]

### § 1421.2 Administration.

(a) The marketing assistance loan and loan deficiency payment program shall be administered under the general supervision of the Executive Vice President, CCC and shall be carried out in the field by FSA State and county committees, respectively.

(b) State and county committees, and representatives and employees thereof, cannot modify or waive any requirement of this part, except as provided in paragraph (e) of this section.

(c) The State committee shall take any required action not taken by the county committee. The State committee shall also:

(1) Correct or require correction of an action taken by a county committee that is not in compliance with this part; or

(2) Require a county committee to not take an action or implement a decision that is not under the regulations of this part.

(d) The Executive Vice President, CCC, or a designee, may determine any question arising under these programs, or reverse or modify a determination made by a State or county committee.

(e) The Deputy Administrator for Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the marketing assistance loan and loan deficiency payment program.

(f) A representative of CCC may execute marketing assistance loan and loan deficiency payment applications and related documents only under the terms and conditions determined and announced by CCC. Any document not executed under such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15650, Apr. 7, 2009]

### § 1421.3 Definitions.

The definitions in this section apply for all purposes of program administration. Terms defined in part 718 of this title and parts 1412 and 1425 of this chapter also apply, except where they conflict with the definitions in this section.

*Administrative County Office* is the FSA County Office where a producer's FSA records are maintained.

*Basic loan rate* means the loan rate established by CCC for a commodity before any adjustment for premiums and discounts.

*CCC* means the Commodity Credit Corporation.

*Charges* means all fees, costs, and expenses incurred in insuring, carrying, handling, storing, conditioning, and marketing the commodity tendered to CCC for loan. Charges also include any other expenses incurred by CCC in protecting CCC's or the producer's interest in such commodity.

*Chickpeas* means any chickpea that meets the definition of a chickpea according to the Grain Inspection, Packers and Stockyards Administration (GIPSA), Federal Grain Inspection Service (FGIS).

(1) Small chickpea falls below a 20/64th sieve.

(2) Large chickpea stays above a 20/64th sieve.

*CMA* means a cooperative marketing association that is subject to regulations in Part 1425 of this chapter.

*COC* means the FSA county committee.

*Commodity certificate exchange* means the exchange, as provided for in part 1401 of this chapter, of commodities pledged as collateral for a marketing assistance loan at a rate determined by

CCC in the form of a commodity certificate bearing a dollar denomination. Such certificate may not be transferred or exchanged for the inventory of CCC.

*Control or Recording FSA County Office* is the FSA County Office that controls subsidiary files for producers designated as multi-county producers.

*Crop* means with respect to a year, commodities harvested in that year. That is, a reference to the 2009 crop of a commodity means commodities that when planted were intended for harvest in calendar year 2009.

*Crop year* means any time relevant to the relevant crop for that year. Thus references to the 2009 crop year are used to include any activities relevant to the 2009 crop.

*Current net worth ratio* means current assets minus current liabilities, divided by current liabilities, based on the financial statement provided in connection with a DMA application or a recertification for DMA status.

*Department* means the United States Department of Agriculture.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, Farm Service Agency (FSA) or a designee of that person.

*DMA Service County Office* is an FSA County Office designated by CCC to accept, process, and disburse bundled peanut MALs and LDPs to a DMA. In the absence of a centralized MAL and LDP processing system for peanuts, a service county FSA office is necessary for entering MALs and LDPs made by DMAs into CCC accounting systems.

*Designated Marketing Association* (DMA) means an entity, or a subsidiary thereof, that performs marketing functions for peanut producers and is designated to handle marketing assistance loans and loan deficiency payments for them. A DMA is eligible to perform those functions only if the DMA meets the eligibility criteria set out elsewhere in this part.

*Drawdown account* is an account titled to the DMA at a financial institution and funded at the discretion of CCC for the purpose of allowing the DMA to advance funds to producers who have applied for MALs and LDPs before a subsequent MAL or LDP is made to the DMA by an assigned FSA county office.

*Electronic warehouse receipt (EWR)* means a receipt electronically filed in a central filing system by an approved provider as provided in an executed, "Farm Service Agency Provider Agreement to Electronically File and Maintain Warehouse Receipts."

*FSA* means the Farm Service Agency of the United States Department of Agriculture.

*High moisture state* means corn or grain sorghum having a moisture content in excess of CCC standards used to determine eligibility for marketing assistance loans made by the Secretary.

*Incorrect certification* means the certifying of a quantity of a commodity for the purpose of obtaining a marketing assistance loan or a loan deficiency payment in excess of the quantity eligible for such marketing assistance loan or loan deficiency payment or the making of any fraudulent representation with respect to obtaining loans or loan deficiency payments.

*Loan commodities* means wheat, corn, grain sorghum, barley, oats, rice, soybeans, other oilseeds, peanuts, wool, mohair, dry peas, lentils, chickpeas, and other crops designated by CCC.

*Loan deficiency payment (LDP)* means a payment received in lieu of a loan when the CCC-determined value is below the applicable county loan rate.

*Loan settlement* means farm stored commodities delivered to CCC and warehouse stored commodities forfeited to CCC, effective with the 2009 through 2012 crop years.

*MAL* means marketing assistance loan.

*Medium grain rice* for the purposes of this part includes both short and medium grain rice as defined by the U.S. Standards for Rice.

*Mohair* means the hair sheared from a live Angora goat. Mohair does not include pelts, or hides or mohair shorn from pelts or hides.

*Oilseeds* means any crop of sunflower seed, canola, rapeseed, safflower, flaxseed, mustard seed, crambe, sesame seed, and other oilseeds as determined and announced by CCC.

*Other crops designated by CCC* means with respect to eligibilities for benefits under this part:

(1) Those crops harvested as other than grain, such as silage, haylage, earlage;

(2) Specific crops designated for grazing; or

(3) As otherwise designated by CCC.

*Pulse crops* means any crop of dry peas, lentils, and chickpeas as defined by CCC.

*Rice* means, unless otherwise noted, long grain rice and medium grain rice.

*Secretary* means the Secretary of the United States Department of Agriculture, or the Secretary's delegate.

*Security for DMAs* means a certified or cashier's check payable to CCC, an irrevocable commercial letter of credit in a form acceptable to CCC, a performance or surety bond conditioned on the DMA fully discharging all of its obligations under this part, or other form of financial security as CCC may deem appropriate.

*Servicing agent bank* means the bank designated as the financial institution for a CMA or a designated marketing association.

*STC* means the FSA State committee.

*Unauthorized disposition* means the conversion of any loan quantity pledged as collateral for a farm-stored loan without prior written authorization from the county committee.

*Unauthorized removal* means the movement of any farm-stored loan quantity from the storage structure in which the commodity was stored or structures that were designated when the loan was approved to any other storage structure, whether or not such structure is located on the producer's farm, without prior written authorization from the county committee.

*Unshorn pelt* means the removed skin and attached wool from a slaughtered lamb that has never been shorn.

*Warehouse receipt* means a receipt containing the required information prescribed in this part and is:

(1) A pre-numbered, negotiable warehouse receipt issued under the authority of the U.S. Warehouse Act, a state licensing authority, or by an approved CCC warehouse in such format authorized and approved, in advance, by CCC;

(2) An electronic warehouse receipt issued by such warehouse recorded in a central filing system or system maintained in one or more locations which are approved by FSA to operate such system; or

(3) Other such acceptable evidence of title, as determined by CCC.

*Wool* means the fiber sheared from a live sheep and includes, unless noted otherwise, graded and nongraded wool.

[67 FR 63511, Oct. 11, 2002, as amended at 68 FR 37940, June 26, 2003; 70 FR 33799, June 10, 2005; 74 FR 15650, Apr. 7, 2009]

### § 1421.4 Eligible producers.

(a) To be an eligible producer, the producer must:

(1) Be a person, partnership, association, corporation, estate, trust, or other legal entity that produces an eligible commodity as a landowner, landlord, tenant, or sharecropper, or in the case of rice, furnishes land, labor, water, or equipment for a share of the rice crop. With respect to wool and mohair, the producer must own, other than through a security interest mortgage, or lien, the sheep and goats that produced the wool and mohair respectively for a period of not less than 30 days.

(2) Comply with all provisions of this part and, as applicable:

(i) 7 CFR part 12—Highly Erodible Land and Wetland Conservation;

(ii) 7 CFR part 707—Payments Due Persons Who Have Died, Disappeared, or Have Been Declared Incompetent;

(iii) 7 CFR part 718—Provisions Applicable to Multiple Programs;

(iv) 7 CFR part 996—Minimum Quality and Handling Standards for Domestic and Imported Peanuts Marketed in the United States;

(v) 7 CFR part 1400—Payment Limitation & Payment Eligibility for 2009 and Subsequent Crops, Programs, or Fiscal Years;

(vi) 7 CFR part 1402—Policy for Certain Commodities Available for Sale;

(vii) 7 CFR part 1403—Debt Settlement Policies and Procedures;

(viii) 7 CFR part 1405—Loans, Purchases, and Other Operations;

(ix) 7 CFR part 1412—Direct and Counter-Cyclical Program and Average Crop Revenue Election Program for the 2008 and Subsequent Crop Years; and

(x) 7 CFR part 1423—Commodity Credit Corporation Approved Warehouses.

(3) Have made an acreage certification with respect to all the cropland on the farm.

(b) A receiver or trustee of an insolvent or bankrupt debtor's estate, an executor or an administrator of a deceased person's estate, a guardian of an estate of a ward or an incompetent person, and trustees of a trust shall be considered to represent the insolvent or bankrupt debtor, the deceased person, the ward or incompetent, and the beneficiaries of a trust, respectively. The production of the receiver, executor, administrator, guardian, or trustee shall be considered to be the production of the person or estate represented by the receiver, executor, administrator, guardian, or trustee. Marketing assistance loans and loan deficiency payment documents executed by any such person will be accepted by CCC only if they are legally valid and such person has the authority to sign the applicable documents.

(c) A minor who is otherwise an eligible producer is eligible to receive marketing assistance loans or loan deficiency payments only if the minor meets one of the following requirements:

(1) The right of majority has been conferred on the minor by court proceedings or by statute;

(2) A guardian has been appointed to manage the minor's property and the applicable marketing assistance loan or loan deficiency payment documents are signed by the guardian;

(3) Any note or loan deficiency payment program application signed by the minor is cosigned by a person determined by the county committee to be financially responsible; or

(4) A bond is furnished under which a surety guarantees to protect CCC from any loss incurred for which the minor would be liable had the minor been an adult.

(d) If more than one producer executes a note and security agreement with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and the regulations in this part. Each such producer shall also remain liable for repayment of the entire marketing assistance loan amount until the loan is fully repaid without regard to such producer's claimed share in the commodity pledged as collateral for the loan. In addition, such producer may not amend the note and security agreement with respect to the producer's claimed share in such commodities, or loan proceeds, after execution of the note and security agreement by CCC.

(e)(1) The county committee may deny a producer a marketing assistance loan on farm-stored commodities if the producer has:

(i) Made a misrepresentation in connection with the marketing assistance loan or LDP program;

(ii) Previously not allowed a representative access to the site where commodities pledged as collateral for CCC loans were stored or otherwise failed to cooperate in the settlement of a marketing assistance loan; or

(iii) Failed to adequately protect the interests of CCC in the commodity pledged as collateral for a farm-stored loan.

(2) A producer who is denied a farm-stored loan will be eligible to pledge a commodity as collateral for a warehouse-stored loan or provide some other form of financial assurance to obtain a farm-stored loan.

(f) A CMA may obtain a marketing assistance loan and loan deficiency payment on eligible production of a loan commodity on behalf of its members who are eligible to receive marketing assistance loans or loan deficiency payments with respect to a crop of a commodity. For purposes of this subpart, the term "producer" includes a CMA.

(g) In case of the death, incompetency, or disappearance of any producer who is entitled to the payment of any sum in settlement of a marketing assistance loan or loan deficiency payment, payment shall, upon proper application to the FSA county service center that disbursed the marketing assistance loan or loan deficiency payment, be made to the persons who would be entitled to such producer's payment under the regulations contained in part 707 of this title.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15650, Apr. 7, 2009; 75 FR 19193, Apr. 14, 2010]

**§ 1421.5 Eligible commodities.**

(a) Commodities eligible to be pledged as collateral for a loan made under this part are:

(1) Barley, corn, grain sorghum, oats, peanuts, soybeans, oilseeds, wheat, dry peas, lentils, chickpeas, rice and other crops designated by CCC produced and mechanically harvested in the United States;

(2) Dual purpose sorghum varieties as determined by CCC; and

(3) Wool and mohair produced and shorn from live animals in the United States.

(b) A commodity produced on land owned or otherwise in the possession of the United States that is occupied without the consent of the United States is not an eligible commodity.

(c)(1) To be an eligible commodity, the commodity must be merchantable for food, feed, or other uses determined by CCC and must not contain mercurial compounds, toxin producing molds, or other substances poisonous to humans or animals. A commodity containing vomitoxin, aflatoxin, or Aspergillus mold may not be pledged for a loan made under this part, except as provided by CCC in the marketing assistance loan note and security agreement.

(2) The determination of eligibility for rice includes class, grade, grading factor, milling yields, and other quality factors and will be based upon the U.S. Standards for Rice as applied to rough rice whether or not such determinations are made on the basis of an official inspection.

(3) The determination of eligibility for peanuts includes type, quality, and quantity.

(4) With regard to barley, canola, corn, flaxseed, grain sorghum, oats, rice, soybeans, sunflower seed for extraction of oil, wheat, and other commodities designated by CCC, the determination of eligibility will be based upon the Official U.S. Standards for Grain: U.S. Standards for Whole Dry Peas, Split Peas, and Lentils for dry peas and lentils; and the U.S. Standards for Beans for chickpeas, whether or not such determinations are made on the basis of an official inspection.

(5) With regard to hull-less barley, hull-less oats, mustard seed, rapeseed, safflower seed, and sunflower seed used for a purpose other than to extract oil, the determination of eligibility will be based on quality requirements established and announced by CCC, whether or not such determinations are made on the basis of an official inspection. The costs of an official quality determination may be paid by CCC. The quality requirements that are used in administering marketing assistance loans and loan deficiency payments for the oilseeds in this paragraph are available in USDA State and county FSA service centers.

(6) With regard to farm-stored peanuts, the determination of eligibility will be determined at the time of delivery to CCC by a Federal or State Inspector authorized or licensed by the Secretary.

(d) Eligible wool and mohair must:

(1) Have been produced and sheared from live sheep and goats, of domestic origin and located in the U.S. for a period of not less than 30 calendar days prior to shearing.

(2) Be of merchantable quality deemed by CCC to be suitable for loan and must have been shorn in the United States.

(e) When certifying acreage on farms in which an interest is held, the producer must provide acceptable evidence of the commodity from which the county committee may determine whether the eligible production claimed by the producer is reasonable for the production practices on such farm or similar farms in the same county; or have either the eligible or ineligible commodity measured by a representative of the county FSA service center at the producer's expense, before commingling.

(f) A commodity that is purchased, substituted, or acquired by sale, gift or, exchange of an existing harvested, sheared, or slaughtered commodity, or through any other transaction is ineligible to be pledged as collateral for a marketing assistance loan; in addition a loan deficiency payment shall not be made with respect to such commodities.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32422, June 6, 2006; 74 FR 15651, Apr. 7, 2009; 75 FR 19193, Apr. 14, 2010]

**§ 1421.6 Beneficial interest.**

(a) To be eligible to receive marketing assistance loans and loan deficiency payments, a producer must have beneficial interest in the commodity that is tendered to CCC for a marketing assistance loan or is requested for a loan deficiency payment. For the purposes of this part, the term "beneficial interest" refers to a determination by CCC that a person has title to and control of the commodity that is tendered to CCC as collateral for a marketing assistance loan or of the commodity that will be used to determine a loan deficiency payment.. A determination of whether a person has beneficial interest in a commodity is made by CCC in accordance with this part and is not based upon a determination under any State law or any other regulation of a Federal agency.

(b) Except as provided in paragraph (e) of this section, when requesting a marketing assistance loan for a loan commodity, in order to have beneficial interest in the commodity tendered as collateral for the loan, a person must:

(1) Be the producer of the commodity as determined in accordance with § 1421.4;

(2) Have had ownership of the commodity from the time it was planted (with respect to wool and mohair from time of shearing) through the earlier the date the loan was repaid or the maturity date of the loan;

(3) Have control of the commodity from the time of planting (for wool and mohair from the time of shearing) through the maturity date of the loan. To have control of the commodity, such person must have complete decision-making authority regarding whether the commodity will be tendered as collateral for a loan, when the loan will be repaid, or if the collateral will be forfeited to CCC in satisfaction of the loan obligations of such person, and where the commodity will be maintained during the term of the loan;

(4) Not have received any payment from any party with respect to the commodity; and

(5) If the commodity has been physically delivered to a location other than a location owned or under the total control of the producer, have delivered the commodity to a warehouse authorized in accordance with § 1421.103(c). Delivery of the commodity to a location other than to such an authorized warehouse will result in the loss of beneficial interest in the commodity on the date of physical delivery and the producer will be considered to have lost beneficial interest as of 11:59 p.m. of such day. Accordingly, delivery of a commodity to entities such as a dairy, feedlot, ethanol plant, wool pool, feed mill, feed or grain bank, or other facilities as determined by CCC will result in the loss of beneficial interest as of the date of delivery, regardless of any other action or agreement between such an entity and the producer unless such an entity has been authorized by CCC under § 1421.103(c).

(c) Except as provided in paragraph (e) of this section, when requesting a loan deficiency payment for a loan commodity, in order to have beneficial interest in the commodity a person must:

(1) Be the producer of the commodity as determined in accordance with § 1421.4;

(2) Have had ownership of the commodity from the time it was planted, with respect to wool and mohair from the time of shearing, or from the time of slaughter for unshorn pelts, through the date the producer has elected to determine the loan deficiency payment rate;

(3) Have control of the commodity. For control such person must have complete decisionmaking authority regarding whether a loan deficiency payment will be requested with respect to the commodity; when the loan deficiency rate will be selected; and where the commodity will be maintained prior to the date on which the loan deficiency payment rate will be determined;

(4) Not have received any payment from any party with respect to the commodity; and

(5) If the commodity has been physically delivered to a location other than a location owned or under the total control of the producer, have delivered the commodity to a warehouse authorized in accordance with § 1421.103(c). Delivery of the commodity to a location other than to an authorized warehouse will result in the loss of

beneficial interest in the commodity on the date of physical delivery and the producer will be considered to have lost beneficial interest as of 11:59 p.m. of such day. Accordingly, delivery of a commodity to entities such as a dairy, feedlot, ethanol plant, wool pool, feed mill, feed or grain bank, or unauthorized storage facility, will result in the loss of beneficial interest as of the date of delivery, regardless of any other action or agreement between such an entity and the producer unless such an entity has been authorized by CCC under § 1421.103(c).

(d) Notwithstanding any provision of paragraphs (b) and (c) of this section and § 1421.5(f), in order to facilitate handling situations involving the death of a producer, CCC will consider an estate, heirs of the deceased producer, and a person to whom title to a commodity has passed by virtue of State law upon the death of the producer to have beneficial interest in a commodity produced by the producer under the same terms and conditions that would otherwise be applicable to such producer;

(e) Notwithstanding any provision of paragraphs (b) and (c) of this section and § 1421.5(f), a person who purchases or otherwise acquires a commodity from a producer under any circumstances does not obtain beneficial interest to the commodity whether such purchase or acquisition is made prior to the harvest of the crop or after harvest; however, CCC will consider a person to have beneficial interest in a commodity if, prior to harvest, such person has obtained title to the growing commodity at the same time that such person obtained full title to the land on which such crop was growing;

(f) If marketing assistance loans and loan deficiency payments are made available to producers through an approved cooperative marketing association in accordance with part 1425 of this chapter, the beneficial interest in the commodity must always have been in the producer-member who delivered the commodity to the approved cooperative marketing association or its member approved cooperative marketing association, except as otherwise provided in this section. If the producer-member who delivered the commodity does not retain the right to share in the proceeds from the marketing of the commodity as provided in part 1425 of this chapter, commodities delivered to an approved cooperative marketing association shall not be eligible to be pledged as collateral for a marketing assistance loan or be taken into consideration when a loan deficiency payment is made.

(g) A producer will lose beneficial interest in a commodity if the producer receives any payment from any person under any contractual arrangement with respect to a commodity if the person who is making the payment, or any person otherwise associated with the person making the payment, will at any time have title to the commodity or control of the commodity prior to or after harvest, shearing, or slaughter unless:

(1) Such payment is authorized in accordance with part 1425 of this chapter; or

(2) The payment is made as consideration for an option to purchase the commodity and such option contains the following language:

*Notwithstanding any other provision of this option to purchase or any other contract, title and control of the commodity and beneficial interest in the commodity as specified in 7 CFR 1421.6 shall remain with the producer until the buyer exercises this option to purchase the commodity. This option to purchase shall expire, notwithstanding any action or inaction by either the producer or the buyer, at the earlier of:*

*(1) The maturity of any Commodity Credit Corporation (CCC) loan that is secured by such commodity;*

*(2) The date CCC claims title to such commodity; or*

*(3) Such other date as provided in this option.*

(h) Inclusion in a contract of one or more of the following types of provisions will not result in the loss of beneficial interest in a commodity:

(1) A provision that allows the producer to select the sales price of the commodity at a time the contract is entered into or at a later date, for example, a contract normally referred to as a deferred-price, forward or price later contract. The following conditions apply:

(i) Producers under a deferred-price, forward, or price later contract will lose beneficial interest in the commodity the earlier of receipt of any payment or once the commodity is applied in fulfillment of the delivery requirements of such a contract.

(ii) Beneficial interest in the commodity is retained by the producer if the contract has no restrictive or contradictory clauses within the contract that may cause the producer to lose beneficial interest in the commodity.

(2) A provision between the producer and a warehouse authorized in accordance with § 1421.103(c) for the storage of CCC loan collateral that provides the producer a period of time following the date of physical delivery of the commodity to elect whether the commodity is to be stored and receipted on behalf of the producer or is to be considered transferred to the warehouse if CCC determines such a provision is required.

(i) Commodities produced under a contract in which the title to the seed remains with the entity providing the seed to the producer, including contracts for the production of hybrid seed, genetically modified commodities, and other specialty seeds as approved in writing by CCC, are eligible to be pledged as collateral for a marketing assistance loan or a loan deficiency payment may be made with respect to such production if, at the time of the request for such a loan or LDP, the producer has not:

(1) Received a payment under the contract; or

(2) Delivered the commodity to another person.

[71 FR 32422, June 2, 2006, as amended at 71 FR 51426, Aug. 30, 2006; 71 FR 60413, Oct. 13, 2006; 74 FR 15651, Apr. 7, 2009]

### § 1421.7 Requesting marketing assistance loans and loan deficiency payments.

(a) A producer must, unless authorized by CCC, request marketing assistance loans and loan deficiency payments at the county office that, under part 718 of this title, is responsible for administering programs for the farm on which the commodity was produced.

(b) A marketing assistance loan or loan deficiency payment may be requested in person, by mail or electronic format designated by CCC. Forms prescribed by CCC may be obtained from the USDA, Farm Service Agency Web site.

(c) To receive marketing assistance loans or loan deficiency payments for an eligible commodity, a producer must execute a note and security agreement or loan deficiency payment application on or before the applicable final loan availability date, as follows:

(1) March 31 of the year following the year in which the following crops are normally harvested: barley, canola, flaxseed, oats, rapeseed, crambe, sesame seed, and wheat.

(2) May 31 of the year following the year in which the following crops are normally harvested: corn, grain sorghum, mustard seed, rice, safflower, soybeans, sunflower seed, dry peas, lentils, and chickpeas.

(3) January 31 of the year following the year in which peanuts are normally harvested or wool and mohair are normally sheared.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15651, Apr. 7, 2009]

### § 1421.8 Eligible quantity.

(a) With respect to marketing assistance loans and loan deficiency payments for:

(1) Farm-stored commodities, all determinations of weight, and quality, except as otherwise agreed to or required by CCC, shall be determined at the time of delivery of the commodity to CCC or at the time the loan deficiency payment application is filed for measured requests, if applicable or selected for spot-check for certified requests.

(2) Warehouse-stored commodities, all determinations of grade, weight and quality, except as otherwise agreed to or required by CCC, shall be determined at the time the loan or LDP is requested when acceptable documentation, under §§ 1421.9, 1421.106, and 1421.107 as applicable" 1421.9, 1421.106, and 1421.107 as applicable , accompanies the loan or LDP request.

(b)(1) A producer may, before the final loan availability date for obtaining a marketing assistance loan for a commodity, repledge as collateral for securing a marketing assistance loan

any commodity that had been previously pledged as collateral for a marketing assistance loan, except with respect to:

(i) Commodities that have been acquired with commodity certificate exchanges under part 1401 of this chapter;

(ii) Commodities that have been redeemed at the prevailing world market price for rice, or the alternative repayment rate for all other commodities, as determined by CCC.

(iii) Commodities on which a loan deficiency payment has been received.

(2) The commodity repledged as security for the subsequent loan shall have the same maturity date, under § 1421.101 as the original loan.

(c)(1) The marketing assistance loan documents shall not be presented for disbursement unless the commodity subject to the note and security agreement is an eligible harvested commodity, is in existence, and is in authorized farm or warehouse storage, as determined by CCC. If the commodity was not either an eligible commodity, in existence, or in authorized storage at the time of disbursement, the total amount disbursed under the marketing assistance loan and charges plus interest shall be refunded promptly by the producer.

(2) CCC shall limit the total marketing assistance loan quantity for a loan disbursement, or loan deficiency payment quantity for a loan deficiency payment, based on a subsequent increase in the quantity of an eligible commodity by the final loan availability date to 100 percent of the outstanding quantity of such marketing assistance loan or loan deficiency payment application. A producer may obtain a separate marketing assistance loan or loan deficiency payment before the final loan availability date for the commodity for quantities in excess of 100 percent of such quantity if such quantities are otherwise eligible.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15651, Apr. 7, 2009]

### § 1421.9 Basic loan rates.

(a) Basic marketing assistance loan rates for a commodity may be established on a National, State, regional, county basis or other basis, will be at rates that comply with applicable statutes, and may be adjusted by CCC to reflect grade, type, quality, location and other factors applicable to the commodity and as otherwise provided in this section.

(b) The basic marketing assistance loan rates for wheat, corn, barley, oats, grain sorghum, rice, peanuts, soybean, canola, flaxseed, mustard seed, rapeseed, safflower, sunflower seed, dry peas, lentils, chickpeas, crambe, sesame seed, wool, mohair and other crops designated by CCC will be determined by CCC and made available to State and county offices.

(c)(1) Subject to adjustment under paragraph (g) of this section in case of forfeiture, for all 2009 through 2012 crop year commodities, except rice and peanuts, warehouse-stored loans will be disbursed at levels based on the basic county marketing assistance loan rate for the county where the commodity is stored. For the 2008 crop year only, warehouse-stored loans will be disbursed at levels based on the basic county marketing assistance loan rate for the county where the commodity is stored, adjusted for the schedule of premiums and discounts established for the commodity on the basis of grade, type, and quality factors set forth on warehouse receipts or supplemental certificates and for other factors, as determined and announced by CCC.

(2) Subject to adjustment under paragraph (g) of this section in case of forfeiture, for 2009 through 2012 crop years rice, warehouse-stored loans will be disbursed at levels based on the milling yields times the whole and broken kernel marketing assistance loan rates. For the 2008 crop year of rice only, warehouse-stored loans will be disbursed at levels based on the milling yields times the whole and broken kernel marketing assistance loan rates, adjusted for the schedule of discounts on the basis of grade and quality factors set forth on warehouse receipts or supplemental certificates and for other factors, as determined and announced by CCC.

(3) For peanuts, warehouse-stored loans will be disbursed at levels based on National loan rates by peanut type, adjusted for the schedule of premiums and discounts on the basis of grade,

quality, and other factors set forth on warehouse receipts.

(d) The Secretary will establish a single loan rate in each county for each kind of other oilseeds, such as but not limited to, sunflower, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, and other oilseeds as designated by the Secretary.

(e) Adjustments by the Secretary to establish loan rates for loan commodities, except rice, on a county basis will not be lower than 95 percent of the national average loan rate, if those loan rates do not result in an increase in outlays. Adjustments in this section will not result in an increase in the national average loan rate for any year.

(f) For the 2009 through 2012 crops, producers on farms in the Acreage Crop Revenue Election program under part 1400 of this title will receive a 30 percent reduction in loan rate as established under this section for all loan commodities from the farm, except honey, wool, and mohair.

(g) For the 2009 through 2012 crop years, premiums and discounts will not be applicable for all eligible loan commodities, except for peanuts, at loan disbursement; however, premiums and discounts will apply if the eligible loan commodities are forfeited and delivered to CCC and any deficiency must be repaid to CCC.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15651, Apr. 7, 2009]

### § 1421.10 Loan repayment rates.

(a) For the 2008 through 2012 crops of barley, corn, grain sorghum, oats, wheat, dry peas, lentils, chickpeas, oilseeds, wool, mohair, and other crops as designated by CCC (other than peanuts, long grain rice, medium grain rice, and confectionery and each other kind of sunflower seed (other than oil sunflower seed)), a producer may repay a nonrecourse marketing assistance loan at a rate that is the lesser of:

(1) The loan rate established for the commodity under § 1421.9, plus interest;

(2) A rate (as determined by the Secretary) that is calculated based on average market prices for the loan commodity during a preceding 30-day period and that the Secretary has determined will minimize discrepancies in marketing loan benefits across State boundaries and across county boundaries; or

(3) A rate that the Secretary may develop using alternative methods for calculating a repayment rate for a loan commodity that the Secretary determines will: Minimize potential loan forfeitures; minimize the accumulation of stocks of the commodity by the Federal Government; minimize the cost incurred by the Federal Government in storing the commodity; allow the commodity produced in the U.S. to be marketed freely and competitively, both domestically and internationally; and minimize discrepancies in marketing loan benefits across State boundaries and across county boundaries.

(b) To the extent practicable, CCC will determine and announce repayment rates under paragraphs (a)(2) and (a)(3) of this section based upon market prices at appropriate U.S. markets as determined by CCC and these repayment rates may be adjusted to reflect grade, type, quality, location, and other factors for each crop of a commodity as follows:

(1) On a weekly basis in each county for oilseeds, except canola, flaxseed, soybeans, and sunflower seed;

(2) On a daily basis in each county for barley, canola, corn, flaxseed, grain sorghum, oats, soybeans, sunflower seed and wheat; and

(3) On a weekly basis regionally for dry peas, lentils, chickpeas, wool and mohair.

(c)(1) For the 2008 through 2012 crops of peanuts, a producer may repay a nonrecourse loan at a rate that is the lesser of:

(i) The loan rate established for the commodity under § 1421.9, plus interest; or

(ii) A rate that the Secretary determines will: Minimize potential loan forfeitures; minimize the accumulation of stocks of the commodity by the Federal Government; minimize the cost incurred by the Federal Government in storing the commodity; and allow the commodity produced in the United States to be marketed freely and competitively, both domestically and internationally.

(2) To the extent practicable, CCC will determine and announce weekly

alternative repayment rates for peanuts.

(d) For the 2008 through 2012 crop of peanuts, the Secretary will require the repayment of handling and other associated costs paid under § 1421.104 for all peanuts pledged as collateral for a loan that are redeemed under this section.

(e) The Secretary will permit producers to repay a marketing assistance loan for long grain rice and medium grain rice at a rate that is the lesser of:

(1) The loan rate established for the commodity under § 1421.9, plus interest; or

(2) The prevailing world market price for the commodity, as determined and adjusted by the Secretary in accordance with this section.

(f) For purposes of this section, the Secretary will prescribe—

(1) A formula to determine the prevailing world market price for long grain rice and medium grain rice and

(2) A mechanism by which the Secretary will announce periodically those prevailing world market prices.

(g) Adjustments will be made to the prevailing world market price for long grain rice and medium grain rice.

(1) The prevailing world market price for long grain and medium rice determined under paragraph (f) of this section will be adjusted to U.S. quality and location.

(2) In making adjustments under this subsection, the Secretary will establish a mechanism for determining and announcing the adjustments in order to avoid undue disruption in the U.S. market.

(h)(1) The prevailing world market price for a class of rice will be determined by CCC based upon a review of prices at which rice is being sold in world markets and a weighting of such prices through the use of information such as changes in supply and demand of rice, tender offers, credit concessions, barter sales, government-to-government sales, special processing costs for coatings or premixes, and other relevant price indicators, and will be expressed in U.S. equivalent values F.O.B. (free on board) vessel, U.S. port of export, per hundredweight as follows:

(i) U.S. grade No. 2, 4 percent broken kernels, long grain milled rice;

(ii) U.S. grade No. 2, 4 percent broken kernels, medium grain milled rice; and

(iii) U.S. grade No. 2, 4 percent broken kernels, short grain milled rice.

(2) Export transactions involving rice and all other related market information will be monitored on a continuous basis. Relevant information may be obtained for this purpose from USDA field reports, international organizations, public or private research entities, international rice brokers, and other sources of reliable information.

(3) The prevailing world market price for a class of rice adjusted to U.S. quality and location, the adjusted world price (AWP), as determined under paragraph (h)(5) of this section, will apply to this section.

(4) The adjusted world price for each class of rice will equal the prevailing world market price for a class of rice (U.S. equivalent value) as determined under paragraphs (h)(1) and (h)(2) of this section and adjusted to U.S. quality and location as follows:

(i) The prevailing world market price for a class of rice will be adjusted to reflect an F.O.B. mill position by deducting from such calculated price an amount that is equal to the estimated national average costs associated with:

(A) The use of bags for the export of U.S. rice, and

(B) The transfer of such rice from a mill location to F.O.B. vessel at the U.S. port of export with such costs including, but not limited to, freight, unloading, wharfage, insurance, inspection, fumigation, stevedoring, interest, banking charges, storage, and administrative costs.

(ii) The price determined under paragraph (h)(4)(i) of this section will be adjusted to reflect the market value of the total quantity of whole kernels contained in milled rice by deducting the world value of broken kernels it contains, with the value of the broken kernels determined by multiplying a formulaic quantity of broken kernels (4 percent per hundredweight) by the world market value of broken kernels. The world market value of broken kernels will be based upon the relationship of whole and broken kernel world prices as estimated from observations of prices at which rice is being sold in world markets.

(iii) The price determined under paragraph (h)(4)(ii) of this section will be adjusted to reflect the per-pound market value of whole kernels by dividing the price by the quantity of whole milled kernels contained in the milled rice (96 percent per hundredweight).

(iv) The price determined under paragraph (h)(4)(iii) of this section will be adjusted to reflect the market value of whole kernels contained in 100 pounds of rough rice by multiplying such price by the estimated national average quantity of whole kernel rice by class obtained from milling 100 pounds of rough rice.

(v) The price determined under paragraph (h)(4)(iv) of this section will be adjusted to reflect the total market value of rough rice by:

(A) Adding to such price:

(*1*) The market value of bran contained in the rough rice, computed by multiplying the domestic unit market value of bran by the estimated national average quantity of bran produced in milling 100 pounds of rice; and

(*2*) The market value of broken kernels contained in the rough rice, computed by multiplying the estimated world market value of broken kernels by the estimated national average quantity of broken kernels produced in milling 100 pounds of rice;

(B) Deducting from such price an estimated cost of milling rough rice; and an estimated cost of transporting rough rice from farm to mill locations.

(5) The adjusted world price for each class of rice, loan rate basis, will be determined by CCC and announced, to the extent practicable, on or after 7 a.m. Eastern Standard Time each Wednesday or more frequently as determined necessary by CCC, continuing through the later of:

(i) The last Wednesday of July in the year in which the crop rice loan matures;

(ii) The last Wednesday of the latest month the crop rice loans mature, or

(iii) In the event that Tuesday is not a normal business day, the determination may be made on the next work day, on or after 7 a.m. Eastern Standard Time.

(i) The producer may repay a marketing assistance loan under this section for confectionery and each other kind of sunflower seed (other than oil sunflower seed) at a rate that is the lesser of:

(1) The loan rate established for the commodity under § 1421.9, plus interest, or

(2) The repayment rate established for oil sunflower seed.

(j)(1) On a form prescribed by CCC, a producer may request to lock in the applicable repayment rate for a period of 60 calendar days or for the remaining life of the loan term, whichever is less, provided that no request may be granted within 14 calendar days of the end of the loan.

(2) The request to lock in the applicable repayment rate must be received in the FSA county service center that disbursed the loan.

(3) The repayment rate that is locked in will be the rate in effect when the request to lock in is approved.

(4) The repayment rate may be locked in on outstanding farm-stored or warehouse-stored loans.

(5) The repayment rate that is locked in will expire as provided in paragraph (j)(1) of this section.

(6) The requests can only be completed one time for a designated quantity.

(7) The requests can be made in person or by facsimile.

(8) The requests cannot be canceled, terminated, or changed after approval.

(9) The locked in applicable repayment rate will not transfer to any loan disbursed outside of the originating county where the commodity was stored.

(10) Once a repayment rate is locked in it cannot be extended.

(k) If a producer fails to repay a marketing assistance loan within the time prescribed by CCC under the terms and conditions of the request to lock in a market loan repayment rate, the producer may repay the loan:

(1) On or before maturity, at the lesser of:

(i) Principal plus interest as determined by CCC; or

(ii) The repayment rate in effect on the day the repayment is received in the FSA County Service Center.

(2) After maturity, at principal plus interest.

(l) When the proceeds of the sale of the commodity are needed to repay all or a part of a farm-stored loan, the producer must request and obtain prior written approval on a CCC-approved form and comply with the terms and conditions of such form, to remove a specified quantity of the commodity from storage. Approval does not constitute release of CCC's security interest in the commodity or release of producer liability for amounts due CCC for the marketing assistance loan indebtedness if payment in full is not received by the county office. Failure to repay a marketing assistance loan within the time period prescribed by CCC in the case of a farm-stored loan and delivery of the pledged collateral to a buyer is a violation of the agreement. In the case of such violation, the producer must repay the loan principal and interest or another amount as determined by the Deputy Administrator, FSA, as specified in § 1421.109.

(m) The producer may obtain county committee approval of a release of all or part of pledged collateral for a warehouse-stored loan at or before the maturity of such loan by paying to CCC:

(1) The principal amount of the marketing assistance loan and charges plus interest or

(2) An amount less than the principal amount of the marketing assistance loan and charges plus interest under the terms and conditions specified by CCC at the time the producer redeems the collateral for such loan.

(n) A partial release of marketing assistance loan collateral must cover all of the commodity represented by one warehouse receipt. Warehouse receipts redeemed by repayment of the marketing assistance loan must be released only to the producer. However, such receipt may be released to persons designated in a written authorization that is filed with the county office by the producer within 15 days before the date of repayment.

(o) The note and security agreement will not be released until the marketing assistance loan has been satisfied in full.

(p)(1) If the commodity is moved from storage without obtaining prior approval to move such commodity, such removal will constitute unauthorized removal or disposition, as applicable under § 1421.109(b), unless the removal occurred on a non-workday and the producer notified the county office on the next workday of such removal.

(2) Any loan quantities involved in a violation of § 1421.109 must be repaid under § 1421.109(e).

(q) In the event of a severe disruption to marketing, transportation, or related infrastructure, the Secretary may modify the repayment rate otherwise applicable under this section for marketing assistance loans. Any adjustment made to the repayment rate for marketing assistance loans for a loan commodity under § 1421.5 will be in effect on a short-term and temporary basis, as determined by the Secretary.

[74 FR 15652, Apr. 7, 2009]

### § 1421.11 Spot checks.

(a) CCC may inspect the collateral for marketing assistance loans, and producers with such loans shall allow CCC access to the farm and storage facility as necessary to conduct collateral inspections, or "spot checks" as they are called. Spot checks will verify that the quality and quantity of farm-stored commodities pledged as collateral for marketing assistance loans are maintained by the producer.

(b) Loan deficiency payments are selected for spot check to ensure that all eligibility requirements, as required by CCC, are met in order to receive such loan deficiency payment.

(c) Producers must present production evidence for commodities acceptable to CCC when a spot check is conducted.

### § 1421.12 Production evidence.

(a) Producers who redeem marketing assistance loan collateral at the prevailing world market price for rice, or the alternative repayment rate for all other commodities, as CCC determines or receives a loan deficiency payment may be required to provide CCC with:

(1) Evidence of production of the collateral such as:

(i) Evidence of sales,

(ii) Delivery evidence,

(iii) Load summaries from warehouse, processor, or buyer,

(iv) Warehouse receipts

(v) Paid measurement service

(vi) Spot check measurements with paid measurement service

(vii) Cleaning tickets for seed (viii) Scale tickets, if not issued by the producer for the producer's own production

(ix) Core tests for wool and mohair

(x) Maximum eligible quantity as determined by CCC

(2) The storage location of the collateral that has not been otherwise disposed of and access to such collateral;

(3) Permission to inspect, examine, and make copies of the records and other written data as deemed necessary to verify the eligibility of the producer and commodity;

(4) In the case of wool and mohair, permission to examine and inspect the sheep herd; and

(5) Any other evidence requested by the county FSA service center or the Deputy Administrator, FSA.

(b) A producer who fails to provide acceptable evidence of production shall be required to repay the market gain or loan deficiency payment and charges, plus interest, as determined by CCC.

### § 1421.13 Special loan deficiency payments.

(a)(1) Eligible producers of unshorn pelts produced from live sheep and hay and silage derived from an eligible loan commodity as provided in § 1421.5 are eligible to request unshorn pelt, hay, and silage quantities for a loan deficiency payment under subpart C of this part.

(2) Unshorn pelts, hay, and silage derived from an eligible loan commodity are not eligible to be pledged as collateral to obtain a marketing assistance loan under subpart B of this part.

[71 FR 32424, June 6, 2006, as amended at 74 FR 15654, Apr. 7, 2009]

### § 1421.14 Obtaining peanut loans.

(a) Peanuts loans to individual producers may be obtained through:

(1) County offices; or

(2) A designated Marketing Association or a CMA approved by CCC.

(b) The loan documents shall not be presented for disbursement unless the peanuts pledged as collateral for the marketing assistance loan is eligible in accordance with § 1421.8. If the peanuts were ineligible at the time of the disbursement, the total amount disbursed under loan, or as an LDP, plus charges and interest shall be refunded promptly.

## Subpart B—Marketing Assistance Loans

SOURCE: 67 FR 63511, Oct. 11, 2002, unless otherwise noted.

### § 1421.100 Applicability.

This subpart provides the terms and conditions for marketing assistance loans offered by CCC. Additional terms and conditions are also in the note and security agreement which the producer must sign to receive such marketing assistance loans.

### § 1421.101 Maturity dates.

(a)(1) All marketing assistance loans shall mature on demand by CCC and no later than the last day of the 9th calendar month following the month in which the note and security agreement is filed and disbursed except, for transferred marketing assistance loan collateral. The maturity date for transferred marketing assistance loan collateral will be the maturity date applicable to the original loan that was transferred.

(2) CCC may at any time call the marketing assistance loan by notifying the producer at least 30 days in advance of the accelerated maturity date.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009]

### § 1421.102 Adjustment of basic loan rates.

(a) Basic loan rates are established under § 1421.9 and will be adjusted or not adjusted as follows:

(1) For farm-stored commodities, except for peanuts, that exceed acceptable levels of contamination, the loan rate will be discounted to 10 percent of the base county marketing assistance loan rate.

(2) For farm-stored commodities where the test weight discounts are on the:

(i) Crop year specific schedules of premiums and discounts, the loan rate shall be adjusted for the higher of the

discount for test weight or grade based on test weight.

(ii) Additional schedule of discounts, the marketing assistance loan rate shall be reduced to 20 percent of the county loan rate.

(3) With respect to commodities harvested, excluding silage or hay, as other than grain and pledged as collateral for a nonrecourse marketing assistance loan, the marketing assistance loan rate shall be discounted to 30 percent of the county loan rate.

(4) With respect to farm-stored wheat, the basic county loan rate shall not be adjusted to reflect the protein content.

(5) With respect to Segregation 2 and 3 peanuts as determined by CCC, the marketing assistance loan rate shall be discounted to 35 percent of the applicable loan rate.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009]

### § 1421.103 Authorized storage.

(a) Authorized farm storage is:

(1) A storage structure located on or off the farm, (excluding public warehouses that do not enter into an agreement with CCC), that CCC determines to be controlled by the producer which affords safe storage of collateral pledged for a marketing assistance loan;

(2) If determined and announced to be available in a State or county, on ground storage and other temporary storage structures approved by CCC.

(3) As determined by CCC, temporary authorized storage may also include:

(i) On-ground storage or;

(ii) Other storage arrangements.

(b) CCC may reduce the quantity of a commodity pledged as collateral for a loan made available under paragraph (a)(2) of this section to not more than 75 percent of such otherwise eligible quantity in order to protect the interests of CCC. CCC may also limit the length of time the commodity may be stored on-ground or in temporary structures to not more than 90 days. A marketing assistance loan made with respect to such commodity which is not moved to a structure specified in (a)(2) within 90 days of the date the loan was disbursed may be called by CCC.

(c)(1) Authorized warehouse storage consists of warehouses that:

(i) If Federally licensed, are in compliance with 7 CFR part 735 or

(ii) If not Federally licensed, are in compliance with State laws and that issue warehouse receipts that meet the criteria specified in § 1421.107.

(iii) If not Federally licensed or in compliance with State Laws and issue warehouse receipts that meet the criteria specified in § 1421.107, have entered into a storage agreement with CCC.

(2) Notwithstanding paragraph (c)(1) of this section, if storing peanuts, the warehouse must in all cases have entered into a storage agreement with CCC. For storing other crops, notwithstanding paragraph (c)(1) of this section, CCC may, on a case-by-case basis, still require a warehouse operator that would qualify under paragraphs (c)(1)(i) or (ii) of this section to enter into a storage agreement if deemed necessary by the Deputy Administrator to be needed to protect CCC's interests.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009]

### § 1421.104 Marketing assistance loan making.

(a)(1) CCC may conduct such lien searches, and may perfect its interest in loan commodities under State law, as it deems to be in its interest.

(2) The cost for terminating the financing statement for marketing assistance loans disbursed under this part before the end of the term shall be paid by the producer.

(3) If there are any liens or encumbrances on the commodity pledged as collateral for a marketing assistance loan made under this part, waivers that fully protect CCC's interest must be obtained even though the liens or encumbrances are satisfied from loan proceeds disbursed under this part. No additional liens or encumbrances shall be placed on the commodity after such a loan is approved.

(b) Fees, charges, interest, and all applicable approved commodity assessment collections must be paid by the producer to CCC at a rate CCC determines or, in the case of assessments, at

a rate approved by the assessment authority. Such fees, charges, and interest include:

(1) A non-refundable loan service fee;

(2) Interest that accrues on a loan under part 1405 of this chapter.

(c) For the 2008 through 2012 crop years, to ensure proper storage of peanuts for which a loan is made under this section, the Secretary will pay reasonable handling and other associated costs (other than storage) incurred at the time at which the peanuts are placed in a warehouse stored loan. Such rates will be available in the State and county FSA offices.

(d) The cost of terminating a financing statement shall be paid by the producer.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32424, June 6, 2006; 74 FR 15654, Apr. 7, 2009; 75 FR 19193, Apr. 14, 2010]

### § 1421.105 Farm-stored marketing assistance loans.

(a) The producer of a commodity pledged as security for a farm-storage loan shall:

(1) Certify the quantity of such commodity on the loan application, or;

(2) Have such quantity measured by CCC at the measurement service rate established by CCC.

(b) The State committee may establish a marketing assistance loan percentage not to exceed a percentage CCC establishes or it may apply quality discounts to the loan rate in each year for each commodity on a Statewide basis or for specified areas within the State. Before approving a county committee request to establish a different loan percentage, or to apply quality discounts, the State committee shall consider conditions in the State or areas within a State to determine if the marketing assistance loan percentage should be reduced below the maximum marketing assistance loan percentage or the quality discounts should be applied to the basic county marketing assistance loan rate to provide CCC with adequate protection. Marketing assistance loans disbursed based upon loan percentages previously lowered and loan rates adjusted for quality shall not be altered if conditions within the State or areas within the State change to substantiate removing such reductions. Percentages established or loan rates adjusted for quality under this section shall apply only to new marketing assistance loans and not to outstanding marketing assistance loans. In determining loan percentages or the necessity to apply quality discounts, the State committee shall consider any factor at its discretion, including the following:

(1) General crop conditions;

(2) Factors affecting quality peculiar to an area within the State; and

(3) Climatic conditions affecting storability.

(c) An eligible quantity of a commodity that is commingled with an ineligible quantity of the commodity is not eligible to be collateral for a marketing assistance loan unless the producer, when requesting a marketing assistance loan designates all structures that may be used for storage of the marketing assistance loan collateral.

(1) In such cases, the producer is not required to obtain prior written approval from the county committee before moving marketing assistance loan collateral from one designated structure to another designated structure.

(2) In all other instances, if the producer intends to move marketing assistance loan collateral from a designated structure to another undesignated structure, the producer must request prior approval from the county committee. Such approval shall be written and the eligible or ineligible commodity must be measured by a representative of the county office, at the producer's expense, before commingling. Prior to commingling, with respect to wool and mohair, a representative of the county committee may determine an average production of the wool and mohair in a manner approved by CCC.

(d)(1) Two or more producers may obtain:

(i) A single joint marketing assistance loan for commodities that are stored in the same farm storage facility; or

(ii) Individual marketing assistance loans for their share of the commodity that is commingled in a farm storage facility with commodities owned by other producers if such other producers execute an agreement that provides

that such producers shall obtain the permission of a representative of the county committee before removal of any quantity of the commodity from the storage facility. All producers who store a commodity in a farm storage facility in which commodities that have been pledged as collateral for a marketing assistance loan shall be liable for any damage incurred by CCC for the deterioration or unauthorized removal or disposition of such commodities.

(2) In such cases, each producer must execute a note and security agreement with CCC, and each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and the requirements of this part. Each producer is also liable for repayment of the entire marketing assistance loan amount until the marketing assistance loan is fully repaid without regard to their share in the commodity pledged as collateral. In addition, such producer may not amend the note and security agreement for the producer's claimed share in such commodities, or marketing assistance loan proceeds, after execution of the note and security agreement by CCC.

(e)(1) A producer, when requesting a marketing assistance loan, shall designate in writing specific storage structures.

(2) The producer is not required to request prior approval before moving marketing assistance loan collateral between such designated structures.

(3) Movement of marketing assistance loan collateral to any other structures not designated or the disposal of such loan collateral without prior written approval of the county committee, shall subject the producer to administrative actions.

(4) The producer is responsible for any loss in quantity or quality of the farm-stored commodity pledged as collateral.

(5) CCC shall not assume any loss in quantity or quality of the marketing assistance loan collateral for farm-stored loans.

### § 1421.106 Warehouse-stored marketing assistance loan collateral.

(a) A commodity may be pledged as collateral for a warehouse-stored marketing assistance loan in the quantity delivered to CCC for storage at a warehouse that meets standards for approval at part 1423 of this chapter. Such quantity shall be the net weight specified on the warehouse receipt or supplemental certificate.

(b) Two or more producers may obtain a single joint marketing assistance loan for commodities stored in an approved warehouse if the warehouse receipt pledged as collateral is issued jointly to the producers.

(c) If more than one producer executes a note and security agreement with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and the regulations in this part. Each such producer shall also remain liable for repayment of the entire marketing assistance loan amount until the marketing assistance loan is fully repaid without regard to such producer's claimed share in the commodity pledged as collateral for the marketing assistance loan. In addition, such producer may not amend the note and security agreement with respect to the producer's claimed share in such commodities, or marketing assistance loan proceeds, after execution of the note and security agreement by CCC.

(d) Storage rates that CCC has approved to be deducted from marketing assistance loan proceeds are available in USDA State and county FSA service centers. Deductions shall be based upon entries on the warehouse receipt or supplemental certificate, but the storage rate shall not exceed the storage rate CCC has approved. No storage deduction shall be made if written evidence acceptable to CCC is submitted indicating that:

(1) Storage charges through the maturity date have been prepaid; or

(2) The producer has arranged with the warehouse operator for the payment of storage charges through the maturity date and the warehouse operator enters an endorsement in substantially the following form on the warehouse receipt:

Storage arrangements have been made by the depositor of the commodity covered by this receipt through (date through which storage has been provided). No lien will be asserted by the warehouse operator against

CCC or any subsequent holder of the warehouse receipt for the storage charges that accrued before the specified date.

(e) The beginning date to be used for computing storage deductions on the commodity stored in an approved warehouse shall be the later of the following:

(1) The date the commodity was received or deposited in the warehouse;

(2) The date the storage charges start; or

(3) The day following the date through which storage charges have been paid.

(f) For hard red winter and hard red spring wheat tendered to CCC and stored in an approved warehouse, producers must obtain official protein content determinations or, as CCC determines is acceptable, protein content may be determined by mutual agreement between the producer and the warehouse operator. Costs of determinations shall not be paid by CCC.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009]

### § 1421.107 Warehouse receipts.

(a) Warehouse receipts tendered to CCC under § 1421.3 for marketing assistance loans must meet the provisions of this section and all other provisions of this part, and CCC program documents.

(b) Warehouse receipts must be issued in the name of the eligible producer or CCC. If issued in the name of the eligible producer, the receipt must be properly endorsed on its reverse side certifying that the crop is free of encumbrances in order for title to vest in the holder. Receipts must be issued by an authorized warehouse and must represent a commodity that is deemed to be stored commingled. The receipts must be negotiable and must represent a commodity that is the same quantity and quality as the eligible commodity actually in storage in the warehouse of the original deposit.

(c) If the receipt is issued for a commodity that is owned by the warehouse operator either solely, jointly, or in common with others, the fact of such ownership shall be stated on the receipt. In States where the pledge of warehouse receipts issued by a warehouse operator on the warehouse operator's commodity is invalid, the warehouse operator may offer the commodity to CCC for a marketing assistance loan if such warehouse is licensed under the U.S. Warehouse Act.

(d) Each warehouse receipt or accompanying supplemental certificate representing a commodity stored in an authorized warehouse must indicate that the commodity is insured. CCC shall not be responsible for the cost of such insurance.

(e) A separate warehouse receipt must be submitted for each grade and class of any commodity tendered to CCC and, for rice, such receipt must also state the milling yield of the rice, and for wool, such receipts must also state the yield and micron of the wool.

(f) With respect to peanuts, a warehouse receipt must be submitted exhibiting grade, type, and segregation for peanuts tendered to CCC.

(g)(1) Each warehouse receipt, or a supplemental certificate (in duplicate) that properly identifies the warehouse receipt, must be issued by an authorized warehouse as specified in § 1421.103(c)(1), as applicable, and must indicate:

(i) The name and location of the storing warehouse;

(ii) The warehouse code assigned by licensing authority;

(iii) The warehouse receipt number;

(iv) The date the receipt was issued;

(v) The type of commodity;

(vi) The date the commodity was deposited or received;

(vii) The date to which storage has been paid or the storage start date;

(viii) Whether the commodity was received by rail, truck or barge;

(ix) The amount per bushel, pound, or hundredweight of prepaid in or out charges;

(x) The signature of the warehouse operator or the authorized agent; and

(xi) For warehouses operating under a merged warehouse code agreement (KC–385), the location and county to which the producer delivered the commodity.

(2) In addition to the information specified in paragraph (g)(1) of this section, additional commodity specific requirements shall be determined by CCC and be available at State and county offices and the Kansas City Commodity Office.

(h) If a warehouse receipt indicates that the commodity tendered for loan grades "infested" or "contains excess moisture", or both, the receipt must be accompanied by a supplemental certificate in order for the commodity to be eligible for a marketing assistance loan. The grade, grading factors, and quantity to be delivered must be shown on the certificate as follows:

(1) When the warehouse receipt shows "infested" and the commodity has been conditioned to correct the infested condition, the supplemental certificate must show the same grade without the "infested" designation and the same grading factors and quantity as shown on the warehouse receipt.

(2)(i) When the warehouse receipt shows that the commodity contained excess moisture and the commodity has been dried or blended, the supplemental certificate must show the grade, grading factors, and quantity after drying or blending of the commodity. Such entries shall reflect a drying or blending shrinkage as provided in paragraph (h)(2)(iv) of this section.

(ii) When a supplemental certificate is issued under paragraphs (g)(1) and (h)(2)(i) of this section, the grade, grading factors and the quantity shown on such certificate shall supersede the entries for such items on the warehouse receipt.

(iii) If the commodity has been dried or blended to reduce the moisture content, the quantity specified on the warehouse receipt or the supplemental certificate shall represent the quantity after drying or blending.

(iv) For commodities dried or blended under paragraph (h)(2)(iii) of this section, such quantity shall reflect a minimum shrinkage in the receiving weight excluding dockage:

(A) For the following commodities, 1.3 times the percentage difference between the moisture content of the commodity received and the following percentages for the specified commodity:

(*1*) Barley: 14.5 percent;
(*2*) Corn: 15.5 percent;
(*3*) Grain sorghum: 14.0 percent;
(*4*) Oats: 14.0 percent;
(*5*) Rice: 14.0 percent;
(*6*) Soybeans: 14.0 percent;
(*7*) Wheat: 13.5 percent; and
(*8*) Peanuts: 10.0 percent.

(B) For the following commodities, 1.1 times the percentage difference between the moisture content of the commodity received and the following percentages for the specified commodity:

(*1*) Canola: 10.0 percent;
(*2*) Flaxseed: 9.0 percent;
(*3*) Mustard Seed: 10.0 percent;
(*4*) Rapeseed: 10.0 percent;
(*5*) Safflower Seed: 10.0 percent;
(*6*) Sunflower Seed: 10.0 percent;
(*7*) Crambe: 10.0 percent; and
(*8*) Sesame Seed: 10.0 percent.

(i)(1) If, under paragraph (g) of this section, a supplemental certificate is issued in connection with a warehouse receipt, such certificate must state that no lien for processing will be asserted by the warehouse operator against CCC or any subsequent holder of such receipt.

(2) Warehouse receipts and the commodities represented by such receipts may be subject to a lien for warehouse charges. For all commodities except peanuts, the producer who pledged such a receipt as collateral for a loan under this part shall pay to CCC all costs incurred by CCC as result of the existence of the lien. In no event shall a warehouse operator be entitled to satisfy such a lien by sale of the commodities when CCC is the holder of such receipt.

(j) Warehouse receipts representing commodities that have been shipped by rail or by barge, must be accompanied by supplemental certificates completed under paragraph (g) of this section.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009; 75 FR 19193, Apr. 14, 2010]

### § 1421.108 Transfers and reconcentrations.

(a) Upon request by the producer before transfer, the county committee may approve the transfer of a quantity of a commodity that is pledged as collateral for a farm-stored loan to a warehouse-stored loan at any time during the loan period.

(1) Liquidation of the farm-stored loan or part thereof shall be made through the pledge of warehouse receipts for the commodity placed under warehouse-stored loan and the immediate payment by the producer of the

amount by which the warehouse-stored loan is less than the farm-stored loan or part thereof and charges plus interest. The loan quantity for the warehouse-stored loan cannot exceed 110 percent of the loan quantity transferred from the farm-stored loan.

(2) Any amounts due the producer shall be disbursed by the FSA county service center.

(b) Upon request by the producer before the transfer, the county committee may approve the transfer of a warehouse-stored loan or part thereof to a farm-stored loan at any time during the marketing assistance loan period. Quantities pledged as collateral for a farm-stored loan shall be based on a measurement or a calculation of average production of wool and mohair, such measurement or calculation to be made by a representative of the county office before approving the farm-stored loan. The producer must immediately repay the amount by which the farm-stored loan is less than the warehouse-stored loan and charges plus interest on the shortage. The maturity date of the farm-stored loan shall be the maturity date applicable to the warehouse-stored loan that was transferred.

(c) Upon the filing of the Reconcentration Agreement and Trust Receipt by the producer and warehouse operator, CCC may, during the marketing assistance loan period, approve the reconcentration in another authorized warehouse for all or part of a commodity that is pledged as collateral for a warehouse-stored loan. Any such approval shall be subject to the terms and conditions in the Reconcentration Agreement and Trust Receipt. A producer may, before the new warehouse receipt is delivered to CCC, pay CCC:

(1) The principal amount of the marketing assistance loan and charges plus interest and applicable charges; or

(2) If CCC so announces, an amount less than the principal amount of the marketing assistance loan and charges plus interest under the terms and conditions specified by CCC at the time the producer redeems the commodity pledged as collateral for such marketing assistance loan.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15654, Apr. 7, 2009]

**§ 1421.109 Personal liability of the producer.**

(a) When a producer obtains a commodity marketing assistance loan, the producer agrees, in writing, not to:

(1) Provide an incorrect certification of the quantity or make any fraudulent or erroneous representation for the marketing assistance loan; or

(2) Remove or dispose of a quantity of commodity that is collateral for a CCC farm-stored loan without prior written approval from CCC in accordance with § 1421.10.

(3) The violation of the terms and conditions of the note and security agreement, will cause harm or damage to CCC in that funds may be disbursed to the producer for a quantity of a commodity that is not actually in existence or for a quantity on which the producer is not eligible. If CCC determines that the producer has violated the terms and conditions of the applicable forms prescribed by CCC, liquidated damages will be assessed on the quantity of the commodity that is involved in the violation.

(b) Such violations as referred to in paragraph (a)(3) of this section may include, but are not limited to:

(1) Incorrect certification;

(2) Unauthorized removal; and

(3) Unauthorized disposition.

(c) If the county committee determines that the producer has committed such violations, liquidated damages shall be assessed on the quantity of the commodity that is involved in the violation.

(d) Liquidated damages assessed in accordance with this section will be determined by multiplying the quantity involved in the violation by 10 percent of the marketing assistance loan rate applicable to the loan note.

(e) When it has been determined that a violation of the terms and conditions of the note and security agreement has occurred as a result of unauthorized removal or disposition, CCC will determine the quantity of the commodity involved with respect to such violation and require the repayment of that portion of the marketing assistance loan which is equivalent to such quantity of the commodity. In the case of these violations, if CCC determines the producer:

(1) Acted in good faith when the violation occurred, liquidated damages shall be assessed according to paragraph (d) of this section and the commodity involved in the violation must be redeemed at the lesser of:

(i) The rate at which the loan was disbursed, plus interest and any other charges assessed under the note and security agreement; or

(ii) The alternative repayment rate in effect on the date of the determination is issued by CCC that a violation has occurred, plus 15 percent of the original loan rate as provided on the note and security agreement.

(2) Did not act in good faith when the violation was committed, liquidated damages shall be assessed in accordance with paragraph (d) of this section, and administrative actions shall be taken in accordance with paragraph (h) of this section. The loan must be redeemed at the rate at which the loan was disbursed, plus interest and any other charges assessed under the note and security agreement.

(f) When it has been determined that a violation of the terms and conditions of the note and security agreement has occurred as result of an incorrect certification, CCC will determine the quantity of the commodity involved with respect to such violation and require the repayment of that portion of the marketing assistance loan which is equivalent to such quantity of the commodity. In the case of an incorrect certification, if CCC determines the producer:

(1) Acted in good faith when the violation occurred, liquidated damages shall be assessed according to paragraph (d) of this section, and the commodity involved in the violation must be redeemed at the rate at which the loan was disbursed, plus interest and any other charges assessed under the note and security agreement.

(2) Did not act in good faith about the violation, liquidated damages shall be assessed in accordance with paragraph (d) of this section and administrative actions shall be taken in accordance with paragraph (h) of this section. The loan must be redeemed at the rate at which the loan was disbursed, plus interest and any other charges assessed under the note and security agreement.

(g) If the producer fails to pay such amount within 30 days from the date of notification of violations as provided in paragraphs (e)(1) and (f)(1) of this section, the producer must immediately repay the marketing assistance loan at the rate at which the loan was disbursed plus interest, and any other charges assessed under the note and security agreement.

(h) For violations subject to paragraphs (e)(2) and (f)(2) of this section, the producer must immediately repay the marketing assistance loan at the rate at which the loan was disbursed plus interest, and any other charges assessed under the note and security agreement. If the loan has already been repaid, any market gain previously realized on the loan, plus interest, must be refunded to CCC. CCC will demand delivery of any remaining loan collateral if not repaid within the 30 calendar day notification period.

(i) If the county committee determines that the producer has committed a violation, the county committee shall notify the producer in writing that:

(1) The producer has 30 calendar days to provide sufficient evidence and information regarding the circumstances that caused the violation, to the county committee; and

(2) Administrative actions will be taken.

(j) If the loan is accelerated, the producer may not repay the loan at the alternative loan repayment rate and may not utilize commodity certificate exchanges, unless authorized by CCC.

(k) Producers denied or rejected for a farm-stored loan for any reason under this section may apply for a warehouse-stored loan.

(l) The loan plus other charges shall be payable to CCC upon demand if a producer:

(1) Makes any fraudulent representation in obtaining a marketing assistance loan, maintaining, or settling a loan; or

(2) Disposes or moves the loan collateral without the approval of CCC.

(m) A producer shall be personally liable for damages resulting from a commodity delivered to or removed by

CCC containing mercurial compounds, toxin producing molds, or other substances poisonous or harmful to humans or animals or property.

(n) If the amount disbursed under a marketing assistance loan or in settlement thereof, exceeds the amount authorized by this part, the producer shall be liable for repayment of such excess and charges, plus interest.

(o) If the amount collected from the producer in satisfaction of the marketing assistance loan is less than the amount required under this part, the producer shall be personally liable for repayment of the amount of such deficiency and charges, plus interest.

(p) In the case of joint loans , the personal liability for the amounts specified in this section shall be joint and several on the part of each producer signing the note.

(q) Any or all of the liquidated damages assessed under this section may be waived if the CCC determines that the violation occurred inadvertently, accidentally, or unintentionally.

[67 FR 63511, Oct. 11, 2002, as amended at 68 FR 67939, Dec. 5, 2003; 71 FR 32424, June 6, 2006; 74 FR 15655, Apr. 7, 2009]

### § 1421.110 Commodity certificate exchanges.

(a) For any outstanding marketing assistance loan for the 2008 and 2009 crop years, a producer may purchase a commodity certificate and exchange that commodity certificate for the marketing assistance loan collateral.

(b) The exchange rate is the lesser of:

(1) The loan rate and charges, plus interest applicable to the loan;

(2) The prevailing world market price, as determined by CCC, for rice or the alternative repayment rate for all other commodities, as determined by CCC.

(c) Commodity certificate exchanges may not be used when locking in a repayment rate under § 1421.10.

(d) Producers must request a commodity certificate exchange in person at the FSA county service center that disbursed the marketing assistance loan by:

(1) Completing a written request as CCC determines.

(2) Purchasing a commodity certificate for the exact amount required to exchange the marketing assistance loan collateral.

(3) Immediately exchanging the purchased commodity certificate for the outstanding loan collateral.

(e) The authority to make commodity certificates available to the producer will terminate effective the ending of the 2009 crop year.

[67 FR 63511, Oct. 11, 2002. Redesignated and amended at 74 FR 15655, Apr. 7, 2009]

### § 1421.111 Loan settlement.

(a) The value of the settlement of marketing assistance loan shall be made by CCC on the following basis:

(1) For nonrecourse marketing assistance loans, the schedule of premiums and discounts for the commodity provided that:

(i) If, the value of the collateral at settlement is less than the amount due, the producer shall pay to CCC the amount of such deficiency and charges, plus interest on such deficiency; or

(ii) If, the value of the collateral at settlement is greater than the amount due, such excess shall be retained by CCC and CCC shall have no obligation to pay such amount to any party.

(2) For recourse marketing assistance loans, the proceeds from the sale of the commodity provided that:

(i) If, the value of the collateral at settlement is less than the amount due, the producer shall pay to CCC the amount of such deficiency and charges, plus interest on such deficiency; or

(ii) If, the proceeds received from the sale of the commodity are greater than the sum of the amount due, plus any cost incurred by CCC in conducting the sale of the commodity, the amount of such excess shall be paid to the producer or, if applicable, to a secured creditor of the producer.

(3) If CCC sells the commodity described in paragraph (a)(1) and (a)(2) of this section in settlement of the marketing assistance loan, the sales proceeds shall be applied to the amount owed CCC by the producer. The producer shall be responsible for any costs incurred by CCC in completing the sale and CCC will deduct the amount of these costs from the sales proceeds. If CCC sells any commodity obtained by delivery or forfeiture under a non-recourse marketing assistance loan, CCC

will, in all instances, retain all proceeds obtained from the sale of the commodity and will not make any payment of any amount of such proceeds to any party, including the producer who had satisfied their obligation under the loan through forfeiture of the commodity to CCC.

(b) Settlements made by CCC for eligible commodities that are acquired by CCC and that are stored in an authorized warehouse will be made on the basis of the entries in the applicable warehouse receipt, supplemental certificate, and accompanying documents.

(1) All eligible commodities that are stored in other than authorized warehouses must be delivered to CCC as CCC instructs. Settlement will be based on entries in the applicable warehouse receipt, supplemental certificate, and accompanying documents.

(2) For eligible loan commodities that are delivered from other than an authorized warehouse, settlement will be made by CCC on the basis of the basic marketing assistance loan rate that is in effect for the commodity at the producer's customary delivery point, as determined by CCC.

(c) Settlements made by CCC for peanuts acquired by CCC and stored in an authorized warehouse shall be based on the settlement value at the time of the loan disbursement and the entries in the applicable warehouse receipt, supplemental certificate, and accompanying documents subject to adjustments for changes in quality and other factors.

(1) All eligible commodities that are stored in other than authorized warehouses shall be delivered to CCC as CCC instructs. Settlement shall be based on entries in the applicable warehouse receipt, supplemental certificate, and accompanying documents.

(2) For eligible loan commodities that are delivered from other than an authorized warehouse, settlement shall be made by CCC on the basis of the basic marketing assistance loan rate that is in effect for the commodity at the producer's customary delivery point, as determined by CCC.

(d) For peanuts forfeited to CCC, the Secretary will pay reasonable storage, handling, and other associated costs for all peanuts pledged as collateral that are forfeited under this section.

(e) In all cases, settlements may be adjusted for changes in quality and other factors affecting the value of the commodity.

(f) Beginning with the 2009 through 2012 crop years, premiums and discounts will apply to all eligible loan commodities forfeited and delivered to CCC. This will not require any additional adjustment for peanuts to the extent that such premiums and discounts were accounted for when the loan was made.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32425, June 6, 2006. Redesignated and amended at 74 FR 15655, Apr. 7, 2009]

### § 1421.112 Foreclosure.

(a)(1) Upon maturity and nonpayment of a warehouse-stored loan, title to the unredeemed collateral securing the marketing assistance loan shall immediately vest in CCC.

(2) Upon maturity and nonpayment of a farm-stored marketing assistance loan, title to the unredeemed collateral shall automatically transfer to CCC upon CCC demand.

(3) When CCC acquires title to the unredeemed collateral, CCC shall not pay for any market value that such collateral may have in excess of the marketing assistance loan indebtedness, (the unpaid amount of the note and charges plus interest).

(b) If the total amount due on a farm-stored loan (the unpaid amount of the note plus charges, and interest) is not satisfied upon maturity, CCC may remove the commodity from storage, and assign, transfer, and deliver the commodity or documents evidencing title thereto when, how, and upon terms as CCC determines. Disposition may also be effected without removing the commodity from storage. The commodity may be processed before sale and CCC may become the purchaser of the whole or any part of the commodity at either a public or private sale.

(1) The value of settlement for a farm-stored commodity removed by CCC from storage and shall be as provided in § 1421.111.

(2) If a deficiency exists after the collateral is sold, a claim for such deficiency will be established in accordance with part 1403 of this title.

[67 FR 63511, Oct. 11, 2002. Redesignated and amended at 74 FR 15655, Apr. 7, 2009]

### § 1421.113 Recourse marketing assistance loans.

(a) CCC shall make recourse marketing assistance loans available to eligible producers of high moisture corn, high moisture grain sorghum and other eligible loan commodities as determined by the Deputy Administrator, Farm Programs.

(b) Repayment must be paid in full at principal plus interest on or before the loan maturity date.

(c) Recourse marketing assistance loan collateral may not be delivered or forfeited to CCC in satisfaction of the loan indebtedness.

[67 FR 63511, Oct. 11, 2002. Redesignated at 70 FR 33799, June 10, 2005. Redesignated and amended at 74 FR 15655, Apr. 7, 2009]

## Subpart C—Loan Deficiency Payments

SOURCE: 67 FR 63511, Oct. 11, 2002, unless otherwise noted.

### § 1421.200 Applicability.

(a) During the loan availability period, loan deficiency payments will be made available to eligible producers when the alternative repayment rate is less than the applicable county loan rate.

(b) To be eligible to receive loan deficiency payments a producer must:

(1) Comply with all marketing assistance loan eligibility including beneficial interest requirements.

(2) Agree to forgo obtaining such loan, if applicable; and

(3) File in person, by mail or electronically a request for payment on a form prescribed by CCC; and

(4) Otherwise comply with all program requirements.

(c)(1) A producer must submit to the FSA Service Center a completed request for a loan deficiency payment on forms prescribed by CCC. This submission must be received on or before the date beneficial interest is lost in the commodity and before the final loan availability date for the commodity. Such completed and submitted forms indicate the producer's intentions and further provide the terms and conditions of the loan deficiency payment program. If all or any of the provisions of this paragraph are not met by the producer, the producer may not obtain the loan deficiency payment benefit.

(2) With respect to a request for a loan deficiency payment for unshorn pelts, a completed request for such a payment must be submitted on or before the earlier of the date of slaughter of the lamb or the loss of beneficial interest in the lamb or the unshorn pelt produced from the lamb. In addition, the lamb must have been owned for not less than 30 days prior to the date such application is filed with CCC and must have been slaughtered for personal use, or sold for slaughter and slaughtered within 10 calendar days after the sale.

(d) For unshorn pelts, the lamb must be owned for a period of not less than 30 days in advance of the application and sold for immediate slaughter or slaughtered for personal use. Producers must submit acceptable production evidence to CCC under § 1421.12 at the time of request. Producers who do not sell lambs for immediate slaughter are ineligible for a loan deficiency payment.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32425, June 6, 2006; 74 FR 15655, Apr. 7, 2009]

### § 1421.201 Loan deficiency payment rate.

(a) The loan deficiency payment rate for a crop shall be the amount by which the loan rate for the crop exceeds the rate at which CCC has announced that producers may repay their loans under § 1421.10.

(b) The loan deficiency payment rate will be the rate in effect in the county where the commodity was marketed or stored on the date:

(1) The request for benefits is received in the FSA Service Center, if the producer retains beneficial interest in the quantity on that date.

(2) Beneficial interest was lost, as determined by CCC and as provided in §§ 1421.6 and 1421.13, if on the date the request for benefits was received in the

FSA Service Center the producer no longer has beneficial interest in the requested quantity.

(3) The commodity is delivered, if the producer elects to receive the LDP rate based on the date of delivery.

(c) The loan deficiency payment applicable to such crop shall be computed by multiplying the loan deficiency payment rate, as determined under paragraph (b) of this section, by the quantity of the crop the producer is eligible to pledge as collateral for a nonrecourse loan for which the loan deficiency payment is requested.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32425, June 6, 2006; 71 FR 51426, Aug. 30, 2006; 74 FR 15655, Apr. 7, 2009]

### § 1421.202 Loan deficiency payment quantity.

(a) A loan deficiency payment may be based on 100 percent of the net eligible quantity specified on acceptable evidence of production of the commodity certified as eligible for loan deficiency payment if such production evidence is provided for such commodity under § 1421.12.

(b) Two or more producers may obtain a single joint loan deficiency payment for commodities that are stored in the same storage facility. Two or more producers may obtain individual loan deficiency payments for their share of the commodity that is stored commingled in a farm storage facility with commodities for which a loan deficiency payment has been requested and shall be liable for any damage incurred by CCC for incorrect certification of such commodities under § 1421.203.

(c) Two or more producers may obtain a single joint loan deficiency payment for commodities that are stored in an authorized or unauthorized warehouse if the acceptable documentation representing an eligible commodity for which a loan deficiency payment is requested is completed jointly for such producers.

[67 FR 63511, Oct. 11, 2002, as amended at 74 FR 15656, Apr. 7, 2009]

### § 1421.203 Personal liability of the producer.

(a) When a producer requests a loan deficiency payment, the producer agrees:

(1) When signing the Loan Deficiency Payment Agreement and Request, as applicable, that the producer will not provide an incorrect certification of the quantity or make any fraudulent representation, that CCC will rely upon when determining eligibility for a loan deficiency payment; and

(2) That violation of the terms and conditions of the loan deficiency payment request, as applicable, will cause harm or damage to CCC in that funds may be disbursed to the producer for a quantity of a commodity that is not actually in existence or for a quantity on which the producer is not eligible. If CCC determines that the producer has violated the terms and conditions of the applicable forms prescribed by CCC, liquidated damages shall be assessed on the quantity of the commodity that is involved in the violation.

(b) Liquidated damages assessed in accordance with this section will be determined by multiplying the quantity involved in the violation by 10 percent of the loan deficiency payment.

(c) If CCC determines that the producer:

(1) Acted in good faith when the violation occurred, liquidated damages will be assessed according to paragraph (b) of this section and the producer must repay the loan deficiency payment applicable to the loan deficiency quantity involved in the violation and charges, plus interest applicable to the amount repaid. If the producer fails to pay such amount within 30 days from the date of notification the producer must repay the entire loan deficiency payment and any other charges plus interest.

(2) Did not act in good faith when the violation was committed, liquidated damages will be assessed in accordance with paragraph (b) of this section and the producer shall repay the entire loan deficiency payment and any other charges plus interest.

(d) CCC may waive the liquidated damages assessed according to paragraph (b) of this section if the CCC determines that the violation occurred inadvertently, accidentally, or unintentionally.

(e) If, for any violation to which paragraph (b) of this section applies, the county committee determines that CCC's interest is not or will not be protected, the county committee shall:

(1) Call the producer's farm-stored loans;

(2) Deny future farm-stored loans for the current and 2 following crop years;

(3) Deny loan deficiency payments for the current and 2 following crop years unless production evidence is presented to CCC. Depending on the severity of the violation, the county committee may deny future farm-stored loan and loan deficiency payments without production evidence.

(f) If the county committee determines that the producer has committed a violation, the county committee shall notify the producer in writing that:

(1) The producer has 30 calendar days to provide sufficient evidence and information regarding the circumstances that caused the violation, to the county committee; and

(2) Administrative action will be taken under this section.

(g) If the amount disbursed under loan deficiency payments exceeds the amount authorized by this part, the producer shall be liable for repayment of such excess and liquidated damages, plus interest.

(h) In the case of joint loan deficiency payments, the personal liability for the amounts specified in this section shall be joint and several on the part of each producer signing the loan deficiency payment application.

(i) Any or all of the liquidated damages assessed under the provisions of paragraph (b) of this section may be waived as determined by CCC.

[67 FR 63511, Oct. 11, 2002, as amended at 71 FR 32425, June 6, 2006; 74 FR 15656, Apr. 7, 2009]

## Subpart D—Grazing Payments for the 2008 Through 2012 Crop of Wheat, Barley, Oats, and Triticale

SOURCE: 66 FR 13404, Mar. 6, 2001, unless otherwise noted. Redesignated at 67 FR 63511, Oct. 11, 2002.

### § 1421.300 Applicability.

(a) The regulations in this subpart are applicable to the 2008 through 2012 crops of eligible acreage planted to wheat, barley, oats or triticale that is grazed by livestock and not harvested in any other manner. This subpart sets forth the terms and conditions under which a grazing payment in lieu of a loan deficiency payment will be made by CCC.

(b) The form that is used in administering these payments is available in State and county FSA offices and shall be prescribed by CCC.

[66 FR 13404, Mar. 6, 2001. Redesignated and amended at 67 FR 63511, 63523, Oct. 11, 2002; 74 FR 15656, Apr. 7, 2009]

### § 1421.301 Administration.

(a) This subpart shall be administered by the Farm Service Agency (FSA) under the general direction and supervision of the Executive Vice President, CCC or designee. The program shall be carried out in the field by State and county FSA employees under the general direction and supervision of the State and county FSA committees.

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations in this part, as amended or supplemented.

(c) The State committee shall take any action required by this part which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action which is

not in accordance with the regulations of this part.

(d) No delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(e) The Deputy Administrator for Farm Programs (DAFP), FSA, may authorize State and county committees to waive or modify deadlines and other program requirements in cases where timeliness or failure to meet such other requirements does not adversely affect the operation of the program. In addition, DAFP may establish other conditions for payments that will assist in achieving the goals of the program and may include such provisions in the program agreement or other program documents.

### § 1421.302 Eligible producer and eligible land.

(a) To be an eligible producer for a payment under this subpart, the person must be a producer of wheat, barley, oats, or triticale in the 2008 through 2012 crop years. Also, to be an eligible producer, the person must meet all other qualifications for payment that are set out in this subpart, set out in parts 12, 718, 1400, and 1405 of this title. A person will not be considered the producer of the crop unless that person was responsible for the planting of the crop and had control and title of the crop at all times, including, at the time of planting and the time of the request for a payment under, this subpart.

(b) A minor may participate in the program if the right of majority has been conferred on the minor by court order or by statute, or if the minor participates through a guardian authorized to act on the minor's behalf in these matters. Alternatively, a minor may participate if the program documents are all signed by an acceptable (to CCC) guarantor or if bond, acceptable to CCC, is provided by a surety.

(c) For the crop to be eligible, the crop, in addition to other standards that may apply, must be grown on land that is classified as "cropland" in FSA farm records or on land that FSA determines has been cropped in the last 3 years except that the land may also qualify if the land is committed to a crop rotation, normal for the locality, that includes harvesting the subject crop for grain. These rules are designed to assure, to the extent practicable, the available payment did not produce plantings that otherwise would not have occurred and the CCC may deny payments in any instance in which there is reason to believe that the planting was done for that purpose. To that end, if the commodity involved has not been previously grown by the producer or is not one which is not predominately produced locally, the producer must submit evidence of seed purchases for planting the commodities and other evidence deemed needed or appropriate by the COC in order to assure that the program goals are made and that the land was not planted to an eligible commodity simply to obtain a payment. Also, the land to be eligible must, for the year involved, be grazed and cannot, during the crop year, be harvested at any time for any purpose, except as determined by the Deputy Administrator to accommodate producers with a history of double-cropping when the crop to be harvested is not the crop for which a payment is to be made under this subpart. Land will be considered grazed only to the extent that the crop on the land is consumed in the field as live plants by livestock for the normal period of time for grazing in the area.

(d)(1) A producer must, at the time of the agreement made under this part to obtain a payment, meet all other eligible criteria for obtaining loan deficiency payments.

(2) For producers of triticale who obtain a payment under this subpart the producer must enter into an agreement with CCC to forgo any harvesting of triticale on the acreage for which such a payment is made.

(e)(1) No payment will be made if the crop could not have been harvested because of weather conditions or any other reason.

(2) The producer must retain the control and title of the commodity for which the payment is sought from the date of planting through the date on

which mechanical harvesting of the crop would normally occur.

(f) Producers who elect to graze 2008 through 2012 crop wheat, barley, oats, or triticale will not be eligible for an indemnity under the Federal Crop Insurance Program provision of Chapter IV of this title or a payment under Noninsured Crop Assistance Program authorized under part 1437 of this chapter.

[66 FR 13404, Mar. 6, 2001. Redesignated and amended at 67 FR 63511, 63523, Oct. 11, 2002. Redesignated and amended at 74 FR 15656, Apr. 7, 2009]

### § 1421.303 Time and method for application.

Application for the program provided in this subpart must be received, at the county office that is responsible for administering programs for the farm, no earlier than the date on which eligible crops would normally be harvested and no later than the final loan availability date as determined in accordance with § 1421.5. The application must describe the land to be grazed and, in accordance with standards set by CCC, the tract/field location. The COC will determine the first harvest date which shall take into account the date on which such crops are, locally, normally harvested for any purpose. Where multiple producers are involved, the form must reflect each producer's share in the crop. No producer must receive payments under this subpart except to the extent that the payments are commensurate with that share. Should a person who is entitled to receive a payment under this subpart die, that payment, as earned, may be made to other persons as provided for in the rules set out in part 707. Third parties may also receive payments to the extent provided for in that part for other situations involving an incapacitation of the producer. Refusals to allow CCC to verify information on any form or report utilized for this subpart can result in program ineligibility and producers must provide CCC and its agent to the property involved and to all records as may be relevant to the making of payments under this subpart. Further, false statements will disqualify the producer from the program and may be subject to other sanctions including criminal sanctions.

[66 FR 13404, Mar. 6, 2001. Redesignated and amended at 67 FR 63511, 63524, Oct. 11, 2002. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.304 Payment amount.

(a) The grazing payment rate shall be the loan deficiency payment in effect for the farm on the date which the producer submits a complete program application to CCC. For triticale, the grazing rate will be equal to the loan deficiency payment rate in effect for the predominant class of wheat in the county where the farm is located as of the date the application is filed.

(b) The payable units of production shall be computed by multiplying the eligible grazed acres by the applicable yield determined under paragraph (c) of this section.

(c) The payment yield shall be the yield in effect for the calculation of direct payments under part 1412 of this chapter. In a case of a farm for which a farm program payment yield is unavailable for a covered commodity, an appropriate payment yield for the covered commodity on the farm will be determined by CCC taking into consideration the farm program payment yields applicable to the commodity using three (3) similar farms. For triticale, the payment yield shall be the yield for wheat from three (3) similar farms in that county.

(d) No payment may be received or retained under this subpart to the extent that the payment, were they considered to be LDP's, would place that person over the per person per year payment limit that applies to LDP's. The producer agrees that the CCC may collect any payment considered to be an overpayment by reason of this subsection by withholding LDP payments until the matter is resolved, by treating the LDP as being not payable to the extent that a grazing refund would otherwise be due, by setoff, or by any other means available to CCC.

(e) Payments can be withheld until the actual grazed acreage is verified and justified in connection with any other reports filed with FSA with respect to the farm (or filed with some other person or agency) and until all

other necessary information is obtained. CCC may require such other verification as it deems appropriate to assure that the program goals are met.

(f) To receive the payment, the eligible producer must submit a request for payment on an application form as prescribed by CCC or FSA. The application may be obtained from the county FSA office, or from the USDA or FSA web site in the Internet. The form must be submitted to the county by the close of business on or before March 31 of the calendar year following the year the crop is normally harvested.

(g) The producer will be ineligible for payments under this subpart if any discrepancies between the reported acreage on the program form and other reports of acreage by the producer are not resolved by a date set by CCC.

[66 FR 13404, Mar. 6, 2001. Redesignated and amended at 67 FR 63511, 63524, Oct. 11, 2002. Redesignated and amended at 74 FR 15656, Apr. 7, 2009]

### § 1421.305 Misrepresentation and scheme or device.

(a) A producer shall be ineligible to receive payments under this subpart if it is determined by DAFP, the State committee, or the county committee to have:

(1) Adopted any scheme or device which tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this subpart to a producer engaged in a misrepresentation, scheme, or device, or to any other person as a result of the producer's actions, shall be refunded with interest together with such other sums as may become due. Any producer engaged in acts prohibited by this section and any person receiving payment under this subpart, as a result of such acts, shall be jointly and severally liable for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

[≤66 FR 13404, Mar. 6, 2001. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.306 Refunds; joint and several liability.

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under this application, of this subpart, and if any refund of a payment to CCC shall become due for that or other reason in connection with the application, of this subpart, all payments made under this subpart to any producer shall be refunded to CCC together with interest as determined in accordance with paragraph (c) of this section and late-payment charges as provided for in part 1402 of this chapter.

(b) All persons listed on an application shall be jointly and severally liable for any refund due in connection with that application and for any related charges which may be determined to be due for any reason.

(c) Interest shall be applicable to refunds required from the producer. Such interest shall be charged at the rate of interest which the United States Treasury charges CCC for funds, as of the date CCC made such benefits available. Such interest shall accrue from the date such benefits were made available to the date of repayment but the interest rate shall increase to reflect any increase in the rate charged to CCC by Treasury for any percent of time for which the interest assessment is collected. CCC may waive the accrual of interest if CCC determines that the cause of the erroneous determination was not due to any action of the producer.

(d) Late payment interest shall be assessed on refunds in accordance with the provisions of, and subject to the rates in part 1403 of this chapter.

(e) Producers must refund to CCC any excess payments made by CCC with respect to any application in which they have an interest. Such refund shall be subject to interest at the same rate that applies to other refunds.

[66 FR 13404, Mar. 6, 2001. Redesignated and amended at 74 FR 15656, Apr. 7, 2009]

## Subpart E—Designated Marketing Associations for Peanuts

SOURCE: 70 FR 33799, June 10, 2005, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to subpart appear at 74 FR 15656, Apr. 7, 2009.

### § 1421.400 Applicability and abbreviations.

(a) This subpart sets forth the terms and conditions under which an entity which is a marketing association of peanut producers, or a subsidiary of such an entity, may qualify to become an eligible "designated marketing association" or "DMA" qualified to process peanut marketing assistance loans and peanut loan deficiency payments for peanut producers. This subpart only applies with respect to peanut loans and peanut loan deficiency payments.

(b) [Reserved]

[70 FR 33799, June 10, 2005, as amended at 74 FR 15656, Apr. 7, 2009]

### § 1421.401 DMA responsibilities.

(a) DMAs are eligible to process the marketing loans and loan deficiency payments provided for in this part only for peanut producers and only if the DMA and the producers and peanuts meet all eligibility criteria set out in this part, including, but not limited to, the DMA eligibility provisions of this subpart. In carrying out those functions, DMAs must:

(1) Prepare and execute the appropriate CCC peanut MAL and LDP application documents;

(2) Determine whether producers and the commodity are eligible for MALs and LDPs, including whether the otherwise eligible peanuts are free and clear of all liens which DMAs shall determine by performing lien searches at DMAs expense;

(3) Instruct the holder of EWRs, if applicable, to notify the EWR provider to amend the EWR to show CCC is the holder;

(4) Receive MAL and LDP documents from a DMA Service County Office;

(5) Disburse peanut MALs and LDP proceeds to eligible producers;

(6) Prepare and execute documents for MAL repayments;

(7) Collect loan repayments from producers or buyers and transmitting these funds to CCC;

(8) Transmit documents to render forfeited collateral to CCC; and

(9) Collect data for reporting to CCC as required by CCC;

(b) As part of performing the responsibilities in paragraph (a) of this section, DMAs shall:

(1) Become knowledgeable of and follow the procedures in CCC and FSA peanut program regulations, applicable notices published in the FEDERAL REGISTER, applicable FSA peanut program handbooks and amendments thereto, and any applicable notices or instructions issued by FSA and the Agricultural Marketing Service.

(2) Make and service CCC peanut MALs and LDPs, only upon the presenting by producers or their agents of the warehouse receipts, unless otherwise directed by CCC.

(3) Attend, at the DMAs expense, DMA peanut MAL, and LDP program training offered by CCC.

(4) Provide sufficient personnel, computer hardware, computer communications systems, and software, as determined necessary by CCC, to administer the peanut MAL and LDP program.

[70 FR 33799, June 10, 2005. Redesignated and amended at 74 FR 15656, Apr. 7, 2009]

### § 1421.402 DMA eligibility to process loans and loan deficiency payments.

(a) A DMA is eligible to process any marketing assistance loan or loan deficiency payments only if approved in advance to handle such matters by the Farm Service Agency pursuant to this part; and:

(1) The DMA meets the financial requirements and other requirements in this subpart and part;

(2) The DMA is comprised solely of peanut producers or is a subsidiary of an organization of peanut producers;

(3) The DMA is not controlled directly or indirectly by a person or entity that acquires peanuts for processing or crushing through a business involved in buying and selling peanuts or peanut products;

(4) The DMA does not take title at any time to any peanuts for which it processes loans or loan deficiency payments, irrespective of whether such title is taken before or after those activities are performed. If such title or interest is taken, the DMA shall be responsible to return to CCC the full amount of the CCC proceeds disbursed with respect to the peanuts; and

(5) The DMA meets any additional requirements imposed by CCC or FSA.

(b) The DMAs activities under this part shall be conducted only with respect to peanuts and only for producers and peanuts that meet all the eligibility requirements of this part. Such requirements include, but are not limited to, the requirement of § 1421.6 that the producer must have the beneficial interest in the peanuts while the peanuts are under loan or when the loan deficiency payment is received and must be the only person that has had such an interest in the peanuts prior to that time except as allowed by § 1421.6.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.403 DMA approval.

(a) Entities wishing to apply to be a DMA enabled to perform loan and loan deficiency functions under this part for peanuts must submit an application for such approval to FSA in a form approved by CCC. That application shall include the following:

(1) Two originals of a properly executed Designated Marketing Association agreement containing the terms and conditions prescribed by CCC.

(2) A financial statement of not less than 1 year old on the date submitted, including accompanying notes, schedules, or exhibits, certified by a certified public accountant as fairly representing the entity's financial condition.

(3) The entity's tax identification number.

(4) A copy of any applicable incorporating or partnership documents.

(5) The applicant entity's mailing address, electronic mail address, and telephone number and facsimile number.

(6) Any and all information requested by CCC regarding the DMAs materials, and equipment as CCC determines is necessary for the applicant to perform the services for which the approval to perform is sought.

(7) A narrative explaining how the proposed DMA entity or parent entity provides marketing services to peanut producers.

(8) Any additional information or financial security requested by the Agency.

(b) Applicants are responsible for notifying FSA when any changes occur to their operations requiring amendments to their application or supporting documents.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.404 Financial security.

In order to be approved to handle loans and loan deficiency payments, the DMA must:

(a) Have a current net worth ratio of at least 1:1.

(b) Provide security equal to $100,000 or a greater amount as determined by CCC.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.405 Liability.

(a) DMAs shall indemnify CCC against any claim or loss by CCC in connection with the processing of any MALs or LDPs or other activity carried out by the DMA. If CCC pays any claim or suffers a loss as a result of the actions of DMA, or if a refund otherwise becomes due to CCC, payment in the amount of such losses or refund, plus interest, may be set-off by CCC from the financial security provided by DMA as required by this subpart. If the amount of the loss exceeds the amount of the financial security, such amount shall be paid to CCC by DMA with interest. Interest and other charges may be assessed consistent with § 1403.9 of this chapter. Remedies provided in this section or part are in addition to other remedies or penalties, whether civil, criminal or otherwise, as may apply.

(b) If a DMA becomes liable to CCC under paragraph (a) of this section or otherwise in connection with this subpart, such DMA shall not be eligible to process a LDP or MAL until the claim amount owed CCC is paid in full, and the full amount of financial security required by this subpart has been restored.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.406 Reporting requirements.

(a) *Report of changes.* A DMA shall furnish information to CCC within thirty calendar days relating to any

substantial change in the DMA operations including but not limited to the following:

(1) A change in its articles of incorporation;

(2) A resolution affecting loan or LDP operations.

(3) A change to the DMAs name, address, phone number, or related information on the DMA agreement.

(b) *Other Information*. The DMA shall supply such additional information as CCC may request related to the DMAs continued approval by CCC to process loans and LDPs under the authority provided in this subpart.

(c) *CCC request for information*. CCC may require a DMA to submit updated information, a new application, or a request for recertification whenever CCC becomes aware of any changes or has any reason to be uncertain that the DMA is operating in a manner that is consistent with the information already submitted, or consistent with this part.

(d) *Annual recertification*. Within 4 months after the end of the DMAs fiscal year, a DMA must submit the following information to CCC:

(1) A current financial statement prepared according to generally accepted accounting principles;

(2) A report of audit or review of the financial statement conducted by an independent Certified Public Accountant. The accountant's report of audit or review shall include the accountant's certifications, assurances, opinions, comments, and notes with respect to such financial statements.

(3) Additional financial security as determined by CCC, if the financial security on file with CCC does not meet current requirements or has expired.

(4) A report of changes as required under paragraph (a) of this section.

(e) *Activity report*. DMAs shall provide CCC reports of MAL and LDP volume and benefit earnings made by the DMA for individual producers, and gains received on behalf of each peanut producer, in a format as directed by CCC.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.407 Suspension and termination.

(a) *Suspension*. If CCC determines that a DMA is not in compliance with the DMA agreement CCC may suspend the DMA from making peanut MALs and LDPs until the DMA corrects the violation, or longer.

(b) *Termination*. The DMA agreement may be terminated by the DMA upon 30-calendar day's written notice to CCC. CCC may cancel the agreement at any time. Upon termination DMA shall immediately cease processing MAL or LDP requests and documents except as needed to preserve CCC's position with respect to existing loans or LDPs.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.408 Prohibited activity.

(a) DMAs approved to handle loans under this subpart may not:

(1) Discriminate against or deny any producer from receiving MALs or LDPs because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status for which they would otherwise be eligible under the statutes regulating the MAL and LDP program.

(2) Pool peanuts for the purpose of obtaining peanut MALs or LDPs from CCC.

(3) Pool the proceeds obtained from peanut MALs or LDPs made by CCC.

(4) Process farm-stored certified or measured MALs or LDPs unless authorized by CCC.

(5) Take title to any peanuts.

(6) Operate the DMA under the same entity and tax identification number of a CCC-approved CMA.

(7) Refuse services to producers because the DMA was not granted a power of attorney for purposes of executing MAL documents to obtain MALs for the producer, repaying the MAL for the producer, obtaining LDPs for the producer, or marketing the producer's peanuts.

(8) Adopt any scheme or device to circumvent the purpose of the peanuts MAL and LDP program regulations, the regulation governing DMAs, or the DMAs agreement with CCC.

(9) Process MALs or LDPs for producers involved in a bankruptcy proceeding unless authorized by CCC.

(10) Process MALs or LDPs on ineligible peanuts.

(b) If the prohibitions of this section are violated FSA or CCC may take one or more of the actions authorized in this part or otherwise authorized.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.409 Monitoring payment limitations.

DMAs shall monitor potential gains for producers and not disburse proceeds or permit loan repayments in lieu of forfeitures of the peanuts that would produce a gain over the per person per year limit allowed to the producer by this part and part 1400 of this chapter or which would otherwise be prohibited. Payment limitations are not applicable for the 2009 through 2012 crop years.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.410 Recordkeeping requirements.

A DMA shall maintain producer MAL and LDP paper documents and electronic records for an indefinite period unless otherwise notified by CCC.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.411 Forms.

For purposes of conducting business related to this part, a DMA shall use either current CCC forms or other forms approved by CCC. A DMA may perform functions under this part only when approval has been obtained by CCC.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.412 Powers of attorney.

DMAs may hold a power of attorney from a producer allowing the DMA to sign MAL and LDP documents for the producer, but DMAs may obtain and hold such powers only in accordance with the requirements of CCC governing such powers.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.413 Liens and waivers.

DMAs performing loan-related functions pursuant to the authority in this subpart shall determine, to the same extent as required for loans handled by FSA county offices, whether a lien on the peanuts exists by performing or obtaining a lien search for all peanuts to be pledged for each MAL, except that the cost associated with such lien search and any necessary lien waivers shall be borne by the DMA. If a lien exists, the DMA shall obtain, on an approved CCC form, a signed waiver from each lienholder with an interest in any such lien.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.414 Producer request to a DMA for an MAL or LDP.

Peanut producers or their authorized agent may request that an MAL or LDP be processed by a DMA only if the DMA is approved under this subpart to process such a request and only if the producer supplies to the DMA:

(a) *Beneficial interest information.* Beneficial interest must be maintained by the producer according to § 1421.6 for the peanuts to be eligible for MAL or LDP; accordingly, the producer must supply to the DMA such information as it needed to make that determination.

(b) *Warehouse receipts and lien information.* Producers must supply for all peanuts either individual paper warehouse receipts in the producer's name or an electronic warehouse receipt (EWR) number and provider's name. Producers must supply relevant lien information regarding the peanuts; however, the producer's obligation in this regard does not relieve the DMA from making the appropriate lien search.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.415 Processing marketing assistance loans.

DMAs shall take the following actions in the following order when an application for an MAL is filed:

(a) Make all the determinations that are a precondition for a loan, including lien determinations and if requested by the producer, enter into a power of attorney agreement with the producer.

(b) If there is an EWR for the peanuts, instruct the current holder to notify the electronic warehouse receipt provider to amend the electronic warehouse receipt to show the DMA as holder. If a paper receipt is involved, the DMA must obtain the receipt (and later, at the appropriate time include the receipt in the documents delivered to the CCC).

(c) Complete all MAL forms.

(d) After the producer or the person holding the power of attorney for the producer signs MAL document, provide the signatory with copies of the documents.

(e) Where there is an EWR for the peanuts notify the EWR provider to make CCC the holder of the EWR and secure an affirmation verifying that CCC has been made the holder of the EWR.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.416 Processing loan deficiency payments.

(a) DMAs shall take the following actions in the following order when an application for an LDP is filed:

(1) In addition to other determinations as must be made, the DMA shall determined whether the producer has sufficient remaining eligibility under the applicable payment limit to allow the receipt of the LDP. If there is not sufficient eligibility, the DMA must refuse to process the request;

(2) If EWRs are applicable for the peanuts for which the LDP is sought, the DMA must instruct the current holder to notify the EWR provider to amend the EWR to show that the peanuts were used to obtain an LDP;

(3) The DMA must insure that the producer or the person holding the power of attorney for the producer signs the LDP documents; and

(4) If the peanuts and the producer are eligible for the loan and all other conditions have been met, the DMA may disburse funds to the producer subject to the time limits set out elsewhere in this part.

(b) The LDP rate applicable to the LDP request will be the rate in effect on the date the DMA receives the request except as may otherwise be provided for in this part.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.417 Disbursing MAL and LDP proceeds.

(a) A DMA may request that CCC establish a drawdown account from which to disburse MAL and LDP amounts to producers, and designate the financial institution they wish to use.

(b) CCC will determine whether a drawdown account is justified and the amount of the account.

(c) If there is no drawdown account, MAL and LDP proceeds shall be distributed to the producer within 3 work days from the date the DMA receives MAL or LDP proceeds from CCC, after deduction of authorized charges or fees for services. If there is a drawdown account, the MAL and LDP proceeds shall be distributed to the producer within 3 days of the completion of the application.

(d) The DMA shall assess charges and fees at the same rate for each producer that it serves.

(e) If a drawdown account is used, CCC shall replenish the amount as necessary as it is drawn down.

(f) The DMA must notify CCC of the actual date on which the MAL is disbursed.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.418 Submitting MAL and LDP documentation to FSA.

(a) Until such time as an alternative FSA loan or LDP making system is made available to DMAs, within 3 business days of any DMA prepared disbursement, the DMA shall group separately and submit to FSA:

(1) MALs with the same disbursement date, peanut type, warehouse code, and State where peanuts were inspected; and

(2) LDPs with the same LDP rate, approval date, and peanut type.

(b) Each of the groups identified in paragraph (a) of this section shall be

submitted to FSA with the following documents:

(1) Individual paper warehouse receipts or EWR numbers, and the EWR provider's name representing the bundled MALs or LDPs.

(2) A form to itemize receipts, and other data, as required, or a pre-processed electronic file containing data required by FSA.

(c) FSA may process each DMA prepared MAL or LDP group for the volume of peanuts on multiple receipts as one MAL or LDP, waive the service fee to the DMA, and either hold MAL paper warehouse receipts, or verify that CCC is holder of the EWRs as of the date of disbursement.

(d) In the case of an MAL, if CCC was not the holder of the EWR on or before the date the DMA prepared MAL was disbursed, the applicable receipts shall be rejected, and funds shall not be distributed to the DMA drawdown account until CCC becomes the holder of the EWR.

(e) If MAL and LDP documentation is acceptable, FSA will disburse MAL or LDP funds to the DMA, with appropriate supporting documentation.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.419 MAL or LDP servicing.

(a) The DMA shall be responsible for servicing MALs and are required to take the following actions:

(1) Send the producer a maturity notice letter before MAL maturity.

(2) Maintain the MAL or LDP documents according to FSA requirements.

(3) Transmit the necessary funds to repay the MAL to FSA.

(b) FSA shall process the CCC release of paper receipts or EWRs where such a release is appropriate.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.420 Inspections and reviews.

The books, documents, papers, and records of the DMA and parent company shall be maintained for six years after the applicable crop year and shall be made available to CCC for inspection and examination at all reasonable times. At any time after an application is received, CCC shall have the right to examine all books, documents, papers, and determine whether the DMA is operating or has operated in accordance with the regulations in this part, any articles of incorporation, articles of association, partnership documents, agreements with producers, the representations made by the DMA in its application for approval, and, where applicable, its agreements with CCC. If the DMA is determined to be not complying with this part or any of its agreements, CCC will take appropriate action as provided in elsewhere in this subpart or other action CCC determines appropriate.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

### § 1421.421 Appeals.

Parts 11 and 780 of this title apply to this subpart.

[70 FR 33799, June 10, 2005. Redesignated at 74 FR 15656, Apr. 7, 2009]

## PART 1423—COMMODITY CREDIT CORPORATION APPROVED WAREHOUSES

Sec.

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1423.13 Appeals, suspensions, and debarment.

AUTHORITY: 15 U.S.C. 714b and 714c.

SOURCE: 71 FR 35773, June 22, 2006, unless otherwise noted.

### § 1423.1 Applicability.

(a) This part sets forth the terms and conditions for approval of a warehouse operator by the Commodity Credit Corporation (CCC) to store and handle CCC interest commodities, which are owned by CCC and, as may be required under

parts 1421, 1427 and 1435 of this title, with respect to commodities pledged as security for a loan made by CCC. CCC may require that a warehouse enter into a storage agreement under this part to store such commodities. The execution of such a storage agreement by CCC does not constitute a commitment that CCC will use the warehouse.

(b) By entering into a storage agreement with CCC, the warehouse operator agrees to comply with the terms and conditions of the storage agreement.

### § 1423.2 Administration.

On behalf of CCC, the Farm Service Agency (FSA) will administer this part under the supervision of the Deputy Administrator for Commodity Operations (Deputy Administrator), FSA.

### § 1423.3 Definitions.

*Active shipping order* means an early shipping order or shipping order, as defined in this section, scheduled for a current cotton warehouse reporting week or for a prior reporting week, but not picked up.

*Agreement* means agreements covering storage and handling of any such commodity CCC may determine appropriate for storage.

*Early shipping order* means a list of bale tag numbers sent to a cotton warehouse operator without transfer of warehouse receipts.

*KCCO* means the FSA, Kansas City Commodity Office.

*Shipping order* means a list of bale tag numbers sent to a cotton warehouse operator accompanied by transfer of warehouse receipts.

*Warehouse* means a building, structure, or other protected enclosure, in good state of repair, and adequately equipped to receive, handle, store, preserve, and deliver the applicable commodity.

*Warehouse operator* means an individual, partnership, corporation, association, or other legal entity engaged in the business of storing or handling for hire, or both, the applicable commodity.

[71 FR 35773, June 22, 2006, as amended at 75 FR 50849, Aug. 18, 2010]

### § 1423.4 General requirements.

(a) Unless otherwise provided in this part, approved warehouse operators must maintain a current and valid license for the kind of storage operation for which the warehouse operator seeks approval if such a license is required by State or local laws or regulations and maintain accurate and complete inventory and operating records.

(b) Approved warehouse operators may only use pre-numbered warehouse receipts, or pre-assigned ranges of numbers for electronic warehouse receipts as set forth in the agreement, and may only use pre-numbered scale tickets, if applicable, as CCC may approve.

(c) In addition, the warehouse operator must:

(1) Be in compliance with state and local laws regarding fire safety;

(2) Furnish a copy of any written lease agreement to CCC with the application. All leases are subject to CCC approval; and

(3) Have sufficient employees and management with technical qualifications and skills in the warehousing business regarding the commodities subject to the agreement.

(d) Unless otherwise provided in this part, each approved warehouse shall:

(1) Be maintained under the control of the warehouse operator;

(2) Be maintained in a good state of repair; and

(3) Maintain adequate equipment to receive, handle, store, preserve and deliver the applicable commodity.

### § 1423.5 Application requirements.

To apply for approval under this part, a warehouse operator shall submit to CCC the following:

(a) An application as prescribed by CCC for the applicable commodity storage agreement;

(b) Evidence of compliance with § 1423.4;

(c) Current financial information sufficient to meet the requirements of § 1423.6;

(d) For State licensed or non-licensed warehouse operators, a sample copy of the warehouse operator's warehouse receipts or electronic warehouse receipt record descriptor when applicable; and

(e) Such other documents or information as CCC may require to make a determination that the warehouse operator can comply with the provisions of this part.

### § 1423.6 Financial information documentation requirements.

To be approved under this part, a warehouse operator shall submit a current financial statement at the time of application, and annually thereafter, as provided for in the applicable storage agreement.

### § 1423.7 Net worth alternatives.

Warehouse operators with net worth equal to or greater than the minimum net worth required, but less than the total net worth for the commodity involved in the particular agreement, may satisfy the net worth deficiency by furnishing one of the following:

(a) A bond which:

(1) Is executed by a surety approved by the U.S. Department of the Treasury so long as the surety maintains someone authorized to accept service of legal process in the State where the warehouse is located.

(2) Is executed on either a bond form obtained from CCC, or which is furnished under State law or operational rules for non-governmental supervisory agencies, if approved by CCC, so long as CCC determines that such alternative bond:

(i) Provides adequate protection to CCC;

(ii) Has been executed by a surety approved by the U.S. Department of the Treasury or has an acceptable blanket rider and endorsement executed by such a surety with the liability of the surety under such rider or endorsement being the same as that of the surety under the original bond; and

(iii) Is effective for at least 1 year and cannot be canceled without 120 days notice to CCC. Excess coverage on a bond for one warehouse will not be accepted by CCC against insufficient bond coverage on other warehouses;

(b) Cash and negotiable securities. Any such cash or negotiable securities accepted by CCC will be returned to the warehouse operator when the period for which coverage was required has ended and CCC determines there is no liability under the storage agreement;

(c) An irrevocable letter of credit meeting CCC requirements that is effective for at least 1 year and cannot be canceled without 120 days notice to CCC. The issuing bank must be a commercial bank insured by the Federal Deposit Insurance Corporation or a financial institution subject to the Farm Credit Act, or

(d) Other alternative instruments and forms of financial assurance as the Deputy Administrator determines appropriate to secure the warehouse operator's compliance with this section.

### § 1423.8 Approval or rejection.

(a) CCC will notify warehouse operators approved under this part in writing. Such approval does not relieve the warehouse operator of any obligation under any agreement to CCC or any other agency of the United States, and does not obligate CCC to use the warehouse.

(b) CCC will notify the warehouse operator of rejection under this part in writing. The notification will state the cause(s) for rejection. CCC will reconsider a warehouse for approval when the warehouse operator establishes that the reasons for rejection have been remedied or requests reconsideration of the action and presents to the Director, KCCO, in writing, information in support of such request. The warehouse operator may, if dissatisfied with the Director's determination, obtain a review of the determination and an informal hearing by submitting a request with the Deputy Administrator. Appeals shall be as prescribed in part 780 of this title.

[71 FR 35773, June 22, 2006, as amended at 71 FR 42017, July 25, 2006]

### § 1423.9 Examination of warehouses.

Before approval, and while a storage agreement is in effect, a warehouse must be examined by a person designated by CCC periodically to determine compliance with this part. CCC or any other agency of USDA shall, at any time, have the right to inspect the warehouse storage facilities and any applicable records. Inspection or examination by CCC does not absolve the warehouse operator of any failure to

comply with this part that CCC does not discover. Failure to allow access to facilities as required under this paragraph will result in rejection or revocation of approval.

### § 1423.10 Exceptions for United States Warehouse Act licensed warehouses.

The financial requirements, net worth alternatives and examination provisions of this part do not apply if the warehouse operator is licensed under the U.S. Warehouse Act (USWA) for such commodities, but an examination under this part will be made of such a warehouse whenever CCC determines such action is necessary to protect its interests.

### § 1423.11 Delivery and shipping standards for cotton warehouses.

(a) Unless prevented from doing so by severe weather conditions, fire, explosion, flood, earthquake, insurrection, riot, strike, labor dispute, acts of civil or military authority, non-availability of transportation facilities or any cause beyond the control of the warehouse operator that renders performance impossible, the warehouse operator will:

(1) Deliver stored cotton without unnecessary delay.

(2) Be considered to have delivered cotton without unnecessary delay if, for the week in question, the warehouse operator has made available for shipment at least 4.5 percent of their applicable storage capacity in effect during the relevant week of shipment.

(b) The warehouse operator shall provide a written report to CCC on a weekly basis. The reporting week shall be the seven day period starting at midnight following the close of business on each Saturday and ending at midnight after close of business of the following Saturday. Before close of business of the first business day of the following week, the warehouse operator will provide following information to CCC:

(1) Bales made available for shipment (BMAS) during such week. BMAS is defined as any cotton bales that:

(i) Have been delivered, or are scheduled and ready for delivery during such week; and

(ii) Were scheduled and ready for delivery in a previous week, but were not picked up by the shipper and remain available for immediate loading and another shipping date has not been established, or such bales are not subject to a restocking fee as provided in the warehouse operator's public tariff.

(2) Active shipping orders, by week; and

(3) Applicable storage capacity that is the higher of CCC approved capacity or the maximum number of bales stored at any time during the applicable crop year.

(c) The warehouse operator may resolve any claim for noncompliance from any entity other than CCC with the cotton shipping standard in a court of competent jurisdiction or through mutually agreed upon arbitration procedures. In no case will CCC provide assistance or representation to parties involved in arbitration proceedings arising with respect to activities authorized under the Cotton Storage Agreement.

[71 FR 51426, Aug. 30, 2006]

### § 1423.12 Application, inspection, and annual agreement fees.

Each warehouse operator not licensed under USWA shall pay to CCC a fee or fees, including an application fee, inspection fee, and an annual agreement fee for each warehouse approved by CCC or for which approval is sought. The terms and conditions of such fees will be set forth in the applicable agreement.

### § 1423.13 Appeals, suspensions, and debarment.

(a) After initial approval, warehouse operators may request that CCC reconsider adverse actions when the warehouse operator establishes that the reasons for the action have been remedied or requests reconsideration of the action and presents to the Director, KCCO, in writing, information in support of such request. The warehouse operator may, if dissatisfied with the Director's determination, obtain a review of the determination and an informal hearing by submitting a request to the Deputy Administrator. Appeals shall be as prescribed in part 780 of this title, and under such regulations the

warehouse operator shall be considered as a "participant."

(b) Suspension and debarment actions taken under this part shall be conducted in accordance with part 1407 of this chapter. After expiration of the suspension or debarment period, a warehouse operator may, at any time, apply for approval under this part.

# PART 1424—BIOENERGY PROGRAM

Sec.
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1424.13 Misrepresentation and scheme or device.
1424.14 Offsets, assignments, interest and waivers.

AUTHORITY: 7 U.S.C. 8108, 15 U.S.C. 714b and 714c.

SOURCE: 68 FR 24600, May 7, 2003, unless otherwise noted.

## § 1424.1 Applicability.

This part sets out regulations for the Bioenergy Program (program). It sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions a bioenergy producer must meet to obtain payments under this program and part from the Commodity Credit Corporation (CCC) for eligible bioenergy production. Additional terms and conditions may be set forth in the document required to request program benefits and in the program contract or agreement prescribed by CCC. This program is effective October 1, 2002, through September 30, 2006.

## § 1424.2 Administration.

This part shall be administered by the Executive Vice President, CCC, under the general direction and supervision of the Executive Vice President or designee. The Executive Vice President or a designee may authorize a waiver or modification of deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the program, and may set such additional requirements as will facilitate the operation of the program. The funds available for the program shall be limited as set by this rule, otherwise announced by the Executive Vice President, CCC, or limited by law.

## § 1424.3 Definitions.

The definitions set forth in this section shall be applicable for all purposes of program administration under this subpart.

*Agreement* means the Bioenergy Program Agreement or other form prescribed by CCC that must be executed for participation in the program.

*Application* means the application form prescribed by CCC or another form that contains the same terms, conditions, and information required.

*ATF* means the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

*Base production* means a biodiesel producer's current FY's biodiesel production from eligible commodities that is not an increase over biodiesel production in the previous FY to date.

*Biodiesel* means a mono alkyl ester manufactured in the United States and its territories that meets the requirements of an appropriate American Society for Testing and Materials Standard.

*Biodiesel* producer means a producer that produces and sells biodiesel who is also registered and in compliance with section 211 (b) of the Environmental Protection Agency Clean Air Act Amendment of 1990.

*Bioenergy* means ethanol and biodiesel produced from eligible commodities.

*Conversion factor* means:

(1) For ethanol production, a factor that converts the number of ethanol gallons back to commodity units as determined in the manner announced by CCC;

(2) For biodiesel production, the factor that will treat 1.4 gallons of biodiesel produced as having involved the consumption of one bushel of soybeans in any case when the feedstock was an eligible commodity that has a corresponding oil or grease market price; if there is none, then the factor shall be as determined and announced by CCC.

*Eligible commodity* means barley; corn; grain sorghum; oats; rice; wheat; soybeans; cotton seed; sunflower seed; canola; crambe; rapeseed; safflower; sesame seed; flaxseed; mustard seed; cellulosic crops, such as switchgrass and hybrid poplars; fats, oils, and greases (including recycled fats, oils and greases) derived from an agricultural product; and any animal byproduct (in addition to oils, fats and greases) that may be used to produce bioenergy, as CCC determines, that is produced in the United States and its territories.

*Eligible producer* means a bioenergy producer who meets all requirements for program payments.

*Ethanol* means anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, rendered unfit for beverage use, produced at a facility and in a manner approved by ATF for the production of ethanol for fuel; or

(2) As denatured ethanol used by blenders and refiners and rendered unfit for beverage use.

*Ethanol producer* means a person authorized by ATF to produce ethanol.

*FSA* means the Farm Service Agency, USDA.

*FY* means the fiscal year beginning each October 1 and ending September 30 of the following calendar year.

*KCCO* means the FSA, Kansas City Commodity Office.

*Posted County Price* means the same Posted County Price for different locations as is used under other CCC commodity programs for marketing loan gains and other matters.

*Producer* is a legal entity (individual, partnership, cooperative, or corporation, etc.) who is a commercial bioenergy producer making application or otherwise involved under this program.

*Quarter* means the respective time periods of October 1 through December 31, January 1 through March 31, April 1 through June 30, and July 1 through September 30 of each FY, as applicable.

*Sign-up period* means the time period announced by CCC during which CCC will accept program agreements.

*USDA* means the United States Department of Agriculture.

### § 1424.4 General eligibility rules.

(a) An applicant must be determined eligible by KCCO and be assigned an agreement number.

(b) To be eligible for program payments, a producer must maintain records indicating for all relevant FY's and FY quarters:

(1) The use of eligible commodities in bioenergy production;

(2) The quantity of bioenergy produced from an eligible commodity by location;

(3) The quantity of eligible commodity used by location to produce the bioenergy referred to in paragraph (b)(2) of this section; and

(4) All other records, needed, or required by the agreement to establish program eligibility and compliance.

(c) A producer must allow verification by CCC of all information provided. Refusal to allow CCC or any other agency of USDA to verify any information provided will result in a producer being determined not eligible.

(d) For producers not purchasing raw commodity inputs, the production must equal or exceed that amount of production that would be calculated using the raw commodity inputs and the conversion factor set out in § 1424.3. A producer that purchases soy oil from a soybean crushing plant for further refinement into biodiesel must be able to prove to CCC's satisfaction both soy oil purchases and biodiesel production for the applicable quarter. Any special conversion factors needed will be the province of CCC and CCC alone and CCC's decision will be final.

(e) A producer must meet all other conditions set out in these regulations, in the agreement, or in other program documents.

### § 1424.5 Agreement process.

(a) To participate, an eligible producer must submit a signed agreement

during the FY sign-up period. Agreements may be for single or multiple FY's. However, multiple FY agreements require producers to submit annual production estimate reports during each applicable FY sign-up period. Such reports must comply with the terms of the agreement and this part. In all cases, the accounting for compliance will be made on a per FY basis.

(b) Sign-up each FY will be held for 30 calendar days beginning for:

(1) FY 2003 on the date of publication of this rule;

(2) FY 2004 and beyond on August 1 of the FY before the applicable FY.

(c) After agreements are submitted:

(1) If determined eligible by KCCO, an agreement number will be assigned, and a notification will be mailed to the producer;

(2) If additional information is needed for KCCO to determine eligibility, the producer will be contacted as soon as practicable and requested to provide additional supporting documentation;

(3) If determined ineligible by KCCO, producers will be notified in writing that their agreement was rejected and the reason for the determination.

### § 1424.6 Payment application process.

(a) To apply for payments under this program during an FY, an eligible producer must:

(1) Submit an application or eligibility report for each quarter. Submit the last quarterly application or report of the FY within 30 calendar days of the end of the FY for which payment is requested. If the actual deadline is a non-workday, the deadline will be the next business day;

(2) Certify with respect to the accuracy and truthfulness of the information provided;

(3) Furnish CCC such certification, and access to such records, as CCC considers necessary to verify compliance with program provisions; and

(4) Provide documentation as requested by CCC of both the producer's net purchases of eligible commodities and net production of bioenergy compared to such production at all locations during the relevant periods. CCC may adjust the formulaic payments otherwise payable to the producer if there is a difference between the amount actually used and certified and the amount of increased commodity use calculated under the formula.

(b) After applications or reports are submitted, eligible producers:

(1) Shall submit such additional supporting documentation as requested by KCCO when additional information is needed to determine eligibility;

(2) Will be notified in writing of their ineligibility and reason for the determination, when the application is determined ineligible by KCCO; and

(3) Shall promptly refund payments when a refund to CCC is due. If a refund is not made promptly, CCC may establish a claim.

### § 1424.7 Gross payable units.

(a) For ethanol, producers will be eligible for payments on gross payable units for only their ethanol production from eligible inputs that exceeds, for the program year to date, their total comparable production at all locations as compared to the comparable portion of the previous year. Producers of ethanol are not eligible for base production payments. Producers shall not be paid twice for the same increase and any decline in relative production between quarters will require a comparable refund. For example, if at the end of the first quarter, a producer were to be paid for an increase of 500 gallons of ethanol, but at the end of the second quarter, that producer's year-to-date production was down to a net increase for the year of 450 gallons, then a refund would be due for the loss of the corresponding 50 gallons of net extra production. Repayment rates shall be based on previous payment rates. Unless otherwise determined by CCC, the extra ethanol production from eligible inputs will be converted to gross payable units by dividing the gallons of increased ethanol by the applicable conversion factor.

(b) Biodiesel producers will be eligible for payments on gross payable units for all biodiesel production from eligible inputs. For eligibility purposes there will be two kinds of payment: additional production payments (APP), and base production payments (BPP). Repayment rates shall be based on previous payment rates. Unless otherwise determined by CCC, gross payable units

for biodiesel production from eligible inputs will be calculated as follows:

(1) For APP, by dividing the gallons of increased biodiesel by the biodiesel conversion factor of 1.4. APP payments will be made on increases as compared with the previous FY. Producers will not be paid twice for the same production. Failure to maintain year to date biodiesel production increases between quarters will require a comparable APP refund as specified below. That is, for example, if a producer were to be paid, at the end of the first quarter, for 500 gallons of increased biodiesel production, but by the end of the second quarter that producer's production, for the year to date, was only 450 gallons, then a refund of the APP premium would be due for the loss of the corresponding 50 gallons of net production increase.

(2) For BPP, which will be made on production not eligible for the APP, by dividing the base production by the biodiesel conversion factor of 1.4 and multiplying the result by 0.5 in FY 2003, 0.3 in FY 2004, 0.15 in FY 2005, or 0.0 (zero) in FY 2006 to determine base biodiesel production gross payable units.

(3) Adding the APP and BPP to determine biodiesel gross payable units.

(c) There shall only be one eligible producer per plant location.

(1) When producers move production from one plant to another between FY's, the prior FY's production for the producer for program payment calculations tied to increases in production shall be the greater of:

(i) The production at the plant operated by the producer in the prior FY, or

(ii) The production in the prior FY at the plant being taken over by the producer in the current FY.

(2) New producers who are taking over a plant with prior bioenergy production shall assume that production history for program purposes. For example: in FY 2002, Producer A produced 1,000 gallons of bioenergy in plant 1 and Producer B produced 500,000 of bioenergy in plant 2. In FY 2003, Producer A assumes operation of plant 2; Producer B moves to plant 3, which was not in the program in FY 2002, but with FY 2002 production of 400,000 gallons from eligible commodities; and Producer C assumes operations of plant 1. In FY 2003, for program purposes solely based on these respective plants, Producer A would have a prior FY production of 500,000 gallons; Producer B would have a prior FY production of 500,000 gallons; and Producer C would have a prior FY production of 1,000 gallons. These examples would apply when a producer moves its entire operation from one plant to another. Otherwise, for purposes of computing whether a producer has increased production in the current year from the previous year, the determination will be made by comparing for the current year the producer's production figures from all locations in which the producer has an interest with, for the previous year, the sum of:

(i) Production at those locations by any person including, but not limited to, the producer, and

(ii) Additional production by the producer at any other location in that year.

(3) Also, as needed to avoid frustrating the goals of the program, the Executive Vice President of CCC may treat producers with common interests, common ownership, or common facilities or arrangements as the same producer.

### § 1424.8 Payment amounts.

(a) An eligible producer may be paid the amount specified in this section, subject to the availability of funds. Total available funds shall be as determined appropriate by CCC and shall not exceed $150 million in any of FY's 2003 through 2006.

(b) For agreements submitted during an FY sign-up, applicants must project increases in production. Based on expected commodity prices, using the formula set out in this section, submissions will be assigned an expected payment value. When the payment value of all timely submitted and validly executed agreements exceed available funding, CCC may, at its discretion, prorate payments to be made under such agreements based on total available funding.

(c) When the payment value of all timely submitted applications exceed available funding, CCC will prorate

payments based on total available funding.

(d) Subject to this section and conditions in the agreement, a producer's payment eligibility shall be adjusted at the end of each quarter, and calculated as follows:

(1) Gross payable units, calculated and determined in accordance with § 1424.7, shall be converted to net payable units for producers whose annual bioenergy production is:

(i) Less than 65 million gallons, by dividing by 2.5;

(ii) Equal to or more than 65 million gallons, by dividing by 3.5;

(2) Net payable units calculated under paragraph (d)(1) of this section shall then be converted to a gross payment by multiplying net payable units by the per-unit value of the commodity as of the 10th business day before the start of the production quarter, determined as follows:

(i) For ethanol:

(A) For those agricultural commodities with an established Posted County Price, CCC will use the Posted County Price that CCC announces daily for the county in which the plant is located and applicable quality factors as CCC may establish.

(B) For agricultural commodities that CCC determines do not have Posted County Prices, CCC will use market data CCC determines to be appropriate for the applicable commodity.

(ii) For biodiesel made from:

(A) Soybeans or soy oil, CCC will use the Posted County Price for soybeans for the county where the plant is located.

(B) Eligible commodities other than soybeans or soy oil that have a corresponding oil or grease market price, CCC will first use the soybeans Posted County Price for Macon County, Illinois. Then, the applicable feedstock's oil or yellow grease (for animal fats and oils) market price, as determined by CCC, will be divided by the soy oil price published in the Agricultural Marketing Service's weekly "Soybean Crush Report" (Central Illinois (Decatur, Macon County, Illinois)) for the applicable date. The resulting percentage will be multiplied by the soybean gross payment to determine the producer's gross payment.

(C) Eligible commodities that do not have a corresponding oil or grease market price, in a manner as determined by CCC.

(3) The gross payment calculated under paragraph (d)(2) of this section shall be reduced to a net payment by multiplying the gross payment figure by the proration factor determined under paragraph (c) of this section.

(4) Subject to other provisions of this section, producers shall be paid the net current payment, if positive, determined for the quarter, subject to the requirements and refund provisions of this part.

(5) After the first quarter, adjustments shall be made based on changes in production. Refunds, when due, shall be due at the per unit values at which they were paid.

(6) For an FY, no producer may receive more than 5 percent of the available funding for this program.

(e) When the commodity's conversion factor has been established, that factor will, as practicable, be posted on the program's website.

(1) If the commodity's conversion factor is not determined when the sign-up is announced, the conversion factor will be provided in a letter to producers with accepted agreements to the extent practicable.

(2) After FY 2003, changes to established conversion factors shall be announced in a press release issued by CCC 90 calendar days before the applicable FY's sign-up, to the extent practicable.

### § 1424.9 Reports required.

Once an eligible producer has submitted a payment application, that producer shall file cumulative and per-plant information for each relevant bioenergy producing facility quarterly through the end of the applicable FY as specified by CCC or as otherwise needed to establish compliance with this part.

### § 1424.10 Succession and control of facilities and production.

A person who obtains a facility that is under contract under this part may request permission to succeed to the program agreement and CCC may grant such request if it is determined that permitting such succession would serve

the purposes of the program. If appropriate, CCC may require the consent of the original party to such succession. Also, CCC may terminate a contract and demand full refund of payments made if a contracting party loses control of a facility whose increased production is the basis of a program payment or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

### § 1424.11 Maintenance and inspection of records.

For the purpose of verifying compliance with the requirements of this part, each eligible producer shall make available at one place at all reasonable times for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to the program that is within the control of such entity for not less than three years from the payment date.

### § 1424.12 Appeals.

(a) A participant subject to an adverse determination under this part may appeal by submitting a written request to: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, D.C. 20250–0550. The appeal must be delivered in writing to the Deputy Administrator or postmarked within 30 days after the date the Agency decision is mailed or otherwise provided to the participant. The Deputy Administrator may consider a late appeal if determined warranted by the circumstances.

(b) The regulations at 7 CFR part 11 apply to decisions made under this part.

(c) Producers who believe they have been adversely affected by a determination by the Agency must seek review with the Deputy Administrator before any other review may be requested within the Agency.

### § 1424.13 Misrepresentation and scheme or device.

(a) A producer shall be ineligible to receive payments under this program if CCC determines the producer:

(1) Adopted any scheme or device that tends to defeat the purpose of the program in this part;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a producer engaged in a misrepresentation, scheme, or device, or to any other person as a result of the bioenergy producer's actions, shall be refunded with interest together with such other sums as may become due, plus damages as may be determined by CCC.

(c) Any producer or person engaged in an act prohibited by this section and any producer or person receiving payment under this part shall be jointly and severally liable for any refund due under this part and for related charges.

(d) The remedies provided in this part shall be in addition to other civil, criminal, or administrative remedies that may apply.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions and rates prescribed in part 1403 of this chapter.

### § 1424.14 Offsets, assignments, interest and waivers.

(a) Any payment or portion thereof to any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the bioenergy, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found in part 1403 of this chapter shall be applicable to agreement payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this chapter.

(c) Interest charged by CCC under this part shall be at the rate of interest that the United States Treasury charges CCC for funds, as of the date CCC made such funds available. Such interest shall accrue from the date such payments were made available to the date of repayment or the date interest increases as determined in accordance with applicable regulations.

(d) CCC may waive the accrual of interest and/or damages if CCC determines that the cause of the erroneous determination was not due to any action of the bioenergy producer.

# PART 1425—COOPERATIVE MARKETING ASSOCIATIONS

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AUTHORITY: 7 U.S.C. 1441 and 1421, 7 U.S.C. 7931–7939; and 15 U.S.C. 714b, 714c, and 714j.

SOURCE: 63 FR 17312, Apr. 9, 1998, unless otherwise noted.

## § 1425.1 Applicability.

This part sets forth the terms and conditions an approved Cooperative Marketing Association (CMA) must meet to obtain commodity marketing assistance loans (loans) and loan deficiency payments (LDP's) from CCC on behalf of its members. A CMA meeting these terms and conditions may obtain loans and LDP's for any eligible commodity for which a loan and LDP program is in effect.

## § 1425.2 Administration.

On behalf of CCC, the Farm Service Agency will administer the provisions of this part under the general direction and supervision of the Deputy Administrator for Farm Programs. In the field, the provisions of this part will be administered by the State and county FSA committees.

## § 1425.3 Definitions.

The definitions set forth in this section shall be applicable for all purposes of program administration. The terms defined in parts 718 of this title and parts 1421 and 1427 of this chapter shall also be applicable, except where those definitions conflict with the definitions in this section.

*Active member* is a member who has utilized the services offered by a CMA in one of the three preceding CMA fiscal years or such shorter period as may be provided in the CMA's articles of incorporation or bylaws.

*Approved cooperative marketing association (CMA)* is a cooperative approved by CCC to participate in loan and LDP programs for any authorized commodity.

*Authorized commodity* is a commodity for which a CMA is approved by CCC to obtain marketing assistance loans or Loan deficiency payments.

*Cooperative* is a business owned and controlled by the producers who use its services and operated under generally accepted cooperative principles.

*Eligible commodity* is a commodity which meets the commodity's eligibility requirements set forth in chapter XIV of this title, and is produced and delivered to the CMA from a producer eligible for loan or LDP.

*Loan pool* is any CMA pool containing commodities used by the CMA to obtain either loans or LDP's.

*Market gain* is the sum of loan rate, minus the repayment rate on loans repaid with less than the loan rate, plus for LDP's, the same rate, times the quantity of commodity. Market gains cannot exceed the producer's applicable payment limitation as set out in part 1400 of this chapter.

*Member* is a producer who:

(a) Has fully paid for membership stock or earned equity credits in the CMA;

(b) Has executed a uniform marketing agreement with the CMA; and

(c) Is entitled to all CMA membership rights.

[63 FR 17312, Apr. 9, 1998, as amended at 67 FR 64458, Oct. 18, 2002]

### § 1425.4 Approval.

(a) For a cooperative to gain CMA status to participate in a marketing assistance loan or Loan deficiency payment program for the 2002 through 2007 crop years, a cooperative must submit an application for approval to CCC. An application must include:

(1) A completed Form CCC–846 indicating commodities for which it seeks approval;

(2) A balance sheet, dated within the last year, prepared for the cooperative and accompanied by a letter from an independent Certified Public Accountant, certifying that the balance sheet was prepared in accordance with generally accepted accounting principles;

(3) A copy of the articles of incorporation or articles of association and all marketing agreements for loan pools, together with a certification that this material is current;

(4) Resolutions made by the cooperative's board of directors stating the cooperative will abide by provisions of this part, the nondiscrimination provisions thereof, and all other related CCC policies;

(5) A detailed description of how proceeds from each loan pool will be distributed to members as provided for in § 1425.18;

(6) An executed form CCC-Cotton G, Cotton Cooperative Loan Agreement, by cooperatives applying for approval to participate in the cotton loan and LDP program; and

(7) Other information as requested by CCC concerning the organizational, operational, financial or any other aspect of the cooperative requested by CCC related to the cooperative's proposed methods of conducting CCC loan and LDP business.

(b) A CMA must submit, on an annual basis, the following information to CCC:

(1) A completed Form CCC–846–1, which shall disclose:

(i) The number of active and inactive CMA members;

(ii) The CMA's allocated equity;

(iii) The CMA's unallocated equity; and

(iv) Quantity of each loan pool commodity delivered to the CMA for marketing and the portion of such commodities received from active members during the prior year.

(2) The CMA's latest balance sheet. This balance sheet must be dated within the past year and be accompanied by a letter from an independent Certified Public Accountant certifying that the balance sheet was prepared in accordance with generally accepted accounting principles.

(c) A CMA shall furnish information to CCC within thirty calendar days relating to any:

(1) Change in its articles of incorporation and loan pool marketing agreements;

(2) Resolution affecting loan or LDP operations;

(3) Change to the CMA's name, address, phone number, or related data shown on the CCC–846–1;

(4) Change in loan pool operations with an explanation and justification; and

(5) Additional information CCC may request related to the CMA's continued approval by CCC.

(d) CCC may require a CMA to submit a new initial application instead of a recertification application when it questions whether the CMA is operating according to documents previously submitted.

[63 FR 17312, Apr. 9, 1998, as amended at 67 FR 64458, Oct. 18, 2002]

### § 1425.5 Confidentiality.

Information submitted to CCC related to trade secrets, financial or commercial operations, or the financial condition of a CMA, whether for initial approval or continued approval, shall be kept confidential by the officers, agents, and employees of CCC and the Department of Agriculture except as required to be disclosed by law.

### § 1425.6 Approved CMA's.

(a) CCC shall, in accordance with the provisions of this part, approve a CMA to obtain marketing assistance loans and LDP's.

(b) CCC may approve a CMA to participate in a marketing assistance loan and Loan deficiency payment program for the 2002 through 2007 crops as:

(1) Unconditionally approved; or

(2) Conditionally approved.

(c) If CCC determines a CMA is in substantial but not total compliance with the requirements of this part, CCC may make the approval conditional on CMA coming into full compliance within a reasonable period of time as specified in the notification of conditional approval.

(d) A CMA is approved to participate in a marketing assistance loan and LDP program until the CMA's approval is suspended or terminated by CCC.

[63 FR 17312, Apr. 9, 1998, as amended at 67 FR 64459, Oct. 18, 2002]

### § 1425.7 Suspension and termination of approval.

(a) CCC may suspend a CMA from obtaining loans and LDP's when CCC determines the CMA has not:

(1) Operated according to the CMA's application for approval or its last recertification submission;

(2) Complied with applicable regulations;

(3) Corrected deficiencies of the CMA's operation as noted by CCC; or

(4) Violated any of its agreements with CCC.

(b) A suspension may be lifted when CCC determines the CMA has complied with all requirements for approval. When suspensions are not lifted within 1 year, or a shorter time period if so indicated in CCC's suspension notification, the CMA's approval automatically terminates.

(c) CCC may terminate a CMA's approval by giving the CMA written notice of the termination.

(d) A CMA may, when it does not have any marketing assistance loans outstanding, through written notice to CCC, voluntarily terminate its participation in a loan and LDP program.

(e) CCC may, on demand, call all outstanding CCC loans made to a suspended or terminated CMA. When loans are called, CCC will provide at least 10 calendar days written notice to the CMA. Commodities pledged as collateral for loans must be repaid by the date specified by CCC. If redemption is not made by the date specified, title to the commodity shall vest in CCC and CCC shall have no obligation to pay the commodity's market value above the principal amount of such loans.

### § 1425.8 Ownership and control.

(a) CMA's must be owned and controlled by active members of the CMA.

(b) The CMA must provide evidence that:

(1) Active members own more than 50 percent of its allocated equity; and

(2) A majority of directors are active members of the CMA or authorized representatives of active members.

(c) An applicant cooperative or a CMA, not under the ownership or control, of its active members, may be approved by CCC if it is able to establish that, by retiring the equity of its inactive members or by obtaining new members, it can vest ownership and control in its active members, as required by this section, by a date specified by CCC.

### § 1425.9 Open membership.

(a) The CMA shall provide CCC documented proof that the CMA admits every membership applicant who is eligible under the statute regulating the CMA.

(b) Notwithstanding paragraph (a) of this section, a CMA may refuse membership to an applicant whose admission would prejudice, hinder, or otherwise obstruct the interests or purposes of the CMA.

### § 1425.10 Financial ratio requirement.

To be financially able to make advances to their members and to market their commodities, CMA's shall have a current ratio of at least 1 dollar of current assets for each 1 dollar of current liabilities (current ratio of 1:1 or better) on the balance sheet it submits to CCC with its initial application or annual recertification required in § 1425.4.

### §§ 1425.11–1425.12 [Reserved]

### § 1425.13 Uniform marketing agreement.

(a) A CMA must enter into a uniform marketing agreement with each member who delivers a commodity to a loan pool.

(b) The identification number used by the member to report acreage on applicable farms to FSA must appear on the marketing agreement.

**§ 1425.14 Member business.**

(a) At least 50 percent of a crop of an authorized commodity acquired by, or delivered to, a CMA for marketing must be produced by its members for the CMA to obtain a loan or LDP for such crop. CCC may, for a period not to exceed 2 years, waive this requirement if:

(1) The CMA can establish to CCC that such authorization is necessary for the efficient operation of the CMA; and

(2) The CMA's plan, approved by CCC, will bring the CMA into compliance with the provisions of this section.

(b) Commodities purchased or acquired from CCC and processed products acquired from other processors or merchandisers shall not be considered in determining the volume of member or nonmember business.

**§ 1425.15 Vested authority.**

The marketing agreement between the CMA and its members shall give the CMA the authority to pledge the commodity as collateral for a loan, to place a lien on such commodity, and to market the commodity on behalf of its members even though the individual members retain the right, in effect, to determine the price at which the commodity can be marketed by the CMA.

**§ 1425.16 Payment limitation.**

CMA's shall monitor market gains they receive from CCC on behalf of their members and not obtain market gains for a member above the member's payment limitation determined in accordance with part 1400 of this chapter.

**§ 1425.17 Eligible commodity and pooling.**

(a) A CMA may establish separate loan pools as needed for quantities of a commodity.

(b) Loans and, if applicable, LDP's will be available to CMA's for any eligible commodity in a loan pool as provided in paragraph (e) of this section and the beneficial interest provisions of parts 1421 and 1427 of this chapter.

(c) A pool shall be eligible for loans and LDP's if:

(1) All of the commodity in the pool is eligible for loans or LDP's, except as provided in paragraphs (d) and (e) of this section;

(2) The commodity was delivered by members to the CMA for their benefit;

(3) The commodity was delivered and the members are eligible for loans and LDP's;

(4) Members retain the right to share in marketing proceeds from the commodity in accordance with § 1425.18; and

(5) Members agreed to accept a payment of initial advances from the CMA in accordance with § 1425.18(a).

(d) Ineligible commodities may be included in eligible pools when:

(1) The CMA inadvertently included ineligible quantities based on grade, quality, bale weight or repacking in the case of cotton, or other factors; or

(2) There are eligibility discrepancies within FSA records, the producer has certified to the CMA that the commodity is eligible for loan, and there is no market gain or LDP involved in the loan pool for the crop year.

(e) A CMA may, for a period of time as specified in Handbook 1–CMA, include a commodity that is ineligible based on FSA records when the producer has certified to the CMA the commodity is eligible. In these instances, CCC specifies a time period during which CMA's may obtain loan or LDP's on the applicable quantity while the eligibility status is resolved. If the final resolution is that the commodity was ineligible, the CMA must repay any loans outstanding with principal plus interest and any market gains obtained plus interest from the date of receiving the market gain through the repayment date.

(f) The CMA must have in inventory a quantity of commodity delivered by members of each class and grade at least equal to the quantity each class and grade pledged as loan collateral.

(g) Loans will be available to the CMA for the quantity of a farm-stored commodity that is, pursuant to such CMA marketing agreement with a member, part of the CMA's loan pool.

(h) A CMA shall have identity-preserved loan pool commodities stored in approved warehouses while the commodities are pledged as collateral for loan.

(i) Loan eligibility for commingled commodities stored on a farm or in a

warehouse may be transferred to an approved warehouse.

(j) Commodities pledged as collateral for CCC loans shall be free and clear of all liens and encumbrances based on a CMA's financial agreements or the CMA shall obtain a completed form CCC–679, Lien Waiver. When liens are applicable based on CMA financial agreements, the CMA shall provide CCC the completed CCC–679. CMA's shall not take any action to cause a lien or encumbrance to be placed on a commodity after a loan is approved.

(k) If a loan or LDP is obtained for any quantity in a loan pool, allocations of costs and expenses among separate pools for the commodity in the pool shall be made according to generally accepted accounting principles.

(l) A CMA shall not apply marketing losses from a commodity not used to obtain a loan or LDP against the marketing proceeds of a commodity used to obtain a loan or LDP.

(m) CMA's shall not carry forward losses from one loan pool and apply them against a subsequent loan pool without CCC's authorization. CCC may grant authorization when it determines that carrying forward the loss complies with CCC's loan and LDP program intent.

(n) The CMA is responsible to CCC for any loss related to commodities the CMA pledged as collateral for loan or used to obtain LDP related to:

(1) The CMA failing to comply with these regulations;

(2) Changes in quantity or quality of either warehouse or farm stored commodities; or

(3) Liens based on either the CMA's or its members' financial agreements.

### § 1425.18 Distribution of proceeds.

(a)(1) If CCC makes loans or LDP's for any quantity in a loan pool, the related proceeds shall be distributed or otherwise made available to the members account:

(i) Based on the quantity and quality of the commodity delivered by each member;

(ii) Less any authorized charges for services performed or paid by the CMA necessary to condition or otherwise make the commodity eligible for loans or LDP's, according to the marketing agreement provided for in § 1425.13;

(iii) Within 15 work days from the date the CMA receives loan or LDP proceeds from CCC, or held according to the terms of a deferred payment agreement if requested by the member.

(2) CMA's may credit advances to its members made before loans and LDP's are obtained against the distribution of loan and LDP proceeds requirement in paragraph (a)(1)(iii) of this section.

(b)(1) Except as provided in paragraph (b)(2) of this section, loan pool proceeds shall not be combined with non-loan pool proceeds and the CMA shall distribute loan pool proceeds according to the information it provided CCC in accordance with § 1425.4(b)(7).

(2) Sales proceeds from a loan pool may be combined with sales proceeds from other pools if the proceeds from such pools are allocated among the pools according to the quantity and quality of the commodity included in the pools.

(3) Loan and LDP proceeds shall only be issued to members involved in pools used for loans or LDP's.

(4) When notified by CCC that loan and LDP distributions to a member must be reduced for a program year, farm, or crop, a CMA shall not make subsequent pool distributions and shall reimburse CCC for distributions previously issued, if applicable.

[63 FR 17312, Apr. 9, 1998, as amended at 71 FR 42750, July 28, 2006]

### § 1425.19 Member cooperatives.

A CMA may obtain loans or LDP's on behalf of a member cooperative when the member cooperative is itself a CMA operating in accordance with this part. Loans and LDP's are restricted based on the CMA obtaining the loan or LDP.

### § 1425.20 [Reserved]

### § 1425.21 Records required.

(a) A CMA shall maintain records for each loan or LDP commodity showing the quantity:

(1) Received from each member and nonmember;

(2) Eligible for loans and LDP's;

(3) By quality factors specified in the applicable commodity regulations including class, grade, and quality, where applicable; and

(4) Of unprocessed inventory broken down by items 1 through 3 above.

(b) Except as provided in paragraph (c) of this section, inventory shall be allocated in the following manner until all inventory in a loan pool is depleted:

(1) For processed commodities, the pool's inventory shall be adjusted when the commodity is withdrawn from inventory for processing; and

(2) For commodities that are not processed, the pool's inventory shall be allocated to the pool and the pool's inventories adjusted when the commodity is shipped.

(c) Records of loan and non-loan pool dispositions do not have to be maintained separately when sales proceeds from pools are allocated according to the quantity and quality of commodity in the pools.

### § 1425.22 Inspection and investigation.

(a) The books, documents, papers, and records of the CMA and subsidiaries shall be maintained for five years after the applicable crop year and shall be available to CCC for inspection and examination at all reasonable times.

(b) At any time after an application is received, CCC shall have the right to examine all books, documents, papers, and determine whether the CMA is operating or has operated in accordance with the regulations in this part, its articles of incorporation or articles association, and agreements with producers, the representations made by the CMA in its application for approval, and, where applicable, its agreements with CCC.

### § 1425.23 Reports.

(a) CMA's shall annually provide CCC a report of all commodity deliveries involved in loans and LDP's by FSA farm number for each member.

(b) When requested by CCC, CMA's shall report market gains received on behalf of each member.

### § 1425.24 OMB control number assigned pursuant to Paperwork Reduction Act.

The information collection requirements contained in these regulations (7 CFR 1425) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB number 0560–0040.

### § 1425.25 Appeals.

Parts 11 and 780 of this title apply to this part.

[67 FR 64459, Oct. 18, 2002]

# PART 1427—COTTON

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AUTHORITY: 7 U.S.C. 7231–7236 and 8737; and 15 U.S.C. 714b, and 714c.

## Subpart A—Nonrecourse Cotton Loan and Loan Deficiency Payments

SOURCE: 67 FR 64459, Oct. 18, 2002, unless otherwise noted.

### § 1427.1 Applicability.

(a) The regulations of this subpart are applicable to the 2008 through 2012 crops of upland cotton and extra long staple cotton. Rules codified in this part which are issued after October 1, 2008, will not affect the 2007 and prior crops except that changes in the calculation of loan repayment rates that apply to the 2008 crop also apply to 2007 crop loans outstanding at the time of the changes in 2008 crop calculations. Other adjustments for the 2008 crop, such as storage rate adjustments will not apply. These regulations set forth the general provisions under which marketing assistance loans and loan deficiency payment programs shall be administered by the Commodity Credit Corporation (CCC). Additional terms and conditions are in the note and security agreement and the loan deficiency payment application that must be executed by a producer to receive marketing assistance loans and loan deficiency payments.

(b) The basic loan rate, the schedule of premiums and discounts, and forms applicable to the cotton marketing assistance loan and loan deficiency payment programs are available from FSA offices. The forms for use in connection with the programs in this subpart shall be prescribed by CCC.

(c) Marketing assistance loans and loan deficiency payments will not be available for any cotton produced on land owned or otherwise in the possession of the United States if such land is occupied without the consent of the United States.

(d) Notwithstanding the other provisions of this part, a producer may only receive the maximum assistance allowed by part 1400 of this chapter.

(e) Eligible producers, under 7 CFR 1421.4, who produce upland cotton during the 2008 through 2012 crop years on a farm that is not covered under a direct and counter-cyclical program contract, as defined in part 1412 of this chapter, are eligible for marketing assistance loans or loan deficiency payments as are eligible producers who produced commodities on farms covered by such a contract.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65719, Nov. 5, 2008]

### § 1427.2 Administration.

(a) The marketing assistance loan and loan deficiency payment programs shall be administered under the general supervision of the Executive Vice President, CCC, or a designee and shall be carried out by FSA employees, and state and county committees.

(b) No FSA employee or committee may modify or waive any requirement in this subpart, except as provided in paragraph (e) of this section.

(c) The State committee shall take any required action not taken by the county committee. The State committee shall also:

(1) Correct, or require a correction of an action that is not in compliance with this part; or

(2) Stop an employee from taking an action or decision that is not in accordance with the regulations of this part.

(d) The Executive Vice President, CCC, or a designee may determine any question arising under these programs, and reverse or modify a determination made by an FSA employee or State or county committee.

(e) The Deputy Administrator for Farm Programs, FSA, may authorize State or county committees to waive or modify deadlines and other program requirements in cases where lateness or failure to meet such other program requirements does not adversely affect the operation of the marketing assistance and loan deficiency payment programs.

(f) A representative of CCC may execute marketing assistance loan and loan deficiency payment applications and related documents only under the terms and conditions determined and announced by CCC. Any document not executed under such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65719, Nov. 5, 2008]

### § 1427.3 Definitions.

The definitions in this section shall apply for all purposes of program administration regarding the cotton loan and loan deficiency payment programs. The terms defined in part 718 of this title and parts 1412, 1421, 1423, 1425, and 1434 of this chapter shall also apply, except where they conflict with definitions in this section.

*Adjusted spot price* means the spot price adjusted to reflect any lack of data for base quality to make the adjusted spot price comparable to a spot price assuming the base quality. If base quality spot price data are not available, spot prices for other qualities will be used and adjusted by the average difference between base quality spot prices and those for other qualities over the available observations during the previous 12 months.

*Approved cooperative marketing association* (CMA) means a cooperative marketing association approved under part 1425 of this chapter which has executed a Cotton Cooperative Loan Agreement on a form prescribed by CCC.

*Bale opening* means the removal of the bagging and ties from a bale of eligible upland cotton in the normal opening area, immediately before use, by a manufacturer in a building or collection of buildings where the cotton in the bale will be used in the continuous process of manufacturing raw cotton into cotton products in the United States.

*Charges* means all fees, costs, and expenses incurred by CCC in insuring, carrying, handling, storing, conditioning, and marketing the cotton tendered to CCC for loan. Charges also include any other expenses incurred by CCC in protecting CCC's or the producer's interest in such cotton.

*Classification* means the measurement results provided by the Agricultural Marketing Service (AMS) of color grade, leaf, staple, strength, extraneous matter and micronaire, and for upland cotton, length uniformity.

*Commodity certificate exchange* means the exchange, as provided in part 1404 of this chapter, of commodities pledged as collateral for a marketing assistance loan at a rate determined by CCC in the form of a commodity certificate bearing a dollar denomination. Such certificate may not be transferred or exchanged for the inventory of CCC.

*Consumption* means the use of eligible cotton by a domestic user in the manufacture in the United States of cotton products.

*Cotton* means upland cotton and extra loan staple cotton meeting the definition in the definitions of "upland cotton" and "extra long staple (ELS) cotton" in this section, respectively, and excludes cotton not meeting such definitions.

*Cotton clerk* means a person approved by CCC to assist producers in preparing loan and loan deficiency documents.

*Cotton commercial bank* means the bank designated as the financial institution for a CMA or loan servicing agent.

*Cotton product* means any product containing cotton fibers that result from the use of a bale of cotton in manufacturing.

*Cotton storage deficit area* means a State, County, or group of contiguous counties within a State, where the production of cotton for the area based on the most recent estimate from the USDA, National Agricultural Statistics Service exceeds the combined approved inside storage capacity less carry-in stocks, of warehouses that have entered into a Cotton Storage Agreement with CCC.

*Current Far East shipment price* means, during the period in which two daily price quotations are available for the growth quoted for M 13/32 inch cotton, CFR (cost and freight) Far East, the price quotation for cotton for shipment no later than August/September of the current calendar year.

*Electronic Agent Designation* is an electronic record that:

(1) Designates the entity authorized by a producer to redeem all of the cotton pledged as collateral for a specific loan;

(2) Is maintained by providers of electronic warehouse receipts; and

(3) A producer may authorize CCC to use as the basis for the redemption and release of loan collateral.

*Extra long staple (ELS) cotton* means any of the following varieties of cotton which is produced in the United States and is ginned on a roller gin:

(1) American-Pima;

(2) All other varieties of the Barbadense species of cotton, and any hybrid thereof; and

(3) Any other variety of cotton in which one or more of these varieties predominate.

*False packed cotton* means cotton in a bale containing substances entirely foreign to cotton; containing damaged cotton in the interior with or without any indication of the damage on the exterior; composed of good cotton on the exterior and decidedly inferior cotton in the interior, but not detectable by customary examination; or, containing pickings or linters worked into the bale.

*Financial institution* means:

(1) A bank in the United States which accepts demand deposits; and

(2) An association organized pursuant to Federal or State law and supervised by Federal or State banking authorities.

*Form A loan* means a nonrecourse loan entered into between a producer and CCC.

*Form G loan* means a CCC nonrecourse loan entered into between a CMA and CCC.

*Good condition* means a bale of cotton that, by comparison with the photographic standards of "A Guide for Cotton Bale Standards" of the Joint Cotton Industry Bale Packaging Committee, is determined to be a Grade A or Grade B bale.

*Lint Cotton* means cotton that has passed through the ginning process.

*Loan deficiency payment* means a payment received in lieu of a loan when the CCC-determined value is below the applicableloan rate.

*Loan rate* is the national loan rate for base quality upland cotton and the national average rate for ELS cotton adjusted by any premiums and discounts determined by CCC.

*Loan servicing agent* means a legal entity that enters into a written agreement with CCC to act as a loan servicing agent for CCC in making and servicing Form A cotton loans. The loan servicing agent may perform, on behalf of CCC, only those services which are specifically prescribed by CCC including, but not limited to, the following:

(1) Preparing and executing loan and loan deficiency payment documents;

(2) Disbursing loan and loan deficiency payment proceeds;

(3) Accepting loan repayments;

(4) Handling documents involved with forfeiture of loan collateral to CCC; and

(5) Providing loan, loan deficiency payment, and accounting data to CCC for statistical purposes.

*Transfer* means, depending on the context, the process for a producer or an authorized agent of the producer to:

(1) Physically relocate cotton loan collateral from one CCC-approved warehouse to another CCC-approved warehouse,

(2) Exchange an electronic warehouse receipt for a receipt certificated by a warehouse for delivery under a futures contract without physically relocating the cotton, or

(3) Do both of the above.

*Upland cotton* means planted and stub cotton which is produced in the United States from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate.

*Warehouse receipt* means a receipt containing the required information prescribed in this part that may or may not be certificated for delivery for a futures-pricing contract, and is:

(1) For 2008-crop cotton only, a prenumbered, pre-punched negotiable warehouse receipt issued under the authority of the U.S. Warehouse Act, a state licensing authority, or by an approved CCC warehouse in such format authorized and approved, in advance, by CCC; or

(2) For 2008 through 2012-crop cotton, an electronic warehouse receipt record issued by such warehouse recorded in a central filing system or systems maintained in one or more locations that are approved by FSA to operate such system.

*Wet cotton* means a bale of cotton that, at a gin, has 7.5 percent or more moisture, wet basis, at any point in the bale.

[67 FR 64459, Oct. 18, 2002, as amended at 71 FR 51427, Aug. 30, 2006; 73 FR 30275, May 27, 2008; 73 FR 65719, Nov. 5, 2008;75 FR 50849, Aug. 18, 2010]

### § 1427.4 Eligible producer.

(a) To be an eligible producer, the producer must:

(1) Be an individual, partnership, association, corporation, estate, trust,or other legal entity that produces cotton as a landowner, landlord, tenant, or sharecropper;

(2) Comply with all provisions of this part; and

(i) 7 CFR part 12—Highly Erodible Land and Wetland Conservation:

(ii) 7 CFR part 718—Provisions Applicable to Multiple Programs;

(iii) 7 CFR part 1400—Payment Limitation and Payment Eligibility;

(iv) 7 CFR part 1403—Debt Settlement Policies and Procedures; and

(v) 7 CFR part 1405—Loans, Purchases and Other Operations; and

(3) Have made an acreage certification with respect to all the cropland on the farm.

(b) A receiver or trustee of an insolvent or bankrupt debtor's estate, an executor or an administrator of a deceased person's estate, a guardian of an estate of a ward or an incompetent person, and trustees of a trust estate shall be considered to represent the insolvent or bankrupt debtor, the deceased person, the ward or incompetent, and the beneficiaries of a trust, respectively. The production of the receiver, executor, administrator, guardian, or trustee shall be considered to be the production of the person or estate represented by the receiver, executor, administrator, guardian, or trust. Loan and loan deficiency payment documents executed by any such person will be accepted by CCC only if they are legally valid and such person has the authority to sign the applicable documents.

(c) A minor who is otherwise an eligible producer shall be eligible to receive loans and loan deficiency payments only if the minor meets one of the following requirements:

(1) The right of majority has been conferred on the minor by court proceedings or by statute;

(2) A guardian has been appointed to manage the minor's property and the applicable loan or loan deficiency payment documents are signed by the guardian;

(3) Any note and security agreement or loan deficiency payment application signed by the minor is co-signed by a

person determined by CCC to be financially responsible; or

(4) A bond is furnished under which a surety guarantees to protect CCC from any loss incurred for which the minor would be liable had the minor been an adult.

(d)(1) If more than one producer executes a note and security agreement with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and the regulations in this part. Each such producer shall also remain liable for repayment of the entire marketing assistance loan amount until the loan is fully repaid without regard to such producer's claimed share in the commodity pledged as collateral for the loan. In addition, such producer may not amend the note and security agreement with respect to the producer's claimed share in such commodities, or loan proceeds, after execution of the note and security agreement by CCC.

(2) The cotton in a bale may have been produced by two or more eligible producers on one or more farms if the bale is not a repacked bale.

(e) A CMA may obtain a marketing assistance loan and loan deficiency payments on eligible cotton on behalf of its members who are eligible to receive loans or loan deficiency payments for a crop of cotton. For purposes of this subpart, the term "producer" includes a CMA.

(f) In case of death, incompetency, or disappearance of any producer who is entitled to the payment of any sum in settlement of a marketing assistance loan or loan deficiency payment, payment shall, upon application to CCC, be made to the persons who would be entitled to the producer's payment under the regulations contained in part 707 of this title.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65719, Nov. 5,2008]

### § 1427.5 General eligibility requirements.

(a) To receive loans or loan deficiency payments for a crop of cotton, a producer must execute a note and security agreement or loan deficiency payment application on or before May 31 of the year following the year in which such crop is normally harvested.

(1) Form A loan documents or loan deficiency payment applications must be signed by the applicant and submitted to CCC or a loan servicing agent. Submissions by cotton clerks must occur within 15 calendar days after the producer signs the forms and within the period of loan availability. A producer, except for a CMA, must request loans and loan deficiency payments:

(i) At the county office that is responsible under part 718 of this title for administering programs for the farm on which the cotton was produced; or

(ii) From a loan servicing agent.

(2) Form G loan documents and requests for loan deficiency payments by a CMA must be signed by the CMA and delivered to CCC or the cotton commercial bank within the period of loan availability.

(b) For a bale of cotton to be eligible to be pledged as collateral for a marketing assistance loan or a subject of a loan deficiency payment application, the bale must:

(1) Be tendered to CCC by an eligible producer;

(2) Be in existence and good condition and be covered by fire insurance. Bales pledged as collateral for a CCC loan, must be stored inside an approved storage warehouse unless, as determined under § 1427.10, CCC has approved the warehouse to use outside storage for cotton loan collateral for the period of the loan. Bales submitted to CCC for a loan deficiency payment are not subject to the approved storage requirements contained in § 1423.10.

(3) Be represented by a warehouse receipt meeting the requirements of § 1427.11, except as provided in §§ 1427.10(e) and 1427.23(a)(4);

(4) Not be false-packed, wet cotton, water-packed, mixed-packed, reginned, or repacked;

(5) Not be compressed to universal density at a warehouse where side pressure has been applied and effective for the 2009 crop, not be a flat or modified flat bale;

(6) Not have been sold, nor any sales option on such cotton granted, to a buyer under a contract which provides that the buyer may direct the producer

to pledge the cotton to CCC as collateral for a loan or to obtain a loan deficiency payment;

(7) Not have been previously sold and repurchased or pledged as collateral for a CCC loan and redeemed except as provided in § 1427.172(b)(4);

(8) Not be cotton for which a loan deficiency payment has been previously made;

(9) Weigh at least 325 pounds net weight; bales of more than 600 pounds net weight may be pledged for loan at 600 pounds net weight.

(10) Be packaged in materials that meet the specifications adopted by the Joint Cotton Industry Bale Packaging Committee sponsored by the National Cotton Council of America for the applicable year or that are identified and approved by the Joint Industry Bale Packaging Committee as experimental packaging materials for the applicable crop year, except that producers approved for the outside storageof ELS cotton as provided for in § 1427.10(e) must assure that the packaging materials used for bales stored outside must meet the materials, sealing, and humidity specifications contained in the outside-storage addendum to their ELS cotton marketing assistance loan agreement.

(11) Be ginned by a ginner that:

(i) Has entered the tare weight of the bale (bagging and ties used to wrap the bale) on the gin bale tag or otherwise furnish warehouse operator the tare weight; and

(ii) Has entered into a Cooperating Ginners' Bagging and Bale Ties Certification and Agreement on a form prescribed by CCC, or certified that the bale is wrapped with bagging and bale ties meeting the requirements of paragraph (b)(10) of this section and;

(12) Be production from acreage that has been reported timely under part 718 of this title.

(c) In addition to the requirements of paragraph (b) of this section, for ELS cotton the bale must:

(1) Be of a grade, strength, staple length, and other factors specified in the schedule of loan rates for ELS cotton;

(2) Have a micronaire specified in the schedule of micronaire premiums and discounts for ELS cotton; and

(3) Have an extraneous matter specified in the schedules of premiums and discounts for extraneous matter for ELS cotton.

(d) In addition to the requirements of paragraph (b) of this section, for upland cotton the bale must:

(1) Have been graded by using a High Volume Instrument;

(2) Be a grade, staple length, and leaf specified in the schedule of premiums and discounts for grade, staple, and leaf for upland cotton;

(3) Have a strength reading specified in the schedule of strength premiums and discounts for upland cotton;

(4) Have a micronaire specified in the schedule of micronaire premiums and discounts for upland cotton;

(5) Have an extraneous matter within the limits specified in the schedule of discounts for extraneous matter for upland cotton; and

(6) Have a uniformity specified in the schedule of uniformity premiums and discounts for upland cotton.

(e) To be eligible to receive marketing assistance loans and loan deficiency payments, a producer must have beneficial interest in the cotton that is tendered to CCC for a marketing assistance loan or loan deficiency payment. For the purposes of this part, the term "beneficial interest" refers to a determination by CCC that a person has the requisite title to and control of cotton that is tendered to CCC as collateral for a marketing assistance loan or is the cotton that will be used to determine a loan deficiency payment. A determination of whether a person has beneficial interest in cotton is made by CCC in accordance with this part and is not based upon a determination under any State law or any other regulation of a Federal agency.

(f) Except as provided in paragraph (h) of this section, when requesting a marketing assistance loan, in order to have beneficial interest in the cotton tendered as collateral for the loan, a person must:

(1) Be the producer of the cotton as determined in accordance with § 1427.4;

(2) Have had ownership of the cotton from the time it was planted through the earlier the date the loan was repaid or the maturity date of the loan;

(3) Have control of the cotton from the time of planting through the maturity date of the loan. To have control of the cotton, such person must have complete decision making authority regarding whether the cotton will be tendered as collateral for a loan, when the loan will be repaid or if the collateral will be forfeited to CCC in satisfaction of the loan obligations of such person, and where the cotton will be maintained during the term of the loan; and

(g) Except as provided in paragraph (h) of this section, when requesting a loan deficiency payment, in order to have beneficial interest in the cotton a person must:

(1) Be the producer of the cotton as determined in accordance with § 1427.4;

(2) Have had ownership of the cotton from the time it was planted through the date the producer has elected to determine the loan deficiency payment rate; and

(3) Have control of the cotton from the time of planting through the date the producer has elected to determine the loan deficiency payment rate. To have control of the cotton, such person must have complete decision making authority regarding whether a loan deficiency payment will be requested with respect to the cotton; when the loan deficiency rate will be selected; and where the cotton will be maintained prior to the date on which the loan deficiency payment rate will be determined;

(4) If the cotton has been physically delivered to a location other than a location owned or under the total control of the producer, have delivered the cotton to a warehouse approved in accordance with § 1427.10. Delivery of the cotton to a location other than to such an approved warehouse will result in the loss of beneficial interest in the cotton on the date of physical delivery and the producer will be considered to have lost beneficial interest as of 11:59 p.m. of such day regardless of any other action or agreement between the entity where the cotton was delivered and the producer, unless such an entity has been approved by CCC under § 1427.10.

(h) Notwithstanding paragraphs (f) and (g) of this section, in order to facilitate the handling of situations involving the death of a producer, CCC will consider an estate and a person to whom title to cotton has passed by virtue of State law upon the death of the producer to have beneficial interest in the cotton produced by the producer under the same terms and conditions that would otherwise be applicable to such producer;

(i) Notwithstanding paragraphs (f) and (g) of this section, a person who purchases or otherwise acquires cotton from a producer under any circumstances does not obtain beneficial interest to the cotton whether such purchase or acquisition is made prior to the harvest of the crop or after harvest except in one instance. CCC will consider a person to have beneficial interest in cotton if, prior to harvest, such person has obtained title to the growing cotton at the same time that such person obtained full title to the land on which such crop was growing;

(j) A producer will lose beneficial interest in cotton if the producer receives any payment from any person under any contractual arrangement with respect to cotton if the person who is making the payment, or any person otherwise associated with the person making the payment, will at any time have title to the cotton or control of the cotton prior to or after harvest unless:

(1) Such payment is authorized in accordance with part 1425 of this chapter; or

(2) The payment is made as consideration for an option to purchase the cotton and such option contains the following provision:

*Notwithstanding any other provision of this option to purchase or any other contract, title and control of the cotton and beneficial interest in the cotton as specified in 7 CFR 1427.5 shall remain with the producer until the buyer exercises this option to purchase the cotton. This option to purchase shall expire, notwithstanding any action or inaction by either the producer or the buyer, at the earlier of:*

*(1) The maturity of any Commodity Credit Corporation (CCC) loan that is secured by such cotton;*

*(2) The date CCC claims title to such cotton; or*

*(3) Such other date as provided in this option.*

(k) Absent other provisions causing the producer to lose beneficial interest in the cotton, inclusion in a contract of a provision that allows the producer to select the sales price of the cotton at the time the contract is entered into or at a later date, a contract normally referred to as a deferred price contract or a price later contract, will not result in the loss of beneficial interest in the cotton.

(l) Commodities produced under a contract in which the title to the seed remains with the entity providing the seed to the producer, including contracts for the production of hybrid seed, genetically modified commodities and other specialty seeds as approved in writing by CCC, are eligible to be pledged as collateral for a marketing assistance loan and a loan deficiency payment may be made with respect to such production if at the time of the request for such a loan or payment the producer has not:

(1) Received a payment under the contract; or

(2) Delivered the commodity to another person.

(m) Each bale of upland cotton sampled by the warehouse operator upon initial receipt which has not been sampled by the ginner must not show more than one sample hole on each side of the bale. If more than one sample is desired when the bale is received by the warehouse operator, the sample shall be cut across the width of the bale, broken in half or split lengthwise, and otherwise drawn under Agricultural Marketing Service (AMS) dimension and weight requirements. This requirement will not prohibit sampling of the cotton at a later date if authorized by the producer.

(n) Marketing assistance loans may be disbursed to eligible producers who store upland cotton in unapproved storage facilities only if the producer agrees to redeem the marketing assistance loan on the date on which the loan is disbursed with a commodity certificate exchange.

(o) If marketing assistance loans or loan deficiency payments are made available to producers through a CMA under part 1425 of this chapter, the beneficial interest in the cotton must always have been held by the producer-member who delivered the cotton to the CMA or its member, except as otherwise provided in this section. Cotton delivered to such a CMA shall not be eligible to receive a marketing assistance loan or a loan deficiency payment if the producer-member who delivered the cotton does not retain the right to share in the proceeds from the marketing of the cotton as provided in part 1425 of this chapter.

[67 FR 64459, Oct. 18, 2002, as amended at 68 FR 49328, Aug. 18, 2003; 69 FR 12056, Mar. 15, 2004; 71 FR 32426, June 6, 2006; 71 FR 51427, Aug. 30, 2006; 71 FR 60413, Oct. 13, 2006; 73 FR 65719, Nov. 5, 2008]

### § 1427.6 Disbursement of loans.

(a) Individual producers may request loans from:

(1) FSA County Service Centers;

(2) Loan servicing agents; or

(3) An approved cotton clerk who has entered into a written agreement with CCC on a form prescribed by CCC.

(b) Loan proceeds may be disbursed by CCC or a cotton commercial bank.

(c) The loan documents shall not be presented for disbursement unless the cotton covered by the mortgage or pledged as security is eligible under § 1427.5. If the cotton was not eligible cotton at the time of disbursement, the total amount disbursed under the loan, and charges plus interest shall be refunded promptly.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65720, Nov. 5, 2008]

### § 1427.7 Maturity of loans.

(a)(1) Form A loans and Form G loans mature on demand by CCC and no later than the last day of the 9th calendar month following the month in which the note and security agreement is filed under § 1427.5(a).

(2) CCC may at any time accelerate the loan maturity date by providing the producer notice of such acceleration at least 30 days in advance of the accelerated maturity date.

(b) If the loan is not repaid by the loan maturity date, title to the cotton shall vest in CCC the day after such maturity date and CCC shall have no obligation to pay for any market value which such cotton may have in excess of the amount of the loan, plus interest and charges.

(c) Following written notice by CCC to the producer and warehouse operator, CCC may advance the maturity date of cotton pledged as collateral for a marketing assistance loan if:

(1) CCC determines such loan cotton collateral is improperly warehoused and subject to damage,

(2) Any term of the producer's loan agreement is violated, or

(3) Carrying charges are substantially in excess of the average of carrying charges available elsewhere and the storing warehouse, after notice, declines to reduce such charges.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65720, Nov. 5, 2008]

### § 1427.8 Amount of loan.

(a) The loan rates for crops of upland cotton and ELS cotton will be determined and announced by CCC and made available at State and county offices.

(b) The quantity of cotton which may be pledged as collateral for a loan shall be the net weight of the eligible cotton as shown on the warehouse receipt issued by an approved warehouse, except that in the case of a bale which has a net weight of more than 600 pounds, the weight to be used in determining the amount of the loan on the bale shall be 600 pounds. Cotton pledged as collateral for loans on the basis of reweights will not be accepted by CCC.

(c) The amount of the loan for each bale will be determined by multiplying the net weight of the bale, as determined under paragraph (b) of this section by the applicable loan rate.

(d) CCC will not increase the amount of the loan made for any bale of cotton as a result of a redetermination of the quantity or quality of the bale after it is tendered to CCC, except that if it is established to the satisfaction of CCC that a bona fide error was made for the weight of the bale or the classification for the bale, such error may be corrected.

(e) The loan rate as determined under paragraph (a) of this section adjusted for applicable premiums and discounts will be reduced by 30 percent during each of the 2009 through 2012 crop years for producers who make an irrevocable election to receive "Average Crop Revenue Election" program payments as provided in § 1412 of this title or elsewhere in this title.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65720, Nov. 5, 2008]

### § 1427.9 Classification of cotton.

(a) All cotton tendered for loan and loan deficiency payment must be classed by an AMS Cotton Classing Office or other entity approved by AMS.

(b) An AMS cotton classification must be based upon a representative sample drawn from the bale by samplers under AMS procedures and instructions.

(c) If the producer's cotton has not been classed or sampled in a manner acceptable by CCC, the warehouse must sample such cotton and forward the samples to the AMS Cotton Classing Office or other entity approved by AMS. Such warehouse must be licensed by AMS or be approved by CCC to draw samples for submission to the AMS Cotton Classing Office.

(d) If a sample has been submitted for classification, another sample shall not be drawn, except for a review classification.

(e) Where review classification is not involved:

(1) If through error or otherwise two or more samples from the same bale are submitted for classification, the loan rate will be based on the classification having the lower loan value;

(2) CCC will use classification information received directly from AMS rather than AMS classification information received from the producer.

(f) CCC will base any cotton loan rate or loan deficiency payment rate on the most recent classification information available before the loan or loan deficiency payment has been calculated. CCC will not adjust such rates based on review classification information submitted subsequent to the original benefit calculation.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65720, Nov. 5, 2008]

### § 1427.10 Approved storage.

(a) Eligible cotton may be pledged as collateral for loans only if stored at warehouses approved by CCC, unless the producer agrees to provisions of 1427.5(n).

(1) Persons desiring approval of their facilities should contact the Kansas City Commodity Office Beacon Facility-Mail Stop 8748, P.O. Box 419205, Kansas City, Missouri 64141–6205.

(2) The names of approved warehouses may be obtained from the Kansas City Commodity Office or from State or county offices.

(b) When the operator of a warehouse receives notice from CCC that a loan has been made on a bale of cotton, the operator shall, if such cotton is not stored within the warehouse, as directed by CCC place such cotton within such warehouse.

(c) An approved cotton storage warehouse may temporarily store cotton pledged as collateral for a CCC loan outside, subject to the following conditions:

(1) The warehouse submits a request for approval of outside storage in a format prescribed by CCC.

(2) The warehouse is located in a storage deficit area as determined by CCC.

(3) The warehouse complies with all outside storage requirements established by CCC including but not limited to the duration of such outside storage as granted by CCC for the individual application, all-risk insurance for the loan value of the cotton with CCC as loss payee, and use of additional protective coverings and materials that elevate the entire bottom surface of the bale to protect such cotton from damage by water or airborne contaminants.

(4) The electronic warehouse receipt for any bale or bales of cotton pledged as collateral for a CCC loan must include the dates that the bale was initially stored outside, and the date that outside storage stopped.

(5) The warehouse operator provides CCC:

(i) A weekly report in a format prescribed by CCC identifying individual bales of cotton pledged as collateral for a CCC loan that are stored outside, and

(ii) Through their electronic warehouse receipt provider, on a current basis, location indicators and effective dates for any loan bale stored outside.

(d) Warehouse charges paid by a producer will not be refunded by CCC.

(e) The approved storage requirements provided in this section may be waived by CCC if the producer requests a loan deficiency payment pursuant to the loan deficiency payment provisions contained in § 1427.23.

(f) With respect tocrops of ELS cotton, a producer may obtain a loan on cotton that is not stored as otherwise provided in this section if such cotton is stored:

(1) At a commercial entity that is involved in the handling or storage of cotton in a county or area determined and announced by CCC as approved for outside storage of ELS loan collateral; and

(2) The site is constructed so as to prevent the accumulation of water under such cotton.

[67 FR 64459, Oct. 18, 2002, as amended at 68 FR 49328, Aug. 18, 2003; 69 FR 12056, Mar. 15, 2004; 71 FR 51427, Aug. 30, 2006; 73 FR 65720, Nov. 5, 2008]

### § 1427.11 Warehouse receipts.

(a) Producers may obtain loans on eligible cotton represented by warehouse receipts only if the warehouse receipts meet the definition of a warehouse receipt and provide for delivery of the cotton to bearer or are properly assigned by endorsement in blank, so as to vest title in the holder of the receipt or are otherwise acceptable to CCC. The warehouse receipt must:

(1) Contain the gin bale number;

(2) Contain the warehouse receipt number;

(3) Be dated on or before the date the producer signs the note and security agreement.

(b) Warehouse receipts, under § 1427.3, when issued as block warehouse receipts will be accepted when authorized by CCC only if the owner of the warehouse issuing the block warehouse receipt owns the cotton represented by the block warehouse receipt and the warehouse is not licensed under the U.S. Warehouse Act.

(c)(1) Each receipt must set out in its terms the tare and the net weight of the bale represented by the receipt. The net weight shown on the warehouse receipt must be the difference between the gross weight as determined by the warehouse at the warehouse site and the tare weight. The

warehouse receipt may show the net weight established at a gin if gin weights are permitted by the licensing authority for the warehouse.

(2) The tare weight shown on the receipt must be the tare weight furnished to the warehouse by the ginner or entered by the ginner on the gin bale tag. A machine card type warehouse receipt reflecting an alteration in gross, tare weight, or net weight will not be accepted by CCC unless it bears, on the face of the receipt, the following legend or similar wording approved by CCC, duly executed by the warehouse or an authorized representative of the warehouse:

Corrected (gross, tare, or net) weight,
(Name of warehouse),
By (Signature or initials),
Date.

(3) Alterations in other inserted data on a machine card type warehouse receipt must be initialed by an authorized representative of the warehouse.

(d) If warehouse storage charges have been paid, the receipt must show that date through which the storage charges have been paid.

(e) If warehouse receiving charges have been paid or waived, the warehouse receipt must show such fact.

(f) The warehouse receipt must show the compression status of the bale; *i.e.*, flat, modified flat, standard, gin standard, standard density (short), gin universal, universal density (short), or warehouse universal density. The receipt must show if the compression charge has been paid, or if the warehouse claims no lien for such compression.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65720, Nov. 5, 2008]

### § 1427.12 Liens.

(a) Waivers that fully protect the interest of CCC must be obtained before loan disbursement, notwithstanding provisions in § 1427.19(h), if there are any liens or encumbrances on the cotton tendered as collateral for a loan, even though the liens or encumbrances are satisfied from the loan proceeds, except that CCC may elect to waive such lien requirements for loans having a principal value of less than $50,000.

(b) CCC may elect to accept cotton as loan collateral that has warehouse receiving, compression, or other charges without a lien waiver if the producer at the time of loan application agrees to reimburse CCC for any such charges that CCC may pay on behalf of the producer or that reduce the value of the cotton delivered to CCC.

[71 FR 51427, Aug. 30, 2006, as amended at 73 FR 65721, Nov. 5, 2008]

### § 1427.13 Fees, charges and interest.

(a) A producer shall pay a nonrefundable loan service fee to CCC or, if applicable, to a loan servicing agent, at a rate determined by CCC. Such fee shall be in addition to a cotton clerk fee paid under paragraph (b) of this section. The fee amounts are available in State and county offices and are shown on the note and security agreement. Fees shall be deducted from the loan proceeds.

(b) Cotton clerks may only charge fees for the preparation of loan or loan deficiency payment documents at the rate determined by CCC.

(1) Such fees may be deducted from the loan or loan deficiency payment proceeds instead of the fees being paid in cash.

(2) The amount of such fees is available from CCC and is shown on the note and security agreement.

(c) Interest which accrues for a loan shall be determined under part 1405 of this chapter. All or a portion of such interest may be waived for a quantity of upland cotton which has been redeemed under § 1427.19 at a level which is less than the principal amount of the loan plus charges and interest.

(d) For each crop of upland cotton, the producer, as defined in the Cotton Research and Promotion Act (7 U.S.C. 2101), shall remit to CCC an assessment which shall be transmitted by CCC to the Cotton Board and shall be deducted from the:

(1) Loan proceeds for a crop of cotton and shall be at a rate equal to one dollar per bale plus up to one percent of the loan amount; and

(2) Loan deficiency payment proceeds for a crop of cotton and shall be at a rate equal to up to one percent of the loan deficiency payment amount.

(e) If the producers elects to forfeit the loan collateral to CCC, the producer shall pay to CCC, at the rates that are specified in the storage agreement between the warehouse and CCC, the following accrued warehouse charges:

(1) All warehouse storage charges associated with the forfeited cotton that accrued before the date that all required documents were provided to CCC; and

(2) Any accrued warehouse receiving charges associated with the forfeited cotton, including, if applicable, charges for new ties as specified in § 1427.11.

(3) Any warehouse storage charges associated with the forfeited cotton that accrued during the period of the loan and paid by CCC to the warehouse that:

(i) Exceed CCC's maximum storage credit rate for the warehouse established in § 1427.19 and

(ii) Were paid by CCC for periods subject to denied storage credits due to the cotton being stored outside as specified in § 1427.19(h)(2)(ii).

(4) Unpaid warehouse compression charges.

[67 FR 64459, Oct. 18, 2002, as amended at 71 FR 51427, Aug. 30, 2006; 73 FR 65721, Nov. 5, 2008]

### § 1427.14 [Reserved]

### § 1427.15 Special procedure where funds are advanced.

(a) This special procedure is provided to assist persons or firms which, in the course of their regular business of handling cotton for producers, have made advances to eligible producers on cotton eligible to be pledged as collateral for a marketing assistance loan or to receive a loan deficiency payment. A person, firm, or financial institution which has made advances to eligible producers on eligible cotton may also obtain reimbursement for the amounts advanced under this procedure.

(b) This special procedure shall apply only:

(1) If such person or firm is entitled to reimbursement from the proceeds of the marketing assistance loans or loan deficiency payments for the amounts advanced and has been authorized by the producer to deliver the loan or loan deficiency payment documents to a county office for disbursement of the loans or loan deficiency payments; and

(2) To marketing assistance loan or loan deficiency payment documents covering cotton on which a person or firm has advanced to the producers, including payments to prior lienholders and other creditors, the note amounts shown on the Form A loan documents, except for:

(i) Authorized cotton clerk fees;

(ii) The research and promotion fee to be collected for transmission to the Cotton Board by CCC; and

(iii) CCC loan service charges.

(c)(1) All marketing assistance loan or loan deficiency payment documents shall be mailed or delivered to the appropriate county office and shall show the entire proceeds of the marketing assistance loans or loan deficiency payments, except for CCC loan service charges and research and promotion fees, for disbursement to:

(i) The financial institution which is to allow credit to the person or firm which made the loan or loan deficiency payment advances or to such financial institution and such person or firm as joint payees; or

(ii) The person, firm, or financial institution which made the marketing assistance loan or loan deficiency payment advances to the producers.

(2) The documents shall be accompanied by a Transmittal Schedule of Loan and Loan Deficiency Payment Documents (Transmittal) on a form prescribed by CCC, in original and two copies, numbered serially for each county office by the person, firm, or financial institution which made the marketing assistance loan or loan deficiency payment advance. The Transmittal shall show the amounts invested by the person, firm, or financial institution in the marketing assistance loans or loan deficiency payments.

(3) Upon receipt of the marketing assistance loan or loan deficiency payment documents and Transmittal, the county office will stamp one copy of the Transmittal to indicate receipt of the documents and return this copy to the person, firm, or financial institution.

(d) The person, firm, or financial institution shall be deemed to have invested funds in the loans or loan deficiency payment as of the date marketing assistance loan or loan deficiency payment documents acceptable to CCC were delivered to a county office or, if received by mail, the date of mailing as indicated by postmark or the date of receipt in a county office if no postmark date is shown. Patron postage meter date stamp will not be recognized as a postmark date.

(e) Interest will be computed on the total amount invested by the person, firm, or financial institution in the marketing assistance loan or loan deficiency payment represented by accepted documents from and including the date of investment of funds by the person, firm, or financial institution to, but not including, the date of disbursement by CCC.

(1) Interest will be paid at the rate in effect for CCC loans as provided in part 1405 of this chapter.

(2) Interest earned by the person, firm, or financial institution on the investment in loans disbursed during a month will be paid by CCC after the end of the month.

### § 1427.16 Movement and protection of warehouse-stored cotton.

(a) CCC may insure or reinsure stored cotton against any risk, or otherwise take an action it deems necessary to protect the interest therein of CCC.

(b) A producer may transfer cotton loan collateral subject to the following conditions:

(1) The cotton is represented by an electronic warehouse receipt;

(2) The request is submitted by a producer or a properly designated agent of the producer;

(3) The transfer is agreed to by the receiving warehouse operator;

(4) The CCC marketing assistance loan that is secured by such cotton matures at least 30 days after the date on which the request for the transfer is submitted to CCC; and

(5) Any charges, fees, costs, or expenses incident to the transfer of cotton loan collateral under this paragraph must be paid by the requestor of the transfer.

(c) CCC will exclude from the calculation of any storage credits payable under § 1427.19 the following periods:

(1) The period during which the cotton is in transit between warehouses; and

(2) Any period beyond 75 days starting from the date of transfer from the shipping warehouse, unless the shipping warehouse is:

(i) Not in compliance with any of the terms of its Cotton Storage Agreement, (ii) Storing cotton loan collateral outside, or

(iii) Under common ownership with the receiving warehouse.

[71 FR 51427, Aug. 30, 2006, as amended at 73 FR 65721, Nov. 5,2008]

### § 1427.17 [Reserved]

### § 1427.18 Liability of the producer.

(a)(1) If a producer makes any fraudulent representation in obtaining a marketing assistance loan or loan deficiency payment or in maintaining or settling a loan, or disposes of or moves the loan collateral without the prior written approval of CCC, such loan or loan deficiency payment shall be payable upon demand by CCC. The producer shall be liable for:

(i) The amount of the marketing assistance loan or loan deficiency payment;

(ii) Any additional amounts paid by CCC for the loan or loan deficiency payment;

(iii) All other costs which CCC would not have incurred but for the fraudulent representation or the unauthorized disposition or movement of the loan collateral;

(iv) Applicable interest on such amounts;

(v) Liquidated damages under paragraph (e) of this section; and

(vi) About amounts due for a loan, the payment of such amounts may not be satisfied by the forfeiture of loan collateral to CCC of cotton with a settlement value that is less than the total of such amounts or by repayment of such loan at the lower loan repayment rate as prescribed in § 1427.19.

(2) If a producer makes a fraudulent representation or if the producer has disposed of, or moved the loan collateral without prior written approval

from CCC, the value of such collateral will be equal to its loan value, plus accrued interest, plus warehouse charges, and liquidated damages, as determined by CCC.

(b) If the amount disbursed under a marketing assistance loan, or in settlement thereof, or loan deficiency payment exceeds the amount authorized by this subpart, the producer shall be liable for repayment of such excess, plus interest. In addition, the commodity pledged as collateral for such loan shall not be released to the producer until such excess is repaid.

(c) If the amount collected from the producer in satisfaction of the marketing assistance loan or loan deficiency payment is less than the amount required under this subpart, the producer shall be personally liable for repayment of the amount of such deficiency plus applicable interest.

(d) If more than one producer executes a note and security agreement or loan deficiency payment application with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and security agreement or loan deficiency payment application and this subpart. Each producer shall also remain liable for repayment of the entire loan or loan deficiency payment amount until the loan is fully repaid without regard to their share in the cotton pledged as collateral for the loan or for which the loan deficiency payment was made. In addition, such producer may not amend the note and security agreement or loan deficiency payment application for the producer's claimed share in such cotton after execution of the note and security agreement or loan deficiency payment application by CCC.

(e) The producer and CCC agree that it will be difficult, if not impossible, to prove the amount of damages to CCC if a producer makes any fraudulent representation in obtaining a loan or loan deficiency payment or in maintaining or settling a loan or disposing of or moving the loan collateral without the prior written approval of CCC. Accordingly, if CCC determines that the producer has violated the terms or conditions of their requests for a loan or any applicable form required by CCC, liquidated damages shall be assessed on the quantity involved in the violation. Liquidated damages assessed in accordance with this section will be determined by multiplying the quantity involved in the violation by 10 percent of the marketing assistance loan rate applicable to the loan note.

(f) When it has been determined that a violation of the terms and conditions of a loan deficiency application has occurred, CCC will determine the quantity of the cotton involved with respect to such violation and assess liquidated damages by multiplying the quantity of cotton involved in the violation by 10 percent of the marketing assistance loan rate.

(g) For cases other than first or second offenses, or any offense for which CCC cannot determine good faith when the violation occurred, CCC shall:

(1) Assess liquidated damages under paragraph (e) of this section; and

(2) Call the applicable marketing assistance loan involved in the violation and require repayment of any market gain previously realized for the applicable loan, plus any interest previously waived and any storage paid by CCC, and for a loan deficiency payment, require repayment of the loan deficiency payment and charges plus interest from the date the loan deficiency payment was made.

(h) If the county committee acting on behalf of CCC determines that the producer has committed a violation under paragraph (e) of this section, CCC shall notify the producer in writing that:

(1) The producer has 30 calendar days to provide evidence and information regarding the circumstances which caused the violation, to the county committee; and

(2) Administrative actions will be taken under paragraph (f) or (g) of this section.

(i) If CCC accelerates the maturity date for a loan under this section, the producer must repay the loan at principal and charges, plus interest and may not repay the loan at the lower of the loan repayment rate under § 1427.19 or utilize the provisions of part 1401 of this chapter for such loan.

(j) Any or all of the liquidated damages assessed under paragraph (e) of

this section may be waived as determined by CCC.

(k)(1) Notwithstanding any other provision of this part, for ELS cotton stored as provided in §1427.10(f), the producer shall be liable for all costs associated with the storage of the cotton while it is stored outside. CCC shall make no storage payment or any other payment with respect to ELS cotton stored as provided in §1427.10(f).

(2) The producer of ELS cotton which is stored as provided in §1427.10(f) shall:

(i) Certify the quantity of such cotton on the loan application; certify the cotton is packaged in a hermetically sealed bag with an internal humidity level established by the gin as appropriate to safeguard the cotton; certify that packaging materials meet or exceed industry minimum standards; certify that the storage area is suitable for cotton storage and is in an area approved by CCC; certify that the storage area is constructed to prevent water accumulation under the cotton and is outside a 100-year floodplain; and certify that the storage area is serviced by bale handling and transport equipment that will not damage the sealed bag or degrade the storage area;

(ii) Be responsible for any loss in quantity or quality of such cotton;

(iii) If the loan is satisfied by forfeiting the cotton to CCC, be responsible for all costs associated with delivering such cotton to a warehouse designated by CCC, all costs associated with any re-classification and repackaging that may be required by CCC or the warehouse operator to whom the cotton is delivered, all charges by the receiving warehouse for receiving the cotton and issuing an electronic warehouse receipt for the cotton, and other charges as may be levied by the warehouse specific to outside-stored cotton; and

(iv) Not move such cotton after the loan application is submitted to CCC without prior written approval of the county committee. Failure of the producer to receive such permission shall subject the producer to administrative actions.

[67 FR 64459, Oct. 18, 2002, as amended at 68 FR 49328, Aug. 18, 2003; 69 FR 12056, Mar. 15, 2004; 71 FR 32427, June 6, 2006; 73 FR 65721, Nov. 5, 2008]

**§ 1427.19 Repayment of loans.**

(a) Warehouse receipts pledged as collateral for a CCC loan will not be released except as provided in this section.

(b) A producer, an authorized agent or anyone subsequently designated by the producer in the manner prescribed by CCC may redeem one or more bales of cotton pledged as collateral for a loan by payment to CCC of an amount applicable to the bales of cotton being redeemed determined under this section. CCC, upon proper payment for the amount due, shall release the warehouse receipts applicable to such cotton.

(c) A producer or agent or subsequent agent authorized in writing in a manner prescribed by CCC may repay the loan amount for one or more bales of cotton pledged as collateral for a marketing assistance loan:

(1) For upland cotton, at a level that is the lesser of:

(i) The loan level and charges, plus interest determined for such bales; or

(ii) The adjusted world price, as determined by CCC under §1427.25, in effect on the day the repayment is received by the county office, loan servicing agent, or cotton commercial bank that disbursed the loan.

(2) For ELS cotton, by repaying the loan amount and charges, plus interest determined for such bales.

(d) CCC shall determine and publicly announce the adjusted world price for each crop of upland cotton on a weekly basis.

(e) The difference between the loan level, excluding charges and interest, and the loan repayment level is the market gain. The total amount of any market gain realized by a person is subject to part 1400 of this chapter.

(f) Repayment of loans will not be accepted after CCC acquires title to the cotton under §1427.7.

(g) In the event that Thursday is a non-workday, such loan repayments will not be accepted beginning at 7 a.m. Eastern Standard time the next workday until an announcement of the adjusted world price for the succeeding weekly period has been made under §1427.25(e).

(h) For purposes of calculating loan-period accrued storage charges that

CCC may credit to the loan repayment amount under paragraph (i) of this section:

(1) The warehouse storage rates to be used for the 2008 through 2011 crops will be the lower of:

(i) The tariff storage rate for the warehouse for the 2005 crop or, for any warehouse not in existence in 2005, a CCC-assigned average 2005 crop tariff rate for the county or area; or

(ii) For warehouses located in Arizona and California $3.93 per bale per month and for warehouses located in all States other than Arizona and California $2.39 per bale per month.

(2) The warehouse storage rates to be used for the 2012 and subsequent crops will be the lower of:

(i) The tariff storage rate for the warehouse for the 2005 crop or, for any warehouse not in existence in 2005, a CCC-assigned average 2005 crop tariff rate for the county or area; or

(ii) For warehouses located in Arizona and California $3.50 per bale per month and for warehouses located in all States other than Arizona and California $2.13 per bale per month.

(3) CCC will not credit the loan repayment amount for a bale for any storage charges that accrued while the cotton was stored outside, except that storage may be credited for up to 15-days of outside storage beginning on the day the warehouse was notified that the bale is under loan if the bale was inside on the 15th day from the date of notification.

(4) The loan period will be determined by CCC to begin:

(i) For loan disbursed by the Farm Service Agency, on the date all loan documents, as determined and announced by CCC, have been received or

(ii) For a loan disbursed by a Cooperative Marketing Association or an authorized loan servicing agent, on the date the loan was disbursed by CCC.

(i)(1) An upland cotton loan repayment rate will not exceed the loan principal plus accrued interest for the period provided in § 1427.19(j).

(2) When the prevailing adjusted world price of upland cotton, as determined under § 1427.25, is less than the combined value of the loan principal, accrued interest, and warehouse storage that accrued during the period of the loan, CCC will permit the loan to be repaid at the adjusted world price less the storage charges that accrued during the period of the loan.

(j) For purposes of calculating interest charges on upland and extra long staple cotton loan principal, the loan period will be the period starting the date after the disbursement of the loan amount to, and including, the loan repayment date, except that interest is not charged for a loan that is disbursed and repaid on the same date.

(k) Repayment of loans will not be accepted after CCC acquires title to the cotton in accordance with § 1427.7.

[67 FR 64459, Oct. 18, 2002, as amended at 71 FR 51428, Aug. 30, 2006; 73 FR 65721, Nov. 5, 2008]

### § 1427.20 Handling payments and collections not exceeding $9.99.

Amounts of $9.99 or less will be paid to the producer only at their request. Deficiencies of $9.99 or less, including interest, may be disregarded unless CCC demands in writing that they be paid.

### § 1427.21 Settlement.

(a) The settlement of cotton loans will be made by CCC on the basis of the quality and quantity of the cotton delivered to CCC by the producer or acquired by CCC subject to the producer being responsible for, if applicable, warehouse receiving charges, new bale ties, unpaid warehouse compression, charges for and related to the certification of a bale and for any subsequent exchange of certificated receipts, storage charges for any period of yard storage, and storage charges in excess of any maximum storage credit rates as determined and announced by CCC.

(b) For purposes of settlements for cotton delivered to CCC in satisfaction of a loan obligation, CCC may elect to calculate such settlement values based on the net weight, condition, and classification as reflected on the warehouse receipt delivered to CCC, whether such receipt is the receipt issued by the original storing warehouse and presented for calculating the loan amount or a receipt issued by a subsequent warehouse due to the transfer of such bale while pledged as collateral for a CCC loan.

(c) If a producer does not pay CCC the amount due under a loan, CCC shall take title to the cotton as provided in § 1427.7(b).

(d) With respect to ELS cotton which is stored as provided in § 1427.10(f), settlement of loans shall be made based upon the determination of the quantity and quality made by CCC at the time of acceptance of the cotton by CCC at the warehouse designated by CCC as provided in § 1427.18(k).

(e) If CCC sells the commodity described in paragraph (a) of this section in settlement of the recourse loan, the sales proceeds shall be applied to the amount owed CCC by the producer. The producer shall be responsible for any costs incurred by CCC in completing the sale and CCC will deduct the amount of these costs from the sales proceeds. When CCC sells any cotton obtained by forfeiture under a marketing assistance loan, CCC will, in all instances, retain all proceeds obtained from the sale of the cotton and will not make any payment of any amount of such proceeds to any party, including the producer who had satisfied their obligation under the loan through forfeiture of the cotton to CCC.

(f) CCC will pay to the warehouse any unpaid storage or receiving charges for forfeited loan collateral, not to exceed the amount that accrued from the date that all necessary documents were received by CCC to the loan maturity date, as soon as practicable after the cotton is forfeited.

[67 FR 64459, Oct. 18, 2002, as amended at 68 FR 49329, Aug. 18, 2003; 71 FR 32427, June 6, 2006; 73 FR 65721, Nov. 5, 2008]

### § 1427.22 Commodity certificate exchanges.

(a) For any outstanding marketing assistance loan provided for upland cotton, a producer may purchase a commodity certificate and exchange that commodity certificate for the marketing assistance loan collateral. This provision terminates effective ending with the 2009 crop and will not be available for subsequent crops.

(b) The exchange rate is the lesser of:

(1) The loan rate and charges, plus interest applicable to the loan, or

(2) The adjusted world price for cotton as determined by CCC.

(c) Producers must request a commodity certificate exchange in person at the FSA county service center that disbursed the marketing assistance loan by:

(1) Completing a written request as CCC determines,

(2) Purchasing a commodity certificate for the exact amount required to exchange the marketing assistance loan collateral, and

(3) Immediately exchanging the purchased commodity certificate for the outstanding loan collateral.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65722, Nov. 5, 2008]

### § 1427.23 Cotton loan deficiency payments.

(a) In order to be eligible to receive such loan deficiency payments, the producer of the upland cotton must:

(1) Comply with all of the upland cotton marketing assistance loan eligibility requirements under this subpart;

(2) Agree to forgo obtaining such loans unless denied a loan deficiency payment due to payment limitation;

(3) Submit, on a form prescribed by CCC, to the FSA Service Center on or before beneficial interest is lost in such quantity and before the final loan availability date for the commodity:

(i) An indication of their intentions to receive a loan deficiency payment on the identified commodity or

(ii) A completed request for a loan deficiency payment for a quantity of eligible cotton under § 1427.5(a).

(4) Provide warehouse receipts or, as determined by CCC, a list of gin bale numbers for such cotton showing, for each bale, the net weight established at the gin;

(5) For loan deficiency payments requested before ginning of the cotton based on a locked-in adjusted world price, provide identifying numbers for modules or other storage units that will correspond to the gin-assigned numbers of the bales produced from the unginned cotton; and

(6) Otherwise comply with all program requirements.

(b) The loan deficiency payment applicable to a crop of cotton shall be computed by multiplying the applicable loan deficiency payment rate, as determined under paragraph (c) of this

section, by the quantity of the crop the producer is eligible to pledge as collateral for a loan, excluding any quantity for which the producer obtains a marketing assistance loan.

(c) The loan deficiency payment rate for a crop of upland cotton shall be the amount by which the loan rate determined for a bale of such crop exceeds the adjusted world price, as determined by CCC under § 1427.25, in effect on the day the request is received by, the county office, loan servicing agent, or cotton commercial bank. In no case shall the loan deficiency payment rate for a bale exceed the value of the bale had it been pledged as collateral for a marketing assistance loan.

(d) The total amount of any loan deficiency payments that a person may receive is subject to part 1400 of this chapter.

(e) If the producer enters into an agreement with CCC on or before the date of ginning a quantity of eligible upland cotton, and the producer has the beneficial interest in such quantity as specified under § 1427.5(c) on the date the cotton was ginned, and the producer meets all the other requirements in paragraph (a) of this section on or before the final date to apply for a loan deficiency payment under § 1427.5, the loan deficiency payment rate applicable to such cotton will be:

(1) Based on the date the cotton was ginned, which CCC will consider to be the date of the LDP request, if payment application is made in the manner prescribed by CCC for obtaining such rate;

(2) Based on the date of request for lock-in of the adjusted world price if payment application is made in the manner prescribed by CCC for obtaining such rate; or

(3) Based on the date a completed request including production evidence is submitted in the manner prescribed by CCC for obtaining such rate.

(f) In the event that Thursday is a non-workday, such applications for loan deficiency payments will not be accepted beginning at 7 a.m. Eastern time the next workday until an announcement of the adjusted world price for the succeeding weekly period has been made under § 1427.25(e).

[67 FR 64459, Oct. 18, 2002, as amended at 71 FR 32427, June 6, 2006; 73 FR 65722, Nov. 5, 2008]

### § 1427.24 [Reserved]

### § 1427.25 Determination of the prevailing world market price and the adjusted world price for upland cotton.

(a) CCC will determine the world market price for upland cotton as follows:

(1) During the period when only one daily price quotation is available for each growth quoted for Middling one and three-thirty-second inch (M 1 3/32-inch) cotton, CFR (cost and freight) Far East, the prevailing world market price for upland cotton will be based on the average of the quotations for the preceding Friday through Thursday for the 5 lowest-priced growths of the growths quoted for M 1 3/32-inch cotton, CFR Far East.

(2) During the period when both a price quotation for cotton for shipment no later than August/September of the current calendar year (current Far East shipment price) and a price quotation for cotton for shipment no earlier than October/November of the current calendar year (forward Far East shipment price) are available for growths quoted for M 1 3/32-inch cotton, CFR Far East, the prevailing world market price for upland cotton will be based on the average of the current Far East shipment prices for the preceding Friday through Thursday for the 5 lowest-priced growths of the growths quoted for M 1 3/32-inch cotton, CFR Far East, except as may be determined by the Secretary as specified in paragraph (c)(3)(iv) of this section.

(3) The upland cotton prevailing world market price determined as specified in paragraphs (a)(1) or (a)(2) of this section is referred to as the "Far East price" (FE).

(4) If quotes are not available for 1 or more days in the 5-day period, the available quotes during the period will be used. If no quotes are available during the Friday through Thursday period, the prevailing world market price will be based on the best available

world price information, as CCC determines.

(b) The upland cotton prevailing world market price, adjusted as specified in paragraph (c) of this section (adjusted world price (AWP)), will apply to the 2008 through 2012 crops of upland cotton and to the 2007 crop to the extent provided in §1427.1.

(c) The upland cotton AWP will equal the FE determined as specified in paragraph (a) of this section, adjusted as follows:

(1) FE will be adjusted to U.S. location by deducting the average costs to market, including average transportation costs, as determined by the Secretary.

(2) The price determined as specified in paragraph (c)(1) of this section will be adjusted to reflect the price of base quality upland cotton by deducting the difference, as CCC announces, between the applicable loan rate for an upland cotton crop for M 1 3/32-inch, leaf 3, (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 25.5 through 29.4 grams per tex, length uniformity 79.5 through 82.4 percent) cotton and the loan rate for base quality upland cotton.

(3) The prevailing world market price, adjusted as specified in paragraphs (c)(1) and (c)(2) of this section, may be further adjusted if it is determined that the adjustment is necessary to:

(i) Minimize potential loan forfeitures;

(ii) Minimize the accumulation of stocks of upland cotton by the Federal Government;

(iii) Ensure that upland cotton produced in the United States can be marketed freely and competitively, both domestically and internationally; and

(iv) Ensure an appropriate transition between current-crop and forward-crop price quotations, except that forward-crop price quotations may be used prior to July 31 of a marketing year only if there are insufficient current crop quotations and the forward-crop price quotation is the lowest such quotation available.

(d) The upland cotton AWP, determined as specified in paragraph (c) of this section, and the amount of the additional adjustment determined as specified in paragraphs (e) and (f) of this section, will be announced, to the extent practicable, at 4 p.m. eastern time each Thursday continuing through the last Thursday of March 2014 (March 27, 2014). In the event that Thursday is a non-workday, the determination will be announced, to the extent practicable, at 8 a.m. eastern time the next work day.

(e)(1)(i) AWP, determined as specified in paragraph (c) of this section, will be subject to a further coarse count adjustment as provided in this section regarding all qualities of upland cotton eligible for loan except the following upland cotton grades with a staple length of 1 1/16-inch or longer:

(A) White Grades—Strict Middling and better, leaf 1 through leaf 6; Middling, leaf 1 through leaf 6; Strict Low Middling, leaf 1 through leaf 6; and Low Middling, leaf 1 through leaf 5;

(B) Light Spotted Grades—Strict Middling and better, leaf 1 through leaf 5; Middling, leaf 1 through leaf 5; and Strict Low Middling, leaf 1 through leaf 4; and

(C) Spotted Grades—Strict Middling and better, leaf 1 through leaf 2; and

(ii) Grade, leaf, and staple length must be determined as specified in §1427.9. If no such official classification is presented, the coarse count adjustment will not be made.

(2) The adjustment for upland cotton specified in paragraph (e)(1) of this section will be determined by deducting from AWP:

(i) The difference between FE, and

(A) During the period when only one daily price quotation for each growth quoted for "coarse count" cotton, CFR Far East, is available, the average of the quotations for the corresponding Friday through Thursday for the three lowest-priced growths of the growths quoted for "coarse count" cotton, CFR Far East (Far East coarse count price); or

(B) During the period when both current Far East shipment prices and forward Far East shipment prices are available for the growths quoted for "coarse count" cotton, CFR Far East, the result calculated by the average of the current Far East shipment prices for the preceding Friday through Thursday for the three lowest-priced

growths of the growths quoted for "coarse count" cotton, CFR Far East (Far East coarse count price) minus

(ii) The difference between the applicable loan rate for an upland cotton crop for M 1 3/32-inch, leaf 3, (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 25.5 through 29.4 grams per tex, length uniformity 80 through 82 percent) cotton and the loan rate for an upland cotton crop for SLM 1 1/32-inch, leaf 4, (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 25.5 through 29.4 grams per tex, length uniformity 79.5 through 82.4 percent) cotton.

(3) Regarding the determination of the Far East coarse count price specified in paragraph (e)(2)(i) of this section:

(i) If no quotes are available for one or more days of the 5-day period, the available quotes will be used;

(ii) If quotes for three growths are not available for any day in the 5-day period, that day will not be considered; and

(iii) If quotes for three growths are not available for at least 3 days in the 5-day period, that week will not be considered, in which case the adjustment determined as specified in paragraph (e)(2) of this section for the latest available week will continue to be applicable.

(f)(1)(i) AWP, determined as specified in paragraph (c) of this section, will be subject to a further fine count adjustment as provided in this section regarding all upland cotton having a loan schedule premium or discount exceeding that for Middling, leaf 3, staple length 1 3/32-inch upland cotton, and

(ii) Grade, staple length, and leaf must be determined as specified in § 1427.9. If no such official classification is presented, the fine count adjustment will not be made.

(2) The adjustment for upland cotton specified in paragraph (f)(1) of this section will be determined by deducting from AWP:

(i) The difference between FE, and

(A) During the period when only one daily price quotation for each growth quoted for "fine count" cotton, CFR Far East, is available the average of the quotations for the corresponding Friday through Thursday for the three lowest-priced growths of the growths quoted for "fine count" cotton, CFR Far East (Far East fine count price) or

(B) During the period when both current Far East shipment prices and forward Far East shipment prices are available for the growths quoted for "fine count" cotton, CFR Far East, the result calculated by the average of the current Far East shipment prices for the preceding Friday through Thursday for the three lowest-priced growths of the growths quoted for "fine count" cotton, CFR Far East (Far East fine count price) minus

(ii) The difference between the applicable loan rate for an upland cotton crop for M 1 3/32-inch, leaf 3, (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 25.5 through 29.4 grams per tex, length uniformity 79.5 through 82.4 percent) cotton and the loan rate for an upland cotton crop for SM 1 1/8-inch, leaf 2, (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 25.5 through 29.4 grams per tex, length uniformity 79.5 through 82.4 percent) cotton.

(3) Regarding the determination of the Far East fine count price under paragraph (f)(2)(i) of this section:

(i) If no quotes are available for one or more days of the 5-day period, the available quotes will be used;

(ii) If quotes for three growths are not available for any day in the 5-day period, that day will not be considered; and

(iii) If quotes for three growths are not available for at least 3 days in the 5-day period, that week will not be considered, in which case the adjustment determined as specified in paragraph (f)(2) of this section for the latest available week will continue to be applicable.

(g) In the determination of FE as specified in paragraph (a)(2) of this section, the Far East coarse count price specified in paragraph (e)(2)(i)(B) of this section, and the Far East fine count price as specified in paragraph (f)(2)(i)(B) of this section, CCC will use either current Far East shipment prices, forward Far East shipment prices, or any combination thereof to determine FE or the Far East coarse count price or the Far East fine count price used in the determination of the adjustment for upland cotton specified

in paragraphs (e)(1) and (f)(1) of this section and determined as specified in paragraphs (e)(2) and (f)(2) of this section to prevent distortions in such adjustment.

(h) For particular bales, the AWP determined as specified in paragraph (c) of this section, will be subject to further adjustments to a value no less than zero, as CCC determines, based on the Schedule of Premiums and Discounts as announced for the loan program for an upland cotton crop.

[73 FR 65722, Nov. 5, 2008]

## Subpart B [Reserved]

## Subpart C—Economic Adjustment Assistance to Users of Upland Cotton

SOURCE: 73 FR 65723, Nov. 5, 2008, unless otherwise noted.

### § 1427.100 Applicability.

(a) Regulations in this subpart are applicable beginning August 1, 2008. These regulations specify the terms and conditions under which CCC will make payments to eligible domestic users who entered into an Upland Cotton Domestic User Agreement with CCC to participate in the upland cotton domestic user program under section 1207 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246, referred to commonly as the "2008 Farm Bill").

(b) CCC will prescribe forms used in administering Economic Adjustment Assistance to Users of Upland Cotton.

### § 1427.101 Eligible upland cotton.

(a) For purposes of this subpart, eligible upland cotton is baled upland cotton, regardless of origin, that is opened by an eligible domestic user on or after August 1, 2008, and is either:

(1) Baled lint, including baled lint classified by USDA's Agricultural Marketing Service as Below Grade;

(2) Loose samples removed from upland cotton bales for classification purposes that have been rebaled;

(3) Semi-processed motes that are of a quality suitable, without further processing, for spinning, papermaking, or production of non-woven fabric; or

(4) Re-ginned (processed) motes.

(b) Eligible upland cotton must not be:

(1) Cotton for which a payment, under the provisions of this subpart, has been made available;

(2) Raw (unprocessed) motes, pills, linters, or other derivatives of the lint cleaning process; or

(3) Textile mill wastes.

### § 1427.102 Eligible domestic users.

(a) For purposes of this subpart, a person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of spinning, papermaking, or processing of non-woven cotton fabric in the United States, who has entered into an agreement with CCC to participate in the upland cotton user program, will be considered an eligible domestic user.

(b) Applications for payment under this subpart must contain documentation required by the provisions of the Upland Cotton Domestic User Agreement and other instructions that CCC issues.

### § 1427.103 Upland cotton Domestic User Agreement.

(a) Payments specified in this subpart will be made available to eligible domestic users who have entered into an Upland Cotton Domestic User Agreement with CCC and who have complied with the terms and conditions in this subpart, the Upland Cotton Domestic User Agreement, and instructions issued by CCC.

(b) Upland Cotton Domestic User Agreements may be obtained from Contract Reconciliation Division, Kansas City Commodity Office (KCCO), P.O. Box 419205, Stop 8758, Kansas City, Missouri 64141–6205. In order to participate in the program authorized by this subpart, domestic users must execute the Upland Cotton Domestic User Agreement and forward the original and one copy to KCCO.

### § 1427.104 Payment rate.

(a) Beginning August 1, 2008 and ending July 31, 2012, the payment rate for purposes of calculating payments as specified in this subpart will be 4 cents per pound.

(b) Beginning August 1, 2012, the payment rate for purposes of calculating payments as specified in this subpart will be 3 cents per pound.

**§ 1427.105 Payment.**

(a) Payments specified in this subpart will be determined by multiplying the payment rate, as specified in § 1427.104, by

(1) In the case of baled upland cotton, whether lint, loose samples or reginned motes, but not semi-processed motes, the net weight of the cotton used (gross weight minus the weight of bagging and ties);

(2) In the case of unbaled reginned motes consumed, without rebaling, for an end use in a continuous manufacturing process, the weight of the reginned motes after final cleaning; and

(3) In the case of semi-processed motes which are of a quality suitable, without further processing, for spinning, papermaking, or manufacture of non-woven cotton fabric, 25 percent of the weight (gross weight minus the weight of bagging and ties, if baled) of the semi-processed motes; provided further, that with respect to semi-processed motes that are used prior to August 18, 2010, payment may be allowed by CCC in its sole discretion at 100 percent of the weight as determined appropriate for a transition of the program to the 25 percent factor.

(b) In all cases, the payment will be determined based on the amount of eligible upland cotton that an eligible domestic user consumed during the immediately preceding calendar month. For the purposes of this subpart, eligible upland cotton will be considered consumed by the domestic user on the date the bale is opened for consumption, or if not baled, the date consumed, without further processing, in a continuous manufacturing process.

(c) Payments specified in this subpart will be made available upon application for payment and submission of supporting documentation, as required by the CCC-issued provisions of the Upland Cotton Domestic User Agreement.

(d) All payments received by the agreement holder must be used for purposes as specified in section 1207 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246, referred to commonly as the 2008 Farm Bill). Authorized expenditures include acquisition, construction, installation, modernization, development, conversion, or expansion of land, plant, buildings, equipment, facilities, or machinery. Such capital expenditures must be directly attributable and certified as such by the user for the purpose of manufacturing upland cotton into eligible cotton products in the United States.

[73 FR 65723, Nov. 5, 2008, as amended at 75 FR 50849, Aug. 18, 2010]

## Subpart D—Recourse Seed Cotton Loans

SOURCE: 67 FR 64459, Oct. 18, 2002, unless otherwise noted.

**§ 1427.160 Applicability.**

(a) This subpart is applicable to the 2008 through 2012 crops of upland and extra long staple seed cotton. These regulations set forth the terms and conditions under which recourse seed cotton loans shall be made available by CCC. Such loans will be available through March 31 of the year following the calendar year in which such crop is normally harvested. CCC may change the loan availability period to conform to State or locally imposed quarantines. Additional terms and conditions are in the note and security agreement which must be executed by a producer in order to receive such loans.

(b) Loan rates and the forms that are used in administering the recourse seed cotton loan program for a crop of cotton are available in FSA State and county offices. Loan rates will be based on the base quality loan rate for upland cotton and the national average loan rate for extra long staple cotton.

(c) A producer must, unless otherwise authorized by CCC, request the loan at the county office which, under part 718 of this title, is responsible for administering programs for the farm on which the cotton was produced.All note and security agreements and related documents necessary for the administration of the recourse seed cotton loan program shall be prescribed by CCC and shall be available at State and county offices.

(d) Loans shall not be available for seed cotton produced on land owned or otherwise in the possession of the United States if such land is occupied without the consent of the United States.

[67 FR 64459, Oct. 18, 2002, as amended at 73 FR 65724, Nov. 5, 2008]

### § 1427.161 Administration.

(a) The recourse seed cotton loan program which is applicable to a crop of cotton shall be administered under the general supervision of the Executive Vice President, CCC, or a designee and shall be carried out in the field by State and county FSA committees (State and county committees, respectively).

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State committee shall take any action required by these regulations which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, an action taken by such county committee which is not under the regulations of this subpart; or

(2) Require a county committee to withhold taking any action which is not under the regulations of this subpart.

(d) No provision or delegation herein to a State or county committee shall preclude the Executive Vice President, CCC (Administrator, FSA), or a designee from determining any question arising under the recourse seed cotton program or from reversing or modifying any determination made by the State or county committee.

(e) The Deputy Administrator, FSA, may authorize waiver or modification of deadlines and other program requirements where lateness or failure to meet such other requirements does not adversely affect the operation of the recourse seed cotton loan program.

(f) A representative of CCC may execute loan applications and related documents only under the terms and conditions determined and announced by CCC. Any such document which is not executed under such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void.

### § 1427.162 [Reserved]

### § 1427.163 Disbursement of loans.

(a) A producer or the producer's agent shall request a loan at the county office for the county which, under part 718 of this title, is responsible for administering programs for the farm on which the cotton was produced and which will assist the producer in completing the loan documents, except that CMA's designated by producers to obtain loans in their behalf may, unless otherwise authorized by CCC, obtain loans through a central county office designated by the State committee.

(b) Disbursement of each loan will be made by the county office of the county which is responsible for administering programs for the farm on which the cotton was produced, except that CMA's designated by producers to obtain loans in their behalf may, unless otherwise authorized by CCC, obtain disbursement of loans at a central county office designated by the State committee. Service charges shall be deducted from the loan proceeds. The producer or the producer's agent shall not present the loan documents for disbursement unless the cotton is in existence and in good condition. If the cotton is not in existence and in good condition at the time of disbursement, the producer or the agent shall immediately return the check issued in payment of the loan or, if the check has been negotiated, the total amount disbursed under the loan, and charges plus interest shall be refunded promptly.

### § 1427.164 Eligible producer.

An eligible producer must meet the requirements of § 1427.4.

### § 1427.165 Eligible seed cotton.

(a) Seed cotton pledged as collateral for a loan must be tendered to CCC by an eligible producer and must:

(1) Be in existence and in good condition at the time of disbursement of loan proceeds;

(2) Be stored in identity-preserved lots in approved storage meeting requirements of § 1427.171;

(3) Be insured at the full loan value against loss or damage by fire;

(4) Not have been sold, nor any sales option on such cotton granted, to a buyer under a contract which provides that the buyer may direct the producer to pledge the seed cotton to CCC as collateral for a loan;

(5) Not have been previously sold and repurchased; or pledged as collateral for a CCC loan and redeemed;

(6) Be production from acreage that has been reported timely under part 718 of this title; and

(b) The quality of cotton which may be pledged as collateral for a loan shall be the estimated quality of lint cotton in each lot of seed cotton as determined by the county office, except that if a control sample of the lot of cotton is classed by an Agricultural Marketing Service (AMS) Cotton Classing Office or other entity approved by CCC, the quality for the lot shall be the quality shown on the applicable documentation issued for the control sample.

(c) To be eligible for loan, the beneficial interest in the seed cotton must be in the producer who is pledging the seed cotton as collateral for a loan as provided in § 1427.5(c).

### § 1427.166 Insurance.

The seed cotton must be insured at the full loan value against loss or damage by fire.

### § 1427.167 Liens.

If there are any liens or encumbrances on the seed cotton tendered as collateral for a loan, waivers that fully protect the interest of CCC must be obtained even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the cotton after the loan is approved.

### § 1427.168 [Reserved]

### § 1427.169 Fees, charges, and interest.

(a) A producer shall pay a non-refundable loan service fee to CCC at a rate determined by CCC.

(b) Interest which accrues for a loan shall be determined under part 1405 of this chapter.

### § 1427.170 Quantity for loan.

(a) The quantity of lint cotton in each lot of seed cotton tendered for loan shall be determined by the county office by multiplying the weight or estimated weight of seed cotton by the lint turnout factor determined under paragraph (b) of this section.

(b) The lint turnout factor for any lot of seed cotton shall be the percentage determined by the county committee representative during the initial inspection of the lot. If a control portion of the lot is weighed and ginned, the turnout factor determined for the portion of cotton ginned will be used for the lot. If a control portion is not weighed and ginned, the lint turnout factor shall not exceed 32 percent for machine-picked cotton and 22 percent for machine-stripped cotton unless acceptable proof is furnished showing that the lint turnout factor is greater.

(c) Loans shall not be made on more than a percentage established by the county committee of the quantity of lint cotton determined as provided in this section. If the seed cotton is weighed, the percentage to be used shall not be more than 95 percent. If the quantity is determined by measurement, the percentage to be used shall not be more than 90 percent. The percentage to be used in determining the maximum quantity for any loan may be reduced below such percentages by the county committee when determined necessary to protect the interests of CCC on the basis of one or more of the following risk factors:

(1) Condition or suitability of the storage site or structure;

(2) Condition of the cotton;

(3) Location of the storage site or structure; and

(4) Other factors peculiar to individual farms or producers which related to the preservation or safety of the loan collateral. Loans may be made on a lower percentage basis at the producer's request.

### § 1427.171 Approved storage.

Approved storage shall consist of storage located on or off the producer's

farm (excluding public warehouses) which is determined by a county committee representative to afford adequate protection against loss or damage and which is located within a reasonable distance, as determined by CCC, from an approved gin. If the cotton is not stored on the producer's farm, the producer must furnish satisfactory evidence that the producer has the authority to store the cotton on such property and that the owner of such property has no lien for such storage against the cotton. The producer must provide satisfactory evidence that the producer and any person having an interest in the cotton including CCC, have the right to enter the premises to inspect and examine the cotton and shall permit a reasonable time to such persons to remove the cotton from the premises.

**§ 1427.172 Settlement.**

(a) A producer may, at any time before maturity of the loan, obtain release of all or any part of the loan seed cotton by paying to CCC the amount of the loan, plus interest and charges.

(b)(1) A producer or the producer's agent shall not remove from storage any cotton which is pledged as collateral for a loan until prior written approval has been received from CCC for removal of such cotton. If a producer or the producer's agent obtains such approval, they may remove such cotton from storage, sell the seed cotton, have it ginned, and sell the lint cotton and cottonseed obtained therefrom. The ginner shall inform the county office in writing immediately after the seed cotton removed from storage has been ginned and furnish the county office the loan number, producer's name, and applicable gin bale numbers. If the seed cotton is removed from storage, the loan principal plus interest and charges thereon must be satisfied not later than the earlier of:

(i) The date established by the county committee;

(ii) 5 days after the date of the producer received the AMS classification under § 1427.9 (and the warehouse receipt, if the cotton is delivered to a warehouse), representing such cotton; or

(iii) The loan maturity date.

(2) If the seed cotton or lint cotton is sold, the loan principal, interest, and charges must be satisfied immediately.

(3) A producer, except a CMA, may obtain a nonrecourse loan or loan deficiency payment under subpart A of this part, on the lint cotton, but:

(i) The loan principal, interest, and charges on the seed cotton must be satisfied from the proceeds of the nonrecourse loan under subpart A of this part; or

(ii) The loan deficiency payment must be applied to the loan principal, interest, and charges on the outstanding seed cotton loan.

(4) A CMA must repay the seed cotton loan principal, interest, and charges before pledging the cotton for a nonrecourse loan or before a loan deficiency payment can be approved under subpart A of this part, on the lint cotton. If CMA's authorized by producers to obtain loans in their behalf remove seed cotton from storage before obtaining approval to move such cotton, such removal shall constitute conversion of such cotton unless the CMA:

(i) Notifies the county office in writing the following morning by mail or otherwise that such cotton has been moved and is on the gin yard;

(ii) Furnishes CCC an irrevocable letter of credit if requested; and

(iii) Repays the loan principal, plus interest and charges, within the time specified by the county committee.

(5) Any removal from storage shall not be deemed to constitute a release of CCC's security interest in the seed cotton or to release the producer or CMA from liability for the loan principal, interest, and charges if full payment of such amount is not received by the county office.

(c) If, either before or after maturity, the producer discovers that the cotton is going out of condition or is in danger of going out of condition, the producer shall immediately notify the county office and confirm such notice in writing. If the county committee determines that the cotton is going out of condition or is in danger of going out of condition, the county committee will call for repayment of the loan principal, plus interest and charges on

or before a specified date. If the producer does not repay the loan or have the cotton ginned and obtain a nonrecourse loan under subpart A of this part on the lint cotton produced therefrom within the period as specified by the county committee, the cotton shall be considered abandoned.

(d) If the producer has control of the storage site and if the producer subsequently loses control of the storage site or there is danger of flood or damage to the seed cotton or storage structure making continued storage of the cotton unsafe, the producer shall immediately either repay the loan or move the seed cotton to the nearest approved gin for ginning and shall, at the same time, inform the county office. If the producer does not do so, the seed cotton shall be considered abandoned.

**§ 1427.173 Foreclosure.**

Any seed cotton pledged as collateral for a loan which is abandoned or which has not been ginned and pledged as collateral for a nonrecourse loan under subpart A of this part by the seed cotton loan maturity date may be removed from storage by CCC and ginned and the resulting lint cotton warehoused for the account of CCC. The lint cotton and cottonseed may be sold, at such time, in such manner, and upon such terms as CCC may determine, at public or private sale. CCC may become the purchaser of the whole or any part of such cotton and cottonseed. If the proceeds received from the sales of the cotton are less than the amount due on the loan (including principal, interest, ginning charges, and any other charges incurred by CCC), the producer shall be liable for such difference. If the proceeds received from sale of the cotton are greater than the sum of the amount due plus any cost incurred by CCC in conducting the sale of the cotton, the amount of such excess shall be paid to the producer or, if applicable, to any secured creditor of the producer.

**§ 1427.174 Maturity of seed cotton loans.**

Seed cotton loans mature on demand by CCC but no later than May 31 following the calendar year in which such crop is normally harvested.

**§ 1427.175 Liability of the producer.**

(a)(1) If a producer makes any fraudulent representation in obtaining a loan, maintaining a loan, or settling a loan or if the producer disposes of or moves the loan collateral without the prior approval of CCC, such loan amount shall be refunded upon demand by CCC. The producer shall be liable for:

(i) The amount of the loan;

(ii) Any additional amounts paid by CCC for the loan;

(iii) All other costs which CCC would not have incurred but for the fraudulent representation or the unauthorized disposition or movement of the loan collateral;

(iv) Applicable interest on such amounts; and

(v) Liquidated damages under paragraph (e) of this section.

(2) Notwithstanding any provision of the note and security agreement, if a producer has made any such fraudulent representation or if the producer has disposed of, or moved, the loan collateral without prior written approval from CCC, the value of such collateral acquired by CCC shall be equal to the sales price of the cotton less any costs incurred by CCC in completing the sale.

(b) If the amount disbursed under a loan, or in settlement thereof, exceeds the amount authorized by this subpart, the producer shall be liable for repayment of such excess, plus interest. In addition, seed cotton pledged as collateral for such loan shall not be released to the producer until such excess is repaid.

(c) If the amount collected from the producer in satisfaction of the loan is less than the amount required under this subpart, the producer shall be personally liable for repayment of the amount of such deficiency plus applicable interest.

(d) If more than one producer executes a note and security agreement with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and security agreement and the regulations in this subpart. Each such producer shall also remain liable for repayment of the entire loan amount until the loan is fully repaid without regard to such producer's

claimed share in the seed cotton pledged as collateral for the loan. In addition, such producer may not amend the note and security agreement for the producer's claimed share in such seed cotton, after execution of the note and security agreement by CCC.

(e) The producer and CCC agree that it will be difficult, if not impossible, to prove the amount of damages to CCC if a producer makes any fraudulent representation in obtaining a loan or in maintaining or settling a loan or disposing of or moving the collateral without the prior approval of CCC. Accordingly, if CCC or the county committee determines that the producer has violated the terms or conditions of the note and security agreement, liquidated damages shall be assessed on the quantity of the seed cotton which is involved in the violation. If CCC or the county committee determines the producer:

(1) Acted in good faith when the violation occurred, liquidated damages will be assessed by multiplying the quantity involved in the violation by:

(i) 10 percent of the loan rate applicable to the loan note for the first offense;

(ii) 25 percent of the loan rate applicable to the loan note for the second offense; or

(2) Did not act in good faith about the violation, or for cases other than first or second offense, liquidated damages will be assessed by multiplying the quantity involved in the violation by 25 percent of the loan rate applicable to the loan note.

(f) For first and second offenses, if CCC or the county committee determines that a producer acted in good faith when the violation occurred, the county committee shall:

(1) Require repayment of the loan principal applicable to the loan quantity affected by the violation, and charges plus interest applicable to the amount repaid;

(2) Assess liquidated damages under paragraph (e) of this section; and

(3) If the producer fails to pay such amount within 30 calendar days from the date of notification, call the applicable loan involved in the violation.

(g) For cases other than first or second offenses, or any offense for which CCC or the county committee cannot determine good faith when the violation occurred, the county committee shall:

(1) Assess liquidated damages under paragraph (e) of this section;

(2) Call the applicable loan involved in the violation.

(h) If CCC or the county committee determines that the producer has committed a violation under paragraph (e) of this section, the county committee shall notify the producer in writing that:

(1) The producer has 30 calendar days to provide evidence and information to the county committee regarding the circumstances which caused the violation, and

(2) Administrative actions will be taken under paragraphs (f) or (g) of this section.

(i) Any or all of the liquidated damages assessed under the provision of paragraph (e) of this section may be waived as determined by CCC.

## Subpart E—Standards for Approval of Warehouses for Cotton and Cotton Linters

AUTHORITY: Secs. 4 and 5, 62 Stat. 1070, as amended, 1072, as amended (15 U.S.C. 714 b and c).

SOURCE: 44 FR 67085, Nov. 23, 1979, unless otherwise noted.

### § 1427.1081 General statement and administration.

(a) This subpart prescribes the requirements which must be met and the procedures which must be followed by a warehouseman in the United States or Puerto Rico who desires the approval by the Commodity Credit Corporation (hereinafter referred to as "CCC") of warehouse(s) for the storage and handling of cotton and cotton linters, under a Cotton Storage Agreement, which are owned by CCC or held by CCC as security for price support loans. This subpart is not applicable to cotton or cotton linters purchased in storage for prompt shipment or to handling operations of a temporary nature.

(b) Copies of the CCC storage agreement and forms required for obtaining

approval under this subpart may be obtained from the Kansas City Commodity Office, U.S. Department of Agriculture, P.O. Box 205, Kansas City, Missouri 64141 (hereinafter referred to as the "KCCO").

(c) A warehouse must be approved by the KCCO and a storage agreement must be in effect between CCC and the warehouseman before CCC will use such warehouse. The approval of a warehouse or the entering into of a storage agreement does not constitute a commitment that CCC will use the warehouse, and no official or employee of the U.S. Department of Agriculture is authorized to make any such commitment.

(d) A warehouseman, when applying for approval under this subpart shall submit to CCC at KCCO:

(1) A completed Form CCC–49, "Application for Approval of Warehouse for Storage of Cotton and/or Cotton Linters,"

(2) A current financial statement on Form WA–51, "Financial Statement", supported by such supplemental schedules as CCC may request. Financial statements may be submitted on forms other than Form WA–51 with approval of the Director, KCCO, or the Director's designee. Financial statements shall show the financial condition of the warehouseman as of a date no earlier than ninety (90) days prior to the date of the warehouseman's application, or such other date as CCC may prescribe. Additional financial statements shall be furnished annually and at such other times as CCC may require. CCC also may require that financial statements prepared by the warehouseman or by a public accountant be examined by an independent certified public accountant in accordance with generally accepted auditing standards. Only one financial statement is required for a chain of warehouses owned or operated by a single business entity. If approved by the Director, KCCO, or the Director's designee, the financial statement of a parent company, which includes the financial position of a wholly-owned subsidiary, may be used to meet the CCC standards for approval for the wholly-owned subsidiary.

(3) Evidence that the warehouseman is licensed by the appropriate licensing authority as required under § 1427.1082(a)(2) and such other documents or information as CCC may require,

(4) For warehouseman not operating under the U.S. Warehouse Act, a sample copy of the warehouseman's receipts and bale tags, and

(5) Evidence of applicable fire insurance rates.

[44 FR 67085, Nov. 23, 1979, as amended by Amdt. 3, 50 FR 16454, Apr. 26, 1985]

### § 1427.1082 Basic standards.

Unless otherwise provided in this subpart, each warehouseman and each of the warehouses owned or operated by such warehouseman for which CCC approval is sought for the storage or handling of CCC-owned or -loan commodities shall meet the following standards:

(a) The warehouseman shall:

(1) Be an individual, partnership, corporation, association, or other legal entity engaged in the business of storing or handling for hire, or both, the applicable commodity. The warehouseman, if a corporation, shall be authorized by its charter to engage in such business,

(2) Have a current and valid license for the kind of storage operation for which the warehouseman seeks approval if such a license is required by State or local laws or regulations,

(3) Have a net worth which is the greater of $25,000 or the amount which results from multiplying the maximum storage capacity of the warehouse (the total number of bales of cotton or cotton linters which the warehouse can accommodate when stored in the customary manner) times ten (10) dollars per bale. The net worth need not exceed $250,000. If the calculated net worth exceeds $25,000, the warehouseman may satisfy any deficiency in net worth between the $25,000 minimum requirement and such calculated net worth by furnishing bond (or acceptable substitute security) meeting the requirements of § 1427.1083,

(4) Have available sufficient funds to meet ordinary operating expenses,

(5) Have satisfactorily corrected, upon request by CCC, any deficiencies in the performance of any storage agreement with CCC,

(6) Maintain accurate and complete inventory and operating records,

(7) Use only card type warehouse receipts which are pre-numbered and prepunched or such other document as CCC may prescribe,

(8) Have available at the warehouse adequate and operable firefighting equipment for the type of warehouse and applicable stored commodity, and

(9) Have a work force and equipment available to provide adequate storage and handling service.

(b) The warehouseman, officials, or supervisory employees of the warehouseman in charge of the warehouse operation shall have the necessary experience, organization, technical qualifications, and skills in the warehousing business regarding the applicable commodities to enable them to provide proper storage and handling services.

(c) Warehouseman, officials and each of the supervisory employees of the warehouseman in charge of the warehouse operation shall:

(1) Have a satisfactory record of integrity, judgment, and performance, and

(2) Be neither suspended nor debarred under applicable CCC suspension and debarment regulations.

(d) The warehouse shall:

(1) Be of sound construction, in good state of repair, and adequately equipped to receive, handle, store, preserve, and deliver the applicable commodity,

(2) Be under the control of the contracting warehouseman at all times, and

(3) Not be subject to greater than normal risk of fire, flood, or other hazards.

[44 FR 67085, Nov. 23, 1979, as amended by Amdt. 3, 50 FR 16455, Apr. 26, 1985]

### § 1427.1083 Bonding requirements for net worth.

A bond furnished by a warehouseman under this subpart must meet the following requirements:

(a) Such bond shall be executed by a surety which:

(1) Has been approved by the U.S. Treasury Department, and

(2) Maintains an officer or representative authorized to accept service of legal process and in the State where the warehouse is located.

(b) Such bond shall be on Form CCC–33, "Warehouseman's Bond", except that a bond furnished under State law (statutory bond) or under operational rules of nongovernmental supervisory agencies may be accepted in an equivalent amount as a substitute for a bond running directly to CCC if:

(1) CCC determines that such bond provides adequate protection to CCC.

(2) It has been executed by a surety specified in paragraph (a) of this section or has a blanket rider and endorsement executed by such a surety with the liability of the surety under such rider or endorsement being the same as that of the surety under the original bond, and

(3) It is noncancellable for not less than ninety (90) days or includes a rider providing for not less than ninety (90) days' notice to CCC before cancellation. Excess coverage on a substitute bond for one warehouse will not be accepted or applied by CCC against insufficient bond coverage on other warehouses.

(c) Cash and negotiable securities offered by a warehouseman may be accepted by CCC in lieu of the equivalent amount of required bond coverage. Any such cash or negotiable securities accepted by CCC will be returned to the warehouseman when the period for which coverage was required has ended and there appears to CCC to be no liability under the storage agreement.

(d) A legal liability insurance policy may be accepted by CCC in lieu of the required amount of bond coverage provided such policy contains a clause or rider making the policy payable to CCC, CCC determines that it affords protection equivalent to a bond, and the Office of the General Counsel, U.S. Department of Agriculture, approves it for legal sufficiency.

(e) An irrevocable letter of credit may be accepted by CCC in lieu of the required amount of bond coverage provided that the issuing bank is a commercial bank insured by the Federal Deposit Insurance Corporation. Such standby letter of credit shall be on Form CCC–33A, "Irrevocable Letter of Credit", or on such other form as may

be specifically approved by the Director, KCCO, or the Director's designee.

[44 FR 67085, Nov. 23, 1979, as amended by Amdt. 3, 50 FR 16455, Apr. 26, 1985]

### § 1427.1084 Examination of warehouses.

Except as otherwise provided in this subpart, a warehouse must be examined by a person designated by CCC before it may be approved by CCC for the storage and handling of the commodity and periodically thereafter to determine its compliance with CCC's standards and requirements.

### § 1427.1085 Exceptions.

Notwithstanding any other provisions of this report:

(a) The financial bond and original and periodic warehouse examination provisions of this subpart do not apply to any warehouseman approved or applying for approval for the storage and handling of cotton or cotton linters under CCC programs if the warehouse is licensed under the U.S. Warehouse Act for such commodity but a special examination shall be made of such warehouse whenever CCC determines such action is necessary.

(b) A warehouseman who has a net worth of at least $25,000 but who fails, or whose warehouse fails, to meet one or more of the other standards of this subpart may be approved if:

(1) CCC determines that the warehouse services are needed and the warehouse storage and handling conditions provide satisfactory protection for the commodity,

(2) The warehouseman furnishes such additional bond coverage (or cash or acceptable negotiable securities or legal liability insurance policy) as may be prescribed by CCC.

[44 FR 67085, Nov. 23, 1979, as amended by Amdt. 3, 50 FR 16455, Apr. 26, 1985; 56 FR 11502, Mar. 19, 1991]

### § 1427.1086 Approval of warehouse, requests for reconsideration.

(a) CCC will approve a warehouse if it determines that the warehouse meets the standards set forth in this subpart. CCC will send a notice of approval to the warehouseman. Approval under this subpart, however, does not relieve the warehouseman of the responsibility for performing the warehouseman's obligations under any agreement with CCC or any other agency of the United States.

(b) Except as otherwise provided in this subpart:

(1) CCC will not approve the warehouse if CCC determines that the warehouse does not meet the standards set forth in this subpart, and

(2) CCC will send any notice of rejection of approval to the warehouseman. This notice will state the cause(s) for such action. Unless the warehouseman or any officials or supervisory employees of the warehouseman are suspended or debarred, CCC will approve the warehouse if the warehouseman establishes that the causes for CCC's rejection of approval have been remedied.

(c) If rejection of approval by CCC is due to the warehouseman's failure to meet the standards set forth:

(1) In § 1427.1082, other than the standard set forth in paragraph (c)(2) thereof, the warehouseman may, at any time after receiving notice of such action, request reconsideration of the action and present to the Director, KCCO, in writing, information in support of such request. The Director shall consider such information in making a determination of notify the warehouseman in writing of such determination. The warehouseman may, if dissatisfied with the Director's determination, obtain a review of the determination and an informal hearing thereon by filing an appeal with the Deputy Administrator, Commodity Operations, Farm Service Agency (hereinafter referred to as "FSA"). The time of filing appeals, forms for requesting an appeal, nature of the informal hearing, determination and reopening of the hearing shall be as prescribed in the FSA regulations governing appeals, 7 CFR part 780. When appealing under such regulations, the warehouseman shall be considered as a "participant"; and

(2) In § 1427.1082(c)(2), the warehouseman's administrative appeal rights with respect to suspension and debarment shall be in accordance with applicable CCC regulations. After expiration of a period of suspension or debarment, a warehouseman may, at any

time, apply for approval under this subpart.

[Amdt. 3, 50 FR 16455, Apr. 26, 1985]

### § 1427.1087 Exemption from requirements.

(a) If warehousing services in any area cannot be secured under the provisions of this subpart and no reasonable and economical alternative is available for securing such services for commodities under CCC programs, the President or Executive Vice President, CCC may exempt, in writing, applicants in such area from one or more of the standards of this subpart and may establish such other standards as are considered necessary to safeguard satisfactorily the interests of CCC.

(b) Warehousemen who are currently under contract with CCC will be required to meet the terms and conditions of these regulations at the time of renewal of their contract.

[44 FR 67085, Nov. 23, 1979, as amended at 44 FR 74797, Dec. 18, 1979]

### § 1427.1088 Contract fees.

(a) Each warehouseman who has a non-federally licensed cotton warehouse must pay an annual contract fee for each such warehouse for which the warehouseman requests renewal of an existing Cotton Storage Agreement or approval of a new Cotton Storage Agreement as follows:

(1) A warehouseman who has an existing Cotton Storage Agreement with CCC for the storage and handling of CCC-owned cotton or cotton pledged to CCC as loan collateral must pay an annual contract fee for each warehouse approved under such agreement in advance of the renewal date of such agreement.

(2) A warehouseman who does not have an existing Cotton Storage Agreement with CCC for the storage and handling of CCC-owned cotton or cotton pledged to CCC as loan collateral but who desires such an agreement must pay a contract fee for each warehouse for which CCC approval is sought prior to the time that the agreement is approved by CCC.

(b) The amount of the contract fee shall be determined and announced annually in the FEDERAL REGISTER.

[Amdt. 4, 50 FR 36569, Sept. 9, 1985]

### § 1427.1089 OMB Control Numbers assigned pursuant to Paperwork Reduction Act.

The information collection requirements contained in this regulation (7 CFR part 1427) have been approved by the Office of Management and Budget under provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Numbers 0560–0040, 0560–0074, 0560–0027, and 0560–0059.

[Amdt. 3, 50 FR 16455, Apr. 26, 1985. Redesignated by Amdt. 4, 50 FR 36569, Sept. 9, 1985]

## Subpart F [Reserved]

## Subpart G—Extra Long Staple (ELS) Cotton Competitiveness Payment Program

SOURCE: 70 FR 67343, Nov. 7, 2005, unless otherwise noted.

### § 1427.1200 Applicability.

(a) These regulations set forth the terms and conditions under which CCC shall make payments to eligible domestic users and exporters of extra long staple cotton who have entered into an ELS Cotton Domestic User/Exporter Agreement with CCC.

(b) CCC will issue payments to domestic users and exporters in any week following a consecutive 4-week period in which:

(1) The LFQ is less than the USPFE; and

(2) Adjusted LFQ is less than 134 percent of the current crop year loan level for the base quality U.S. Pima cotton.

(c) CCC shall prescribe the forms and information collections necessary in administering the ELS cotton competitiveness payment program. Additional terms and conditions for the program are set forth in the ELS Cotton Domestic User/Exporter Agreement.

### § 1427.1201 [Reserved]

### § 1427.1202 Definitions.

The following definitions apply as used in this subpart:

*Consumption* means the use of eligible ELS cotton by a domestic user in the manufacture in the United States of cotton products.

*Cotton product* means any product containing cotton fibers that result from the use of an eligible bale of ELS cotton in manufacturing.

*Current shipment price* means, during the period in which two daily price quotations are available for the LFQ for the foreign growth, quoted C/F Far East, the price quotation for cotton for shipment no later than August/September of the current calendar year.

*ELS* means Extra Long Staple.

*Forward shipment price* means, during the period in which two daily price quotations are available for the LFQ for foreign growths, quoted C/F Far East, the price quotation for cotton for shipment no earlier than October/November of the current calendar year.

*LFQ* means, during the period in which only one daily price quotation is available for the growth, the lowest average for the preceding Friday through Thursday week of the price quotations for foreign growths of ELS cotton, quoted cost and freight (C/F) Far East, after each respective average is adjusted for quality differences between the respective foreign growth and U.S. Pima, of the base quality.

(1) *Adjusted LFQ* means the LFQ adjusted to reflect the estimated cost of transportation between an average U.S. location and destination ports in the Far East.

(2) *LFQc* means the preceding Friday through Thursday average of the current shipment prices for the lowest adjusted foreign growth, C/F Far East.

(3) *LFQf* means the preceding Friday through Thursday average of the forward shipment prices for the lowest adjusted foreign growth, quoted C/F Far East.

*USPFE* means the Friday through Thursday weekly average of the price quotation for base quality U.S. Pima cotton, as determined by CCC for purposes of administering this subpart, C/F Far East.

(1) *USPFEc* means the preceding Friday through Thursday average of the current shipment prices for U.S. Pima cotton, C/F Far East.

(2) *USPFEf* means the preceding Friday through Thursday average of the forward shipment prices for U.S. Pima cotton, C/F Far East.

### § 1427.1203 Eligible ELS cotton.

(a) For the purposes of this subpart, eligible ELS cotton is domestically produced baled ELS cotton that is:

(1) Opened by an eligible domestic user on or after June 18, 2008, or

(2) Exported by an eligible exporter on or after June 18, 2008, during a Friday through Thursday period in which a payment rate determined under § 1427.1207 is in effect, and that meets the requirements of paragraphs (b) and (c) of this section;

(b) Eligible ELS cotton must be either:

(1) Baled lint, including baled lint classified by USDA's Agricultural Marketing Service as Below Grade; or

(2) Loose.

(c) Eligible ELS cotton must not be:

(1) ELS for which a payment, under the provisions of this subpart, has been made available;

(2) Imported ELS cotton;

(3) Raw, unprocessed motes;

(4) Textile mill wastes; or

(5) Semi-processed or re-ginned, processed motes.

[70 FR 67343, Nov. 7, 2005, as amended at 73 FR 65724, Nov. 5, 2008]

### § 1427.1204 Eligible domestic users and exporters.

(a) For the purposes of this subpart, the following persons shall be considered eligible domestic users and exporters of ELS cotton:

(1) A person regularly engaged in the business of opening bales of eligible ELS cotton to manufacturing such cotton into cotton products in the United States (a domestic user), who has entered into an agreement with CCC to participate in the ELS Cotton Competitiveness Payment Program; or

(2) A person, including a producer or a cooperative marketing association approved under part 1425 of this chapter, regularly engaged in selling eligible ELS cotton for exportation from the United States (an exporter), who has entered into an agreement with CCC to participate in the ELS Cotton Competitiveness Payment Program.

(b) Payment applications must contain the documentation required by this subpart, an ELS Cotton Domestic User/Exporter Agreement and additional information that may be requested by CCC.

### § 1427.1205 ELS Cotton Domestic User/Exporter Agreement.

(a) Payments under this subpart shall be made available to eligible domestic users and exporters who have entered into an ELS Cotton Domestic User/Exporter Agreement with CCC and who have complied with the terms and conditions in this subpart, the ELS Cotton Domestic User/Exporter Agreement and CCC-issued instructions.

(b) ELS Cotton Domestic User/Exporter Agreements may be obtained from CCC. To participate in the program authorized by this subpart, domestic users and exporters must execute the ELS Cotton Domestic User/Exporter Agreement and forward the original and one copy to CCC.

### § 1427.1206 Form of payment.

Payments under this subpart shall be made available in the form of commodity certificates issued under part 1401 of this chapter, or in cash, at the option of the participant, as CCC determines and announces.

### § 1427.1207 Payment rate.

(a) The payment rate for payments made under this subpart shall be determined as follows:

(1) Beginning the Friday on or following August 1 and ending the week in which the LFQc, the LFQf, the USPFEc, and the USPFEf prices first become available, the payment rate shall be the difference between the USPFE and the LFQ in the fourth week of a consecutive 4-week period in which the USPFE exceeded the LFQ each week, and the adjusted LFQ was less than 134 percent of the current crop year loan level for U.S. base quality Pima cotton in all weeks of the 4-week period; and

(2) Beginning the Friday-through-Thursday week after the week in which the LFQc, the LFQf, the USPFEc, and the USFEf prices first become available and ending the Thursday following July 31, the payment rate shall be the difference between the USPFEc and the LFQc in the fourth week of a consecutive 4-week period in which the USPFEc exceeded the LFQc each week, and the adjusted LFQc was less than 134 percent of the current crop year loan level for base quality U.S. Pima in all weeks of the 4-week period. If either or both the USPFEc and the LFQc are not available, the payment rate may be the difference between the USPFEf and the LFQf.

(b) Whenever a 4-week period under paragraph (a) of this section contains a combination of LFQ, LFQc, and LFQf for only one to three weeks, such as may occur in the spring when the LFQ is succeeded by the LFQc and the LFQf (spring transition), and at the start of a new marketing year when the LFQc and the LFQf are succeeded by the LFQ (marketing year transition), under paragraphs (a)(1) and (a)(2) of this section, during both the spring transition and the marketing year transition periods, the LFQc and USPFEc, in combination with the LFQ and USPFE, shall, to the extent practicable, be considered during such 4-week periods to determine whether a payment is to be issued. During both the spring transition and the marketing year transition periods, if either or both USPFEc price and the LFQc are not available, the USPFEf and the LFQf in combination with the USPFE price and LFQ shall be taken into consideration during such 4-week periods to determine whether a payment is to be issued.

(c) For purposes of this subpart, regarding the determination of the USPFE, USPFEc, USPFEf, the LFQ, the LFQc, and the LFQf:

(1) If daily quotations are not available for one or more days of the 5-day period, the available quotations during the period will be used;

(2) If none of the USPFE, USPFEc, or USPFEf prices is available, or if none of the LFQ, LFQc, or LFQf is available, the payment rate shall be zero and shall remain zero unless and until sufficient USPFE prices or the LFQ again becomes available, the USPFE, USPFEc, or USPFEf price exceeds the LFQ, the LFQc, or the LFQf, as the case may be, and the LFQ, the LFQc, or the LFQf, as the case may be, adjusted for transportation, is less than

134 percent of the current crop year loan rate for base quality U.S. Pima for 4 consecutive weeks.

(d) Payment rates for loose lint that is of a suitable quality, without further processing, for spinning, papermaking or bleaching, shall be based on a percentage of the basic rate for baled lint, as specified in the ELS Cotton Domestic User/Exporter Agreement.

**§ 1427.1208 Payment.**

(a) Payments under this subpart shall be determined by multiplying:

(1) The payment rate, determined under § 1427.127, by

(2) The net weight (gross weight minus the weight of bagging and ties) determined under paragraph (b) of this section, of eligible ELS cotton bales that an eligible domestic user opens or an eligible exporter exports during the Friday through Thursday period following a week in which a payment rate is established.

(b) For the purposes of this subpart, the net weight shall be based upon:

(1) For domestic users, the weight on which settlement for payment of the ELS cotton was based (landed mill weight);

(2) For exporters, the shipping warehouse weight or the gin weight if the ELS cotton was not placed in a warehouse, of the eligible cotton unless the exporter obtains and pays the cost of having all the bales in the shipment reweighed by a licensed weigher and furnishes a copy of the certified weights.

(c) For the purposes of this subpart, eligible ELS cotton will be considered:

(1) Consumed by the domestic user on the date the bale is opened for consumption; and

(2) Exported by the exporter on the date that CCC determines is the date on which the cotton is shipped for export.

(d) Payments under this subpart shall be made available upon application for payment and submission of supporting documentation, as required by this subpart, CCC instructions, and the ELS Cotton Domestic User/Exporter Agreement.

# PART 1430—DAIRY PRODUCTS

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AUTHORITY: 7 U.S.C. 7982, 8771, and 8773; and 15 U.S.C. 714b and 714c.

## Subpart A—Dairy Product Price Support Program

SOURCE: 75 FR 41367, July 16, 2010, unless otherwise noted.

### § 1430.100 Applicability.

During the period beginning on January 1, 2008, and ending December 31, 2012, the Secretary of Agriculture will support the price of cheddar cheese, butter, and nonfat dry milk by providing a standing offer to purchase those products from eligible offerors. The products must be made from cow's milk produced in the United States. Purchases are subject to the terms and conditions in CCC's purchase announcements.

### § 1430.101 Definitions.

For purposes of this subpart, the following definitions apply:

*CCC* means the Commodity Credit Corporation, USDA.

*Eligible offeror* means the person, firm, corporation, or other legal entity obligated by the purchase agreement with CCC. The product must not have been sold before to another party and the offeror must be the manufacturer of the dairy product offered or a marketing cooperative for the manufacturer.

*Net removals* means, for a given period of time, the total dairy product purchased by CCC through the program in this subpart plus the quantity of the product exported through the Dairy Export Incentive Program (as authorized in 15 U.S.C. 713a–14), less the quantity sold by CCC for unrestricted use.

### § 1430.102 Eligible products.

(a) To be eligible for the program in this subpart, the products must be manufactured from dairy cow's milk produced in the United States, and must not have been previously owned by CCC. Dairy cow in this instance means an animal of the kind that produces the majority of dairy products in the United States and not, for example, cows of other species of animals such as yaks or oxen.

(b) Products will be purchased only from eligible offerors of the product, and only in carlot weights.

(c) The products purchased must be of the following grades and moisture content, as evidenced by USDA-issued inspection certificates:

(1) Block cheddar cheese must be U.S. Grade A or higher, and the moisture content must not exceed 38.5 percent;

(2) Barrel cheddar cheese must be U.S. Extra Grade, and the moisture content must not exceed 36.5 percent;

(3) Butter must be U.S. Grade A or higher;

(4) Nonfat dry milk must be U.S. Extra Grade, and the moisture content must not exceed 3.5 percent.

(d) CCC may require other terms and conditions of purchase, as specified in CCC's purchase announcement.

### § 1430.103 Purchase prices.

(a) CCC will offer to purchase products at the following prices for all regions of the United States:

(1) Cheddar cheese in blocks for not less than $1.13 per pound; unless

(i) Net removals of cheese for a period of 12 consecutive months exceed 200,000,000 pounds, but do not exceed 400,000,000 pounds, in which case the CCC block cheese purchase price will be not less than $1.03 per pound, during the immediately following month, or

(ii) Net removals of cheese for a period of 12 consecutive months exceed 400,000,000 pounds, in which case the CCC block cheese purchase price will be not less than $0.93 per pound during the immediately following month;

(2) Cheddar cheese in barrels for $0.03 per pound less than the cheddar cheese block price;

(3) Butter for not less than $1.05 per pound; unless

(i) Net removals of butter for a period of 12 consecutive months exceed 450,000,000 pounds, but do not exceed 650,000,000 pounds, in which case the CCC butter purchase price will be not less than $0.95 per pound during the immediately following month, or

(ii) Net removals of butter for a period of 12 consecutive months exceed 650,000,000 pounds, in which case the CCC butter purchase price will be not less than $0.85 per pound during the immediately following month; and

(4) Nonfat dry milk for not less than $0.80 per pound, unless

(i) Net removals of nonfat dry milk for a period of 12 consecutive months exceed 600,000,000 pounds, but do not exceed 800,000,000 pounds, in which case the CCC nonfat dry milk purchase price will be not less than $0.75 per pound during the immediately following month, or,

(ii) Net removals of nonfat dry milk for a period of 12 consecutive months exceed 800,000,000 pounds, in which case the CCC nonfat dry milk purchase price will be not less than $0.70 per pound during the immediately following month.

(b) CCC may offer to purchase cheddar cheese, butter, fortified nonfat dry milk, or fortified instant nonfat dry milk in consumer-sized ready-to-consume packages at a premium to the purchase prices for cheddar cheese, butter and nonfat dry milk specified in paragraph (a) of this section. Any such offers will be made through CCC's purchase announcements, and such offers may be limited by quantity and to a specific time period.

(c) CCC may offer to purchase cheddar cheese with a lower moisture content than is specified in § 1430.102(c) at a premium to the prices specified in paragraph (a) of this section. Any such offers will be made through CCC's purchase announcements, and such offers may be limited by quantity and to a specific time period.

### § 1430.104 Sales from inventories.

(a) CCC may sell any dairy product purchased as specified in this subpart for unrestricted use at the market price prevailing for that product at the time of sale, except that the sale price will not be less than 110 percent of the purchase price specified in § 1430.103(a), before any price reduction for the amount of CCC net removals of the dairy products.

(b) CCC may sell or distribute dairy products purchased under this section for restricted use when such sale is determined to maximize the return to CCC on its purchases.

## Subpart B—Milk Income Loss Contract Program

SOURCE: 67 FR 64476, Oct. 18, 2002, unless otherwise noted.

### § 1430.200 Applicability.

(a) This subpart governs the Milk Income Loss Contract Program. This program provides financial assistance to dairy operations in connection with milk production that is sold in the commercial market.

### § 1430.201 Administration.

(a) This program is administered under the general supervision of the Executive Vice President, CCC, or a designee, and shall be carried out by

Farm Service Agency (FSA) State and county committees and employees.

(b) State and county committees, and their employees may not waive or modify any requirement of this subpart, except as provided in paragraph (e) of this section.

(c) The State committee shall take any action required when not taken by the county committee, require correction of actions not in compliance, or require the withholding of any action that is not in compliance with this subpart.

(d) The Executive Vice President, CCC, or a designee, may determine any question arising under the program or reverse or modify any decision of the State or county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may waive or modify program requirements where failure to meet such requirements does not adversely affect the operation of the Milk Income Loss Contract Program.

(f) A representative of CCC may execute Milk Income Loss Contracts and related documents under the terms and conditions determined and announced by CCC. Any document not under such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void.

**§ 1430.202 Definitions.**

The definitions in this section shall be applicable for all purposes of administering the Milk Income Loss Contract (MILC) program established by this subpart.

*CCC* means the Commodity Credit Corporation of the Department.

*Class I Milk* means milk, including milk components, classified as Class I milk under a Federal milk marketing order.

*Contract application* means a Milk Income Loss Contract as executed on a form prescribed by CCC.

*Contract application period* means the date established by the Deputy Administrator for producers to apply for program benefits.

*County committee* means the FSA county committee.

*County office* means the FSA office responsible for administering FSA programs to farms located in a specific area in a state.

*Dairy operation* means any person or group of persons who as a single unit as determined by CCC, produce and market milk commercially produced from cows, and whose production facilities are located in the United States. In administering this program, for purposes of determining what is a "dairy operation" and its eligibility under this program, those determinations will be made in the same manner as was done for the Dairy Market Loss Assistance (DMLA) contracts in the State in which the dairy is located. New MILC operations, which is to say those operations that did not participate in the MILC program for marketings prior to FY 2008, must be unaffiliated with any other DMLA or MILC operations.

*Deputy Administrator* means the Deputy Administrator for Farm Programs (DAFP), FSA or a designee.

*Eligible production* means milk that was produced at a time relevant to this program by cows in the United States and marketed commercially by a producer in a participating State.

*Farm Service Agency or FSA* means the Farm Service Agency of the Department.

*Federal Milk Marketing Order* means an order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

*Fiscal Year or FY* means the year beginning October 1 and ending the following September 30. Fiscal years will be designated for this part by year by reference to the calendar year in which it ends. For example, FY 2009 is from October 1, 2008, through September 30, 2009 (inclusive).

*Hundredweight or cwt.* means 100 pounds.

*Marketed commercially* means sold to the market to which the dairy operation normally delivers whole milk and receives a monetary amount.

*MILC* means the Milk Income Loss Contract program or the form upon which CCC and the producer agree to the terms of the payment to be made under the MILC program.

*Milk handler* means the marketing agency to or through which the producer commercially markets whole milk.

*Milk marketing* means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use.

*Participating State* means each of the 50 States in the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

*Payment pounds* means the pounds of milk production for which an operation is eligible to be paid under this subpart.

*Producer* means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity who is, or whose members are, a citizen of, or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and makes contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity that are at least commensurate with the share of the individual or entity of the proceeds of this operation.

*United States* means the 50 States of the United Sates of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

*Verifiable production records* means evidence that is used to substantiate the amount of production marketed and that can be verified by CCC through an independent source.

[67 FR 64476, Oct. 18, 2002, as amended at 71 FR 19622, Apr. 17, 2006; 73 FR 73776, Dec. 4, 2008]

### § 1430.203 Eligibility.

To be eligible to receive payments under this subpart, a dairy operation must:

(a) Have produced milk in the United States and commercially marketed the milk produced anytime during the period of October 1, 2007, through September 30, 2012;

(b) Enter into a MILC during the contract application period;

(c) Agree to all terms and conditions in the MILC and those that are otherwise contained in this subpart and comply with instructions issued by CCC;

(d) Provide proof of monthly milk production commercially marketed by all persons in the dairy operation during the contract period, to determine the total pounds of milk that will be converted to hundredweight (cwt.) used for payment;

(e) Submit timely production evidence according to § 1430.209;

(f) Be actively engaged in the business of producing and marketing agricultural products anytime during the period of October 1, 2007, through September 30, 2012;

(g) Meet all adjusted gross income eligibility requirements of part 1400 of this chapter as regards any person or entity seeking to receive payment under this part. No person or entity may, generally, receive any payment for FY 2009 marketings and subsequent marketings if their nonfarm yearly income for the relevant base period for the relevant marketings as determined under the adjusted gross income rules (as in effect when the payment is sought) is over $500,000 as determined under this subpart. Further, for entities an otherwise due payment will be reduced commensurately to the extent that any person with an interest in the entity, as determined under the adjusted gross income rules had such income over that limit for the relevant period;

(h) Have submitted a contract during the applicable contract period for FYs 2008 through 2012:

(1) Except for 2009, and subject to the start month provision of § 1430.205, must have for any fiscal year or month for which payment is sought to be paid submitted the FY 2008 through 2012 contract before the end of that fiscal year or month or

(2) For FY 2008 payments, if payments are generated under this part for that fiscal year, must have submitted a contract for the FY 2008 through 2012 program by October 1, 2009 and for FY 2009 the contract must have been submitted by the month for which payment is first sought except to the extent that § 1430.205 explicitly permits the operation to pick a start month in

advance of the month in which the contract is submitted; and

(i) Must not, if it did not participate in the preceding MILC program for fiscal years prior to FY 2008, be affiliated with any other dairy operation.

[67 FR 64476, Oct. 18, 2002, as amended at 71 FR 19622, Apr. 17, 2006; 73 FR 73766, Dec. 4, 2008]

### § 1430.204 Requesting benefits.

(a) A request for benefits or contract application, under this subpart must be submitted on a form as prescribed by the Agency. Contract applications shall be submitted to the FSA office serving the county where the dairy operation is located. Contract applications must be received by FSA by the close of business on the date established by the Deputy Administrator. Contract applications received after such date shall be disapproved.

(b) The dairy operation requesting MILC benefits must certify the accuracy and truthfulness of the information in their contract application. All information provided is subject to verification by CCC. Refusal to allow CCC or any other agency of the Department to verify any information provided will result in disapproval.

(c) Contract applications will be approved by execution by FSA and producer of a MILC. All persons who share in the risk of a dairy operation's total production must sign and certify the contract application.

### § 1430.205 Selection of starting month.

(a) A dairy operation that enters into a MILC contract with CCC must designate the starting month for each fiscal year for the calculation of payments and pound limits for the operation. Once a start month is chosen for a fiscal year the corresponding month will be the start month for each subsequent fiscal year unless changed by an affirmative request in writing on a form approved by CCC. The production start month must be selected on or before the 14th of the month before the month for which payment is sought. If such date falls on a weekend, the start month selection must be made on the last business day preceding the weekend. A dairy operation cannot select as the start month for payment a month which:

(1) Has already begun, except as provided in paragraph (c)(1) of this section;

(2) Has already passed; or

(3) During which no milk production was produced by the dairy operation.

(b) For FY 2009, if the operation signs its FY 2008 through 2012 MILC contract within 30 days of the beginning of the application period it can pick any preceding FY 2009 month as its start month for that period or can use the normal rule of paragraph (c) of this section to pick the start month.

(c) Except as provided in paragraph (b) of this section, the start month for a fiscal year may only be

(1) For the fiscal year in which the contract is submitted, the month the contract is submitted or

(2) For a fiscal year that has not yet begun, any month, provided that a month may not be selected after the 14th of the preceding month.

(d) Dairy operations may change the production start month on or before the 14th day of the month previously selected.

(e) If a change of the production starting month is not made by the dates required by paragraph (d) of this section, the MILC production starting month cannot be changed until the next fiscal year. If the selected MILC production starting month is never modified, it will remain the same throughout the duration of the contract.

(f) MILC payments will be made consecutively to the dairy operation on a monthly basis after the production starting month has been designated until the earlier of the following:

(1) Payment quantity is reached in accordance with § 1430.207; or

(2) The end of the applicable fiscal year.

(g)(1) MILC production start month selections made during the signup period designated by CCC may be made as provided in paragraph (b) of this section, otherwise MILC production start month selections must be made in accordance with paragraph (c) of this section. If a payment rate is not in effect

during the production start month selected by the dairy operation, payments to the dairy operation will be issued based on the next consecutive month with a payment rate in effect following the MILC production start month selected by the dairy operation. Production in months in which the pay formula does not produce a payment will not count against the fiscal year's poundage limit for the operation.

(2) Dairy operations with MILC production start months that begin with the month a MILC contract is submitted to FSA or that begin with the first month of the fiscal year with an effective payment rate will receive payments made by CCC consecutively on a monthly basis, if otherwise provided for in this part, until the earlier of the following:

(i) The maximum payment quantity for the fiscal year or month is reached as determined in accordance with § 1430.207 or

(ii) The end of the applicable fiscal year.

(h) All producers involved in the dairy operation must agree to the month designated. The dairy operation assumes the risk of not reaching the maximum payment quantity based on the month selected by the dairy operation. Payments will not be issued for past months for the sole purpose of reaching the maximum payment quantity.

[71 FR 19622, Apr. 17, 2006, as amended at 73 FR 73766, Dec. 4, 2008]

### § 1430.206 [Reserved]

### § 1430.207 Dairy operation payment quantity.

(a) The applicant's payment quantity of milk will be determined by CCC, based on the quantity of milk that was produced and commercially marketed by each dairy operation per fiscal year.

(b) The maximum quantity of eligible production for which dairy operations, per separate and distinct operation, are eligible for payment per fiscal year under this subpart will be:

(1) 2,400,000 pounds (24,000 cwt.) for FY 2008 (October 1, 2007, through September 30, 2008);

(2) 2,985,000 pounds (29,850 cwt.) for FY 2009 (October 1, 2008 through September 30, 2009), FY 2010 (October 1, 2009, through September 30, 2010), FY 2011 (October 1, 2010, through September 30, 2011) and FY 2012 (October 1, 2011, through September 30, 2012), provided further an operation may receive payment for September, 2012, marketings only if its pre-September FY 2012 marketings did not exceed 2,400,000 pounds in which case new marketings that would not put the operation's FY 2012 marketings over 2,400,000 pounds will be eligible for payments otherwise permitted in this rule.

(c) In accordance with these regulations, the Deputy Administrator will determine what is a separate and distinct operation. That decision will be final

[67 FR 64476, Oct. 18, 2002, as amended at 73 FR 73767, Dec. 4, 2008]

### § 1430.208 Payment rate and dairy operation payment.

(a) Payments under this subpart may be made to dairy operations when the Boston Class I milk price under the applicable Federal milk marketing order is below $16.94 per cwt. No payments will be made to dairy operations for marketings during the months that the Boston Class I milk price under the applicable milk marketing order is equal to or exceeds $16.94.

(b) A per-hundredweight payment rate will be determined for the applicable month by:

(1) Subtracting from $16.94 the Class I milk price per cwt. in Boston;

(2) Multiplying the difference by 34 percent for marketings during the period beginning on October 1, 2007, and ending on September 30, 2008;

(3) Multiplying the difference by 45 percent for marketings during the period beginning on October 1, 2008, and ending on August 31, 2012; and

(4) Multiplying the difference by 34 percent for marketings in September 2012.

(c) The payment rate as calculated as specified in paragraph (b) of this section, will be adjusted to compensate for feed prices when the National Average Dairy Feed Ration Cost for a month is greater than the levels set in paragraphs (c)(1) and (c)(2) of this section. The National Average Dairy Feed Ration Cost per cwt. for each month will

be calculated using the same procedures used to calculate the feed components of the estimated price of 16 percent Mixed Dairy Feed per pound noted on page 33 of the USDA monthly Agricultural Prices publication (including the data and factors noted in footnote 4). The payment rate adjustment for Entire Month feed prices will be determined by increasing $16.94 by the percentage that is 45 percent of the percentage by which the National Average Dairy Feed Ration Cost exceeds $7.35 per cwt. (except that $7.35 will be $9.50 for September 2012 marketings.)

(d) Each eligible dairy operation payment will be calculated, as determined by the Secretary, by:

(1) Converting whole pounds of milk to hundredweight and

(2) Multiplying the payment rate determined in paragraphs (b) and (c) of this section by the quantity of eligible production marketed by the operation during the applicable month as determined according to § 1430.205 and other provisions of this subpart.

(3) Payments to dairy operations will be based on calculated payment rates rounded seven places to the right of the decimal.

(e) Payments under this subpart may be made to a dairy operation only up to the maximum production limitations set in § 1430.207(b) of eligible production per applicable fiscal year.

(f) Dairy operations receiving benefits under this subpart, will receive earned payments on a monthly basis according to the MILC contract, to the extent practicable, not later than 60 days after the later of production evidence and all supporting documents for the applicable month are received by CCC or the entire month National Average Dairy Feed Ration Cost is made available by USDA, as applicable. Payments issued by CCC more than 60 days after the later of all production evidence and supporting documentation are received by CCC or the entire month National Average Dairy Feed Ration Cost is made available by USDA, whichever is later, will be subject to prompt payment interest as allowed by law. However, CCC will endeavor where possible to make payments within 60 days of the end of the marketing month.

[67 FR 64476, Oct. 18, 2002, as amended at 71 FR 19623, Apr. 17, 2006; 72 FR 48231, Aug. 23, 2007; 73 FR 73767, Dec. 4, 2008]

### § 1430.209 Proof of market loss production.

(a) A dairy operation entering into a MILC must, based on instructions issued by the Deputy Administrator, provide adequate proof of the dairy operation's eligible production during the months of each fiscal year designated in the MILC. The dairy operation must also provide proof that the eligible production was commercially marketed during the months beginning October 1, 2007, and ending September 30, 2012. Evidence of milk production claimed for payment shall be provided to CCC with supporting documentation under paragraph (b) of this section. All information provided is subject to verification, spot check and audit by FSA. Further verification information may be obtained from the dairy operation's milk handler or marketing cooperative if deemed necessary by CCC to verify provided information. Refusal to allow a representative of CCC or any other agency of the Department of Agriculture to verify any information provided will result in a determination of ineligibility for benefits under this subpart.

(b) Eligible dairy operations marketing milk during the period specified in the MILC shall provide any available supporting documents from all producers in the dairy operation to assist CCC in verifying that the dairy operation produced and marketed milk commercially from the designated starting month and thereafter. Examples of supporting documentation include, but are not limited to: milk marketing payment stubs, tank records, milk handler records, daily milk marketings, copies of any payments received as compensation from other sources, or any other documents available to confirm the production and production history of the dairy operation. Producers may also be required to allow CCC to examine the herd of cattle as production evidence. If supporting documentation requested

is not presented to CCC or FSA, the request for MILC benefits will be disapproved.

[67 FR 64476, Oct. 18, 2002, as amended at 71 FR 19623, Apr. 17, 2006; 73 FR 73767, Dec. 4, 2008]

**§ 1430.210 MILC agents.**

(a) MILC benefits may be disbursed by a dairy marketing cooperative that serves special groups or communities, such as an Amish or Mennonite community. Producers in such groups in a dairy operation may authorize an agent of a dairy cooperative or milk handler affiliated with such cooperative to obtain and disburse MILC benefits to the dairy operation.

(b) The authorized MILC agent must on behalf of the dairy operation do the following:

(1) Obtain an acceptable power of attorney or acceptable equivalent for the producers of the dairy operation that authorizes the agent to enter into an MILC contract;

(2) Enter into a written agreement with CCC for approval to act as a MILC agent on a form prescribed by CCC;

(3) Provide the dairy operation's monthly production evidence to the appropriate FSA office;

(4) Disburse payment to the dairy operation in the producer's monthly milk check or in an otherwise approved manner.

**§ 1430.211 Duration of contracts.**

(a) Except as provided in § 1430.205, or elsewhere in this subpart, a MILC entered into by producers in a dairy operation shall cover eligible production marketed by the producers in the dairy operation during the period beginning with the first day of the month the producers in the dairy operation enter into an MILC and ending on September 30, 2012.

(b) If a dairy goes out of business during the contract period, the MILC will be terminated immediately, except as applicable to earned payments.

[67 FR 64476, Oct. 18, 2002, as amended at 71 FR 19623, Apr. 17, 2006; 73 73768, Dec. 4, 2008]

**§ 1430.212 Contract modifications and statutory changes in program.**

(a) Producers in a dairy operation must notify FSA immediately of any changes that may affect their MILC. Changes include, but are not limited to changes to the starting month to receive payment for the next fiscal year, death of producer on the contract, new member joining the operation, member exiting the operation, transfer of shares by sale or other transfer action, or farm reconstitutions undertaken in accordance with § 1430.213.

(b) CCC may modify an MILC if such modifications are desirable to carry out purposes of the program or to facilitate the program's administration.

(c) Payments otherwise due under this subpart or the program will be adjusted or denied to the extent provided for by a statutory change in program eligibilities or requirements of any kind irrespective of whether the program contract preceded the statutory change. Operations will be given the option of accepting the changes or terminating the contract.

[67 FR 64476, Oct. 18, 2002, as amended at 73 FR 73768, Dec. 4, 2008]

**§ 1430.213 Reconstitutions.**

(a) A dairy operation receiving MILC benefits may reorganize or restructure such that the constitution or makeup of its operation is reconstituted in another organizational framework. However, any operation that reorganizes or restructures after October 1, 2007, is subject to a review by FSA to determine if the operation was reorganized or restructured for the sole purpose of receiving multiple or additional MILC payments.

(b) A dairy operation that FSA determines has reorganized solely to receive additional MILC payments will be in violation of its contract and dealt in accordance with § 1430.214.

(c) If during the contract period a change in the dairy operation occurs, the modification to the MILC will not take effect until the first day of the fiscal year following the month FSA received notification of the changes. Changes include but are not limited to any producer affiliated with a dairy operation that has an approved MILC

with CCC forming a new dairy operation that is not formed solely to receive additional MILC payments.

(d) Changes resulting in the following will take effect immediately upon notification to CCC, in accordance with § 1430.212:

(1) Increases or reductions of shareholders or producers and their corresponding share amounts in the dairy operation; or

(2) Purchases of a new dairy operation by a producer or producers not affiliated with an existing dairy operation that has an approved MILC with CCC.

[67 FR 64476, Oct. 18, 2002, as amended at 73 FR 73768, Dec. 4, 2008]

### § 1430.214 Violations.

(a) If producers in a dairy operation violates the MILC or the requirements of this subpart, CCC may:

(1) Terminate the MILC for the remainder of the fiscal year in which the violation occurs, and allow the producer to retain any payments received under the contract; or

(2) Allow the MILC to remain in effect and require the producer to repay a portion of the payments received commensurate with the violation's severity, as CCC determines.

(3) If the MILC is terminated under this section, the participant shall forfeit all rights to further MILC benefits and shall refund all or part of the payments received as CCC determines appropriate.

(4) A producer or operation with a violation, as determined by CCC, shall refund all MILC funds disbursed under of this part. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

(b) A MILC is violated by the following actions:

(1) Failure to comply with the terms and conditions of the MILC and addendum;

(2) Reconstitutions of the dairy operation for the sole purpose of receiving multiple program benefits;

(3) Failure to comply with highly erodible land conservation and wetland provisions of this 7 CFR part 12 or their successor regulations;

(4) Failure to meet the definition of a dairy operation according to § 1430.202;

(5) Any action that tends to defeat the purpose of the program, as CCC determines.

(c) The Deputy Administrator for Farm Programs (DAFP) of the Farm Service Agency may terminate any MILC by mutual agreement upon request of the participant if DAFP determines that termination is in the best interest of the public.

(d) The DAFP may determine that failure of the dairy operation to perform the MILC does not warrant termination and may require the participant to refund part of the payments received or accept adjustments in the payment as the DAFP determines to be appropriate.

### § 1430.215 [Reserved]

### § 1430.216 Contracts not in conformity with regulations.

If it is discovered that an MILC contract does not comply with this subpart as the result of a misunderstanding by someone who has signed the contract, the contract may be modified by mutual agreement. If the parties to the MILC cannot reach agreement for such modification, it shall be terminated and all payments paid or payable under the contract shall be forfeited or refunded to CCC, except as may otherwise be allowed under § 1430.214.

### § 1430.217 Offsets and withholdings.

CCC may offset or withhold any amount due CCC under this subpart under the provisions of part 1403 of this chapter or any successor regulations.

### § 1430.218 Assignments.

Any producer may assign a payment to be made under this part in accordance with part 1404 of this chapter or successor regulations as designated by the Department.

### § 1430.219 Appeals.

Any producer who is dissatisfied with a determination made pursuant to this subpart may request reconsideration or appeal of such determination under part 11 or 780 of this title.

**§ 1430.220 Misrepresentation and scheme or device.**

(a) A dairy operation shall be ineligible for the MILC program if FSA determines that it knowingly:

(1) Adopted a scheme or device that tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a determination under this program. CCC will take steps deemed necessary to protect the interests of the government.

(b) Any funds disbursed to a producer or operation engaged in a misrepresentation, scheme, or device, shall be refunded to CCC. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

**§ 1430.221 Estates, trusts, and minors.**

(a) Program documents executed by producers legally authorized to represent estates or trusts will be accepted only if such producers furnish evidence of the authority to execute such documents.

(b) A minor who is otherwise eligible for assistance under this part must also:

(1) Establish that the right of majority has been conferred on the minor by court proceedings or by statute;

(2) Show that a guardian has been appointed to manage the minor's property and the applicable program documents are executed by the guardian; or

(3) Furnish a bond under which the surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

**§ 1430.222 Death, incompetency, or disappearance.**

In the case of death, incompetency, disappearance or dissolution of a producer that is eligible to receive benefits under this part, such persons as are specified in part 707 of this title may receive such benefits, as determined appropriate by FSA.

**§ 1430.223 Maintenance and inspection of records.**

(a) Producers approved for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified herein, as may be requested by CCC or FSA. Such records and accounts must be retained for 3 years after the date of payment to the dairy operation under this program. Destruction of the records 3 years after the date of payment shall be the risk of the party undertaking the destruction.

(b) At all times during regular business hours, authorized representatives of CCC, the Department, or the Comptroller General of the United States shall have access to the premises of the dairy operation in order to inspect the herd of cattle, examine, and make copies of the books, records, and accounts, and other written data as specified in paragraph (a) of this section.

(c) Any funds disbursed pursuant to this part to any producers or operation who does not comply with the provisions of paragraphs (a) or (b) of this section, or who otherwise receives a payment for which they are not eligible, shall be refunded with interest.

**§ 1430.224 Refunds; joint and several liability.**

(a) In the event of an error on a MILC application, a failure to comply with any term, requirement, or condition for payment arising under the MILC application, or this subpart, all improper payments shall be refunded to CCC together with interest from the date payment was received through the date the refund is received by CCC.

(b) All producers signing a dairy operation's application for payment as having an interest in the operation shall be jointly and severally liable for any refund, including related charges, that is determined to be due for any reason under the terms and conditions of the contract application and addendum or this part for such operation.

**§ 1430.225 Violations of highly erodible land and wetland conservation provisions.**

The provisions of part 12 of this title apply to this part.

**§ 1430.226 Violations regarding controlled substances.**

The provisions of § 718.11 of this title apply to this part.

## Subpart C—2004 Dairy Disaster Assistance Payment Program

SOURCE: 70 FR 56115, Sept. 26, 2005, unless otherwise noted.

**§ 1430.300 Applicability.**

(a) Subject to the availability of funds, this subpart sets forth the terms and conditions applicable to the 2004 Dairy Disaster Assistance Payment Program authorized by section 103 of Division B of Public Law 108–324. Benefits are available to eligible United States producers who have suffered dairy production losses and dairy spoilage losses in eligible counties as a result of a hurricane disaster in 2004.

(b) To be eligible for this program, a producer must have been a milk producer in 2004 in a county declared a disaster by the President of the United States due to a 2004 hurricane. Only losses occurring in those counties are eligible for payment in this program. Producers in contiguous counties that were not designated by the President as a disaster county due to a hurricane in 2004 are not eligible.

(c) Subject to the availability of funds, benefits shall be provided by the Commodity Credit Corporation (CCC) to eligible dairy producers. Additional terms and conditions may be set forth in the payment application that must be executed by participants to receive a disaster assistance payment for dairy production losses and dairy spoilage losses.

(d) To be eligible for payments, producers must comply with the provisions of, and their losses must meet the conditions of, this subpart and any other conditions imposed by CCC.

**§ 1430.301 Administration.**

(a) The 2004 Dairy Disaster Assistance Payment Program shall be administered under the general supervision of the Executive Vice President, CCC (Administrator, FSA), or a designee, and shall be carried out in the field by FSA State and county committees (State and county committees) and FSA employees.

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State committee shall take any action required by the regulations of this subpart that has not been taken by the county committee. The State committee shall also:

(1) Correct, or require the county committee to correct, any action taken by such county committee that is not in accordance with the regulations of this subpart; and

(2) Require a county committee to withhold taking any action that is not in accordance with the regulations of this subpart.

(d) No provision of delegation in this subpart to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by the State or county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines in cases where lateness or failure to meet such requirements do not adversely affect the operation of the 2004 Dairy Disaster Assistance Payment Program and does not violate statutory limitations on the program.

(f) Data furnished by the applicants is used to determine eligibility for program benefits. Although participation in the 2004 Dairy Disaster Assistance Payment Program is voluntary, program benefits are not to be provided unless the participant furnishes all requested data.

**§ 1430.302 Definitions.**

The definitions set forth in this section shall be applicable for all purposes of administering the 2004 Dairy Disaster Assistance Payment Program established by this subpart.

*Application* means the 2004 Dairy Disaster Assistance Payment Program Application.

*Application period* means the time period established by the Deputy Administrator for producers to apply for program benefits.

*CCC* means the Commodity Credit Corporation of the Department.

*County committee* means the FSA county committee.

*County office* means the FSA office responsible for administering FSA programs for farms located in a specific area in a state.

*Dairy operation* means any person or group of persons who, as a single unit, as determined by CCC, produces and markets milk commercially from cows and whose production facilities are located in the United States.

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

*Deputy Administrator* means the Deputy Administrator for Farm Programs (DAFP), FSA, or a designee.

*Disaster county* means a county declared a disaster by the President of the United States due to a hurricane in 2004, and is only the county so declared, not a contiguous county.

*Farm Service Agency or FSA* means the Farm Service Agency of the Department.

*Hundredweight or cwt.* means 100 pounds.

*Milk handler or cooperative* means the marketing agency to, or through which, the producer commercially markets whole milk.

*Milk marketings* means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use. In counting milk toward production amounts, dumped milk will not be considered as marketed for commercial use. Such dumped milk shall be counted toward production but will be accounted for separately from milk that is marketed for normal commercial use as determined by the Deputy Administrator. All production in the months for which loss coverage is available will be counted in making determinations under this part, as determined by the Deputy Administrator, with care to avoid double counting, and with care to avoid a calculated loss that overstates the actual losses.

*Payment pounds* means the pounds of milk production from a dairy operation for which the dairy producer is eligible to be paid under this subpart.

*Producer* means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity who is, or whose members are, a citizen of, or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and makes contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity of the proceeds of this operation.

*Starting base production* means actual commercial production marketed by the dairy operation during the month of July 2004, or alternative period established by the Deputy Administrator.

*Verifiable production records* means evidence that is used to substantiate the amount of production marketed, including any dumped production, and that can be verified by CCC through an independent source.

### § 1430.303 Time and method of application.

(a) Dairy producers may obtain an Application, in person, by mail, by telephone, or by facsimile from any county FSA office. In addition, applicants may download a copy of the Application at *http://www.sc.egov.usda.gov*.

(b) A request for benefits under this subpart must be submitted on a completed Application as defined in § 1430.302. Applications and any other supporting documentation shall be submitted to the FSA county office serving the county where the dairy operation is located but, in any case, must be received by the FSA county office by the close of business on the date established by the Deputy Administrator. The closing date shall be no sooner than October 11, 2005. Applications not received by the close of business on such date will be disapproved as not having been timely filed and the dairy producer will not be eligible for benefits under this program.

(c) All persons who share in the risk of a dairy operation's total production must certify to the information on the Application before the Application is considered complete.

(d) Each dairy producer requesting benefits under this subpart must certify to the accuracy and truthfulness of the information provided in their application and any supporting documentation. All information provided is subject to verification by CCC. Refusal to allow CCC or any other agency of the Department of Agriculture to verify any information provided will result in a denial of eligibility. Furnishing the information is voluntary; however, without it program benefits will not be approved. Providing a false certification to the Government may be punishable by imprisonment, fines and other penalties or sanctions.

**§ 1430.304 Eligibility.**

(a) Producers in the United States are eligible to receive hurricane-related dairy disaster benefits under this part only if they have suffered dairy production or dairy spoilage losses in counties declared a disaster by the President due to any hurricane in 2004. To be eligible to receive payments under this subpart, producers in a dairy operation must:

(1) Have produced and commercially marketed milk in the United States and commercially marketed the milk produced during the 2004 calendar year;

(2) Be a producer on a dairy farm operation physically located in a disaster county where production and milk spoilage losses were incurred as a result of 2004 hurricanes, and limiting their claims to losses occurring in those counties;

(3) Provide proof of monthly milk production dumped and commercially marketed by all persons in the eligible dairy operation during the third quarter of the 2004 milk marketing year, or other period as determined by FSA, to determine the total pounds of eligible losses that will be used for payment; and

(4) Apply for payments during the application period established by the Deputy Administrator.

(b) Payments may be made for losses suffered by an otherwise eligible producer who is now deceased or is a dissolved entity if a representative who currently has authority to enter into a contract for the producer or the producer's estate signs the application for payment. Proof of authority to sign for the deceased producer's estate or a dissolved entity must be provided. If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly-authorized representatives must sign the application for payment.

(c) Producers associated with a dairy operation must submit a timely application and comply with terms and conditions of this subpart, instructions issued by CCC and instructions contained in the Application to be eligible for benefits under this subpart.

(d) As a condition to receive benefits under this part, a producer must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of 7 CFR part 12 for the 2004 calendar year, as applicable, and must not otherwise be barred from receiving benefits under 7 CFR part 12 or any other law or regulation.

(e) Payments are limited to losses in eligible counties in eligible months.

(f) All payments under this part are subject to the availability of funds.

**§ 1430.305 Proof of production.**

(a) Evidence of production is required to establish the commercial marketing and production history of the dairy operation so that production and spoilage losses can be computed in accordance with § 1430.306.

(b) A dairy producer must, based on the instructions issued by the Deputy Administrator, provide adequate proof of the dairy operation's commercial production, including any dumped production and dairy cow purchases, for each month of the period July 2004 through October 2004, and must specifically identify any dumped production for August through October 2004. If a month other than July 2004 is used for base creation purposes records for that month must be provided.

(1) A producer must certify and provide such proof as requested that losses for which compensation is claimed

were hurricane-related and occurred in an eligible county in an eligible month.

(2) Additional supporting documentation may be requested by FSA as necessary to verify production or spoilage losses and dairy herd increases or decreases to the satisfaction of FSA.

(c) Adequate proof of production history of the dairy operation under paragraph (b) of this section must be based on milk marketing statements obtained from the dairy operation's milk handler or marketing cooperative. Supporting documents may include, but are not limited to: tank records, milk handler records, daily milk marketings, copies of any payments received from other sources for production or spoilage losses, or any other documents available to confirm the production history and losses incurred by the dairy operation.

(d) Adequate proof of dairy cow additions to the milking herd during the eligible months can include, but are not limited to sales receipts, invoices, State health certificates, or any other documents available to confirm the cow purchases.

(e) All information provided to FSA by a producer is subject to verification, spot-check and audit by FSA. Also, FSA or another CCC representative may examine the dairy operation's production or spoilage claims.

(f) If adequate proof of commercially-marketed production and supporting documentation is not presented to the satisfaction of CCC or FSA, the request for benefits will be rejected. In the case of a new producer that had no verifiable, actual, commercial production marketed by the dairy operation during the month of July 2004, but which suffered eligible losses, an alternate base period may be established by the Deputy Administrator.

### § 1430.306 Determination of losses incurred.

(a) Eligible payable losses are calculated on a dairy operation by dairy operation basis and are limited to those occurring in August through October 2004. Specifically, dairy production and spoilage losses incurred by producers under this subpart are determined on the established history of the dairy operation's actual commercial production marketed from August through October 2004, and actual production dumped or otherwise not marketed from August through October 2004, as provided by the dairy operation consistent with § 1430.305. Except as otherwise provided in these regulations, the starting base production, as defined in § 1430.302, is adjusted downward by a percentage determined by CCC to determine the base production for the months of August through October 2004. These adjustments are made to account for the seasonal declines that can occur during those months. The base production for each of the months August through October 2004 is calculated by reducing the starting base production (July 2004, or alternate month approved by the Deputy Administrator for new producers) as follows:

(1) August 2004 base production is the starting base production reduced by 9 percent;

(2) September 2004 base production is the starting base production reduced by 15 percent;

(3) October 2004 base production is the starting base production reduced by 11 percent.

(b) The eligible dairy production losses for a dairy operation for each of the months of August through October 2004 will be:

(1) The new base production for the dairy operation calculated under paragraph (a) of this section less,

(2) For each such month for each dairy operation, the total of:

(i) Actual commercially-marketed production (not counting dumped production counted under paragraph (b)(1)(ii) of this section); plus

(ii) The pounds of milk production dumped (whether related to the hurricane or not), or otherwise not commercially marketed (whether related to the hurricane or not). For dumping losses to be eligible, they must, as with other program losses, be hurricane related, as described under paragraphs (c) and (d) of this section.

(c) Actual production losses may be adjusted to the extent the reduction in production is not certified by the producer to be the result of the hurricane or is determined by FSA not to be hurricane-related. Actual production, as adjusted, that exceeds the adjusted

base production will mean that the dairy operation incurred no eligible production losses for the corresponding month as a result of the hurricane disaster, and that the production level for that month does not qualify for a payment under this program.

(d) Eligible dairy spoilage losses incurred by producers under this subpart for each of the months August through October 2004 will be determined based on actual milk produced in those months that was dumped on the farm as a result of the 2004 hurricanes. Proper documentation of milk dumped on the farm as a result of spoilage due to a hurricane must be provided to CCC as provided in §1430.305.

(e) Calculated production losses may be adjusted by FSA based on the monthly average of daily dairy cow additions or reductions to the milking herd during the period of July 1, 2004 through October 31, 2004, to account for production adjustments as a result of dairy cow purchases, sales, or death losses. Production adjustments can be calculated using the average number of dairy cows in a dairy operation's milking herd and the average production per cow during each applicable month. Per-cow production averages during the months of August through October will be determined based on the actual per-cow production average during the month of July 2004 and reduced downward according to the seasonal decline percentages provided in paragraph (a) of this section, to determine the total production that may be credited back to the dairy operation's total production losses. To qualify for the production adjustment:

(1) Producers in eligible dairy operations must report any increases or decreases to the dairy cow milking herd during the period of July 1, 2004 through October 31, 2004.

(2) Adequate supporting documentation according to §1430.305 must be provided to the satisfaction of the COC to verify any claims of herd increases or decreases during the eligible period.

(3) Any cows purchased during the eligible period that would increase the dairy cow milking herd must have been to offset production losses as a result of the 2004 hurricanes.

(f) Eligible production and spoilage losses as otherwise determined under paragraphs (a) through (e) of this section are added together to determine total eligible losses incurred by the dairy operation subject to all other eligibility requirements as may be included in this part or elsewhere.

(g) Payment on eligible dairy operation losses is calculated using whole pounds of milk. No double counting is permitted, and only one payment will be made for each pound of milk calculated as an eligible loss after the distribution of the operation's eligible production loss among the producers of the dairy operation according to §1420.307(b). Payments under this part will not be affected by any payments for dumped or spoiled milk that the dairy operation may have received from its milk handler, or marketing cooperative, or any other private party.

(h) If a producer is eligible to receive payments under this part and benefits under any other program administered by the Secretary for the same losses, the producer must choose whether to receive the other program benefits or payments under this part, but shall not be eligible for both. The limitation on multiple benefits prohibits a producer from being compensated more than once for the same losses. If the other USDA program benefits are not available until after an application for benefits has been filed under this part, the producer may, to avoid this restriction on such other benefits, refund the total amount of the payment to the administrative FSA office from which the payment was received.

### §1430.307 Rate of payment and limitations on funding.

(a) Subject to the availability of funds, the payment rate for eligible production and spoilage losses determined according to §1430.306 is, depending on the State, the average monthly Mailbox milk price for the Florida, the Southeast, or the Appalachian States Marketing Orders as reported by the Agricultural Marketing Service during the months of August, September, and October of 2004. Maximum payment

rates for eligible losses for dairy operations located in specific states are as follows:

(1) Florida—$17.62 per hundredweight ($0.1762 per pound).

(2) Alabama, Georgia, Louisiana, and Mississippi—$16.26 per hundredweight ($0.1626 per pound).

(3) North Carolina and South Carolina—$15.59 per hundredweight ($0.1559 per pound).

(b) Subject to the availability of funds, each eligible dairy operation's payment is calculated by multiplying the applicable payment rate under paragraph (a) of this section by the operation's total eligible losses. Where there are multiple producers in the dairy operation, individual producers' payments are disbursed according to each producer's share of the dairy operation's production as specified in the Application.

(c) If the total value of losses claimed under paragraph (b) of this section exceeds the $10 million available for the 2004 Dairy Disaster Assistance Payment Program, less any reserve that may be created under paragraph (e) of this section, total eligible losses of individual dairy operations that, as calculated as an overall percentage for the full three month period, August–October 2004 (not a monthly average for any one month), are greater than 20 percent of the total base production for those three months will be paid at the maximum rate under paragraph (a) of this section to the extent available funding allows. A loss of over 20 percent in only one or two of the eligible months does not itself qualify for the maximum per-pound payment. Total eligible losses for a producer, as calculated under § 1430.306, of less than or equal to 20 percent during the eligibility period of August to October 2004 will be paid at a rate determined by dividing the eligible losses of less than 20 percent by the funds remaining after making payments for all eligible losses above the 20 percent threshold.

(d) In no event shall the payment exceed the value determined by multiplying the producer's total eligible loss times the average price received for commercial milk production in their area as defined in paragraph (a) of this section.

(e) A reserve may be created to handle claims that extend beyond the conclusion of the application period, but claims shall not be payable once the available funding is expended.

### § 1430.308 Availability of funds.

The total available program funds shall be $10 million as provided by section 103 of Division B of Public Law 108–324.

### § 1430.309 Appeals.

Any producer who is dissatisfied with a determination made pursuant to this subpart may request reconsideration or appeal of such determination in accordance with the appeal regulations set forth at 7 CFR parts 11 and 780. Appeals of determinations of ineligibility or payment amounts are subject to the limitations in §§ 1430.307 and 1430.308.

### § 1430.310 Misrepresentation and scheme or device.

(a) In addition to other penalties, sanctions or remedies as may apply, a dairy producer shall be ineligible to receive assistance under this program if the producer is determined by FSA or CCC to have:

(1) Adopted any scheme or device that tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to any person or operation engaged in a misrepresentation, scheme, or device, shall be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving payment under this subpart shall be jointly and severally liable with other persons or operations involved in such claim for benefits for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies that may apply.

### § 1430.311 Death, incompetence, or disappearance.

In the case of death, incompetency, disappearance, or dissolution of a person that is eligible to receive benefits in accordance with this subpart, such alternate person or persons specified in 7 CFR part 707 may receive such benefits, as determined appropriate by FSA.

### § 1430.312 Maintaining records.

Persons applying for benefits under this program must maintain records and accounts to document all eligibility requirements specified herein. Such records and accounts must be retained for 3 years after the date of payment to the dairy operations under this program. Destruction of the records after such date shall be at the risk of the party undertaking the destruction.

### § 1430.313 Refunds; joint and several liability.

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to comply with any requirement or condition for payment under the application or this subpart, must be refunded to CCC.

(b) A refund required under this section shall be due with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 1403.

(c) Persons signing a dairy operation's application as having an interest in the operation shall be jointly and severally liable for any refund and related charges found to be due under this section.

(d) Interest shall be applicable to any refunds required in accordance with 7 CFR parts 792 and 1403. Such interest shall be charged at the rate the United States Department of the Treasury charges CCC for funds, and shall accrue from the date FSA or CCC made the erroneous payment to the date of repayment.

(e) FSA may waive the accrual of interest if it determines that the cause of the erroneous determination was not due to any action of the person, or was beyond the control of the person committing the violation. Any waiver is at the discretion of FSA alone.

### § 1430.314 Miscellaneous provisions.

(a) *Offset*. CCC may offset or withhold any amount due CCC under this subpart in accordance with 7 CFR part 1403.

(b) *Claims*. Claims or debts are settled in accordance with 7 CFR part 1403.

(c) *Other interests*. Payments or any portion thereof due under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the livestock, or proceeds thereof, in favor of the owner or any other creditor except agencies and instrumentalities of the U.S. Government.

(d) *Assignments*. Any producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

### § 1430.315 Termination of program.

This program ends after payment has been made to those applicants certified as eligible pursuant to the application period established in § 1430.304. All eligibility determinations shall be final except as otherwise determined by the Deputy Administrator.

## Subpart D—Dairy Market Loss Assistance Program

AUTHORITY: Pub. L. 105–277, 112 Stat. 2681; Pub. L. 106–78, 113 Stat. 1135; Pub. L. 106–387, 114 Stat. 1549.

SOURCE: 64 FR 24934, May 10, 1999, unless otherwise noted.

### § 1430.500 Applicability.

This subpart establishes the Dairy Market Loss Assistance Program. The purpose of this program is to provide benefits to dairy operations under Public Law 105–277, 112 Stat. 2681; sections 805 and 825 of Public Law 106–78; and section 805 of Public Law 106–387 only, in order to provide financial assistance to dairy operations in connection with normal milk production that is sold on the commercial market.

[64 FR 24934, May 10, 1999, as amended at 65 FR 7956, Feb. 16, 2000; 66 FR 15176, Mar. 15, 2001]

**§ 1430.501 Administration.**

(a) The provisions of §§ 1430.351, 1430.352, 1430.354, 1430.355, and 1430.360 shall be applied to this subpart in the same manner as they are applied to the subpart in which they are located.

(b) The provisions of §§ 1430.1 through 1430.349, 1430.353, 1430.356 through 1430.359, 1430.361 through 1430.362, and 1430.400 through 1430.410 are not applicable to this subpart.

(c) This subpart shall be administered by the Farm Service Agency (FSA) under the general direction and supervision of the Executive Vice President, CCC or designee. The program shall be carried out in the field by State and county FSA committees under the general direction and supervision of the State and county FSA committees.

(d) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations in this subpart.

(e) The State committee shall take any action required by this subpart which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with the regulations of this subpart; or

(2) Require a county committee to withhold taking any action which is not in accordance with the regulations of this subpart.

(f) No delegation in this subpart to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(g) The Deputy Administrator for Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines and other program requirements in cases where timeliness or failure to meet such other requirements does not adversely affect the operation of the program.

**§ 1430.502 Definitions.**

The definitions set forth in this section shall be applicable for all purposes of administering the Dairy Market Loss Assistance Program established by this subpart.

*Application* means the Dairy Market Loss Assistance Program Payment application, CCC–1040.

*Application period* means April 12, 1999 through February 28, 2001.

*Base period* means the calendar year, either 1997 or 1998, as selected by the dairy operation, during which milk was produced and marketed.

*Commodity Credit Corporation* means the Commodity Credit Corporation.

*Dairy operation* means any person or group of persons who as a single unit as determined by CCC, produce and market milk commercially produced from cows and whose production and facilities are located in the United States.

*Department* means the United States Department of Agriculture.

*Deputy Administrator* means the Deputy Administrator for Farm Programs (DAFP), Farm Service Agency (FSA) or a designee.

*Eligible production* means milk that had been produced by cows in the United States and marketed commercially in the United States anytime during the 1997 and or 1998 calendar year, subject to a maximum of 26,000 cwt per dairy operation.

*Farm Service Agency* or FSA means the Farm Service Agency of the Department.

*Fourth quarter of 1998* means the period from October 1, 1998 through December 31, 1998.

*Marketed commercially* means sold to the market to which the dairy operation normally delivers whole milk and receives a monetary amount.

*Milk handler* means the marketing agency to or through which the producer commercially markets whole milk.

*Milk marketing* means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use.

*Person* means any individual, group of individuals, partnership, corporation, estate, trust, association, cooperative, or other business enterprise or other legal entity who is, or whose

members are, a citizen or citizens of, or legal resident alien or aliens in the United States.

*Secretary* means the Secretary of the United States Department of Agriculture or any other officer or employee of the Department who has been delegated the authority to act in the Secretary's stead with respect to the program established in this part.

*United States* means the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.

[64 FR 24934, May 10, 1999, as amended at 65 FR 7956, Feb. 16, 2000; 66 FR 15177, Mar. 15, 2001]

### § 1430.503 Time and method for application.

(a) Dairy operations may obtain an application, Form CCC–1040 (Dairy Market Loss Assistance Program Payment Application), in person, by mail, by telephone, or by facsimile from any county FSA office. In addition, applicants may download a copy of the CCC–1040 at *http://www.fsa.usda.gov/dafp/psd/*.

(b) A request for benefits under this subpart must be submitted on a completed Form CCC–1040. The Form CCC–1040 should be submitted to the county FSA office serving the county where the dairy operation is located but, in any case, must be received by the county FSA office by the close of business on February 28, 2001. Applications not received by the close of business on February 28, 2001, will be disapproved as not having been timely filed and the dairy operation will not be eligible for benefits under this program.

(c) All persons who share in the milk production of a dairy operation that marketed milk during the fourth quarter of 1998 must certify on the same CCC–1040 in order to obtain the total milk production of the dairy operation before the application is complete.

(d) The dairy operation requesting benefits under this subpart must certify with respect to the accuracy and truthfulness of the information provided in their application for benefits. All information provided is subject to verification and spot checks by CCC. Refusal to allow CCC or any other agency of the Department of Agriculture to verify any information provided will result in a determination of ineligibility. Data furnished by the applicant will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without it program benefits will not be approved. Providing a false certification to the Government is punishable by imprisonment, fines and other penalties.

[64 FR 24934, May 10, 1999, as amended at 65 FR 7956, Feb. 16, 2000; 66 FR 15177, Mar. 15, 2001]

### § 1430.504 Eligibility.

(a) To be eligible to receive cash payments under this subpart, a dairy operation must:

(1) Have produced and marketed milk commercially in the United States anytime during the fourth quarter of 1998;

(2) Indicate all milk commercially marketed by all persons in the dairy operation during calendar year 1997 and 1998 to establish the base period for determining the total pounds of milk that will be converted to hundredweight (cwt) used for payment; and

(3) Apply for payments during the application period.

(b) A dairy operation must submit a timely application and comply with all other terms and conditions of this subpart and those that are otherwise contained in the application to be eligible for benefits under this subpart.

### § 1430.505 Proof of production.

(a) Dairy operations selected for spotchecks by CCC must, in accordance with instructions issued by the Deputy Administrator, provide adequate proof that the dairy operation was commercially marketing milk anytime during the fourth quarter of 1998. The dairy operation must also provide proof of production for the 1997 or 1998 calendar year to verify the base period. The documentary evidence of milk production claimed for payment shall be reported to CCC together with any supporting documentation under paragraph (b) of this section. The pounds of 1997 or 1998 calendar year milk production must be documented using actual records.

(b) All persons involved in such dairy operation marketing milk during the fourth quarter of 1998 shall provide any

available supporting documents to assist the county FSA office in verifying that the dairy operation produced and marketed milk commercially during the fourth quarter of 1998 and the base period milk marketings indicated on Form CCC–1040. Examples of supporting documentation include, but are not limited to: tank records, milk handler records, milk marketing payment stubs, daily milk marketings, copies of any payments received as compensation from other sources, or any other documents available to confirm the production and production history of the dairy operation. In the event that supporting documentation is not presented to the county FSA office requesting the information, dairy operations will be determined ineligible for benefits.

**§ 1430.506 Payment rate and dairy operation payment.**

(a) Payments under this subpart may be made to dairy operations only on the first 26,000 cwt of milk produced by them from cows in the United States actually marketed in the United States during the base period. A payment rate will be determined after the conclusion of the application period, and shall be calculated by:

(1) Converting whole pounds of milk to cwt;

(2) Totaling the eligible cwt (not to exceed 26,000 cwt) of milk marketed commercially during the base period from all approved applications; and

(3) Dividing the amount available for Dairy Market Loss Assistance Program by the total eligible cwt submitted and approved for payment.

(b) Each dairy operation payment will be calculated by multiplying the payment rate determined in paragraph (a) (3) of this section by the dairy operation's eligible production.

(c) In the event that approval of all eligible applications would result in expenditures in excess of the amount available, CCC shall reduce the payment rate in such manner as CCC, in its sole discretion, finds fair and reasonable.

**§ 1430.507 Misrepresentation and scheme or device.**

(a) A dairy operation shall be ineligible to receive assistance under this program if it is determined by the State committee or the county committee to have:

(1) Adopted any scheme or device which tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a dairy operation engaged in a misrepresentation, scheme, or device, or to any other person as a result of the dairy operation's actions, shall be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

**§ 1430.508 Maintaining records.**

Dairy operations making application for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified in this subpart and the pounds of milk marketed commercially during the fourth quarter of 1998 and the base period. Such records and accounts must be retained for at least three years after the date of the cash payment to dairy operations under this program.

**§ 1430.509 Refunds; joint and several liability.**

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application, or this subpart, and if any refund of a payment to CCC shall otherwise become due in connection with the application, or this subpart, all payments made under this subpart to any dairy operation shall be refunded to CCC together with interest

as determined in accordance with paragraph (c) of this section and late-payment charges as provided for in part 1403 of this chapter.

(b) All persons listed on a dairy operation's application shall be jointly and severally liable for any refund, including related charges, which is determined to be due for any reason under the terms and conditions of the application or this subpart.

(c) Interest shall be applicable to refunds required of the dairy operation if CCC determines that payments or other assistance were provided to the producer was not eligible for such assistance. Such interest shall be charged at the rate of interest which the United States Treasury charges CCC for funds, as of the date CCC made such benefits available. Such interest shall accrue from the date such benefits were made available to the date of repayment or the date interest increases as determined in accordance with applicable regulations. CCC may waive the accrual of interest if CCC determines that the cause of the erroneous determination was not due to any action of the dairy operation.

(d) Interest determined in accordance with paragraph (c) of this section may be waived by CCC with respect to refunds required of the dairy operation because of unintentional misaction on the part of the dairy operation, as determined by CCC.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in 7 CFR part 1403.

(f) Dairy operations must refund to CCC any excess payments made by CCC with respect to such application.

(g) In the event that a benefit under this subpart was provided as the result of erroneous information provided by any person, the benefit must be repaid with any applicable interest.

### § 1430.510 New producers.

Notwithstanding other provisions of this subpart, producers who were new producers in 1999 or 2000 and not affiliated with other eligible producers may receive payments from sums made available after October 27, 2000 based on their 1999 production levels or for 2000, on their production levels from October 1, 1999 through September 30, 2000.

[66 FR 15177, Mar. 15, 2001]

### § 1430.511 Supplemental payments.

(a) Supplemental payments under Public Law 106–387 will be made available to dairy operations in connection with normal milk production that is sold on the commercial market.

(b) For supplemental payments made under this section, the payment rate shall be $0.6468 per cwt.

(c) For dairy operations that received a payment under sections 805 and 825 of Public Law 106–78 on less than 12 months production, an annual production level will be calculated by subtracting from the dairy operation's production level for the period of October 1, 1999 through September 30, 2000 the production level on which previous payments were received.

[66 FR 15177, Mar. 15, 2001]

## Subpart E—2005 Dairy Disaster Assistance Payment Program II (DDAP–II)

SOURCE: 71 FR 63670, Oct. 31, 2006, 71 FR 65711, Nov. 9, 2006, unless otherwise noted.

### § 1430.600 Applicability.

(a) Subject to the availability of funds, this subpart sets forth the terms and conditions applicable to DDAP–II authorized by section 3014 of Public Law 109–234. Benefits are available to eligible United States producers who have suffered in 2005 dairy production losses and dairy spoilage losses in eligible counties as a result of Hurricanes Katrina, Ophelia, Rita, and Wilma or conditions related to those hurricanes.

(b) To be eligible for this program, a producer must have been a milk producer in 2005 in a county declared a natural disaster by the Secretary of Agriculture or declared a major disaster or emergency designated by the President of the United States due to a 2005 hurricane or related condition thereof, or in a contiguous county to a county that is directly eligible by way of a natural disaster declaration. Only losses occurring in these counties are eligible for payment under this program.

(c) Subject to the availability of funds, benefits shall be provided by the Commodity Credit Corporation (CCC) to eligible dairy producers. Additional terms and conditions may be set forth in the payment application that must be executed by participants to receive a disaster assistance payment for dairy production losses and dairy spoilage losses.

(d) To be eligible for payments, producers must comply with the provisions of, and their losses must meet the conditions of, this subpart and any other conditions imposed by CCC.

**§ 1430.601 Administration.**

(a) DDAP–II shall be administered under the general supervision of the Executive Vice President, CCC, or a designee, and shall be carried out in the field by FSA State and county committees (State and county committees) and FSA employees.

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State committee shall take any action required by the regulations of this subpart that has not been taken by the county committee. The State committee shall also:

(1) Correct, or require the county committee to correct, any action taken by such county committee that is not in accordance with the regulations of this subpart; and

(2) Require a county committee to withhold taking any action that is not in accordance with the regulations of this subpart.

(d) No provision of delegation in this subpart to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by the State or county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines in cases where lateness or failure to meet such requirements do not adversely affect the operation of the 2005 Dairy Disaster Assistance Payment Program II and does not violate statutory limitations on the program.

(f) Data furnished by the applicants is used to determine eligibility for program benefits. Although participation in DDAP-II is voluntary, program benefits are not provided unless the participant furnishes all requested data.

**§ 1430.602 Definitions.**

The definitions in 7 CFR part 718 shall apply to this subpart except to the extent they are inconsistent with the provisions of this subpart. In addition, for the purpose of this subpart, the following definitions shall apply.

*Application* means DDAP–II Application.

*Application period* means the time period established by the Deputy Administrator for producers to apply for program benefits.

*Base month* means the base month for the particular 2005 hurricane assigned in § 1430.604.

*CCC* means the Commodity Credit Corporation of the Department.

*Claim period* means as assigned in this subpart the qualifying months of calendar year 2005, following the base month, in which the loss occurred.

*County committee* means the FSA county committee.

*County office* means the FSA office responsible for administering FSA programs for farms located in a specific area in a State.

*Dairy operation* means any person or group of persons who, as a single unit, as determined by CCC, produces and markets milk commercially from cows and whose production facilities are located in the United States.

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

*Deputy Administrator* means the Deputy Administrator for Farm Programs (DAFP), FSA, or a designee.

*Farm Service Agency or FSA* means the Farm Service Agency of the Department.

*Hundredweight or cwt.* means 100 pounds.

*Hurricane-affected county* means a county included in the geographic area

covered by a natural disaster declaration related to Hurricane Katrina, Hurricane Ophelia, Hurricane Rita, Hurricane Wilma or conditions related to those hurricanes, and includes counties which qualify because they are contiguous to a county that qualifies by a natural disaster declaration.

*Milk handler or cooperative* means the marketing agency to, or through which, the producer commercially markets whole milk.

*Milk marketings* means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use. In counting milk toward production amounts, dumped milk will not be considered as marketed for commercial use. Such dumped milk shall be counted toward production but will be accounted for separately from milk that is marketed for normal commercial use as determined by the Deputy Administrator. All production in the months for which loss coverage is available will be counted in making determinations under this part, as determined by the Deputy Administrator, with care to avoid double counting, and with care to avoid a calculated loss that overstates the actual losses. Adjustments may be made as appropriate to accomplish these objectives.

*Natural disaster declaration* means a natural disaster declaration issued by the Secretary of Agriculture during calendar year 2005 under section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961 (a)), or a major disaster or emergency designation by the President of the United States during calendar year 2005 under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, including declarations and designations by both the President and Secretary made during calendar year 2006 for which a request was pending as of December 31, 2005.

*Payment pounds* means the pounds of milk production from a dairy operation for which the dairy producer is eligible to be paid under this subpart.

*Producer* means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity who is, or whose members are, citizens of, or legal resident aliens in the United States, and who directly or indirectly, as determined by the Secretary, share in the risk of producing milk, and make contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity.

*Reliable production records* means evidence provided by the producer that is used to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, and records to verify production costs, contemporaneous measurements, and contemporaneous diaries that are determined acceptable by the county committee.

*Starting base production* means actual commercial production marketed by the dairy operation during the base month applicable to the 2005 hurricane disaster, or alternative period established by the Deputy Administrator.

*Verifiable production records* means evidence that is used to substantiate the amount of production including any part marketed normally, dumped, or otherwise disposed of, and that can be verified by CCC through an independent source.

### § 1430.603 Time and method of application.

(a) Dairy producers may obtain an Application, in person, by mail, by telephone, or by facsimile from any county FSA office. In addition, applicants may download a copy of the Application at *http://www.sc.egov.usda.gov*.

(b) A request for benefits under this subpart must be submitted on a completed Application as defined in § 1430.602. Applications and any other supporting documentation shall be submitted to the FSA county office serving the county where the dairy operation is located but, in any case, must be received by the FSA county office by the close of business on the date established by the Deputy Administrator. The closing date shall be no sooner than November 30, 2006. Applications not received by the close of business on such date will be disapproved as not having been timely filed and the

dairy producer will not be eligible for benefits under this program.

(c) All persons who share in the risk of a dairy operation's total production must certify to the information on the Application before the Application is considered complete.

(d) Each dairy producer requesting benefits under this subpart must certify to the accuracy and truthfulness of the information provided in their application and any supporting documentation. All information provided is subject to verification by CCC. Refusal to allow CCC or any other agency of the Department of Agriculture to verify any information provided will result in a denial of eligibility. Furnishing the information is voluntary; however, without it program benefits will not be approved.

**§ 1430.604 Eligibility.**

(a) Producers in the United States are eligible to receive hurricane-related dairy disaster benefits under this part only if they have suffered dairy production or dairy spoilage losses in 2005 as a result of a hurricane disaster or related condition, in a hurricane-affected county. To be eligible to receive payments under this subpart, producers in a dairy operation must:

(1) Have produced and commercially marketed milk in the United States and commercially marketed the milk produced during the 2005 calendar year;

(2) Be a producer on a dairy farm operation physically located in an eligible county where dairy production and milk spoilage losses were incurred as a result of 2005 hurricanes, or a related condition, in and limiting their claims to losses occurring in those counties and contiguous counties;

(3) Provide adequate proof, to the satisfaction of the County Committee, of monthly milk production dumped and commercially marketed by all persons in the eligible dairy operation during the base month and claim period that corresponds with the applicable hurricane-related disaster during the 2005 milk marketing year, or other period as determined by CCC, to determine the total pounds of eligible losses that will be used for payment; and

(4) Apply for payments during the application period established by the Deputy Administrator.

(b) Payments may be made for losses suffered by an otherwise eligible producer who is now deceased or is a dissolved entity if a representative who currently has authority to enter into a contract for the producer or the producer's estate signs the application for payment. Proof of authority to sign for the deceased producer's estate or a dissolved entity must be provided. If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly-authorized representatives must sign the application for payment.

(c) Producers associated with a dairy operation must submit a timely application and comply with terms and conditions of this subpart, instructions issued by CCC and instructions contained in the Application to be eligible for benefits under this subpart.

(d) As a condition to receive benefits under this part, a producer must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of 7 CFR part 12 for the 2005 calendar year, as applicable, and must not otherwise be barred from receiving benefits under 7 CFR part 12 or any other law or regulation.

(e) Payments are limited to losses in eligible counties, in eligible months.

(f) All payments under this part are subject to the availability of funds.

(g) Eligible losses are determined from the applicable base month that corresponds to the hurricane disaster or related condition and must have occurred during the claim periods applicable to the disaster as follows:

(1) For Hurricane Katrina and Hurricane Rita the base month is July 2005 and the corresponding claim period are the 2005 calendar months of August through December; and

(2) For Hurricane Ophelia and Hurricane Wilma the base month is September 2005 and the corresponding claim period are the 2005 calendar months of October through December.

**§ 1430.605 Proof of production.**

(a) Evidence of production is required to establish the commercial marketing and production history of the dairy operation so that dairy production and spoilage losses can be computed in accordance with § 1430.606.

(b) A dairy producer must, based on the instructions issued by the Deputy Administrator, provide adequate proof of the dairy operation's commercial production, including any dumped production and dairy cow purchases, for each month of the applicable base month and claim period that corresponds with the applicable 2005 hurricane disaster or related condition, and must specifically identify any production during the applicable claim period that is dumped. If a month other than the applicable base month is used for base creation purposes, records for that month must be provided.

(1) A producer must certify and provide such proof as requested that losses for which compensation is claimed were hurricane-related and occurred in an eligible county in an eligible month.

(2) Additional supporting documentation may be requested by CCC as necessary to verify production or spoilage losses and dairy herd increases or decreases to the satisfaction of CCC.

(c) Adequate proof of production history of the dairy operation under paragraph (b) of this section must be based on milk marketing statements obtained from the dairy operation's milk handler or marketing cooperative. Supporting documents may include, but are not limited to: Tank records, milk handler records, daily milk marketings, copies of any payments received from other sources for production or spoilage losses, or any other documents available to confirm or adjust the production history and losses incurred by the dairy operation.

(d) Adequate proof of dairy cow additions to the milking herd during the eligible months can include, but is not limited to sales receipts, invoices, State health certificates, or any other documents available to confirm the cow purchases.

(e) If adequate proof of normally marketed production, dumped production, and any other production for relevant periods is not presented to the satisfaction of CCC, the request for benefits will be rejected. In the case of a new producer that had no verifiable, actual, commercial production marketed by the dairy operation during the applicable base month, but which suffered eligible losses, an alternate base period may be established by the Deputy Administrator.

**§ 1430.606 Determination of losses incurred.**

(a) Eligible payable losses are calculated on a dairy operation by dairy operation basis and are limited to those occurring during the applicable claim period, as provided by § 1430.604(g), that corresponds with the hurricane-related disaster. Specifically, dairy production and spoilage losses incurred by producers under this subpart are determined on the established history of the dairy operation's actual commercial production marketed during the applicable claim period that corresponds with the hurricane-related disaster, and actual production dumped or otherwise not marketed during that same claim period, as provided by the dairy operation consistent with § 1430.605. Except as otherwise provided in these regulations, the starting base production, as defined in § 1430.602 and established in § 1430.604(g), is adjusted downward by a percentage determined by CCC to determine the base production for the applicable claim period that corresponds to the hurricane-related disaster. These adjustments are made to account for the seasonal declines that can occur during the months within the claim period. The base production for each of the applicable claim period months is calculated by reducing the starting base production of the applicable base month, or alternate month approved by the Deputy Administrator for new producers, as follows:

(1) August 2005 base production is the starting base production reduced by 8 percent;

(2) September 2005 base production is the starting base production reduced by 17 percent;

(3) October 2005 base production is the starting base production reduced by 11 percent. However, if losses occurred only as a result of Hurricanes

Ophelia and Wilma, for October 2005, base production is not reduced.

(4) November 2005 base production is the starting base production reduced by 6 percent, unless eligible losses occurred only as a result of Hurricanes Ophelia and Wilma, in which case, for November 2005, base production is not reduced.

(5) December 2005 base production is not reduced by a downward adjustment percentage.

(b) The eligible dairy production losses for a dairy operation for each of the claim period months of August through December 2005, as applicable, will be:

(1) The new base production for the dairy operation calculated under paragraph (a) of this section less,

(2) For each such month for each dairy operation, the total of:

(i) Actual commercially-marketed production (not counting dumped production counted under paragraph (b)(1)(ii) of this section); plus

(ii) The pounds of milk production dumped (whether related to the hurricane or not), or otherwise not commercially marketed (whether related to the hurricane or not). For dumping losses to be eligible for payment, however, they must, as with other program losses, be hurricane related, as described under paragraphs (c) and (d) of this section.

(c) Actual production losses may be adjusted to the extent the reduction in production is not certified by the producer to be the result of the hurricane or is determined by CCC not to be hurricane-related. Actual production, as adjusted, that exceeds the adjusted base production will mean that the dairy operation incurred no eligible production losses for the corresponding month as a result of the hurricane disaster, and that the production level for that month does not qualify for a production loss payment under this program.

(d) Eligible dairy spoilage losses incurred by producers under this subpart for each of the months August through December 2005, as applicable to the claim period that corresponds with the hurricane-related disaster, will be determined based on actual milk produced in those months that was dumped on the farm as a result of the 2005 hurricanes, or other related condition. Proper documentation of milk dumped on the farm as a result of spoilage due to a hurricane must be provided to CCC as provided in § 1430.605.

(e) Calculated production losses may be adjusted by CCC based on the monthly average of daily dairy cow additions or reductions to the milking herd during the applicable claim period that corresponds with the hurricane-related disaster, to account for production adjustments as a result of dairy cow purchases, sales, or death losses. Production adjustments can be calculated using the average number of dairy cows in a dairy operation's milking herd and the average production per cow during each applicable month. Per-cow production averages during the applicable claim period months will be determined based on the actual per-cow production average during the base month applicable to the hurricane-related disaster and reduced downward according to the seasonal decline percentages provided in paragraph (a) of this section, to determine the total production that may be credited back to the dairy operation's total production losses. To qualify for the production adjustment credit:

(1) Producers in eligible dairy operations must report any increases to the dairy cow milking herd during the applicable base month and claim period that corresponds to the hurricane disaster condition to the eligible hurricane.

(2) Adequate supporting documentation according to § 1430.605 must be provided to the satisfaction of the COC to verify any claims of herd increases during the eligible period.

(3) Any cows purchased during the eligible period that would increase the dairy cow milking herd must have been to offset production losses as a result of the 2005 hurricanes, or other related condition.

(f) Eligible production and spoilage losses as otherwise determined under paragraphs (a) through (e) of this section are added together to determine total eligible losses incurred by the

dairy operation subject to all other eligibility requirements as may be included in this part or elsewhere.

(g) Payment on eligible dairy operation losses is calculated using whole pounds of milk. No double counting is permitted, and only one payment will be made for each pound of milk calculated as an eligible loss after the distribution of the operation's eligible production loss among the producers of the dairy operation according to § 1420.307(b). Payments under this part will not be affected by any payments for dumped or spoiled milk that the dairy operation may have received from its milk handler, or marketing cooperative, or any other private party.

(h) If a producer is eligible to receive payments under this part and benefits under any other program administered by the Department of Agriculture (USDA) for the same losses, the producer must choose whether to receive the other program benefits or payments under this part, but shall not be eligible for both. The limitation on multiple benefits prohibits a producer from being compensated more than once for the same losses. If the other USDA program benefits are not available until after an application for benefits has been filed under this part, the producer may, to avoid this restriction on such other benefits, refund the total amount of the payment to the FSA administrative office from which the payment was received.

EDITORIAL NOTE: At 71 FR 65711, Nov. 9, 2006, § 1430.606(g) was amended by revising the reference to "§ 1420.305" to read "§ 1430.605". However, because of inaccuarate amendatory language, this amendment could not be incorporated.

### § 1430.607 Rate of payment and limitations on funding.

(a) Subject to the availability of funds, the payment rate for eligible production and spoilage losses determined according to § 1430.606 is, depending on the State, the amount set forth below which is derived from the monthly Mailbox milk price for the Florida, the Southeast, Western Texas or the Appalachian States Marketing Orders as reported by the Agricultural Marketing Service. Maximum payment rates for eligible losses for dairy operations located in specific states are as follows:

(1) Florida—$18.19 per hundredweight ($0.1819 per pound), which is averaged to account for the mailbox price during the months of August 2005 and October 2005 when the hurricane disasters occurred.

(2) Louisiana—$16.47 per hundredweight ($0.1647 per pound), which is averaged to account for the mailbox price during the months of August 2005 and September 2005 when the hurricane disasters occurred.

(3) Alabama, Arkansas, Georgia and Mississippi—$16.49 per hundredweight ($0.1649 per pound).

(4) North Carolina—$15.39 per hundredweight ($0.1539 per pound).

(5) Texas—$14.19 per hundredweight ($0.1419 per pound).

(6) Tennessee—$15.38 per hundredweight ($0.1538 per pound).

(b) Subject to the availability of funds, each eligible dairy operation's payment is calculated by multiplying the applicable payment rate under paragraph (a) of this section by the operation's total eligible losses. Where there are multiple producers in the dairy operation, individual producers' payments are disbursed according to each producer's share of the dairy operation's production as specified in the Application.

(c) If the total value of losses claimed under paragraph (b) of this section exceeds the $17 million available for DDAP–II, less any reserve that may be created under paragraph (e) of this section, total eligible losses of individual dairy operations that, as calculated as an overall percentage for the full disaster claim period that corresponds with the applicable hurricane-related disaster (not a monthly average for any one month), are greater than 20 percent of the total base production for those applicable claim period months will be paid at the maximum rate under paragraph (a) of this section to the extent available funding allows. A loss of over 20 percent in only one or two of the eligible months does not itself qualify for the maximum per-pound payment. Total eligible losses for a producer, as calculated under

§ 1430.606, of less than or equal to 20 percent during the eligible claim period will then be paid at a rate determined by dividing the eligible losses of less than 20 percent by the funds remaining after making payments for all eligible losses above the 20-percent threshold.

(d) In no event shall the payment exceed the value determined by multiplying the producer's total eligible loss times the average price received for commercial milk production in their area as defined in paragraph (a) of this section.

(e) A reserve may be created to handle pending or disputed claims, but claims shall not be payable once the available funding is expended.

**§ 1430.608 Availability of funds.**

The total available program funds shall be $17 million as provided by section 3014 of Title III of Public Law 109–234.

**§ 1430.609 Appeals.**

Any producer who is dissatisfied with a determination made pursuant to this subpart may request reconsideration or appeal of such determination in accordance with the appeal regulations set forth at 7 CFR parts 11 and 780. Appeals of determinations of ineligibility or payment amounts are subject to the limitations in §§ 1430.607 and 1430.608 and other limitations as may apply.

**§ 1430.610 Misrepresentation and scheme or device.**

(a) In addition to other penalties, sanctions or remedies as may apply, a dairy producer shall be ineligible to receive assistance under this program if the producer is determined by CCC to have:

(1) Adopted any scheme or device that tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to any person or operation engaged in a misrepresentation, scheme, or device, must be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving payment under this subpart shall be jointly and severally liable with other persons or operations involved in such claim for benefits for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies that may apply.

**§ 1430.611 Death, incompetence, or disappearance.**

In the case of death, incompetency, disappearance, or dissolution of a person that is eligible to receive benefits in accordance with this subpart, such alternate person or persons specified in 7 CFR part 707 may receive such benefits, as determined appropriate by CCC.

**§ 1430.612 Maintaining records.**

Persons applying for benefits under this program must maintain records and accounts to document all eligibility requirements specified herein. Such records and accounts must be retained for 3 years after the date of payment to the dairy operations under this program. Destruction of the records after such date shall be at the risk of the party imposed with the recordkeeping requirements by this subpart.

**§ 1430.613 Refunds; joint and several liability.**

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to comply with any requirement or condition for payment under the application or this subpart, must be refunded to CCC.

(b) A refund required under this section shall be due with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 1403.

(c) Persons signing a dairy operation's application as having an interest in the operation shall be jointly and severally liable for any refund and related charges found to be due under this section.

(d) In accord with parts 792 and 1403 of this title, interest shall be applicable to any refunds required under this subpart. Such interest shall be charged

at the rate the United States Department of the Treasury charges CCC for funds, and shall accrue from the date FSA or CCC made the erroneous payment to the date of repayment.

(e) CCC may waive the accrual of interest if it determines that the cause of the erroneous determination was not due to any action of the person, or was beyond the control of the person committing the violation. Any waiver is at the discretion of CCC alone.

### § 1430.614 Miscellaneous provisions.

(a) CCC may offset or withhold any amount due CCC under this subpart in accordance with 7 CFR part 1403.

(b) Payments or any portion thereof due under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the livestock or property of any kind, or proceeds thereof, in favor of the owner or any other creditor except agencies and instrumentalities of the U.S. Government.

(c) Any producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

## PART 1434—NONRECOURSE MARKETING ASSISTANCE LOAN AND LDP REGULATIONS FOR HONEY

Sec.

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AUTHORITY: 7 U.S.C. 7931 and Public Law 110–246.

SOURCE: 66 FR 15177, Mar. 15, 2001, unless otherwise noted.

### § 1434.1 Applicability.

(a) This part provides the terms and conditions of Commodity Credit Corporation (CCC) nonrecourse marketing assistance loans or loan deficiency payments for honey for the 2008 through 2012 crop years. Marketing loan gains and loan deficiency payments for the 2008 crop will be limited to the payment limitation rules applicable to the 2008 crop. Beginning with the 2009 crop year, there will not be payment limits on marketing loan gains and loan deficiency payments.

(b) Producers must comply with all provisions of this part and part 1421 of this chapter.

[74 FR 15656, Apr. 7, 2009]

### § 1434.2 Administration.

(a) The regulations of this part shall be administered under the general supervision of the Executive Vice President, CCC, and shall be carried out in the field by State and county Farm Service Agency (FSA) committees.

(b) State and county committees, representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this part.

(c) The State committee shall take any action required by the regulations of this part that has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with the regulations of this part.

(d) No provision or delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying

any determination made by a State or county committee.

(e) The Deputy Administrator for Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines and other program requirements in cases where timeliness or failure to meet such other requirements does not affect adversely the operation of the program.

(f) An approving official of CCC may execute loans and related documents only under the terms and conditions determined and announced by CCC. Any such document that is not executed in accordance with such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void unless affirmed by the Executive Vice President, CCC.

### § 1434.3 Definitions.

The definitions set forth in this section shall be applicable for all purposes of program administration. The terms defined in part 718 of this title shall also be applicable except where those definitions are inconsistent with the definitions set forth in this section or for purpose of program instruments created under this part.

*Approving official* is a representative of CCC who is authorized by the Executive Vice President, CCC, to approve loan documents prepared under this part.

*Charge* is a fee, cost, and expense (including foreclosure costs) incident to insuring, carrying, handling, storing, conditioning, and marketing the honey and otherwise protecting the honey.

*CMA* is a cooperative marketing association engaged in marketing honey.

*County office* is the local FSA office.

*Crop year* is the calendar year in which honey is extracted.

*Ineligible honey* is honey not eligible for a loan under this part for which ineligibility shall include, but is not limited to, honey from applicable floral sources regardless of whether the honey meets other eligibility requirements.

*Intermediate Bulk Container (IBC)* is a bulk container with a polyethylene inner bottle with a galvanized steel protective cage with a 275 and 330 gallon capacity and is reusable.

*Loan* is a nonrecourse marketing assistance loan on honey.

*Nontable honey* is honey having a predominant flavor of limited acceptability for table use even though such honey may be considered suitable for table use.

*Person* is an individual, partnership, association, corporation, estate or trust, or other business enterprise or other legal entity and, whenever applicable a State, political subdivision of a State, or any agency thereof.

*Table honey* is any honey having a good flavor of the predominant floral source which can be readily marketed for table use.

*Representative* is a receiver, executor, administrator, guardian, or trustee representing the interests of a person or an estate.

### § 1434.4 Eligible producer.

(a) To be eligible to receive an individual or joint loan or loan deficiency payments under this part, a person must:

(1) Have produced honey in the United States during the calendar year for which a loan is requested and extracted on or before December 31 of such calendar year;

(2) Be responsible for the risk of keeping the bees and producing honey;

(3) Have a continuous beneficial interest in the honey from the time the honey was extracted through date of repayment of the loan;

(4) Store the honey pledged as loan collateral in eligible storage and in eligible containers that meet the requirements of § 1434.7 and § 1434.8, respectively; and

(5) Adequately protect the interests of CCC by providing security for a loan in accordance with the requirements in § 1434.8 and by maintaining in good condition the honey pledged as security for a loan.

(b) A person who complies with paragraph (a) of this section, who enters into a contract to sell the honey used as collateral for a loan but retains a beneficial interest in the honey and who does not receive an advance payment from the purchaser to enter into the contract unless the purchaser is a cooperative marketing association (CMA) that is eligible under paragraph

(g) of this section, remains eligible for a loan.

(c) Two or more applicants may be eligible for a joint loan if:

(1) The conditions in paragraphs (a) and (b) of this section are met with respect to the commingled honey collateral stored in the same eligible containers they are tendering for a loan; and

(2) The commingled honey is not used as collateral for an individual loan that has not been repaid.

(d) Heirs who succeed to a beneficial interest in the honey are eligible for a loan if they:

(1) Assume the decedent's obligation under a loan if such loan has already been obtained; and

(2) Assure continued safe storage of the honey if such honey has been pledged as collateral for a loan.

(e) A representative may be eligible to receive a loan on behalf of a person or estate who or which meets the requirements in paragraphs (a), (b), (c), and (d) of this section and that the honey tendered as collateral by the representative, in the capacity of a representative, shall be considered as tendered by the person or estate being represented.

(f) A minor who otherwise meets the requirements of this part for a loan shall be eligible to receive a loan only if the minor meets one of the following requirements:

(1) A court or statute has conferred the right of majority on the minor;

(2) A guardian has been appointed to manage the minor's property and the applicable loan documents are signed by the guardian;

(3) Any note signed by the minor is cosigned by a person determined by the county committee to be financially responsible; or

(4) A surety, by furnishing a bond, guarantees to protect CCC from any loss incurred for which the minor would be liable had the minor been an adult.

(g) A CMA that the Executive Vice President, CCC, determines meets the requirements for CMA's in part 1425 of this title may be eligible to obtain a loan on behalf of those members who themselves are eligible to obtain a loan provided that:

(1) The beneficial interest in the honey must always, until loan repayment or forfeiture, remain in the member who delivered the honey to the eligible CMA or its member CMA's, except as otherwise provided in this part; and

(2) The honey delivered to an eligible CMA shall not be eligible for a loan if the member who delivered the honey does not retain the right to share in the proceeds from the marketing of the honey as provided in part 1425 of this title.

### § 1434.5 Eligible honey.

To be eligible for a loan, the honey must:

(a) Have been produced by an eligible producer;

(b) Have been produced in the United States during the calendar year for which a loan is requested and extracted on or before December 31 of such calendar year;

(c) Be of merchantable quality deemed by CCC to be suitable for loan; that is, the honey:

(1) Is not adulterated;

(2) Has not been scorched, burned, or subjected to excessive heat resulting in objectionable flavor, color deterioration or carmelization;

(3) Does not contain any ineligible honey floral sources; such as andromeda, bitterweed, broomweed, cajeput (melaleuca), carrot, chinquapin, dog fennel, desert hollyhock, gumweed, mescal, onion, prickly pear, prune, queen's delight, rabbit brush, snowbrush (ceanothus), snow-on-the-mountain, spurge (leafy spurge), tarweed, and similar objectionably-flavored honey or blends of honey as determined by the Director, Price Support Division, FSA. If any blends of honey contain such ineligible honey, the lot as a whole shall be considered ineligible for loan;

(4) Does not contain excessive bees or bee parts, paint chips, wood chips, or other foreign matter; and

(5) Is not fermenting; and

(d) Be stored in acceptable containers.

### § 1434.6 Beneficial interest.

(a) To be eligible to receive marketing assistance loans under this part

a producer must have the beneficial interest in the honey that is tendered to CCC for a loan. The producer must always have had the beneficial interest in the honey unless, before the honey was extracted, the producer and a former producer whom the producer tendering the honey to CCC has succeeded had such an interest in the honey. Honey obtained by gift or purchase shall not be eligible to be tendered to CCC for loans. Heirs who succeed to the beneficial interest of a deceased producer or who assume the decedent's obligations under an existing loan shall be eligible to receive loans whether succession to the honey occurs before or after extraction so long as the heir otherwise complies with the provisions of this part.

(b) A producer shall not be considered to have divested the beneficial interest in the honey if the producer retains title and control of the honey including the right to make all decisions regarding the tender of such honey to CCC for a loan, and the producer:

(1) Executes an option to purchase, whether or not a payment is made by the potential buyer for such option to purchase, with respect to such honey if all other eligibility requirements are met and the option to purchase contains the following provision:

"Notwithstanding any other provision of this option to purchase or any other contract, title and control of the honey and beneficial interest in the honey, as specified in 7 CFR 1434.6, must remain with the producer until the buyer exercises this option to purchase the honey. This option to purchase will expire, notwithstanding any action or inaction by either the producer or the buyer, at the earlier of:

(1) The maturity of any Commodity Credit Corporation (CCC) loan which is secured by such honey;

(2) The date the CCC claims title to such honey; or

(3) Such other date as provided in this option."

(2) Enters into a contract to sell the honey if the producer retains title, and beneficial interest in the honey and the purchaser does not pay to the producer any advance payment amount or any incentive payment amount to enter into such contract except as provided in part 1425 of this chapter.

(c) If loans are made available to producers through an approved CMA in accordance with part 1425 of this chapter, the beneficial interest in the honey must always have been in the producer-member who delivered the honey to the CMA or its member CMA's, except as otherwise provided in this section. Honey delivered to such a CMA shall not be eligible for loans if the producer-member who delivered the honey does not retain the right to share in the proceeds from the marketing of the honey as provided in part 1425 of this chapter.

(d) A producer may, before the final date for obtaining a loan for honey, re-offer as loan honey any honey that has been previously pledged if the loan was repaid with principal plus interest, the loan on such re-offered honey shall have the same maturity date as the original loan.

[66 FR 15177, Mar. 15, 2001, as amended at 67 FR 64480, Oct. 18, 2002; 74 FR 15656, Apr. 7, 2009]

### § 1434.7 Approved storage.

(a) Loans will be made only on honey in approved storage, which shall consist of a storage structure located on or off the farm that is determined by CCC to be under the control of the producer and affords safe storage for honey pledged as collateral for a loan. If the honey located in a farm storage structure is pledged as collateral that secures more than one loan, the honey must be segregated so as to preserve the identity of the honey securing such loan. Honey securing a loan must also be segregated from any honey not pledged as collateral for a loan that is stored in the same structure.

(b) Producers may also obtain loans on honey packed in eligible containers and stored in facilities owned by third parties in which the honey of more than one person is stored if the honey that is to be pledged as collateral for a loan and that is stored identity preserved or is segregated from all other honey. Each container of the segregated quantity of honey shall be marked with the producer's name, loan number, and lot number so as to identify the honey from other honey stored in the structure.

### § 1434.8 Containers and drums.

(a)(1) To be eligible for assistance under this part, honey must be packed in:

(i) CCC-approved, 5-gallon plastic containers;

(ii) 5-gallon metal containers;

(iii) Steel drums with a capacity not less than 5 gallons nor greater than 70 gallons, or

(iv) Plastic Intermediate Bulk Containers (IBC's).

(2) Honey stored in plastic containers must be determined safe and secure from all possibility of contamination.

(3) Honey storage containers used for these purposes must meet requirements of the Federal Food, Drug and Cosmetic Act, as amended and other specified requirements, as determined by CCC and must be generally fit for the purpose for which they are to be used.

(4) CCC-approved 5-gallon plastic containers must hold approximately 60 pounds of honey. The containers must be free and clear of leakage and punctures and of suitable purity for food contact use and meet food storage standards as provided by CCC. Plastic containers must be new or previously used only to store honey. Plastic containers previously used to store chemicals, pesticides, or any other product or substance other than honey are ineligible for honey storage. The handle of each container must be firm and strong enough to permit carrying the filled container. The cover opening must not be damaged in any way that will prevent a tight seal. Containers that have been punctured and resealed will not be acceptable;

(5) The 5-gallon metal containers must hold approximately 60 pounds of honey, and must be new, clean, sound, uncased, and free from appreciable dents and rusts. The handle of each container must be firm and strong enough to permit carrying the filled container. The cover and container opening must not be damaged in any way that will prevent a tight seal. Containers that are punctured or have been punctured and resealed by soldering will not be acceptable; and

(6) The steel drums must be an open type and filled no closer than 2 inches from the top of the drums. Drums must be new or must be used drums that have been reconditioned inside and outside. Drums must be clean, treated inside and outside to prevent rusting, fitted with gaskets that provide a tight seal and have an inside coating suitable for honey storage.

(7) IBC's are bulk containers with a polyethylene inner bottle and a galvanized steel protective cage, a capacity of either 275 or 330 gallons, and are reusable. IBC's must be clean, sound and provide a tight seal.

(b) Honey shall not be eligible to be pledged as collateral for loans if such honey is stored in:

(1) 55-gallon steel drums having a tare weight less than 38 pounds, 30-gallon steel drums having a tare weight less than 26 pounds, or drums having removable liners of polyethylene or other materials;

(2) Bung-type drums;

(3) Bulk tanks;

(4) Containers that do not meet the specified requirements of paragraph (a) of this section or other CCC specifications or requirements.

(5) Steel drums that are severely enough dented as to cause damage to their lining, improper seal, or stacking capabilities; and

(6) Rusted drums with corroded areas.

[66 FR 15177, Mar. 15, 2001, as amended at 69 FR 52169, Aug. 25, 2004]

### § 1434.9 Determination of quantity.

The amount of a marketing assistance loan and loan deficiency payment shall be based on 100 percent of the net weight in pounds of such quantity certified by the producer and verified by the county office representative for honey on Form CCC–633 (Honey) that is eligible to be pledged as security for the loan or LDP Estimates of the quantity of honey shall be made on the basis of 12 pounds for each gallon of rated capacity of the container.

### § 1434.10 Application, availability, disbursement, and maturity.

(a) A producer must, unless otherwise authorized by CCC, request loans and loan deficiency payments at the appropriate FSA county office responsible

for administering the program as provided under part 718 of this title. To receive loans and loan deficiency payments for honey, a producer shall execute a note and security agreement or loan deficiency payment application on or before March 31 of the year following the year in which the honey was extracted.

(b) A producer must request a loan at the county office of the county where the honey is stored if the honey is stored at the producer's farm. A producer who requests a loan on honey stored in eligible storage other than the producer's farm, may request loans at either the county office of the county where the storage facility is located or at the county office of the county where the producer's main place of business is located. A CMA must request loans at the county office for the county in which the principal office of the CMA is located unless the State committee designates another county office. If the CMA has operations in two or more States, the CMA must file its loan applications at the county office for the county in which its principal office for each State is located.

(c) Loans will be made on the honey as declared and certified by the producer on Form CCC–633 (Honey), (Honey Loan Certification and Worksheet) at the time the honey is pledged as collateral for a loan. The producer is also required to declare and certify on Form CCC–633 (Honey) the class (table or nontable) and floral source of the honey at the time the honey is pledged as collateral for a loan.

(d) The request for a loan shall not be approved until all producers having an interest in the honey sign the note and security agreement and CCC approves such note and security agreement. The disbursement of loans will be made by county offices on behalf of CCC, for honey that:

(1) Has been extracted;

(2) Is in eligible storage; and

(3) Has not been blended or mixed with ineligible honey.

(e) Loans mature on demand but not later than the last day of the ninth calendar month following the month in which the note and security agreement was approved. When the final maturity date falls on a non-workday for county offices, CCC shall extend the final date to the next workday. Before the date determined in paragraph (a) of this section, a producer may re-offer as loan collateral any eligible honey that has been offered previously for a CCC loan and the loan has been repaid at principal plus interest only.

(f) If, after a loan is made, CCC determines that the producer or the honey collateral is not in compliance with any of the provisions of this part, the producer shall refund the total amount disbursed under loan and charges plus interest, including late payment interest as provided in part 1403 of this title.

[66 FR 15177, Mar. 15, 2001, as amended at 67 FR 64481, Oct. 18, 2002]

### § 1434.11 Fees and interest.

(a) A producer shall pay a nonrefundable loan service fee to CCC. The loan service fee shall be the smaller of one-half of 1 percent (.005) times the gross loan amount or $45 per loan plus $3 for each storage structure over one.

(b) Interest that accrues with respect to a loan shall be determined in accordance with part 1405 of this chapter.

### § 1434.12 Liens.

(a) CCC's security interest in the honey pledged as collateral is first and superior to all other security interests.

(b) The county office shall file or record, as required by State law, all financing statements needed to perfect a security interest in honey pledged as collateral for a loan. The cost of filing and recording shall be for the account of CCC.

(c) If there are any other security interests, liens, or encumbrances on the honey, CCC shall obtain waivers that fully protect the interest of CCC even though the security interests, liens, or encumbrances are satisfied from the loan proceeds. No additional security interests, liens, or encumbrances shall be placed on the honey after the loan is approved.

### § 1434.13 Transfer of producer's interest prohibited.

Absent written approval from CCC, the producer shall not transfer either the remaining interest in, or right to redeem, the honey pledged as collateral for a loan on honey nor shall anyone

acquire such interest or right. Subject to the provisions of § 1434.17, a producer who wishes to liquidate all or part of a loan by contracting for the sale of the honey must obtain written approval from the county office on a form prescribed by CCC to remove a specified quantity of the honey from storage. Any such approval shall be subject to the terms and conditions set forth in the applicable form, copies of which may be obtained by producers at the county office.

**§ 1434.14 Loss or damage.**

The producer is responsible for any loss in quantity or quality of the honey pledged as collateral for a loan. CCC shall not assume any loss in quantity or quality of the loan collateral.

**§ 1434.15 Personal liability..**

(a) When applying for an individual or joint loan or loan deficiency payment, each producer agrees:

(1) When signing Form CCC–633 (Honey), Honey Loan Certification and Worksheet and Form CCC–677, Farm Storage Note and Security Agreement, that the producer will:

(i) Provide correct, accurate, and truthful certifications and representations of the loan quantity and all other matters of fact and interest; and

(ii) Not remove or dispose of any amount of the loan quantity without prior written approval from CCC in accordance with this section.

(2) That violation of the terms and conditions of this part and Form CCC–677 will cause harm or damage to CCC in that funds may be disbursed to the producer for a loan quantity that is not actually in existence or for a quantity for which the producer is not eligible.

(b) For the purposes of this section, violations include any failure to comply with this part or the loan agreement, including but not limited to any incorrect certification or:

(1) Unauthorized removal of honey, which shall include, but is not limited to, the movement of any loan quantity of honey from the storage structure in the commodity was stored when the loan was approved to any other storage structure whether or not such structure is located on the producer's farm without prior written authorization from the county committee in accordance with § 1434.14;

(2) Any unauthorized disposition, which shall include, but is not limited to, the conversion of any loan quantity pledged as collateral for a loan without prior written authorization from the county committee in accordance with this section.

(c) The producer and CCC agree that it will be difficult, if not impossible, to prove the amount of damages to CCC for conduct that is in violation of this section. Accordingly, if the county committee determines that the producer has engaged in any such violation, liquidated damages shall be assessed in addition to any loan refund and other charges that may be due. The amount of such damages shall be computed using the quantity of honey that is involved in the violation and the following formula. If CCC determines the producer:

(1) Acted in good faith when the violation occurred, liquidated damages will be assessed by multiplying the quantity involved in the violation by 10 percent of the loan rate applicable to the loan note for each offense.

(2) Did not act in good faith with regard to the violation, or for cases other than the first or second offense, liquidated damages will be assessed by multiplying the quantity involved in the violation by 10 percent of the loan rate applicable to the loan note.

(d) For liquidated damages assessed in accordance with paragraph (c)(1) of this section, the county committee shall:

(1) Require repayment of the loan principal applicable to the loan quantity involved in the violation plus charges and interest; and

(2) If the producer fails to pay such amount within 30 calendar days from the date of notification, call the applicable loan for all of the honey under loan, plus charges and interest.

(e) For liquidated damages assessed in accordance with paragraph (c)(2) of this section, the county committee shall call the loan involved in the violation, and charges plus interest.

(f) The county committee:

(1) May waive the administrative actions taken in accordance with paragraphs (c)(1) and (d) of this section if the county committee determines that:

(i) The violation occurred inadvertently, accidentally, or unintentionally; or

(ii) The producer acted to prevent spoilage of the commodity.

(2) Shall not consider the following acts as inadvertent, accidental, or unintentional:

(i) Movement of loan collateral off the farm;

(ii) Movement of loan collateral from one storage structure to another on the farm; and (iii) Consumption of loan collateral.

(g) If there is any violation of the loan agreement or this part, the loan may be terminated in which case there must be a full refund of the loan plus interest and costs.

(h) If the county committee determines that the producer has violated this part or the loan agreement, the county committee shall notify the producer in writing that:

(1) The producer has 30 calendar days to provide evidence and information regarding the circumstances that caused the violation, to the county committee, and

(2) Administrative actions will be taken in accordance with paragraphs (d) or (e) of this section.

(i)(1) If a producer:

(i) Makes any fraudulent or misleading representation in obtaining a loan, maintaining, or settling a loan; or

(ii) Disposes or moves the loan collateral without the approval of CCC, such loan shall become payable upon demand by CCC. The producer shall be liable for:

(A) The amount of the loan;

(B) Any additional amounts paid by CCC with respect to the loan;

(C) All other costs that CCC would not have incurred but for the fraudulent representation, the unauthorized disposition or movement of the loan collateral;

(D) Interest on such amounts;

(E) Late payment interest as may be provided for in part 1403 of this title; and

(F) Liquidated damages assessed under paragraph (c) of this section; and

(2) Notwithstanding any provisions of the note and security agreement, if a producer has made any such fraudulent or misleading representation to CCC or if the producer has disposed of, or moved, the loan collateral without prior written approval from CCC in accordance with this section, the value of the settlement for such collateral removed by CCC shall be determined by CCC according to this section.

(j) A producer shall be personally liable for any damages resulting from honey removed by CCC, containing mercurial compounds or other substances poisonous to humans, animals, or food commodities that are contaminated.

(k) If the amount disbursed under a loan or in settlement thereof exceeds the amount authorized under this part, the producer shall be personally liable for repayment of such excess and charges, plus interest, and for any other sanction as may be allowed by law.

(l) If the amount collected from the producer in satisfaction of the loan is less than the amount required in accordance with this part, the producer shall be personally liable for repayment of the amount of such deficiency and charges, plus interest.

(m) In the case of joint loans, the personal liability for the amounts specified in this section shall be joint and several on the part of each producer signing the loan note. Further, each producer who is a party to a joint loan will be jointly and severally liable for any violation of the terms and conditions of the note and security agreement, and the regulations set forth in this part. Each such producer shall also remain liable for repayment of the entire loan amount until the loan is fully repaid without regard to such producer's claimed share in the honey, or loan proceeds, after execution of the note and security agreement by CCC.

(n) Any or all of the liquidated damages assessed in accordance with the provisions of paragraph (c) of this section may be waived as determined by CCC.

(o) Remedies set out in this section are in addition to remedies the CCC

will have through its security interest on honey that secures the repayment of the loan made on the honey.

(p) All remedies provided for in this section or part are in addition to any remedies as may otherwise be provided for in law.

[66 FR 15177, Mar. 15, 2001, as amended at 74 FR 15657, Apr. 7, 2009]

### § 1434.16 Release of the honey pledged as collateral for a loan.

(a)(1) A producer shall not move or dispose of any honey pledged as collateral for a loan until prior written approval for such removal or disposition has been received from the county committee in accordance with this section.

(2) A producer may at any time obtain a release of all or part of the honey remaining as loan collateral by paying to CCC the amount of the loan and any charges that had been made by CCC to the producer with respect to the quantity of the honey released, plus interest.

(3) When the proceeds of a sale of honey are needed to repay all or part of a loan, the producer must request and obtain prior written approval of the county office on a form prescribed by CCC in order to remove a specified quantity of the honey from storage. Any such approval shall be subject to the terms and conditions set forth in the applicable form, copies of which may be obtained by producers at the county office. Any such approval shall not constitute a release of CCC's security interest in the commodity or release the producer from liability for any amounts due and owing to CCC with respect to any loan indebtedness if full payment of such amounts is not received by the county office.

(b) The note and security agreement shall not be released until all loan liability has been satisfied in full.

(c) After satisfaction of a loan, CCC shall release CCC's security interest in the honey at the producer's request. The producer shall be responsible for payment of any fee for such release if such fee can be determined.

### § 1434.17 Liquidation of loans.

(a) The producer is required to repay the loan on or before maturity by payment of the amount of loan, plus any charges, plus interest.

(b) If a producer fails to settle the loan in accordance with paragraph (a) of this section within 30 calendar days from the maturity date of such loan, or other reasonable time period as established by CCC, a claim for the loan amount, plus charges, plus interest shall be established. CCC shall inform the producer before the maturity date of the loan of the date by which the loan must be settled or a claim will be established in accordance with part 1403 of this title.

### § 1434.18 Loan repayments.

(a) A honey producer may repay a nonrecourse marketing assistance loan during the loan period at a rate that is the lesser of:

(1) The principal, plus interest; or

(2) The alternative repayment rate for honey as determined by the Secretary.

(3) In the event of a severe disruption to marketing, transportation, or related infrastructure, the Secretary may modify the repayment rate otherwise applicable under this section for marketing assistance loans. Any adjustment made to the repayment rate for marketing assistance loans for honey under this part will be in effect on a short-term and temporary basis, as determined by the Secretary.

(b) To the extent practicable, CCC shall determine and announce the alternative repayment rate, based upon the prevailing domestic market price for honey, on a monthly basis.

[66 FR 15177, Mar. 15, 2001, as amended at 67 FR 64481, Oct. 18, 2002; 74 FR 15657, Apr. 7, 2009]

### § 1434.19 Settlement.

The value of the settlement of loans shall be made by CCC on the following basis:

(a) With respect to nonrecourse loans, the schedule of premiums and discounts for the commodity:

(1) If the value of the collateral at settlement is less than the amount due, the producer shall pay to CCC the amount of such deficiency and charges, plus interest on such deficiency; or

(2) If the value of the collateral at settlement is greater than the amount

due, such excess shall be retained by CCC and CCC shall have no obligation to pay such amount to any party.

(b) With respect to honey that is delivered from other than an approved warehouse, settlement shall be made by CCC on the basis of the basic loan rate that is in effect for the commodity at the producer's customary delivery point, as determined by CCC.

**§ 1434.20 Foreclosure.**

(a) Upon maturity and nonpayment of the loan, title to the unredeemed honey securing the loan shall vest in CCC.

(b) If the total amount due on a loan or the unpaid amount of the note and charges, plus interest is not satisfied upon maturity, CCC may remove the honey from storage and assign, transfer, and deliver the honey or documents evidencing title thereto at such time, in such manner, and upon such terms as CCC may determine at public or private sale. Any such disposition may also be effected without removing the honey from storage. The honey may be processed before sale and CCC may become the purchaser of the whole or any part of the honey at either a public or private sale.

(1) If the value of the collateral computed at settlement is less than the amount due, the producer shall pay to CCC the amount of such deficiency and charges, plus interest on such deficiency and CCC may take any action against the producer to recover the deficiency; or

(2) If the proceeds received from the sale of the honey so computed are greater than the sum of the amount due plus any cost incurred by CCC in conducting the sale of the honey, such excess shall be paid to the producer or, if applicable, to any secured creditor of the producer.

**§ 1434.21 Loan deficiency payments.**

(a) Loan deficiency payments shall be available for 2008 through 2012 crop honey.

(b) In order to be eligible to receive loan deficiency payment for a crop of honey, the producer must:

(1) Comply with all of the program requirements to be eligible to obtain loan in accordance with this part;

(2) Agree to forego obtaining such loans;

(3) Submitted a request for a honey Loan deficiency payment on the form as CCC prescribes.

(4) Comply with §§ 1434.7 and 1434.8 or provide evidence of production as determined by CCC for such quantity; and

(5) Otherwise comply with all program requirements.

(c) The loan deficiency payment rate for a crop shall be the amount by which the marketing assistance loan rate exceeds the rate at which CCC has announced that producers may repay their marketing assistance loan in accordance with § 1434.18.

(d) The loan deficiency payment applicable to a crop of honey shall be computed by multiplying the loan deficiency payment rate, as determined in accordance with paragraph (e) of this section, by the quantity of honey the producer is eligible to pledge as collateral for a price support loan for which a loan deficiency payment is required.

(e) Notwithstanding any provisions in this section, loan deficiency payments may be based on 100 percent of the net quantity specified on acceptable evidence of disposition of the honey certified as eligible for a loan deficiency payment if CCC determines that such quantity represented the quantity for the number of containers of honey initially certified for the loan deficiency payment when the payment was made.

(f) When applying for an individual loan deficiency payment, each producer agrees:

(1) The producer will provide correct, accurate, and truthful certifications and representations of the loan quantity and all other matters of fact and interest when submitting a request for a honey loan deficiency payment; and

(2) That violation of the terms and conditions of this part will cause harm or damage to CCC in that funds may be disbursed to the producer for a LDP quantity that is not actually in existence or for a quantity for which the producer is not eligible.

(g) For the purposes of this section, violations include any failure to comply with this part or the loan agreement, including but not limited to any incorrect certification.

[66 FR 15177, Mar. 15, 2001, as amended at 67 FR 64481, Oct. 18, 2002; 74 FR 15657, Apr. 7, 2009]

### § 1434.22 Death, incompetency, or disappearance; appeals; other loan provisions.

(a) In the case of death, incompetency, or disappearance of any producer who is entitled to the payment of any sum in settlement of a loan, payment shall, upon proper application to the county office that made the loan, be made to the persons who would be entitled to such producer's share under the regulations contained in part 707 of this title. Applications for loans may be made upon application of a representative of the producer as allowed under standard practice for farm programs.

(b) Appeals of adverse decisions made under this part shall be subject to the provisions of 7 CFR parts 11 and 780.

[66 FR 15177, Mar. 15, 2001, as amended at 67 FR 64481, Oct. 18, 2002. Redesignated at 74 FR 15657, Apr. 7, 2009]

# PART 1435—SUGAR PROGRAM

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AUTHORITY: 7 U.S.C. 1359aa–1359jj and 7272; 15 U.S.C. 714b and 714c

SOURCE: 67 FR 54928, Aug. 26, 2002, unless otherwise noted.

## Subpart A—General Provisions

### § 1435.1 Applicability.

These regulations set forth the terms and conditions for the 2008 through 2012 crop years under which the Commodity Credit Corporation (CCC) will:

(a) Make loans and enter agreements with eligible processors,

(b) Collect data from sugarcane processors, sugar beet processors, cane refiners, and importers of sugar, syrup, and molasses,

(c) Administer sugar marketing allotments, and

(d) Administer an inventory disposition program to sell CCC inventory to bioenergy producers and exchange CCC inventory for processor reductions in production or certificates of quota entry.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15363, Apr. 6, 2009]

### § 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration. Terms defined in part 718 of this title are also applicable.

*Ability to market* means, for purposes of determining the State cane sugar allotments and sugarcane processor allocations for Hawaii and Puerto Rico, the estimated quantity of sugar, raw value, as CCC determines, that will be produced in the cane State or by the sugarcane processor, as appropriate, during the applicable crop year; for determining the remaining State cane sugar allotments, the highest single year of sugar production for the State during the 1999 through 2003 crop years; for determining the sugarcane processor allocations for mainland cane States other than Louisiana, the highest single year of sugar production for the processor during the 1999 through 2003 crop years; and, for determining the sugarcane processor allocations for Louisiana, the simple average of two amounts for each processor, including:

(1) The production of sugar for the processor, stated in short tons, raw value, during Crop Year 2003, as determined by CCC; and

(2) The simple average of 3 years of the processor's production of sugar, stated in short tons, raw value, from among the 1999 through 2003 crop years, excluding the year in which the production was the highest and the year in which the production was the lowest. With respect to the 2003 crop year, each processor's production shall be the same as determined under paragraph (1).

*Allocation* means the division of the beet sugar allotment among the sugar beet processors in the United States and the division of each State's cane sugar allotment among the State's sugarcane processors.

*Beet sugar* means sugar that is processed directly or indirectly from sugar beets, sugar beet molasses, or in-process beet sugar, whether produced domestically or imported.

*Beet sugar allotment* means that portion of the overall allotment quantity allocated to sugar beet processors.

*CCC* means the Commodity Credit Corporation.

*Cane sugar* means sugar derived directly or indirectly from sugarcane produced in the United States, including sugar produced from sugarcane molasses.

*Cane sugar allotment* means that portion of the overall allotment quantity allocated to sugarcane processors.

*Cane sugar refiner* means any person in the U.S. Customs Territory that refines raw cane sugar through affination or defecation, clarification, and further purification by absorption or crystallization.

*Carry-in stocks* means inventories of sugar owned by sugar beet processors, sugarcane processors, cane sugar refiners, and CCC and physically located in the United States at the beginning of the fiscal year.

*Crop year* means the period from October 1 through September 30, inclusive, and is identified by the year in which the crop year begins. For example, the 2002 crop year begins on October 1, 2002. The 2002 crop of sugar beets or sugar cane means domestically grown sugar beets or sugar cane processed during the 2002 crop year. The 2002 crop of sugar means sugar processed from domestically-grown sugar beets or sugarcane during the 2002 crop year. Sugar from de-sugaring molasses is considered to be from the crop year the de-sugaring occurred.

*Deputy Administrator* means the Deputy Administrator, Farm Programs, FSA, or designee.

*Deficit* means the quantity of sugar covered by an allocation of an allotment that CCC estimates a sugar beet processor or sugarcane processor will be unable to market during the crop

year in which marketing allotments are in effect.

*Edible molasses* means molasses that is not to be further refined or improved in quality and that is to be distributed for human consumption, either directly or in molasses-containing products.

*Edible syrups* means syrups that are not to be further refined or improved in quality and that are to be distributed for human consumption, either directly or in syrup-containing products.

*Executive Vice President, CCC,* means the Executive Vice President, CCC, or designee.

*Facility* means a factory, mill, or plant.

*Farm* means that entity as defined in § 718 of this title, except that when a State is subject to proportionate shares, producers will not be allowed to have farms reconstituted across State lines even if the farm land is adjoining.

*Fiscal year* means that year beginning October 1 and ending the following September 30.

*FSA* means Farm Service Agency.

*Human consumption* means sugar for use in human food, beverages, or similar products.

*Imports* means sugar originating in foreign countries or areas and entered, or to be entered, into the United States customs territory.

*In-process beet sugar* means the intermediate sugar-containing product, as CCC determines, produced from processing sugar beets. Like sugar beets, it is considered an input into the production of sugar regardless of whether it is produced domestically or imported.

*In-process cane sugar* means the intermediate sugar-containing product, as CCC determines, produced from the processing of sugarcane. It is not raw sugar, nor is it suitable for direct human consumption.

*Market or marketing* means the transfer of title associated with the sale or other disposition of sugar for human consumption in United States commerce. A marketing also includes a sale of sugar under the Feedstock Flexibility Program, the forfeiture of sugar loan collateral under the Sugar Loan Program, exportation of sugar from the United States Customs Territory eligible to receive credits under reexport programs for refined sugar or sugar-containing products administered by the Foreign Agricultural Service, or the sale of sugar eligible to receive credit for the production of polyhydric alcohol under the Polyhydric Alcohol program (see part 1530 of this title) administered by the Foreign Agricultural Service, and for any integrated processor and refiner, the movement of raw cane sugar into the refining process.

*Nonrecourse loan* means a loan for which eligible sugar offered as loan collateral may be forfeited to CCC, at loan maturity, in satisfaction of loan indebtedness.

*Overall allotment quantity* means, on a national basis, the total quantity of domestically produced sugar, raw value, processed from sugarcane, sugar beets or in-process beet sugar (whether the sugar beets or in-process beet sugar are produced domestically or imported), and the raw value equivalent of sugar in sugar products, that is permitted to be marketed by processors, during a crop year or other period in which marketing allotments are in effect.

*Past marketings* means, for purposes of determining State cane sugar allotments and sugarcane processor allocations for States other than Louisiana, the average of the 2 highest years of sugar production during the 1996 through 2000 crop years; for Louisiana sugarcane processor allocations, the average of the 2 highest years of sugar production during the 1997 through 2001 crop years.

*Past processing* means, for determining Hawaii and Puerto Rico's allotments, the 3-year average of the 1998 through 2000 crop years; and for determining the remaining cane State allotments, the 3 crop years with the greatest production (in the States collectively) during the 1991 through 2000 crop years. Past processing, for determining the sugarcane processor allocation for States other than Louisiana, means the average of the 3 highest years of production during the 1996 through 2000 crop years; and, for determining sugarcane processor allocations in Louisiana, the average of the 2 highest years of sugar production during the 1997 through 2001 crop years.

*Per-acre yield goal* means a State's yield level that is established at not less than the State's two highest average per-acre yield years from among the 1999 through 2001 crop years as CCC determines to ensure an adequate net return per pound to State producers.

*Proportionate share* means the total acreage from which a producer may harvest sugarcane for sugar or seed during any crop year or other period in which marketing allotments are in effect.

*Proportionate share State* means a State with an established allotment and more than 250 sugarcane producers in the State, other than Puerto Rico.

*Raw sugar* means any sugar that is to be further refined or improved in quality other than in-process sugar.

*Raw value* of any quantity of sugar means its equivalent in terms of raw sugar testing 96 sugar degrees, as determined by a polarimetric test performed under procedures recognized by the International Commission for Uniform Methods of Sugar Analysis (ICUMSA). Direct-consumption sugar derived from sugar beets and testing 92 or more sugar degrees by the polariscope shall be translated into terms of raw value by multiplying the actual number of pounds of such sugar by 1.07. Sugar derived from sugarcane and testing 92 sugar degrees or more by the polariscope shall be translated into terms of raw value in the following manner: raw value = {[(actual degree of polarization − 92) × 0.0175] + 0.93} × actual weight. For sugar testing less than 92 sugar degrees by the polariscope, derive raw value by dividing the number of pounds of the "total sugar content" (*i.e.*, the sum of the sucrose and invert sugars) thereof by 0.972.

*Reasonable carryover stocks* means desirable inventories of sugar owned by sugar beet processors, sugarcane processors, cane sugar refiners, and CCC and on hand in the United States at the end of the fiscal year, as CCC determines.

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

*Sugar* means any grade or type of saccharine product derived, directly or indirectly, from sugarcane, sugar beets, sugarcane molasses, sugar beet molasses or in-process beet sugar whether domestically produced or imported and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, liquid sugar, and in-process cane sugar.

*Sugar beet processor* means a person who commercially produces sugar, directly or indirectly, from sugar beets, sugar beet molasses, or in-process beet sugar.

*Sugar products* means products for human consumption, other than sugar, that contain 50 percent or more of sucrose, on a dry weight basis, and that are marketed by a sugar beet processor or sugarcane processor. In determining sugar subject to marketing allocations, only the sugar content of such products will be counted against the allocation.

*Sugarcane processor* means a person who commercially produces sugar, directly or indirectly, from sugarcane, has a viable processing facility, and a supply of sugarcane for the applicable allotment year.

*Ton* means a short ton or 2,000 pounds.

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

*U.S. market value* means, for sugarcane, the daily New York Board of Trade No. 14 contract price for raw sugar, or other price, as determined by CCC; for sugar beets, the Midwest refined beet sugar price published in Milling and Baking News, or other price, as determined by CCC.

*USDA* means the United States Department of Agriculture.

[67 FR 54928, Aug. 26, 2002, as amended at 69 FR 55062, Sept. 13, 2004; 74 FR 15363, Apr. 6, 2009]

### § 1435.3 Maintenance of records.

(a) Each sugar beet processor, sugarcane processor, importer of sugars, syrups and molasses, and cane sugar refiner or any person having custody of records required by CCC to operate the sugar program must retain such books, records, accounts, and other written or electronic data for not less than 3 years from the date:

(1) A loan is disbursed under subpart B;

(2) Market data are reported to CCC under subpart C of this part; and

(3) Marketings are conducted under marketing allotments under subpart D of this part.

(b) [Reserved]

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

### § 1435.4 Administration.

(a) This program shall be administered under the general supervision of the Executive Vice President, CCC, and may be carried out in the field by FSA State and county committees.

(b) State and county committees, and representatives and employees thereof, may not modify or waive any of the provisions of part 1435.

(c) The State committee shall take any action required by this part that the county committee has not taken. The State committee shall also:

(1) Correct, or require a county committee to correct, a county committee action not under this part; or

(2) Require a county committee to withhold taking any action not under this part.

(d) No provision or delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, from determining any question arising under the program or from reversing or modifying any State or county committee determination.

(e) The Deputy Administrator may authorize State and county committees to waive or modify deadlines and other program requirements in cases where lateness or failure to meet such requirements do not adversely affect program operation.

(f) A CCC representative may execute loans and related documents only under the terms and conditions CCC determines and announces. Any such document not executed under such terms and conditions, including any purported execution before the CCC-authorized date, shall be null and void.

### § 1435.5 Other regulations

The following are applicable to this part:

(a) Part 707—Payments due persons who have died, disappeared, or have been declared incompetent.

(b) Part 718—Provisions applicable to multiple programs.

(c) Part 780—Appeal regulations.

(d) Part 1403—Debt settlement policies and procedures.

(e) Part 1405—Loans, purchases, and other operations.

## Subpart B—Sugar Loan Program

### § 1435.100 Applicability.

(a) The regulations of this subpart set forth the terms and conditions under which CCC will make nonrecourse loans available to eligible processors. Additional terms and conditions are set forth in the loan application and note and security agreement that a processor must execute to receive a loan.

(b) Loan rates used in administering the loan program are available in FSA State and county offices.

(c) Loans shall not be available for sugar produced from imported sugar beets, sugarcane, molasses, syrups and in-process sugar.

### § 1435.101 Loan rates.

(a) The national average loan rate for raw cane sugar produced from domestically grown sugarcane is: 18 cents per pound for the 2008 crop year; 18.25 cents per pound for the 2009 crop year; 18.50 cents per pound for the 2010 crop year; 18.75 cents per pound for the 2011 crop year; and 18.75 cents per pound for the 2012 crop year.

(b) The national average loan rate for refined beet sugar from domestically grown sugar beets is: 22.90 cents per pound for the 2008 crop year; and a rate equal to 128.5 percent of the loan rate per pound of raw cane sugar for each of the crop years 2009 through 2012.

(c) Loan rates for eligible sugar are adjusted to reflect the processing location of the sugar offered as loan collateral.

(d) Loan rates for eligible in-process sugar shall equal 80 percent of the loan rate applicable to raw cane sugar or beet sugar on the basis of the expected production of raw sugar or beet sugar from the in-process sugar or syrups.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

**§ 1435.102 Eligibility requirements.**

(a) An eligible producer is the owner of a portion or all of the domestically-grown sugar beets or sugarcane, including share rent landowners, at both the time of harvest and the time of delivery to the processor, except those producers determined to be ineligible as a result of the regulations governing highly erodible land and wetland conservation found at 7 CFR part 12, regulations governing crop insurance at 7 CFR part 400, or regulations governing controlled substance violations at 7 CFR part 718.

(b) In addition to all other provisions of this part, a sugar beet or sugarcane processor is eligible for loans only if the processor has agreed to all the terms and conditions in the loan application, and has executed a note and security agreement, and storage agreement with CCC. No loan proceeds will be distributed by CCC before CCC's approval of the note and security agreement and the CCC storage agreement.

(c) Sugar pledged as collateral during the crop year:

(1) May not exceed the quantity derived from processing domestically-grown sugar beets or sugarcane from eligible producers during the applicable crop year;

(2) Must be processed and owned by the eligible processor and stored in a CCC-approved warehouse;

(3) May not have been processed from imported sugarcane, sugar beets in-process sugars, or molasses;

(4) Must have been processed in the United States; and

(5) Must have processor certification in the loan application that the sugar or in-process sugar syrups are eligible and available to be pledged as collateral.

(d) Sugar and in-process sugar must meet the following minimum quality requirements to be eligible to be pledged as loan collateral:

(1) Refined beet sugar to be pledged as loan collateral must be:

(i) Dry and free flowing;

(ii) Free of excessive sediment; and

(iii) Free of any objectionable color, flavor, odor, or other characteristic that would impair its merchantability or that would impair or prevent its use for normal commercial purposes.

(2) Raw cane sugar to be pledged as loan collateral must be:

(i) Of reasonable grain size; and

(ii) Free of objectionable color, flavor, odor, moisture or other characteristic that would impair its merchantability or that would impair or prevent its use for normal refining and commercial purposes.

(3) Edible sugarcane syrup or edible molasses must be free from any objectionable color, flavor, odor, or other characteristic that would impair the merchantability of such syrup or molasses or would impair or prevent the use of such syrup or molasses for normal commercial purposes.

(4) In-process sugar must be of at least the minimum quality expected to commercially yield raw cane sugar or refined beet sugar, as determined by CCC.

(e) The loan collateral must be stored in a CCC-approved warehouse as described in 7 CFR part 1423.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

**§ 1435.103 Availability, disbursement, and maturity of loans.**

(a) Before obtaining a loan, a processor must:

(1) File a loan application, as CCC prescribes, no earlier than October 1 and no later than September 30 of the applicable crop year, with the State committee of the State where such processor is headquartered, or with a county committee designated by the State committee.

(2) Execute a note and security agreement, and storage agreement with CCC;

(3) Provide quantity and quality information as prescribed by CCC of the commodity to be pledged as collateral;

(4) Pay CCC a loan service fee, as determined by CCC, for the disbursement of each loan.

(5) If there are any liens or encumbrances on sugar or in-process sugar pledged as loan collateral, obtain waivers that fully protect CCC's interest even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the sugar after loan approval; and

(6) Agree to reimburse CCC for any costs incurred as a result of the failure of the processor to obtain the waivers specified in subparagraph (5).

(b) No loan proceeds may be disbursed until the sugar and in-process sugar have actually been produced and are otherwise established as being eligible to be pledged as loan collateral.

(c)(1) A processor may, within the loan availability period, repledge as collateral sugar that previously served as loan collateral for a repaid loan. In making application for such a loan, the processor shall:

(i) Specify that the loan collateral should be treated as a quantity of eligible sugar that previously served as loan collateral for a repaid loan; and

(ii) Designate the loan to which the reoffered loan collateral was originally pledged.

(2) The subsequent loan shall have the same maturity date as the original loan.

(3) Loan collateral repledged that was previously redeemed from CCC is not included in determining the total quantity of sugar on which loans have been obtained for purposes of § 1435.102.

(d) Raw cane sugar loan disbursements shall be made without regard to the actual polarity or quality factors of the sugar pledged as loan collateral but shall be made on the assumption that the polarity of such sugar is 96 degrees by the polariscope.

(e)(1) Loans will mature at the earlier of:

(i) the end of the 9-month period beginning on the 1st day of the first month after the month in which the loan is made; or

(ii) September 30 following disbursement of the loan.

(2) CCC may accelerate loan maturity dates under § 1435.105(h).

(f) Processors receiving loans in July, August, or September may repledge the sugar as collateral for a supplemental loan. Such supplemental loan must:

(1) Be requested by the processor during the following October;

(2) Be made at the loan rate in effect at the time the first loan was made; and

(3) Mature in 9 months less the number of months that the first loan was in effect.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

**§ 1435.104 Loan maintenance.**

(a) All processors receiving loans shall:

(1) Abide by the terms and conditions of the loan application, note and security agreement and storage agreement;

(2) Pay interest on the principal at a rate determined in part 1405 of this chapter.

(b) The security interests CCC obtains as a result of the execution of security agreements by sugarcane and sugar beet processors shall be superior to all statutory and common law liens on raw cane sugar, refined beet sugar, and in-process sugar for the producers of sugarcane and sugar beets and all prior recorded and unrecorded liens on the crops of sugarcane and sugar beets from which the sugar was derived.

(c) A processor receiving a loan under this part shall pay all eligible producers who have delivered or will deliver sugar beets or sugarcane to such processors for processing not less than the minimum payment levels CCC specifies for the applicable crop year.

(1) In the case of sugar beets, the minimum payment shall not exceed the rate of payment provided for under the applicable contract between a sugar beet producer and a sugar beet processor.

(2) In the case of sugarcane, CCC will annually determine and announce the annual grower minimum payment.

(3) Processors are ineligible for loans for the crop year following their failure to meet the required minimum grower payment.

(d)(1) A processor shall maintain eligible sugar or in-process sugar of sufficient quality and quantity as collateral to satisfy the processor's loan indebtedness to CCC. CCC shall not assume any loss in quantity or quality of the loan collateral.

(2) The processor is responsible for storage costs through the loan maturity date or title transfer to CCC, whichever occurs later.

(3) Sugar and in-process sugar pledged as loan collateral need not be stored identity preserved.

(4) When the proceeds of the sale of loan collateral are needed to repay all or part of a sugar loan, the processor may request and obtain prior written approval from the loan making office by executing a loan collateral release request, as prescribed by CCC, to remove a specified quantity of the loan collateral from storage for the purpose of delivering it to a buyer before loan repayment. Any such approval shall be subject to the terms and conditions set forth in the applicable form. The loan making office shall not approve such a request unless the buyer of the sugar agrees to pay CCC an amount necessary to satisfy the processor's loan indebtedness regarding collateral being sold. Any such approval shall not:

(i) Constitute a release of CCC's security interest in the loan collateral; or

(ii) Relieve the processor of liability for the full amount of the loan indebtedness, including interest.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

### § 1435.105 Loan settlement and foreclosure.

(a) A processor may, any time before loan maturity, redeem all or any part of the loan collateral by paying CCC the applicable principal and interest.

(b) Forfeiture of sugar loan collateral will be accepted as payment in full of the principal and interest due under a nonrecourse loan, subject to applicable premiums and discounts based on the difference between specifications reported on the sugar loan certification report and actual loadout characteristics.

(c)(1) Forfeiture of in-process sugar serving as loan collateral will be accepted as payment in full of principal and interest if the processor converts the in-process sugar into raw cane sugar or refined beet sugar of acceptable grade and quality for sugar eligible for loans within 1 month of loan maturity.

(2) The in-process sugar must be fully processed into raw cane sugar or refined beet sugar, before the processor shall transfer the sugar to CCC.

(3) On transfer of the sugar, CCC shall make a payment to the processor in an amount equal to the amount obtained by multiplying the difference between the loan rate for raw cane sugar or refined beet sugar, as appropriate, and the in-process loan rate the processor received by the quantity of sugar transferred to CCC. The loan agreement shall specify the quantity of sugar that can be forfeited to CCC.

(d) If the processor does not forfeit the collateral, but instead further processes the in-process sugar into raw cane sugar or refined beet sugar and repays the loan on the in-process sugar;

(1) the processor may obtain a loan for the raw cane sugar or refined beet sugar, as appropriate, and

(2) the term of a loan made under this subsection for a quantity of in-process sugar, when combined with the term of a loan made for the raw cane sugar or refined beet sugar derived from the in-process sugar, may not exceed 9 months.

(e) CCC shall not accept delivery of sugar in settlement of a nonrecourse loan in excess of the quantity of sugar that is shown on the note and security agreement minus any quantity that was redeemed or released for removal under this section.

(f) If the processor does not redeem any of the nonrecourse loan collateral, title to the unredeemed nonrecourse loan collateral as described in the note and security agreement will, without further CCC or processor action transfer to CCC in-store at the CCC-approved warehouse at 12 a.m. the next business day following the maturity date of the loan. Title, all rights, and interest to such sugar shall immediately vest in CCC.

(g) The value of the settlement of loans shall be made by CCC according to the CCC schedule of premiums and discounts.

(h) CCC may, at any time, accelerate the date for loan repayment including interest. CCC will give the processor notice of such acceleration at least 15 days in advance of the accelerated loan maturity date.

(i) If a processor's nonrecourse loan indebtedness is not satisfied under the provisions of this section or if forfeited in-process sugar is not converted to

raw or refined sugar within the prescribed time:

(1) Interest on the processor's indebtedness shall accrue as specified in part 1403 of this title and shall accrue until the debt is paid;

(2) CCC may, upon notice, with or without removing the collateral from storage, sell such collateral at either a public or private sale;

(3) The processor shall be liable for the deficiency if the net proceeds are less than the amount of principal, interest, and any other charges CCC incurs; and

(4) If the processor forfeits the in-process sugar loan collateral but does not transfer raw or refined sugar of suitable quality to CCC within 1 month, CCC will charge liquidated damages, as provided in the loan agreement.

(j) The CCC rates for the storage of forfeited sugar to approved warehouses for each crop year of 2008 through 2011 will be at least:

(1) For refined sugar, 15 cents per hundredweight of refined sugar per month; and

(2) For raw cane sugar, 10 cents per hundredweight of raw cane sugar per month.

(3) For 2012 and subsequent crop years, rates for the storage of forfeited sugar will revert to those used before June 18, 2008.

(4) For sugar located in space not approved by CCC for storage, the payment rate will be zero until such time as the processor delivers such sugar to a CCC-approved warehouse.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15364, Apr. 6, 2009]

### § 1435.106 Miscellaneous provisions.

(a) The regulations governing setoffs and withholding set forth at parts 3 and 1403 of this title are applicable to the program set forth in this subpart.

(b) A producer or processor may obtain reconsideration and review of determinations made under this subpart under the regulations at parts 11 and 780 of this title.

(c) Any false certification, including those made for the purpose of enabling a processor to obtain a loan to which it is not entitled, will subject the person making such certification to liability under applicable Federal civil and criminal statutes.

## Subpart C—Information Reporting and Recordkeeping Requirements

### § 1435.200 Information reporting.

(a) Every sugar beet processor, sugarcane processor, cane sugar refiner, and importer of sugar, syrup, and molasses shall report, by the 20th of each month, on CCC-required forms, its imports and receipts, processing inputs, production, distribution, stocks, and other information necessary to administer the sugar programs. If the 20th of the month falls on a weekend or a Federal holiday, the report shall be due the next business day.

(b) Any processor must, upon CCC's request, provide such information as CCC deems appropriate for determining regional loan rates.

(c) Any processor must, upon CCC's request, provide such information as CCC deems appropriate for determining whether processors of sugarcane or sugar beets will be able to market their respective sugar allocations.

(d) Each sugarcane producer located in Louisiana shall report, in the manner CCC prescribes, sugarcane yields and sugarcane planted acres.

(e) Importers of sugars, syrups, or molasses to be used for domestic human consumption or to be used for the extraction of sugar for domestic human consumption must report such information as CCC requires, including the quantities of the products imported and the sugar content or equivalent of the products.

(f) The Secretary will collect information on the production, consumption, stocks and trade of sugar in Mexico and publish the data in each edition of the World Agricultural Supply and Demand Estimates report.

(g) The Secretary will collect publicly available information on the production, consumption, and trade of high fructose corn syrup in Mexico and publish the data in each edition of the World Agricultural Supply and Demand Estimates report.

(h) Based on the information received under this subsection, the Secretary

shall publish on a monthly basis composite data on sugar production, imports, distribution, and stock levels.

(i) By November 20 of each year, sugar beet processors, sugarcane processors, sugarcane refiners, and importers of sugars, syrups, and molasses, as selected by CCC, will submit to CCC a report, as specified by CCC, from an independent Certified Public Accountant that reviews its information submitted to CCC during the previous October 1 through September 30 period.

(j) The sugar information reporting and recordkeeping requirements of this subpart are administered under the general supervision of the Executive Vice President, CCC.

[67 FR 54928, Aug. 26, 2002, as amended at 71 FR 16200, Mar. 31, 2006; 74 FR 15365, Apr. 6, 2009]

### § 1435.201 Civil penalties.

(a) Any processor, refiner, or importer of sugar, syrup, and molasses who willfully fails or refuses to furnish the information, or who willfully furnishes false data required under § 1435.200(a) through (e), is subject to a civil penalty of no more than the amount specified at § 3.91(b)(10)(ii) of this title for each such violation.

(b) The Controller, CCC, shall assess civil penalties and interest.

(c) Affected processors, refiners, and importers of sugar, syrup, and molasses may request reconsideration of civil penalties by filing a request, within 30 days of receipt of certified written notification from the Controller, CCC, of such assessment of civil penalties, with the Executive Vice President, CCC, Stop 0501, 1400 Independence Ave. SW., Washington, DC 20250–0501.

(d) After reconsideration, affected processors, refiners, or importers of sugar, syrup, and molasses may appeal civil penalties by filing a notice of appeal, within 30 calendar days of receipt of certified written notification from the Executive Vice President, CCC, of an affirmation of the assessment of civil penalties, with the National Appeals Division under part 780 of this title.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15635, Apr. 6, 2009; 75 FR 17561, Apr. 7, 2010]

## Subpart D—Flexible Marketing Allotments For Sugar

### § 1435.300 Applicability.

(a) This subpart applies to the establishment and allocation of marketing allotments for:

(1) Processor marketings of sugar domestically processed from sugar beets or in-process beet sugar, whether such sugar beets or in-process beet sugar were produced domestically or imported,

(2) Processor marketings of sugar processed from sugarcane,

(3) Distribution of a processor's allocation to producers in proportionate share States, and

(4) Harvesting sugarcane by producers subject to proportionate shares.

(b) This subpart does not apply to marketing imported raw or refined sugar.

(c) This subpart applies throughout the United States and Puerto Rico.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15365, Apr. 6, 2009]

### § 1435.301 Annual estimates and quarterly re-estimates.

(a) Not later than August 1 before the beginning of the crop year, CCC will estimate, and make re-estimates as necessary but not later than the beginning of each quarter of such crop year, the:

(1) Quantity of sugar that will be subject to human consumption in the United States during the crop year;

(2) Quantity of sugar that will provide for reasonable carryover stocks;

(3) Quantity of sugar that will be used for human consumption in the United States from carry-in stocks;

(4) Quantity of sugar that will be available from domestically processed sugarcane, sugar beets, and in-process beet sugar; and

(5) Quantity of sugars, syrups, and molasses that will be imported for human consumption or for the extraction of sugar for human consumption in the United States and Puerto Rico (other than sugar imported for the production of polyhydric alcohol or to be refined and re-exported in refined form or in sugar-containing products), whether such articles are included in a tariff-rate quota or not.

(b) Calculation of all allotments, allocations, estimates, and re-estimates in this subpart will use available USDA statistics and estimates of production, consumption, and stocks, taking into account, where appropriate, data supplied in reports submitted pursuant to the reporting requirements set forth in § 1435.200.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15365, Apr. 6, 2009]

### § 1435.302 Establishment of allotments.

(a) By the beginning of the crop year, CCC will establish the overall allotment quantity, beet sugar and cane sugar allotments, State cane sugar allotments, and allocations for processors marketing sugar domestically processed from sugarcane, sugar beets, or in-process beet sugar, whether the sugar beets or in-process beet sugar is domestically produced or imported at a level:

(1) That is sufficient to maintain raw and refined sugar prices above minimum prices to avoid forfeiture of loans to the CCC, but

(2) Not less that 85 percent of estimated quantity of sugar for domestic human consumption for the crop year.

(b) Determinations under this section to establish marketing allotments will be published in the FEDERAL REGISTER and accompanied by a statement of the reasons for the determination.

[74 FR 15365, Apr. 6, 2009]

### § 1435.303 Adjustment of the overall allotment quantity.

(a) The overall allotment quantity may be adjusted, as CCC determines appropriate, but never to a quantity less than 85 percent of the estimated quantity of sugar for domestic human consumption for the crop year:

(1) To avoid forfeiture of sugar loan collateral to CCC,

(2) Ensure adequate supplies of raw and refined sugar in the domestic market, and,

(3) To reflect changes in estimated sugar consumption, stocks, production, or imports based on re-estimates under § 1435.301.

(b) Determinations to adjust the overall allotment quantity will be published in the FEDERAL REGISTER and accompanied by a statement of the reasons for the determination.

(c) The beet sugar allotment, cane sugar allotment, State cane sugar allotments, proportionate shares, and allocations to each sugar beet processor and sugarcane processor will be increased or decreased, as appropriate, to reflect an overall allotment quantity adjustment.

(d) If the overall allotment quantity is reduced under paragraph (a) of this section and the quantity of sugar and sugar products any individual processor marketed by the time of the reduction exceeds the processor's reduced allocation, the quantity of excess sugar or sugar products marketed will be deducted from the processor's allocation under an allotment next established.

[67 FR 54928, Aug. 26, 2002. Redesignated and amended at 74 FR 15365, Apr. 6, 2009]

### § 1435.304 Beet and cane sugar allotments.

(a) The allotment for beet sugar will be 54.35 percent of the overall allotment quantity.

(b) The allotment for cane sugar will be 45.65 percent of the overall allotment quantity.

(c) A sugar beet processor allocated a share of the beet sugar allotment may use only beet sugar to fill such allocation. A sugarcane processor allocated a share of the cane sugar allotment may use only cane sugar to fill such allocation.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15365, Apr. 6, 2009]

### § 1435.305 State cane sugar allotments.

(a) Hawaii and Puerto Rico will be allotted a total of 325,000 short tons, raw value, of the cane sugar allotment.

(b) A new entrant cane State will receive an allotment to accommodate a new processor's allocation under 1435.308.

(c) Subject to paragraphs (a) and (b) of this section, the remaining cane States will be allotted, in aggregate, the remaining cane sugar allotment.

(d) The individual cane State allotments, other than a new entrant cane State, will be based on:

(1) Past marketings of cane sugar,

(2) Past processing of cane sugar, and

(3) The ability to market the sugar covered under the allotment assigned to the State.

(e) Past marketings and past processings will each be weighted by 0.25 and the ability to market will be weighted by 0.50 in determining the States' respective cane sugar allotments. The weights may be adjusted, as CCC deems appropriate, for the crop year.

(f) Except when deficits are reassigned as provided in § 1435.309, a processor may fill an allocation of a cane sugar allotment only with sugar processed from sugarcane grown in the State for which the allotment was established.

[67 FR 54928, Aug. 26, 2002. Redesignated and amended at 74 FR 15365, Apr. 6, 2009]

### § 1435.306 Allocation of marketing allotments to processors.

(a) Each sugar beet processor's allocation, other than a new entrant's, of the beet allotment will be calculated as the beet processor's share times the beet sector allotment:

(1) A beet processor's share is calculated as the beet processor's adjusted weighted average sugar production divided by the sum of all beet processors' adjusted weighted average sugar production.

(2) A beet processor's weighted average sugar production equals 0.25 times its 1998-crop sugar production plus 0.35 times its 1999-crop sugar production plus 0.40 times its 2000-crop sugar production, with the 2000 sugar PIK payments added to its 2000-crop sugar production.

(3) A beet processor's weighted average sugar production shall be adjusted by the following, as CCC determines:

(i) Increased 1.25 percent of the sum of all beet processors' weighted average sugar production for opening a sugar beet processing factory during the 1996 through 2000 crop years;

(ii) Decreased 1.25 percent of the sum of beet processors' weighted average sugar production for closing a sugar beet processing factory during the 1998 through 2000 crop years:

(iii) Increased 0.25 percent of the sum of all beet processors' weighted average sugar production for opening a molasses desugarization facility during the 1998 through 2000 crop years; and

(iv) Increased 1.25 percent of the sum of all beet processors' weighted average sugar production for suffering a substantial quality loss on stored beets, as CCC determines, during the 1998 through 2000 crop years.

(b) Each sugarcane processor's, other than a new entrant's, allocation from a State cane sugar allotment will be calculated as the cane processor's share times the State cane sector allotment.

(1) Each cane processor's share will be calculated as the processor's production base divided by the sum of the State's processor production bases.

(2) A processor's production base is the sum of 0.50 times its ability to market plus 0.25 times its past processings plus 0.25 times its past marketings. These weights may be adjusted as CCC deems appropriate for the crop year.

(c) An informal hearing will be held in August of each year, if requested by affected sugarcane processors and growers by July 15th, to afford all interested persons the opportunity to comment on the next crop year's marketing allotments and allocations. After consideration of comments obtained at the hearing, a final determination on cane State allotments and processor allocations will be announced.

(d) During any crop year in which marketing allotments are in effect and allocated to processors, the quantity of sugar and sugar products that a processor markets shall not exceed the quantity of the processor's allocation.

(e) Paragraph (d) of this section will not apply to:

(1) Any sugar marketings to facilitate the export of sugar or sugar-containing products as long as such exports are not eligible to receive credits under reexport programs administered by the Foreign Agricultural Service for refined sugar or sugar-containing products;

(2) Any sugar marketings for nonhuman consumption, except for the sale of sugar for the production of ethanol or other bioenergy under the Feedstock Flexibility program or the sale of sugar for the production of polyhydric alcohol under the

Polyhydric Alcohol program administered by the Foreign Agricultural Service; and

(3) Any processor marketings of sugar to another processor made to enable the purchasing processor to fulfill its allocation if such sales;

(i) Are made before May 1, and

(ii) Reported to CCC within 51 days of the date of sale.

(f) Paragraph (d) of this section also shall not apply to marketings of purchased sugar marketed in the crop year of the purchase, but does apply to marketings of sugar purchased as part of a transaction pursuant to paragraph (e)(3) of this section.

(g) Paragraph (d) of this section also will not apply to the marketing of beet sugar processed from purchased in-process beet sugar if the processor purchased the in-process beet sugar before October 1, 2008.

(h) A sugar beet processor allocated a share of the beet sugar allotment may use only beet sugar to fill such allocation. A sugarcane processor allocated a share of the cane sugar allotment may only use cane sugar to fill such allocation.

[67 FR 54926, Aug. 26, 2002, as amended at 69 FR 39813, July 1, 2004. Redesignated and amended at 74 FR 15365, Apr. 6, 2009]

### § 1435.307 Transfer of allocation.

(a) If a sugarcane processing facility is sold or transferred to another owner or is closed as part of a corporate consolidation CCC will transfer the allotment allocation to the purchaser or successor.

(b) In proportionate share States, allocations, based on the number of acres of sugarcane base being transferred and the pro rata amount reflecting the grower's contribution to allocation of the processor for the sugarcane base being transferred, will be transferred between facilities if the transfers are based on:

(1) Written consent of the crop-share owners, or their representatives,

(2) Written certification from the processor that will accept the additional sugarcane deliveries that its processing capacity will not be exceeded,

(3) CCC will only consider requests for transfer of allocation submitted during the month of May. The request must include the grower's sugar production history for crop years 1997 through 2003. The facility with the grower's history will be required to certify the history when requested by the grower, and

(4) Allocation transfers will be effective for the next fiscal year after the request is submitted to CCC, that is beginning October 1.

(c) If a sugar beet processing facility or a sugarcane processing facility located in a non-proportionate share State is closed, and the growers that delivered their crops to the closed facility elect to deliver their crops to another processor, the growers may petition the Executive Vice President, CCC, to transfer their share of the allocation from the processor that closed the facility to their new processor. If CCC approves transfer of the allocations, it will distribute the closed facility's allocation based on the contribution of the growers' production history to the closed facility's allocation. CCC may grant the allocation transfer upon:

(1) Written request by a grower to transfer allocation,

(2) Written approval of the processor that will accept the additional deliveries,

(3) Evidence satisfactory to CCC that the new processor has the capacity to accommodate the production of petitioning growers, and

(4) Determinations by the CCC will be made within 60 days after the filing of the petition.

(d) Subject to a transfer of allocation, if any, described in paragraph (c) of this section being completed, CCC will consider a processor to be permanently terminated and eliminate the processor's remaining allocation and distribute it to all other processors on a pro-rata basis when the processor:

(1) Has been dissolved,

(2) Has been liquidated in a bankruptcy proceeding,

(3) Has not processed sugarcane or sugar beets for 2 consecutive crop years,

(4) Has notified CCC that the processor has permanently terminated operations, or

(5) Has been determined by CCC to have permanently terminated operations.

(e) If a processor of beet sugar purchases all the assets of another processor, then CCC will immediately transfer allocation commensurate with the purchased facilities' production history, unless the allocation has already been transferred under paragraph (d) of this section.

(f) If a processor of beet sugar purchases some, but not all, of the assets of another processor, then CCC will assign a pro rata portion of the allocation to the buyer to reflect the historical contribution of the sold facilities, unless the buyer and seller have agreed upon a different allocation amount.

(1) The assignment of the allocation will apply to the crop year in which the sale occurs and for each subsequent year.

(2) The buyer of the facilities as specified in paragraph (e) of this section may fill the assigned allocation with production from other facilities it owns if the purchased facilities lack the production to fill the assigned allocation.

[74 FR 15366, Apr. 6, 2009]

### § 1435.308 New entrants.

(a) The Secretary may assign a new entrant sugarcane processor an allocation that provides a fair, efficient, and equitable distribution of allocations:

(1) Applicants must demonstrate their ability to process, produce, and market sugar for the applicable crop year,

(2) CCC will consider any adverse effects of the allocation upon existing processors and producers,

(3) CCC will conduct a hearing on a new entrant application if an interested processor or grower requests a hearing,

(4) A new entrant's allocation is limited to no more than 50,000 short tons, raw value, for the first crop year, and

(5) A new entrant will be provided, as determined by CCC:

(i) A share of its State's cane allotment if the processor is located in Hawaii, Florida, Louisiana, or Texas or

(ii) A share of the overall mainland cane allotment if the processor is located in any mainland State not listed in paragraph (a)(5)(i) of this section.

(b) For proportionate share States, CCC will establish proportionate shares for the sugarcane required to fill the allocation.

(c) If a new entrant beet processor constructs a new facility or reopens a facility that currently has no allocation, but last produced beet sugar from sugar beets and sugar beet molasses prior to the 1998 crop year, CCC will:

(1) Assign an allocation to the new entrant to enable it to achieve a facility utilization rate comparable to other similarly-situated sugar beet processors and

(2) Reduce all other beet processor allocations by a like amount on a pro rata basis.

(d) If a new entrant acquires an existing facility with production history that processed sugar beets for the 1998 or subsequent crop year, CCC will:

(1) Assign the allocation to the buyer to reflect the historical contribution of the sold facilities, unless the buyer and seller have agreed upon a different allocation amount, or

(2) If the new entrant and the processor holding the allocation of the existing facility cannot agree on an allocation amount, the new entrant will be denied a beet sugar allocation.

[74 FR 15366, Apr. 6, 2009]

### § 1435.309 Reassignment of deficits.

(a) CCC will determine, from time to time, whether sugar beet or sugarcane processors will be unable to market their allocations.

(b) Sugar beet and sugar cane processors will report to CCC current inventories, estimated production, expected marketings, and any other pertinent factors CCC deems appropriate to determine a processor's ability to market their allocation.

(c) If CCC determines a sugarcane processor will be unable to market its full allocation for the crop year in which an allotment is in effect, the deficit will be reassigned as follows:

(1) First, to allocations of other sugarcane processors within that State based on each processor's initial allocation share of the State's allotment, but no processor may receive reassigned allocation such that its allocation exceeds its estimated total sugar supply.

(2) If the deficit cannot be eliminated after reassignment within the same State, be reassigned to the other cane States based on each State's initial share of the cane sugar allotment, but no State may receive reassigned State allotment such that its allocation exceeds its estimated total sugar supply, with the reassigned quantity to each State being allocated according to paragraph (c)(1) of this section.

(3) If the deficit cannot be eliminated by paragraphs (c)(1) and (c)(2) of this section, be reassigned to CCC. CCC shall sell such quantity from inventory unless CCC determines such sales would have a significant effect on the sugar price.

(4) If any portion of the deficit remains after paragraphs (c)(1), (c)(2), and (c)(3) of this section have been implemented, be reassigned to imports of raw cane sugar.

(d) The initial estimate of the sugarcane deficit will be reassigned by June 1. CCC will conduct later reassignments if CCC determines, after June 1, that a sugarcane processor will be unable to market its full allocation.

(e) If CCC determines that a sugar beet processor is unable to market its full allocation for the crop year in which an allotment is in effect, the deficit will:

(1) First, be reassigned proportionately to allocations of other sugar beet processors, depending on the capacity of other processors to fill the portion of the deficit to be reassigned to them, accounting for the interests of associated producers.

(2) If the deficit cannot be eliminated by paragraph (e)(1) of this section, be reassigned to CCC. CCC shall sell such quantity from inventory unless CCC determines such sales would have a significant effect on the sugar price.

(3) If any portion of the deficit remains after paragraphs (e)(1) and (e)(2) of this section have been implemented, be reassigned to imports of raw cane sugar.

(f) The crop year allocation of each sugar beet or sugarcane processor who receives a reassignment will be increased accordingly for that year.

[67 FR 54928, Aug. 26, 2002, as amended at 69 FR 55063, Sept. 13, 2004; 69 FR 58037, Sept. 29, 2004; 70 FR 28181, May 17, 2005; 74 FR 15366, Apr. 6, 2009]

### § 1435.310 Sharing processors' allocations with producers.

(a) Every sugar beet and sugarcane processor must provide CCC a certification that:

(1) The processor intends to share its allocation among its producers fairly and equitably, and in a manner adequately reflecting each producer's production history, and

(2) The processor has, in the previous allotment year, shared its allocation among producers fairly and equitably, reflecting each producer's production history. If a processor is unable to provide such certification, CCC may reduce or eliminate its marketing allocation.

(b) CCC will determine that a processor in a proportionate share state has met the conditions of paragraph (a) of this section if the processor establishes a grower payment plan that incorporates the following provisions:

(1) Pays growers for sugar from their delivered sugarcane in the following priority:

(i) Sugar production from proportionate share acreage; as established under § 1435.311, for producers determined by CCC, who;

(A) Delivered to the mill in at least one of the crop years 1999, 2000, or 2001, or

(B) Obtained an allocation transfer from a predecessor mill,

(ii) Sugar production from base acreage, as established under § 1435.312, but exclusive of the acreage described in paragraph (b)(1)(i) of this section, for producers who meet the requirements of paragraph (b)(1)(i) of this section, then

(iii) All other sugar production.

(2) In determining the payment priority, a processor may aggregate the acreage of an operator (producer making the crop production decisions) across all the operator's farms delivering cane to the processor.

(c) CCC will determine that a processor not in a proportionate share

state, which is cooperatively owned by producers, has met the conditions of paragraph (a) of this section if the processor shares its allocation with its producers according to its cooperative membership agreement.

(d) CCC will disclose farm base and reported acres data in a proportionate share state to processors upon their request for growers delivering to their mill. In the case of multiple producers on a farm or growers delivering to more than one mill, subject mills will be responsible for coordinating proportionate share data.

(e) Any producer or processor may request arbitration of a dispute regarding the sharing of the processor's allocation among the producers. Arbitration will be available on behalf of CCC at the State FSA office for the State in which the processor is located. Subsequent review of the arbitration decision is available at the discretion of the Executive Vice President, CCC. Any arbitration is subject to appeal to the Office of the Administrative Law Judge, USDA.

[67 FR 54926, Aug. 26, 2002, as amended at 69 FR 39813, July 1, 2004; 74 FR 15366, Apr. 6, 2009]

### § 1435.311 Proportionate shares for sugarcane producers.

(a) Proportionate shares and the provisions of this section and §§ 1435.312 through 1435.316 apply only to Louisiana sugarcane farms.

(b) CCC will determine whether Louisiana sugar production, in the absence of proportionate shares, will exceed the quantity needed to enable processors to fill the State cane sugar allotment and provide a normal carryover inventory. If the determination is made that the quantity of sugar produced in Louisiana, plus a normal carryover inventory, will exceed the State's allotment, CCC will establish for each sugarcane producing farm a proportionate share that limits the sugarcane acreage that may be harvested on the farm for sugar or seed.

(c) For purposes of determining proportionate shares CCC will:

(1) Establish the State's per-acre yield goal at a level not less than the average per-acre yield in the State for the 2 highest years from among the 1999 through 2001 crop years;

(2) Adjust the per-acre yield goal by the State average recovery rate;

(3) Convert the State cane sugar allotment into a State acreage allotment by dividing the State allotment by the adjusted per-acre yield goal;

(4) Establish a uniform reduction percentage for the crop by dividing the State acreage allotment by the sum of all adjusted acreage bases in the State as determined under § 1435.312; and

(5) Apply the uniform reduction percentage to the acreage base established for each sugarcane producing farm in the State to determine the farm's proportionate share of sugarcane acreage that may be harvested for sugar or seed.

### § 1435.312 Establishment of acreage bases under proportionate shares.

(a) CCC will establish a sugarcane crop acreage base for each farm subject to proportionate shares as the simple average of the acreage planted and considered planted for harvest for sugar or seed (meaning only those varieties dedicated to the production of sugarcane to produce sugar for human consumption) on the farm in the 2 highest of the 1999 through 2001 crop years. Acreage considered planted shall be determined under § 1435.315.

(b) In establishing crop acreage bases, CCC will:

(1) Not consider acreage prevented from planting, and

(2) Consider acreage planted to sugarcane that fails.

(c) In establishing crop acreage bases, CCC will allow producers who have not previously reported their sugarcane acreage to do so by a date CCC determines and announces. Late-filed acreage reports will be accepted as the Deputy Administrator determines appropriate.

(d) The farm's crop acreage base shall be used to determine the farm's proportionate share.

(e) The regulations at part 718 of this title shall apply to this subpart, except reconstitution of farms with a sugar crop acreage base shall not be allowed across State lines.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15367, Apr. 6, 2009]

### § 1435.313 Permanent transfer of acreage base histories under proportionate shares.

(a) A sugarcane producer on a farm may transfer all or a portion of the producer's acreage base history of land owned, operated, or controlled to any other farm in the State that the producer owns, operates, or controls under the Deputy Administrator-issued instructions. The transfer will reduce permanently the transferring farm's sugarcane acreage base history and increase the receiving farm's crop acreage base.

(1) All farm owners must agree in writing to the transfer.

(2) Producers may transfer sugarcane acreage base histories under this section by the date the State FSA committee establishes annually.

(b) Sugarcane acreage base that has been converted to nonagricultural use on or before May 13, 2002, may be transferred to other land suitable for the production of sugarcane under the following terms:

(1) CCC must notify 1 or more affected landowners within 90 days of becoming aware of the conversion, of their rights to transfer the base to 1 or more farms owned by the landowner;

(2) The landowner has 90 days from the date the landowner was notified to transfer the base;

(3) If the landowner does not exercise this transfer right, the grower of record will have 90 days after being notified by CCC to transfer the base to 1 or more farms owned by the grower;

(4) If the transfers as specified under paragraphs (b)(2) or (3) of this section are not accomplished during the specified periods, FSA county committee will place the base into a pool for possible reassignment to other farms;

(5) After providing notice to farm owners, operators and growers of record in the county, the committee will accept requests from farm owners, operators, and growers in the county;

(6) The county committee will assign the base to other sugarcane farms in the county that are eligible and capable of accepting the acreage base, based on a random drawing among requests received under paragraph (b)(5) of this section;

(7) Any unassigned base will be made available to the State FSA committee and be allocated to remaining FSA county committees in the State representing counties with farms eligible for assignment of the base, based on a random drawing; and

(8) After the acreage base has been reassigned, the acreage base will remain on the farm and subject to the transfer provisions of paragraph (a) of this section.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15367, Apr. 6, 2009]

### § 1435.314 Temporary transfer of proportionate share due to disasters.

(a) If, for reasons beyond the control of a producer on a farm, such producer is unable to harvest sugarcane acreage relative to all or a portion of the proportionate share established for the farm, the Secretary may preserve, on producer application and written consent of all owners of the farm, for a period of not more than 5 consecutive years, the acreage base history of the farm to the extent of the proportionate share involved.

(b) Such proportionate share may be transferred, with the written consent of all owners of the farm, for 1 crop year to other farm owners or operators subject to the following conditions:

(1) The acreage base history of the transferring farm will be preserved for a period from 1 to 5 years; and

(2) Acreage base history will not be increased on the receiving farm.

(c) Producers who transfer a proportionate share under this section will be required to:

(1) Initiate the transfer in the county FSA office where the proportionate shares are established; and

(2) Obtain approval from the transferring county FSA committee.

(d) All transfers made under this section must be completed by the date the State FSA committee establishes.

### § 1435.315 Adjustments to proportionate shares.

Whenever CCC determines that, because of a natural disaster or other condition beyond the control of producers adversely affecting a sugarcane

crop, the amount of sugarcane produced by producers subject to proportionate shares will not be sufficient to enable state processors to produce sufficient sugar to meet the State's cane sugar allotment and provide a normal carryover of sugar, CCC may uniformly allow producers to harvest sugarcane in excess of their proportionate shares, or suspend proportionate shares entirely.

### § 1435.316 Acreage reports for purposes of proportionate shares.

(a) A report of planted and failed acreage shall be required on farms that produce sugarcane for sugar or seed. Such report shall also specify the total acreage intended for harvest for sugar and seed.

(b) The reports required under paragraph (a) of this section shall be on forms prescribed by CCC and shall be filed annually with the county FSA committee by the applicable final reporting date CCC establishes. The farm operator or farm owner shall file such reports.

(c) Acreage reports will be used to determine compliance with proportionate shares and acreage bases for future proportionate shares.

(d) An acreage report may be accepted after the established date for reporting if physical evidence is still available for inspection that may be used to make a determination relative to:

(1) Existence of the crop;

(2) Use made of the crop;

(3) Lack of crop; or

(4) Disaster condition affecting the crop.

(e) The farm operator shall pay the cost of a farm visit by an authorized FSA employee unless the county FSA committee has determined that failure to report in a timely manner was beyond the producer's control.

(f) The farm operator may revise an acreage report. Revised reports shall be filed in accordance with CCC instructions and shall be accepted at any time if:

(1) Evidence exists for inspection and determination of:

(i) Existence of the crop;

(ii) Use made of the crop;

(iii) Lack of crop; or

(iv) Disaster condition affecting the crops.

(2) The farm has not already been inspected and the acreage already determined or harvesting of sugarcane already begun.

(g) Provisions of part 718 of this chapter will apply for field inspections, tolerance, and variance. Assessments for false acreage reporting will be applied under § 1435.318.

### § 1435.317 Revisions of allocations and proportionate shares.

The Executive Vice President, CCC, may modify any processor's allocation or any producer's proportionate share on the same basis as the initial allocation or proportionate share was required to be established.

### § 1435.318 Penalties and assessments.

(a) Any sugar beet or sugarcane processor who knowingly markets sugar or sugar products in excess of the processor's allocation will be liable to CCC for a civil penalty in an amount equal to 3 times the U.S. market value, at the time the violation was committed, of that quantity of sugar involved in the violation.

(b) CCC may assess liquidated damages, as specified in a surplus allocation survey and agreement, with respect to a surplus allocation still existing after the end of a crop year if the processor had a surplus allocation because the processor provided incomplete or erroneous information to CCC.

(c) Under § 359f(c)(5) of the Agricultural Adjustment Act of 1938, as amended, any producer of sugarcane whose farm has a proportionate share, and who knowingly harvests or allows to be harvested an acreage of sugarcane for sugar or seed in excess of the farm's proportionate share shall pay to CCC a civil penalty in an amount equal to 1.5 times the U.S. market value of the quantity of sugar that is marketed by the processor of such sugarcane in excess of the allocation of such processor, for the year in which the violation was committed. However, civil penalties will not be assessed when the producer harvests acreage for sugar or seed in excess of the farm's proportionate share, if the excess sugarcane harvested is:

(1) Processed by a sugarcane processor that does not exceed its marketing allocation; or

(2) Diverted to a use other than sugar or seed if:

(i) The sugarcane producer requests and pays for a CCC field inspection, and

(ii) CCC verifies the disposition of the excess harvest is not for sugar or seed.

(d) Any penalty assessed under paragraph (b) of this section shall be prorated among the producers of all sugarcane acquired by the processor from excess acres.

(e) Any person filing a false acreage report that exceeds tolerance will be subject to an assessment not to exceed the amount specified at § 3.91(b)(10)(iii) of this title. Whenever the failure of a producer to comply fully with the terms and conditions applicable to proportionate shares would result in an assessment, the Deputy Administrator may authorize the waiver or reduction of the assessment in such amounts as determined to be equitable about the seriousness of the failure, the producer's good-faith effort to comply fully with such terms and conditions, and the producer's substantial performance.

(f) Any person who knowingly violates any provision of this subpart other than paragraph (d) of this section is subject to the assessment of a civil penalty by CCC of not more than the amount specified at § 3.91(b)(10)(iv) of this title for each violation.

[67 FR 54928, Aug. 26, 2002, as amended at 74 FR 15367, Apr. 6, 2009; 75 FR 17561, Apr. 7, 2010]

### § 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration of such determination by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250–0501.

(b) For issues arising under section 359d establishing allocations for marketing allotments, and sections 359f(b) and (c), and section 359i of the Agricultural Adjustment Act of 1938, as amended, after completion of the process provided in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC 20250–9200. Any hearing conducted under this paragraph shall be in accordance with instructions issued by USDA's Judicial Officer.

(c) For issues arising under §§ 359a–359c, 359e, and 359g of the Agricultural Adjustment Act of 1938, as amended, after completion of the process provided in paragraph (a) of this section, a person adversely affected by the reconsidered determination may appeal such determination by filing a written notice of appeal with the Director, National Appeals Division, USDA, as provided in part 11 of this title. For issues arising under § 359f(a) of the Agricultural Adjustment Act of 1938, as amended, such disputes shall be resolved through arbitration under the direction of the Executive Vice President, CCC. A request for arbitration must be filed in writing at the address specified in paragraph (a) of this section.

[67 FR 54926, Aug. 26, 2002, as amended at 69 FR 39814, July 1, 2004]

## Subpart E [Reserved]

## Subpart F—Processor Sugar Payment-In-Kind (PIK) Program

SOURCE: 67 FR 54928, Aug. 26, 2002, unless otherwise noted. Redesignated at 74 FR 15367, Apr. 6, 2009.

### § 1435.500 General statement.

This subpart shall be applicable to sugar beet and sugarcane processors throughout the United States who, acting in conjunction with the producers of the sugarcane or sugar beets processed by the processors, reduce sugar production in return for a payment of sugar from CCC when CCC determines that such action will reduce forfeitures

of sugar pledged as collateral for a CCC loan.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

### § 1435.501 Bid submission procedures.

(a) After announcement by CCC that a program authorized by this subpart is in effect, processors who desire to participate in the program must submit a bid to CCC, on a form prescribed by CCC, that specifies:

(1) For a program involving acreage diversion, the amount of acreage to be reduced by producers who have contracts for delivery of sugar beets or sugar cane to the processor and contains the information CCC determines necessary to conduct the program and includes but is not limited to:

(i) The number of acres that the processor, acting in conjunction with the producers, will divert;

(ii) The previous consecutive 3-year simple average sugar beet or sugarcane yield on that acreage while under contract (years with no production contracted with a producer will not be considered (for first-time producers, however, the previous consecutive 3-year simple average sugar beet or sugarcane yield for all the producers under contract who delivered to the applicable factory will be used);

(iii) The previous 3-year simple average sugar content of the producer's beets or sugarcane (for first-time producers, the previous 3-year simple average sugar content for all beets or cane delivered to that factory will be used);

(iv) The processor's previous 3-year simple average recovery rate (for processors that have not been fully operational during the last 3 years, the simple average for those years that they were fully operational);

(v) The value of CCC sugar to be received as payment; and

(vi) Other information CCC deems necessary for program administration; or

(2) The sugar production capacity to be removed from production by the processor.

(b) The following acreage is ineligible for enrollment in the PIK program:

(1) If planted, acreage not currently under contract for delivery of sugar beets to a sugar beet processor or sugarcane to a sugarcane processor for sugar production.

(2) If planted, acreage that is not harvestable,

(3) Acreage devoted to roads or other non-producing areas, or

(4) If planted, acreage on which a crop insurance indemnity or replant payment was received for the current crop or for which a claim has been, or will be, filed to receive a crop insurance indemnity or replant payment for the current crop, except for replant payments for acreage actually replanted before the end of the normal planting period.

(c) If planted, the diverted acres cannot be grazed until after the sugar beets or sugarcane are destroyed by disking, plowing, or other means of mechanical destruction. In addition, the sugar beets or sugarcane on the diverted acres may not be used for any commercial purpose.

(d) The acreage offered must meet the following requirements:

(1) If less than or equal to 15 acres, then the acreage bid must consist of one of the following:

(i) One contiguous area of land,

(ii) One or more entire permanent fields, or

(iii) One or more entire permanent fields and one contiguous area of land to complete the balance;

(2) If more than 15 acres, then the acreage bid must consist of one of the following:

(i) One or more areas of land of at least 15 contiguous acres each with one remaining area of land of less than 15 contiguous acres to complete the balance,

(ii) One or more entire permanent fields, or

(iii) One or more entire permanent fields and one area of contiguous land to complete the balance.

(3) Contiguous areas of land must have a minimum width of 3 chains (198 feet).

(e) For a program involving desugaring capacity, or other measures of sugar production, not involving acreage diversion, the bid must contain the information CCC determine necessary to conduct the program.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

### § 1435.502 Bid selection procedures.

(a) For bids in which the processor offers to remove acreage of sugar beets or sugarcane from production, CCC will rank bids on the basis of the bid amount as a percentage of the expected sugar produced from the retired acreage. Bids with the lowest of such percentages will be selected first. In the case of identical bids, selection may be based on random selection or pro rata shares, as CCC deems appropriate.

(b) CCC will reject bids for which the bid amounts exceed the expected sugar produced from the retired acreage.

(c) For bids in which the processor offers to remove sugar production capacity from production, CCC will rank the bids on the basis of the capacity to be removed from production.

(d) All acceptable bids specified in paragraphs (a) and (c) of this section will be further reviewed by CCC and ranked in order of the greatest reduction in sugar program that can be achieved at the lowest cost to CCC.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

### § 1435.503 In-kind payments.

(a) CCC will, through such methods as CCC deems appropriate, make payments in the form of sugar held in CCC inventory.

(b) To the maximum extent practicable, CCC will use its inventory in making an in-kind payment based on the following priority:

(1) CCC-owned sugar held in storage by the processor;

(2) CCC-owned sugar held in storage by any other processor in the same region as the producer;

(3) CCC-owned sugar held in storage by any other processor that is not in the same region as the producer; and

(4) CCC-owned sugar held in storage anywhere in the United States, if CCC determines that such sugar is eligible to be used for in-kind payments.

(c) The value of CCC-owned inventory is dependent upon the storage location of the sugar and the type of sugar (raw or refined). CCC will announce the value of its inventory before bid solicitation. Accordingly, the quantity of sugar CCC will provide in terms of an in-kind payment to a processor will be determined by dividing:

(1) The total of the processor's bid amount that CCC accepts, by

(2) The value of CCC's inventory at the storage location at which title will transfer from CCC to the processor.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

### § 1435.504 Timing of distribution of CCC-owned sugar.

Distribution of sugar from CCC inventory will occur in such manner as CCC determines appropriate.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

### § 1435.505 Miscellaneous provisions.

(a) CCC may permit processors to bid, in lieu of acreage, desugarizing capacity or other measures of sugar production as CCC determines.

(b) The contract shall provide for the payment of liquidated damages if a processor fails to comply with the obligations specified in the CCC production diversion contract.

(c) CCC will transfer title of the sugar to the processor by notifying the processor or assignee that the sugar is available. CCC will stop storage payments on this sugar on the date of transfer.

[67 FR 54928, Aug. 26, 2002. Redesignated at 74 FR 15367, Apr. 6, 2009]

## Subpart G [Reserved]

# PART 1436—FARM STORAGE FACILITY LOAN PROGRAM REGULATIONS

Sec.

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AUTHORITY: 7 U.S.C. 7971 and 8789; and 15 U.S.C. 714–714p.

SOURCE: 66 FR 4612, Jan. 18, 2001, unless otherwise noted.

### § 1436.1 Applicability.

The regulations of this part provide the terms and conditions under which CCC may provide low-cost financing for producers to build or upgrade on-farm storage and handling facilities. Because liens and security interests related to this activity may be governed by State law, CCC may adapt certain procedures relating to those issues that may vary between States.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41587, Aug. 18, 2009]

### § 1436.2 Administration.

(a) The Farm Storage Facility Loan Program will be administered under the general supervision of the Executive Vice President, CCC or designee and will be carried out in the field by FSA State committees, FSA county committees and FSA employees.

(b) FSA State committees, FSA county committees and FSA employees, do not have the authority to modify or waive any of the provisions of the regulations of this part.

(c) The FSA State committee will take any action required by these regulations that has not been taken by the county committee. The FSA State committee will also:

(1) Correct, or require the FSA county committee to correct, any action taken by such FSA county committee that is not in accordance with the regulations of this part; and

(2) Require the FSA county committee to withhold taking any action that is not in accordance with the regulations of this part.

(d) No provision or delegation herein to a State or FSA county committee will preclude the Executive Vice President, CCC, or a designee, or the Administrator, FSA, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by the State or FSA county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may authorize State and FSA county committees to waive or modify deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the Farm Storage Facility Loan Program.

(f) A representative of CCC may execute Farm Storage Facility Loan Program applications and related documents only under the terms and conditions determined and announced by CCC. Any such document that is not executed in accordance with such terms and conditions, including any purported execution prior to the date authorized by CCC, will be void.

(g) The purpose of the Farm Storage Facility Loan program is to provide CCC funded loans for producers of grains, oilseeds, pulse crops, sugar, hay, renewable biomass, fruits and vegetables (including nuts), and other storable commodities, as determined by the Secretary, to construct or upgrade storage and handling facilities for the eligible facility loan commodities they produce.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41587, Aug. 18, 2009]

### § 1436.3 Definitions.

The following definitions will be applicable to the program authorized by this part and will be used in all aspects of administering this program:

*Aggregate outstanding balance* means the sum of the outstanding balances of all loans disbursed under this part to each borrower signing the note and security agreement.

*Assumption* means the act or agreement by which one borrower takes over or assumes the debt of another borrower.

*Cold storage facility* means a facility or rooms within a facility that are specifically designed and constructed for the cold temperature storage of perishable commodities. The temperature

and humidity in these facilities must be able to be regulated to specified conditions required for the commodity requiring storage.

*Collateral* means the storage structure; the drying, handling, and cold storage equipment; and any other equipment securing the loan.

*Commercial facility* means any structure, used in connection with or by any commercial operation including, but not limited to, grain elevators, warehouses, dryers, processing plants, or cold storage facilities used for the storage and handling of any agricultural product, whether paid or unpaid. Any structure suitable for the storage of an agricultural product that is in working proximity to any commercial storage operation will be considered to be part of a commercial storage operation.

*Commercial storage* means the storing of any agricultural product, whether paid or unpaid, for persons other than the owner of the structure, except for family members and tenants or landlords with a share in the eligible facility loan commodity requiring storage.

*Crop of economic significance* means any insurable facility loan commodity that contributes 10 percent or more of the total expected value of all crops grown by the loan applicant except if the expected liability under the catastrophic level of crop insurance for a crop is equal to or less than the administrative fee for the crop, that crop shall not be economically significant.

*Facility loan commodity* means corn, grain sorghum, oats, wheat, barley, rice, raw or refined sugar, soybeans, sunflower seed, canola, rapeseed, safflower, flaxseed, mustard seed, crambe, sesame seed, other oilseeds as determined and announced by CCC, dry peas, lentils, or chickpeas harvested as whole grain, peanuts, hay, renewable biomass, and fruits and vegetables (including nuts). Corn, grain sorghum, wheat, and barley are included whether harvested as whole grain or other than whole grain.

*Financing statement* means the appropriate document that gives legal notice of a security interest in personal property when properly filed or recorded.

*Hay* means a grass or legume that has been cut and stored. Commonly used grass mixtures include rye grass, timothy, brome, fescue, coastal Bermuda, orchard grass, and other native species, depending on the region. Forage legumes include alfalfa and clovers.

*Non-movable or non-salable collateral* means either collateral the county committee determines cannot be sold and moved to a new location because of the type of construction involved or because the collateral has deteriorated to the point that it has no sale recovery value.

*Renewable biomass* means any organic matter that is available on a renewable or recurring basis including renewable plant material such as feed grains or other agricultural commodities (including, but not limited to, soybeans and switchgrass), other plants and trees (excluding old-growth timber), algae, crop residue (including, but not limited to, corn stover, various straws and hulls, and orchard prunings), other vegetative waste material (including, but not limited to, wood waste, wood residues, and food and yard waste) used for the production of energy in the form of heat, electricity, and liquid, solid, or gaseous fuels. Manure from any source is not included.

*Resale collateral value* means collateral that can be sold and moved to a new location for which compensation equal to the outstanding loan value can be expected.

*Satisfactory credit history* means a history of repaying debts as they came due unless the failure to repay or tardiness in payment was due to circumstance beyond the applicant's control as determined by CCC upon proof submitted by the applicant.

*Severance agreement* means an agreement under which a party may consent to the security interest of another in property thereby allowing the severance of a fixture from the real estate.

*Subordination agreement* means any agreement under which a party may subordinate a security interest in property to the interest of another party.

[66 FR 4612, Jan. 18, 2001, as amended at 67 FR 54938, Aug. 26, 2002; 74 FR 41587, Aug. 18, 2009]

### § 1436.4 Application for loans.

(a) An application for a loan must be submitted:

(1) For all loans, except loans for renewable biomass storage facilities and cold storage facilities for fruits and vegetables, to the administrative county office that maintains the records of the farm or farms to which the application applies. With State office approval, loans may be made or serviced by a county office other than the administrative county office.

(2) For loans for renewable biomass storage facilities and cold storage facilities for fruits and vegetables, to the administrative county FSA office that maintains the records of the farm or farms to which the application applies, if the facility will be located on land that has farm records established at the county office. If the commodities will be produced on land that does not have farm records established at the county office, the application must be submitted to the county FSA office that services the county where the facility will be located.

(b) Upon request, the applicant must furnish information and documents as the State or county committee deems reasonably necessary to support the application. This may include financial statements, receipts, bills, invoices, purchase orders, specifications, drawings, plats, or written authorization of access.

(c) For sugar storage facility loans, a loan application must be submitted to the county FSA office that maintains the applicant's records. If no such records exist, loan applications must be submitted to the county office serving the headquarters location of the sugar processor.

(d) Submitting an application does not ensure loan approval nor create any liability on behalf of CCC. Borrowers who authorize delivery, site preparation, or construction actions without an approved loan, do so at their own risk.

[74 FR 41587, Aug. 18, 2009]

### § 1436.5 Eligible borrowers.

(a) *Borrower* means a person who, as landowner, landlord, operator, producer, tenant, leaseholder, sharecropper, or processor of domestically produced sugarcane or sugar beets:

(1) Has a satisfactory credit history according to the definition in § 1436.3 and as recommended to the approving committee by a FSA employee with FSA loan approval authority;

(2) Demonstrates an ability to repay the debt arising under this program using a financial statement acceptable to CCC prepared within 90 days of the date of application, as recommended to the approving committee by a FSA employee with FSA loan approval authority;

(3) Has no disqualifying delinquent Federal debt under the Debt Collection Improvement Act of 1996;

(4) Is a producer of a facility loan commodity as determined by CCC;

(5) Demonstrates a need for increased storage capacity as determined by CCC if the applicant is applying for a loan for a storage structure. The Deputy Administrator, Farm Programs, may issue a waiver, if requested, on a case by case basis if a crop share landlord or tenant requests to construct a structure to store commodities produced on the farm but only one of the two wishes to accept loan liability;

(6) Annually provides proof of crop insurance offered under the Federal Crop Insurance Program for insurable crops of economic significance on all farms operated by the borrower in the county where the storage facility is located. Crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage, if available, is required on all the commodities stored in the FSFL-funded facility, whether economically significant or not; crop insurance under the Federal Crop Insurance Program may not be available for certain renewable biomass commodities;

(7) Is in compliance with the U.S. Department of Agriculture (USDA) provisions for highly erodible land and wetlands conservation provisions according to 7 CFR part 12;

(8) Demonstrates compliance with any applicable local zoning, land use, and building codes for the applicable farm storage facility structures;

(9) Annually provides proof of flood insurance if CCC determines such insurance is necessary to protect the interests of CCC, and annually provides proof that the structures for which the loan is made has all peril structural insurance;

(10) Demonstrates compliance with the National Environmental Policy Act regulations at 40 CFR parts 1500–1508; and

(11) Has not been convicted under Federal or State law of a disqualifying controlled substance violation or a crop insurance violation under 7 CFR part 718.

(b) For sugar facility loans:

(1) Paragraphs (a)(4), (6), and (7) of this section do not apply.

(2) Sugar processors must be approved by CCC to store sugar owned by CCC or pledged as security to CCC for non-recourse loans.

[66 FR 4612, Jan. 18, 2001; 66 FR 17073, Mar. 29, 2001, as amended at 67 FR 54938, Aug. 26, 2002; 74 FR 41588, Aug. 18, 2008]

### § 1436.6 Eligible storage or handling equipment.

(a) For all eligible facility loan commodities, except sugar and fruits and vegetables, loans may be made only for the purchase and installation of eligible storage facilities, and permanently affixed drying and handling equipment, or for the remodeling of existing storage facilities or permanently affixed drying and handling equipment as provided in this section. The loan collateral must be used for the purpose for which it was delivered, erected, constructed, assembled, or installed for the entire term of the loan. Eligible storage and handling facilities include the following:

(1) New conventional-type cribs or bins designed and engineered for whole grain storage and having a useful life of at least 15 years;

(2) New oxygen-limiting storage structures or remanufactured oxygen-limiting storage structures built to the original manufacturer's design specifications using original manufacturer's rebuild kits or kits from a supplier approved by the Deputy Administrator, Farm Programs, and other upright silo-type structures designed for whole grain storage or other than whole grain storage and with a useful life of at least 15 years; and

(3) New flat-type storage structures including a permanent concrete floor, designed for and primarily used to store facility loan commodities for the term of the loan and having a useful life of at least 15 years;

(4) New structures that are bunker-type, horizontal, or open silo structures designed for whole grain storage or other than whole grain storage and having a useful life of at least 15 years;

(5) New structures suitable for storing hay that are built according to acceptable design guidelines from the Cooperative State Research, Education, and Extension Services (CSREES) or land-grant universities and with a useful life of at least 15 years; and

(6) New structures suitable for storing renewable biomass that are built according to acceptable industry guidelines and with a useful life of at least 15 years.

(b) For all eligible facility loan commodities, except sugar and fruits and vegetables, the calculation of the loan amount may include costs associated with building, improving, or renovating an eligible storage or handling facility, including:

(1) Permanently affixed grain handling equipment and grain drying equipment, including perforated floors determined by the approving committee to be needed and essential to the proper functioning of the grain storage system;

(2) Safety equipment as required by CCC and meeting OSHA requirements such as lighting, and inside and outside ladders;

(3) Equipment to improve, maintain, or monitor the quality of stored eligible facility loan commodity, such as cleaners, moisture testers, and heat detectors;

(4) Electrical equipment, including labor and materials for installation, such as lighting, motors, and wiring integral to the proper operation of the eligible facility loan commodity storage and handling equipment;

(5) Concrete foundations, aprons, pits, and pads (including site preparation, labor and materials) essential to the proper operation of the eligible facility loan commodity storage and handling equipment; and

(6) Flooring appropriate for storing hay and renewable biomass suitable for the region where the facility is located and designed according to acceptable

guidelines from CSREES or land-grant universities.

(c) For all eligible facility loan commodities, except sugar and fruits and vegetables, no loans will be made for installation or related costs of:

(1) Portable grain drying equipment, portable handling equipment and portable augers;

(2) Structures of a temporary nature that require the weight or bulk of the stored commodity to maintain its shape (such as fences or bags);

(3) Used structures or handling equipment, not including remanufactured oxygen-limiting storage structures built to the manufacturer's original design specifications as specified in paragraph (a)(2) of this section;

(4) Structures that are not suitable for storing the facility loan commodities for which a need is determined;

(5) Storage structures to be used as a commercial facility. Any facility that is in working proximity to any commercial storage operation will be considered to be part of a commercial storage operation; and

(6) Portable or permanent weigh scales.

(d) Loans for all eligible facility loan commodities, except sugar and fruits and vegetables, may be approved for financing additions to or modifications of an existing storage facility with an expected useful life of at least 15 years if the county committee determines there is a need for the capacity of the structure, but loans will not be approved solely for the replacement of worn out items such as motors, fans, or wiring.

(e) Loans for all eligible facility loan commodities except sugar and fruits and vegetables may be approved for new storage and handling components of a pre-owned structure provided the completed facility has a useful life of at least 15 years. The pre-owned structure must be purchased and moved to a new storage location. Eligible items for such a loan include costs such as new bin rings or roof panels needed to make a purchased pre-owned structure useable, new aeration systems, site preparation, construction off-farm paid labor cost, foundation material and off-farm paid labor. Ineligible items for such a loan include the cost of purchasing and moving the used structure.

(f) The provisions of this paragraph apply only to sugar storage facility loans.

(1) The loan amount may include costs associated with the purchase, installation, building, improving, remodeling or renovating an eligible storage or handling facility. Eligible facilities include the following:

(i) New conventional-type bins or silos designed for and used to store raw or refined sugar, having a useful life of at least 15 years;

(ii) New flat-type storage structures including a permanent concrete floor, designed for and used to store raw or refined sugar, having a useful life of at least 15 years;

(iii) New storage structures designed for and used to store in-process sugar, having a useful life of at least 15 years.

(iv) Permanently affixed sugar handling equipment determined by the CCC to be needed and essential to the proper functioning of the sugar storage system;

(v) Safety equipment CCC requires such as lighting, and inside and outside ladders;

(vi) Equipment to improve, maintain, or monitor the quality of stored sugar, such as moisture testers, and heat detectors;

(vii) Electrical equipment, including labor and materials for installation, such as lighting, motors, and wiring integral to the proper operation of the sugar storage and handling equipment; and

(viii) Concrete foundations, aprons, pits, and pads (including site preparation, labor and materials) essential to the proper operation of the sugar storage and handling equipment.

(2) Sugar storage facility, loans may be approved for financing additions to or modifications of an existing storage facility with an expected useful life of at least 15 years if CCC determines there is a need for the capacity of the structure.

(3) No sugar storage facility loans will be made for:

(i) Portable handling equipment and portable augers;

(ii) Structures of a temporary natures that require the weight or bulk of

the stored commodity to maintain its shape (such as fences or bags);

(iii) Used or pre-owned structures or handling equipment;

(iv) Structures that are not suitable for storing raw or refined sugar;

(v) Weigh scales.

(g) The provisions of this paragraph apply only to fruit and vegetable cold storage facility loans.

(1) For cold storage facility loans, the loan amount may include costs associated with the purchase, installation, building, improving, remodeling, or renovating an eligible storage or handling facility. Costs associated with the construction of a permanently installed cold storage facility include, but are not limited to, the following: An insulated cement slab floor, insulation for walls and ceiling (including, but not limited to, loose fill cellulose, foam insulation sheets, sprayed-on and foam-in-place materials), and a vapor barrier.

(2) Eligible facilities include, but are not limited to, the following:

(i) A new cold storage facility of wood pole and post construction, steel, or concrete, that is suitable for storing the fruits and vegetables produced by the borrower and with a useful life of at least 15 years;

(ii) New walk-in prefabricated permanently installed cold storage coolers that are suitable for storing the producer's fruits and vegetables and with a useful life of at least 15 years;

(iii) Permanently affixed equipment necessary for a cold storage facility such as refrigeration units or system and circulation fans;

(iv) Permanently installed equipment to maintain or monitor the quality of produce stored in a cold storage facility;

(v) Electrical equipment, including labor and materials for installation, such as lighting, motors, and wiring integral to the proper operation of a cold storage facility.

(3) For cold storage facility loans, loans may be approved for financing additions or modifications to an existing storage facility with an expected useful life of at least 15 years if CCC determines there is a need for the capacity of the structure.

(4) No cold storage facility loans will be made for:

(i) Portable structures;

(ii) Portable handling and cooling equipment;

(iii) Used or pre-owned structures, or cooling and handling equipment; or

(iv) Structures that are not suitable for a fruit or vegetable cold storage facility.

[66 FR 4612, Jan. 18, 2001, as amended at 67 FR 54938, Aug. 26, 2002; 74 FR 41588, Aug. 18, 2009]

### § 1436.7 Loan term.

(a) For eligible facility loan commodities other than sugar, the term of the loan will be 7, 10, or 12 years, based on the total loan principal, from the date a promissory note and security agreement is completed on both the partial and final loan disbursements. The applicant will choose, if applicable, a loan term when submitting the loan application and total cost estimates.

(1) For a loan with the principal of $100,000 or less, the term is 7 years.

(2) For loans from $100,000.01 through $250,000, the borrower will choose a term of 7 or 10 years.

(3) For loans from $250,000.01 through $500,000, the borrower will choose a loan term of 7, 10, or 12 years.

(b) No extensions of the loan term will be granted. The loan balance and all related costs are due at the end of the loan term.

(c) For a sugar-related loan:

(1) CCC, at its discretion, may authorize a maximum loan term of 15 years. The minimum loan term of a sugar-related loan is 7 years.

(2) The loan balance and costs are due at the end of the loan term, which will be established on the date the promissory note and security agreement is executed.

[74 FR 41589, Aug. 18, 2009]

### § 1436.8 Security for loan.

(a) Except as agreed to by CCC, all loans must be secured by a promissory note and security agreement covering the farm storage facility and such other assurances as CCC may demand, subject to the following:

(1) The promissory note and security agreement must grant CCC a security

interest in the collateral and must be perfected in the manner specified in the laws of the State where the collateral is located.

(2) CCC's security interest in the collateral must be the sole security interest in such collateral except for prior liens on the underlying real estate that by operation of law attach to the collateral if it is or will become a fixture. If any such prior lien on the real estate will attach to the collateral, a severance agreement must be obtained in writing from each holder of such a lien, including all government or USDA agencies. No additional liens or encumbrances may be placed on the storage facility after the loan is approved unless CCC approves otherwise in writing.

(b) For any loan amounts of $50,000 or less, CCC will not require a severance agreement from the holder of any prior lien on the real estate parcel on which the storage facility is located, if the borrower:

(1) Agrees to increase the down payment on the storage facility loan from 15 percent to 20 percent; or

(2) Provides other security such as an irrevocable letter of credit, bond, or other form of security, as approved by CCC.

(c) For loan amounts exceeding $50,000, or when the aggregate outstanding balance will exceed $50,000 or for loans in which the approving county or State committee determines, as a result of financial analysis, that additional security is required, a lien on the real estate parcel on which the farm storage facility is located is required in the form of a real estate mortgage, deed of trust, or other security instrument approved by USDA's Office of the General Counsel, provided further that:

(1) CCC's interest in the real estate must be superior to all other liens, except a loan may be secured by a junior lien on real estate when the loan is adequately secured and a severance agreement is obtained from prior lien holders.

(2) A loan will be considered to be adequately secured when the real estate security for the loan is at least equal to the loan amount.

(3) If the real estate is covered by a prior lien, a lien waiver may be obtained by means of a subordination agreement approved for use in the State by USDA's Office of the General Counsel. CCC will not require such an agreement from any agency of USDA.

(d) Title insurance or a title opinion is required for loans secured by real estate.

(e) Real estate liens, with prior CCC approval, may cover land separate from the collateral if a lien on the underlying real estate is not feasible and if:

(1) The borrower owns the separate acreage and the acreage is not subject to any other liens or mortgages that are superior to CCC's lien interest and

(2) The acreage is of adequate size and value at the time of the application as determined by the county committee to adequately secure and insure repayment of the loan.

(f) A borrower, in lieu of such liens required by this section, may provide an irrevocable letter of credit, bond, or other form of security, as approved by CCC.

(g) If an existing structure is remodeled and an addition becomes an attached, integral part of the existing storage structure, CCC's security interest will include the remodeled addition as well as the existing storage structure.

(h) For all farm storage facility loans, except sugar loans, the borrower must pay the cost of loan closings by attorneys, title opinions, title insurance, title searches, filing, and recording all real estate liens, fixture filings, appraisals if requested by the borrower, and all subordinations. CCC will pay costs relating to credit reports, collateral lien searches, and filing and recording financing statements for the collateral.

(i) All loans of $50,000 or less that are secured with collateral with no resale value, as determined by CCC, may require additional security.

(j) For sugar storage facility loans, in addition to other requirements in this section, additional security, including real estate, chattels, crops in storage, and other assets owned by the applicant, is required if deemed necessary by CCC to adequately secure the loan. A sugar storage facility loan will generally be considered to be adequately secured when the CCC-determined

value of security for the loan is equal to at least 125 percent of the loan amount.

(k) For sugar storage facility loans, paragraph (h) of this section is not applicable. However, the borrower must pay all loan making fees and closing costs. This includes, but is not limited to, attorney fees for loan closings, environmental assessments and studies, chattel and real estate appraisals, title opinions, title insurance, title searches, and filing and recording all real estate liens, fixture filings, subordinations, credit reports, collateral lien searches, and filing and recording financing statements for the collateral.

[74 FR 41589, Aug. 18, 2009]

### § 1436.9 Loan amount and loan application approvals.

(a) The cost on which the loan will be based is the net cost of the eligible facility, accessories, and services to the applicant after discounts and rebates, not to exceed a maximum per-bushel, -ton or, -cubic foot cost established by the FSA State committee.

(b) The net cost for all storage facilities and handling equipment:

(1) May include the following: All real estate lien related fees paid by the borrower, including attorney fees, except for filing fees; environmental and historic review fees including archaeological study fees; the facility purchase price; sales tax; shipping; delivery charges; site preparation costs; installation cost; material and labor for concrete pads and foundations; material and labor for electrical wiring; electrical motors; off-farm paid labor; on-farm site preparation and construction equipment costs not to exceed commercial rates approved by the county committee; and new on-farm material approved by the county committee.

(2) May not include secondhand material or any other item determined by the approving authority to be ineligible for loan.

(c) The maximum total principal amount of the farm storage facility loan is 85 percent of the net cost of the applicant's needed storage or handling facility, including equipment, not to exceed $500,000 per loan.

(d) The storage need requirement for eligible facility loan commodities will be determined as follows:

(1) For facility loan commodities, except sugar and fruits and vegetables:

(i) Multiply the average of the applicant's share of the acres farmed for the most recent three years for each type of facility loan commodity requiring suitable storage at the proposed facility;

(ii) By a yield determined reasonable by the county committee;

(iii) Multiply by two (for 2 years production); and

(iv) Subtract existing storage capacity in the units of measurement, such as bushels, tons, or cubic feet, for the type of storage needed to determine remaining storage need.

(v) Compare capacity of proposed facility with storage need (calculated as specified in paragraphs (d)(1)(i)–(iv) of this section) to determine if applicant is eligible for additional storage.

(2) For sugar storage facility loans,

(i) Identify past processing volume and marketing allotments;

(ii) Use the processor's projection of processing volume, available storage capacity, volume not to be marketed due to marketing allotment, and other appropriate factors affecting the processor's storage need to estimate the storage need requirement, and

(iii) Compare capacity of proposed facility with storage need (estimated as specified in paragraphs (d)(2)(i)–(ii) of this section) to determine if additional storage is required.

(3) For cold storage facilities for fruits and vegetables:

(i) Multiply the average of the applicant's share of the acres farmed for the most recent three years for each eligible fruit and vegetable commodity requiring cold storage at the proposed facility;

(ii) By a yield determined reasonable by the county committee;

(iii) Determine cold storage needed (calculated as specified in paragraphs (d)(3)(i)–(ii) of this section) with the assistance of CSREES, land-grant university, or ARS publications; and

(iv) Subtract existing cold storage capacity to determine remaining storage need.

(v) Compare capacity of proposed cold storage facility with cold storage need (calculated as specified in paragraphs (d)(3)(i)–(iv) of this section) to determine if applicant is eligible for additional cold storage.

(4) For all eligible facility loan commodities, except sugar, if acreage data is not available, including prevented planted acres, or data is not applicable to the storage need, a reasonable acreage projection may be made for newly acquired farms, changes in cropping operations, or in facility loan commodity crops being grown for the first time.

(e) When a storage structure has a larger capacity than the applicant's needed capacity, as determined by CCC, the net cost eligible for a loan will be prorated. Only costs associated with the applicant's needed storage capacity will be considered eligible for loan under this part.

(f) Any borrower with an outstanding loan must use the financed structure only for the storage of eligible facility loan commodities. If a borrower uses such structure for other purposes such as office space or display area, the loan amount will be adjusted for the ineligible space as determined by CCC.

(g) The FSA county committee may approve applications, if loan funds are available, up to the maximum approval amount unless the Deputy Administrator, Farm Programs, or the FSA State committee establishes a lower limit for county committee approval authority.

(h) Farm storage facility loan approvals, for all eligible facility loan commodities except sugar, will expire 4 months after the date of approval unless extended in writing for an additional 4 months by the FSA State Committee. A second 4 month extension, for a total of 12 months from the original approval date, may be approved by the FSA State Committee. This authority will not be re-delegated. Sugar storage facility loan approvals will expire 8 months after the date of approval unless extended in writing for an additional 4 months by the FSA State Committee.

(i) For sugar storage facility loans, paragraphs (c) and (g) of this section do not apply.

(j) For sugar storage facility loans, the agency approval officials may only approve loans, subject to available funds.

[74 FR 41590, Aug. 18, 2009]

### § 1436.10 Down payment.

(a) A minimum down payment representing the difference between the net cost of the storage facility and the amount of the loan determined in accordance with § 1436.9 will be made by the loan applicant to the supplier or contractor before either the partial or final loan disbursements.

(b) The down payment must be in cash unless some other form of payment is approved by CCC. The down payment may be obtained by the borrower from another lending source.

(c) The down payment may not include any trade-in, discount, rebate, credit, deferred payment, post-dated check, or promissory note to the supplier or contractor.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41590, Aug.18, 2009]

### § 1436.11 Disbursements and assignments.

(a) At the request of the borrower, one partial disbursement of loan principal and one final loan disbursement will be available. The partial loan disbursement will be made to facilitate the purchase and construction of an eligible facility and will be made after the approved applicant has completed construction on part of the structure. County FSA personnel will inspect and verify the amount of construction completed.

(1) The amount of the partial loan disbursement will be determined by CCC and made after the borrower provides acceptable documentation for that portion of the completed construction to the County Committee.

(2) Security required for the amount of the partial loan disbursement will be required before the partial loan disbursement is finalized.

(3) The final disbursement of the loan by CCC will be made after the farm storage facility has been completely and fully delivered, erected, constructed, assembled, or installed and a

CCC representative has inspected and approved such facility.

(4) All additional security needed to fully secure both the partial and final loan disbursements must be received before the final loan disbursement.

(b) Both the partial and final loan disbursements will be made only if the borrower furnishes satisfactory evidence of the total cost of the facility and payment of all debts on the facility in excess of the amount of the loan. If deemed appropriate by CCC, the partial and final disbursement may have separate notes and separate security instruments.

(c) Both the partial and final loan disbursement will be made jointly to the borrower and the contractor or supplier, except disbursement may be made to the borrower solely where CCC determines, based upon information made available to CCC by the borrower, that the borrower has paid the contractor or supplier all amounts that are due and owing with respect to the facility and that all applicable liens, security interests, or other encumbrances have been released.

(d) A release of liability will be required from all contractors and suppliers providing goods and services to the loan applicant.

(e) Loan proceeds cannot be assigned.

(f) For sugar storage facility loans, only one disbursement will be made and such disbursement will be regarded as a final disbursement.

[74 FR 41591, Aug. 18, 2009]

### § 1436.12 Interest and fees.

(a) Loans will bear interest at the rate equivalent, as determined by CCC, to the rate of interest charged on Treasury securities of comparable term and maturity on the date the loan is initially approved.

(b) The interest rate for each loan will remain in effect for the term of the loan.

(c) Each borrower on a loan application must pay a non-refundable application fee in such amount determined appropriate by CCC; the fee will be not less than $100 per borrower. The loan application fee is determined based on the cost of the fees associated with the loan, including, but not limited to, the cost to CCC for lien searches, security filings, and credit reports.

(d) For sugar storage facility loans, paragraph (c) of this section does not apply.

[73 FR 41591, Aug. 18, 2009]

### § 1436.13 Loan installments, delinquency, and acceleration of maturity date.

(a) Equal installments of principal plus interest will be amortized over the loan term for purposes of setting a payment schedule. Installments are due and payable not later than the last day of each 12-month period of each of the partial and final loan disbursements, until the principal plus interest has been paid in full.

(b) Each installment may be paid in cash, money order, wire transfer, or by personal, certified, or cashier's check. Each payment will be applied first to accrued interest and then to principal.

(c) When installments are not paid on the due date:

(1) CCC will generally mail a demand for payment to the debtor after the due date has passed.

(2) If the installment is not paid within 30 calendar days of the due date or if a new due date acceptable to CCC has not been established based on a financial plan submitted by the debtor, CCC may send two subsequent written demands at approximately 30 calendar day intervals unless CCC needs to take other action to protect the interests of CCC.

(3) If the debtor files an appeal according to § 1436.18, CCC will generally cease collection action until the appeal process is complete, however, CCC may withhold any payments due the debtor and, depending on the outcome of the appeal, any payments due the debtor may later be offset and applied to reduce the indebtedness.

(4) In lieu of a foreclosure on the collateral or the land securing a loan in the case of a delinquency, CCC may permit a rescheduling of the debt or other measures consistent with the collection of other debts under the provisions of part 1403 of this chapter. Any rescheduling or alternate repayment arrangements will be permitted only with prior approval from the Deputy

Administrator, Farm Programs. Alternately, CCC may implement such other collection procedures as it deems appropriate.

(d) A claim will be established against a borrower for any amounts remaining due after liquidation of the loan.

(e) CCC may declare the entire indebtedness immediately due and payable if the borrower violates any of the terms and conditions of this part, fails to pay any installment on time, or breaches any of the terms and conditions of any of the instruments executed in connection with the loan, or if , during the life of the loan, the collateral is used in connection with or by any unauthorized commercial facility including, but not limited to, elevators, warehouses, dryers, processing plants, or retail or wholesale cold storage facilities.

(f) Any action authorized by the provisions of this section may be taken:

(1) Against a debtor's pro rata share of payments due any entity that the borrower participates in, either directly or indirectly, as determined by CCC.

(2) Against related persons or entities, irrespective of the debtor's, share, when CCC determines that the debtor has established an entity, or reorganized, transferred ownership of, or changed in some other manner, their operation, for the purpose of avoiding the payment of the debt.

(g) The loan may be paid in full or in part without penalty at any time before maturity.

(h) Upon payment of a loan, CCC will release CCC's security interest in the collateral.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41591, Aug. 18, 2009]

### § 1436.14 Taxes.

The borrower must pay, when due, all real and personal property taxes that may affect CCC's security interest in all collateral or land securing the note evidencing the loan. To protect its interests, CCC may pay any unpaid taxes with respect to the collateral or land securing a loan made in accordance with this part, and if CCC does so, the borrower will reimburse CCC for such payment, and if unpaid by the borrower, such debt will become due immediately.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41591, Aug. 18, 2009]

### § 1436.15 Maintenance, liability, insurance, and inspections.

(a) The borrower must maintain the loan collateral in a condition suitable for the storage of one or more of the facility loan commodities. For purpose of this section the term "loan collateral" will mean any property of any kind that was built or improved, or acquired using a loan made under this part.

(b) Until the loan has been repaid, the borrower will be liable for all damages to or destruction of the loan collateral. CCC will not assume any loss of the loan collateral.

(c) CCC may conduct annual collateral inspections to insure compliance with this part. The borrower must consent to such inspection as a term of the loan and failure to supply such access will put the borrower into default.

(d) Structures must be insured against all perils in all cases and must also be insured against flooding if the structure is located in a flood plain, as determined by CCC. Proof of flood insurance, if required, and proof of all peril structural insurance, must be provided to CCC annually. CCC must be listed as a loss payee on all peril and flood insurance policies.

(e) CCC will have rights of ingress and egress where the facility is located. Failure of the borrower to secure such access will render a borrower ineligible for the loan and, if a loan has already been made will constitute a loan default for which the remaining balance of the loan willbecome immediately due and payable.

(f) For sugar storage facility loans, in addition to the requirements of paragraph (d) of this section, sugar processors must also insure the contents of storage structures used as collateral for a sugar storage facility loan against all perils.

[66 FR 4612, Jan. 18, 2001, as amended at 67 FR 54939, Aug. 26, 2002; 74 FR 41591, Aug. 18, 2009]

**§ 1436.16 Foreclosure, liquidation, assumptions, sales or conveyance, or bankruptcy.**

(a) The collateral or land securing a loan may be sold by CCC whenever CCC has declared the entire indebtedness immediately due and payable under this part as follows:

(1) If a demand for payment is not received by the due date acceptable to CCC, CCC may call the loan and initiate foreclosure proceedings by issuing a liquidation letter to the borrower.

(2) The debtor may voluntarily agree to allow removal of the collateral to facilitate sale by signing an agreement for sale. If the debtor objects to removal of collateral, the law of the State where the collateral exists will be used to foreclose on the property.

(3) For loans with movable collateral and no real estate lien, CCC may sell the collateral for the best price obtainable. Sales proceeds will be distributed in the following order:

(i) To CCC to satisfy the debtor's indebtedness including all costs associated with selling the collateral.

(ii) Payment to junior lien holders if approved by USDA's Office of the General Counsel and then to the borrower or other persons as determined appropriate by that office.

(4) For loans with non-movable or non-salable collateral, as determined by CCC, and no real estate lien, CCC may establish a claim according to 7 CFR part 1403.

(5) For loans secured with a real estate lien, CCC may obtain an appraisal of the property. Sales proceeds will be distributed in the following order:

(i) To CCC to satisfy the debtor's indebtedness including all costs associated with selling the collateral and the appraisal.

(ii) To junior lien holders if approved by USDA's Office of the General Counsel; or

(iii) To the borrower or other persons as determined appropriate by that office.

(b) Assumption by another borrower of a farm storage facility loan is permitted subject to county committee approval and the subsequent borrower's ability to show a satisfactory credit history. An assumption of the loan may be approved when the collateral is sold by CCC to an otherwise eligible borrower, the current borrower will convey the collateral or property securing the loan to another eligible borrower, or the borrower is dead, incompetent, or missing and an eligible borrower wants to assume the loan.

(1) Requests for approval of assumptions must be made to the county committee by the borrower, the borrower's successors, or representatives of the borrower. If approval is granted, the borrower's successors or representatives must execute a new farm storage facility note and security agreement for the balance of the term of the loan.

(2) The principal amount of the loan will include the unpaid amount of the loan, interest computed to the date of assumption, all past due installments, and any other charges that may be required.

(c) The borrower may voluntarily convey the collateral to CCC before repaying the loan. Before a borrower sells or conveys the facilities or other property securing a loan without repaying the loan in full, the borrower must obtain approval for the sale or conveyance from the FSA county committee with the understanding that sale proceeds must be paid to satisfy the borrower's indebtedness to CCC.

(d) If any significant changes are made to the legal or operating status of the farming operation with an outstanding Farm Storage Facility Loan, the borrower must do one of the following:

(1) Find an eligible borrower or entity to assume the loan as specified in paragraph (b) of this section,

(2) Repay the loan, or

(3) Undergo new financial analysis, as approved and determined by CCC, to ensure CCC's interests are protected and that the current borrower is in a position to continue making the scheduled loan payments.

(e) Remedies provided for in this section will, unless CCC determines otherwise, be subject to the administrative appeals provided for elsewhere in this part, including those that are found at § 1436.13.

[66 FR 4612, Jan. 18, 2001, as amended at 74 FR 41591, Aug. 18, 2009]

### § 1436.17 Environmental compliance.

(a) Except as otherwise specified in this section, prior to approval of any farm storage facility loan, an environmental evaluation will be completed to determine if the proposed action will have any adverse impacts on the environment and cultural resources.

(b) If it is determined that a proposed action or group of proposed actions will not result in any adverse impact, the action will be considered as being categorically excluded for the purpose of compliance with the National Environmental Policy Act (NEPA), 40 CFR parts 1500–1508.

(c)(1) If adverse environmental impacts (either direct or indirect) are identified, an environmental assessment will be completed in accordance with the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA.

(2) The environmental assessment will be used to develop an action that results in no significant environmental impact on the human environment or cultural resources.

(3) No action will be approved that has been determined to have significant impacts on the human environment or cultural resources.

(d)(1) In order to minimize the exposure to environmental liabilities from the presence of contamination on real estate collateral, an evaluation will be made of the economic and environmental risks to the real estate collateral posed by the presence of hazardous substances and petroleum products.

(2) If the evaluation made under paragraph (d)(1) of this section reveals that the collateral is or may be contaminated, then the applicant will be notified and given an option of offering as collateral other real estate that is free from contamination or remediating the contamination on the original site offered as collateral.

### § 1436.18 Appeals.

The appeal, reconsideration, or review of all determinations made under this part, except for provisions for which there are no appeal rights because they are determined rules of general applicability, must be in accordance with parts 11 and 780 of this title.

### § 1436.19 Equal Opportunity and Nondiscrimination requirements.

(a) No recipient of a Storage Facility loan will directly, or through contractual or other arrangement, subject any person or cause any person to be subjected to discrimination on the basis of race, religion, color, national origin, gender, or other prohibited basis. Borrowers must comply with all applicable Federal laws and regulations regarding equal opportunity in hiring, procurement, and related matters. FSFL borrowers are subject to the nondiscrimination provisions applicable to Federally assisted programs contained in 7 CFR parts 15 and 15b.

(b) With respect to any aspect of a credit transaction, CCC will not discriminate against any applicant on the basis of race, color, religion, national origin, disability, sex, marital status, familial status, parental status, sexual orientation, genetic information, political beliefs, reprisal, or age, provided the applicant can execute a legal contract. FSFL is subject to the nondiscrimination provisions applicable to Federally conducted programs contained in 7 CFR parts 15d and 15e. Nor will CCC discriminate on the basis of whether all or a part of the applicant's income derives from any public assistance program, or whether the applicant in good faith, exercises any rights under the Consumer Protection Act.

[67 FR 54939, Aug. 26, 2002. Redesignated at 67 FR 65690, Oct. 28, 2002; 74 FR 41592, Aug. 18, 2009]

## PART 1437—NONINSURED CROP DISASTER ASSISTANCE PROGRAM

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AUTHORITY: 7 U.S.C. 7333; 15 U.S.C. 714 *et seq.*; and 48 U.S.C. 1469.

SOURCE: 67 FR 12448, Mar. 19, 2002, unless otherwise noted.

## Subpart A—General Provisions

### § 1437.1 Applicability.

(a) The Noninsured Crop Disaster Assistance Program (NAP) is intended to provide eligible producers of eligible crops coverage equivalent to the catastrophic risk protection level of crop insurance. NAP is designed to help reduce production risks faced by producers of commercial crops or other agricultural commodities. NAP will reduce financial losses that occur when natural disasters cause a catastrophic loss of production or where producers are prevented from planting an eligible crop.

(b) The provisions contained in this part are applicable to eligible producers and eligible crops for which catastrophic coverage under section 508(b) the Federal Crop Insurance Act (7 U.S.C. 1508(b)), as amended, or its successors, is not available.

(c) The regulations of this part are applicable to the 2001 and subsequent crop years.

### § 1437.2 Administration.

(a) NAP is administered under the general supervision of the Executive Vice-President, CCC (who also serves as Administrator, Farm Service Agency), and shall be carried out by State and county FSA committees (State and county committees).

(b) State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations of this part.

(c) The State committee shall take any action required by the regulations of this part that the county committee has not taken. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No provision or delegation to a State or county committee shall preclude the Executive Vice-President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(e) The Deputy Administrator may authorize State and county committees to waive or modify deadlines (except statutory deadlines) in cases where lateness to file does not adversely affect operation of the program.

(f) Items including, but not limited to, application periods, coverage periods, application deadlines, fees, prices, yields, and payment factors established for NAP in accordance with this part that are used for similarly situated participants and eligible crops are not to be construed to be individual program eligibility determinations or extent of eligibility determinations and are, therefore, not subject to administrative review.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13742, Mar. 17, 2006]

### § 1437.3 Definitions.

The definitions and program parameters set out in this section shall be applicable for all purposes of administering the Noninsured Crop Disaster Assistance Program provided for in this part. Although the terms defined in part 718 of this title and part 1400 of this chapter shall also be applicable, the definitions set forth in this section shall govern for all purposes of administering the Program.

*Administrative county office* means the county FSA office designated to make determinations, handle official records, and issue payments for the producer in accordance with 7 CFR part 718.

*Animal Unit Days (AUD)* means an expression of expected or actual stocking rate for pasture or forage.

*Application Closing Date* means the last date, as determined by CCC, producers can submit an application for coverage for noninsured crops for the specified crop year.

*Catastrophic coverage* means a catastrophic risk protection (CAT) level of crop insurance available in accordance with section 508(b) of the Federal Crop Insurance Act, as amended.

*Controlled environment* means, with respect to those crops for which a controlled environment is expected to be provided, including but not limited to ornamental nursery, aquaculture (including ornamental fish), and floriculture, an environment in which everything that can practicably be controlled with structures, facilities, growing media (including but not limited to water, soil, or nutrients) by the producer, is in fact controlled by the producer.

*Crop year* means the calendar year in which the crop is normally harvested or in which the majority of the crop would have been harvested. For value loss and other specific commodities, see the applicable subpart and section of this part. For crops for which catastrophic coverage is available, the crop year will be as defined by such coverage.

*Fiber* means a slender and greatly elongated natural plant filament, e.g. cotton, flax, etc. used in manufacturing, as determined by CCC.

*Final planting date* means the date which marks the end of the planting period for the crop and in particular the last day, as determined by CCC, the crop can be planted to reasonably expect to achieve 100 percent of the expected yield in the intended harvest year or planting period.

*Food* means a material consisting essentially of protein, carbohydrates, and fat used in the body to sustain growth, repair, and vital processes including the crops used for the preparation of food, as determined by CCC.

*Good farming practices* means the cultural practices generally used for the crop to make normal progress toward maturity and produce at least the individual unit approved yield. These practices are normally those recognized by Cooperative State Research, Education, and Extension Service as compatible with agronomic and weather conditions.

*Harvested* means the producer has removed the crop from the field by hand, mechanically, or by grazing of livestock. The crop is considered harvested once it is removed from the field and placed in a truck or other conveyance

or is consumed through the act of grazing. Crops normally placed in a truck or other conveyance and taken off the crop acreage, such as hay are considered harvested when in the bale, whether removed from the field or not.

*Industrial crop* means a commercial crop, or other agricultural commodity utilized in manufacturing. Industrial crops include caster beans, chia, crambe, crotalaria, cuphea, guar, guayule, hesperaloe, kenaf, lesquerella, meadowfoam, milkweed, plantago, ovato, sesame and other crops specifically designated by CCC.

*Intended Use* means for a crop or a commodity, the end use for which it is grown and produced.

*Multiple planted* means the same crop is planted and harvested during two or more distinct planting periods in the same crop year, as determined by CCC.

*Normal harvest date* means the date harvest of the crop is normally completed in the administrative county, as determined by CCC.

*Seed crop* means propagation stock commercially produced for sale as seed stock for eligible crops.

*Seeded forage* means forage on acreage mechanically seeded with forage vegetation at regular intervals, at least every 7 years, in accordance with good farming practices.

*T-Yield* means the yield which is based on the county expected yield of the crop for the crop year and is used on an adjusted or unadjusted basis to calculate the approved yield for crops covered under the NAP when less than four years of actual, assigned, or appraised yields are available in the APH data base.

*Transitional yield* means an estimated yield of that name provided in the Federal Crop Insurance Corporation (FCIC) actuarial table which is used to calculate an average/approved APH yield for crops insured under the Federal Crop Insurance Act when less than four years of actual, temporary, and/or assigned yields are available on a crop by county basis.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13742, Mar. 17, 2006]

### § 1437.4 Eligibility.

(a) Noninsured crop disaster assistance is available for loss of production or prevented planting of eligible commercial crops or other agricultural commodities:

(1) Planted during the planting period, which means the time during which a majority of the crop is normally planted in the area, as determined by CCC, and is considered timely-planted for NAP purposes;

(2) Prevented from being planted during the planting period;

(3) Planted during the late planting period, which means the time after the planting period, during which certain crops, as determined by CCC, may be planted and remain eligible for reduced NAP coverage; and

(4) Determined by CCC to be eligible crops:

(i) For which catastrophic coverage is not available; or

(ii) For specific perils not included under available catastrophic coverage.

(b) When other conditions are met, NAP may be available for an eligible loss of:

(1) Any commercial crop grown for food, excluding livestock and their byproducts;

(2) Any commercial crop planted and grown for livestock consumption, including but not limited to grain and forage crops; except for the 2001 and preceding crop years assistance for forage produced on Federal- and State-owned lands is available only for seeded forage.

(3) Any commercial crop grown for fiber, excluding trees grown for wood, paper, or pulp products; and

(4) Any commercial production of:

(i) Aquacultural species (including ornamental fish);

(ii) Floricultural crops;

(iii) Ornamental nursery plants;

(iv) Christmas tree crops;

(v) Turfgrass sod;

(vi) Industrial crops;

(vii) Seed crops, including propagation stock such as non-ornamental seedlings, sets, cuttings, rootstock, and others, as determined by CCC; and

(viii) Sea grass and sea oats.

[67 FR 12448, Mar. 19, 2002, as amended at 67 FR 62324, Oct. 7, 2002; 71 FR 13742, Mar. 17, 2006]

### § 1437.5 Coverage period.

(a) The coverage period is the time during which coverage is available against loss of production of the eligible crop as a result of natural disaster.

(b) The coverage period for annual crops, including annual forage crops, begins the later of 30 calendar days after the date the application for coverage is filed; or the date the crop is planted, not to exceed the late planting period; and ends on the earlier of the date harvest is complete; the normal harvest date of the crop in the area; the date the crop is abandoned; or the date the crop is destroyed.

(c) Except as otherwise specified in this part, the coverage period for biennial and perennial crops begins 30 calendar days after the application closing date; and ends as determined by CCC.

(d) Except as otherwise specified in this part, the coverage period for value loss crops, including ornamental nursery, aquaculture, Christmas tree crops, ginseng, and turfgrass sod; and other eligible crops, including floriculture and mushrooms begins 30 calendar days after the application closing date; and ends the last day of the crop year, as determined by CCC.

(e) The coverage period for honey begins 30 calendar days after the application closing date and ends the last day of the crop year, as determined by CCC.

(f) The coverage period for maple sap begins 30 calendar days after the application closing date and ends on the earlier of the date harvest is complete; or the normal harvest date.

(g) For biennial and perennial forage crops the coverage period begins the later of 30 calendar days after the application closing date; for first year seedings, the date the crop was planted; or the date following the normal harvest date. The coverage ends on the normal harvest date of the subsequent year.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13742, Mar. 17, 2006]

### § 1437.6 Application for coverage and service fee.

(a) With respect to each crop, commodity, or acreage, producers must file an application for coverage under this part in the administrative county FSA office no later than the application closing date.

(b) The service fee must be paid at the time of the application. The service fee is $100 per crop per administrative county, up to $300 per producer per administrative county, but not to exceed $900 per producer.

(c) The service fee will be applied per administrative county by crop definition and planting period, as determined by CCC.

(d) Limited resource farmers may request that the service fee be waived and must request such a waiver prior to, or at the same time the application for coverage is filed. For this purpose, a "limited resource farmer" shall be given the meaning assigned by 7 CFR 457.8.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13742, Mar. 17, 2006]

### § 1437.7 Records.

(a) Producers must maintain records of crop acreage, acreage yields, and production for the crop for which an application for coverage is filed in accordance with § 1437.5. For those crops or commodities for which it is impractical, as determined by CCC, to maintain crop acreage, yields or production, producers must maintain records, in addition to the available records required by this section, as may be required in subparts C, D and E, of this part. Producers must retain records of the production and acreage yield for a minimum of 3 years for each crop for which an application for coverage is filed in accordance with § 1437.6. Producers may be selected on a random or targeted basis and be required to provide records acceptable to CCC to support the certification provided. For each harvested crop for which producers file an application for payment in accordance with § 1437.10, producers must provide documentary evidence acceptable to CCC of production and the date harvest was completed, including production of crops planted after the planting period or late planting period. Such documentary evidence must be provided no later than the acreage reporting date for the crop in the subsequent crop year. Records of a

previous crop year's production for inclusion in the actual production history database used to calculate an approved yield for the current crop year must be certified by the producer no later than the acreage reporting date for the crop in the current crop year. Production data provided after the acreage reporting date in the current crop year for the crop may be included in the actual production history data base for the calculation of subsequent approved yield calculations if accompanied by acceptable records of production as determined by CCC. Records of production acceptable to CCC may include:

(1) Commercial receipts, settlement sheets, warehouse ledger sheets, or load summaries if the eligible crop was sold or otherwise disposed of through commercial channels provided the records are reliable or verifiable as determined by CCC; and

(2) Such documentary evidence such as contemporaneous measurements, truck scale tickets, and contemporaneous diaries, as is necessary in order to verify the information provided if the eligible crop has been fed to livestock, or otherwise disposed of other than through commercial channels, provided the records are reliable or verifiable as determined by CCC.

(b) During any crop year that a notice of loss is filed according to this part:

(1) Producers of hand-harvested crops shall, in addition to providing acceptable production records according to this part, notify the administrative county office that harvest is complete. This notification must be made before deterioration or destruction of the crop residue and within 15 days after harvest is completed. If an appraisal of the crop acreage is determined necessary by CCC, the producer shall not destroy the crop residue until the crop acreage is released by an FCIC- or CCC-qualified loss adjustor. Producers may, at their expense, request that an appraisal by certified FCIC or CCC loss adjusters of hand-harvested crop acreage be completed during non-loss crop years in order to maintain accurate actual production history.

(2) Producers shall not allow the gathering (gleaning) of any produce left in the field following normal harvest of the crop acreage until the crop acreage is released by a qualified CCC or FCIC loss adjustor, as determined by CCC. Except, crop acreage may be released by an authorized CCC representative for acceptable gleaning operations, as determined by CCC, when producers and gleaners agree to provide acceptable records, as determined by CCC, of the quantity of the crop gleaned.

(c) Producers must provide verifiable evidence, as determined by CCC, of:

(1) An interest in the commodity produced or control of the crop acreage on which the commodity was grown at the time of disaster; and

(2) The authority of the applicable individual to execute program documents.

(d) Reports of acreage planted or intended but prevented from being planted must be provided to CCC at the administrative FSA office for the acreage no later than the date specified by CCC for each crop and location. Reports of acreage filed beyond the date specified by CCC for the crop and location may, however, be considered timely filed if all the provisions of 7 CFR 718.103 are met. In the case of a crop-share arrangement, all producers will be bound by the acreage report filed by the landowner or operator unless the producer files a separate acreage report prior to the date specified by CCC for the crop and location. Reports of acreage planted or intended and prevented from being planted must include all of the following information:

(1) Number of acres of the eligible crop in the administrative county (for each planting in the event of multiple planting) in which the producer has a share;

(2) Zero acres planted when the producer's crop for which an application for coverage was filed, is not planted;

(3) The producer's share of the eligible crop at the time an application for coverage was filed;

(4) The FSA farm serial number;

(5) The identity of the crop, practices, intended uses, and for forage crops, the predominant species or type and variety of the vegetation;

(6) The identity of all producers sharing in the crop;

(7) The date the crop was planted or planting was completed, including the age of the perennial crops; and

(8) The acreage intended but prevented from being planted.

(e) Producers receiving a guaranteed payment for planted acreage, as opposed to receiving a payment only upon delivery of the production must provide documentation of any written or verbal contract or arrangement with the buyer to CCC. Net production, as determined by CCC, may be adjusted upward by the amount of production corresponding to the amount of the contract payment received.

(f) Producers must provide documentation of any salvage value received by or made available for the quantity of the crop or commodity that cannot be marketed or sold in any market, as determined by CCC and any value received by or made available for a secondary use of the crop or commodity.

(g) Producers requesting payment under this part must maintain records which substantiate gross revenue for the tax year preceding the crop year for which coverage is requested.

(h) Producers requesting a waiver of service fees as a limited resource producer must maintain records which substantiate annual gross income for the two tax years preceding the crop year for which coverage is requested.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13742, Mar. 17, 2006]

### § 1437.8 Unit definition.

(a) The unit identifies the interest of the producer in the administrative county on the basis of the unique relationship of the owner to one or more operators. The unit is the foundation for all determinations of acreage, production, value, AUD, approved yields, requisite losses, payments, and other program requirements.

(b) Separate and distinct units are:

(1) One-hundred percent interest as owner/operator;

(2) Less than one-hundred percent interest as owner or operator; or

(3) Less than one-hundred percent interest, as owner or operator in an inverse relationship.

[71 FR 13743, Mar. 17, 2006]

### § 1437.9 Causes of loss.

(a) To be eligible for benefits under this part, an eligible cause of loss must result in:

(1) A loss of production greater than 50 percent of the approved yield in accordance with subpart B of this part;

(2) Prevented planting of greater than 35 percent of the intended crop acreage according to subpart C of this part;

(3) A value loss of greater than 50 percent of the pre-disaster value according to subpart D of this part, or

(4) An AUD loss of greater than 50 percent of the expected AUD according to subpart E of this part.

(b) The quantity of the crop or commodity will not be reduced for any quality consideration unless a zero value is established.

(c) Eligible causes of loss include:

(1) Damaging weather occurring before or during harvest, including but not limited to drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind, or any combination thereof;

(2) Adverse natural occurrence before or during harvest, such as earthquake, flood, or volcanic eruption; and

(3) A related condition, including but not limited to heat, insect infestation, or disease, which occurs as a result of an adverse natural occurrence or damaging weather occurring before or during harvest that directly causes, accelerates, or exacerbates the destruction or deterioration of an eligible crop, as determined by CCC.

(d) Due to the unique requirements, such as controlled environments, necessary for successful production of some crops and commodities; not all eligible causes of loss will apply to all crops and commodities.

(e) Ineligible causes of loss include but are not limited to:

(1) Negligence or malfeasance of the producer;

(2) Failure of the producer to reseed to the same crop during the same planting period in those areas and under such circumstances where it is customary;

(3) Failure of the producer to follow good farming practices, as determined by CCC;

(4) Water contained or released by any governmental, public, or private dam or reservoir project, if an easement exists on the acreage affected for the containment or release of the water;

(5) Failure or breakdown of irrigation equipment or facilities;

(6) Except for tree crops and perennials and as provided for in §1437.201, inadequate irrigation resources at the beginning of the crop year;

(7) A loss of inventory or yield of aquaculture (including ornamental fish), floriculture or ornamental nursery stemming from drought or any failure to provide water, soil, or growing media to such crop for any reason; or

(8) Any failure to provide a controlled environment or exercise good nursery practices when such controlled environment or practices are a condition of eligibility under this part.

[71 FR 13743, Mar. 17, 2006]

### §1437.10 Notice of loss, appraisal requirements, and application for payment.

(a) When an eligible crop is damaged by an eligible cause of loss, at least one producer having a share in the unit must provide a notice of loss to CCC in the administrative FSA county office for the unit, within:

(1) For prevented planting claims, 15 calendar days after the final planting date,

(2) For low yield claims and allowable value loss, the earlier of:

(i) 15 calendar days after the damaging weather or adverse natural occurrence, or date loss of the crop or commodity becomes apparent for low yield claims; and

(ii) 15 calendar days after the normal harvest date.

(b) For each crop for which a notice of loss is filed, producers must provide the following information:

(1) Crop by type or variety, as applicable;

(2) The cause of the crop damage;

(3) Date the loss occurred, as applicable;

(4) Date the damage or loss became apparent;

(5) The existence of a guaranteed payment through a contract or agreement for planted acreage as opposed to delivery of production, if one exists;

(6) Type of crop loss occurred, e.g. prevented planting or low yield;

(7) Practices employed to grow the crop, e.g. irrigated or non-irrigated;

(8) For prevented planting:

(i) Total acreage intended to be planted to the crop in the administrative county;

(ii) Total acreage planted by the producer to the crop in the administrative county;

(iii) Whether a purchase, delivery, or arrangement for purchase or delivery was made for seed, chemicals, fertilizer, etc; and

(iv) What and when land preparation measures, e.g. cultivation, etc. were completed and indicate what has been done or will be done with the acreage, e.g. abandoned, replanted, etc.

(9) For low yield:

(i) Total acreage planted by the producer to the crop in the administrative county;

(ii) Total acreage of the crop in the administrative county affected;

(iii) What and when land preparation measures and practices, e.g. cultivation, planting, irrigated, etc. were completed before and after the loss; and

(iv) What will be done with the affected crop acreage, e.g. harvested, destroyed and replanted to a different crop, abandoned, etc.

(10) Any such other information requested by CCC to establish the loss.

(c) A notice of loss provided beyond the time specified in paragraph (a) of this section may be considered timely filed if, at the discretion of CCC, provided at such time to permit an authorized CCC representative the opportunity to:

(1) Verify the information on the notice of loss by inspection of the specific acreage or crop involved; and

(2) Determine, based on information obtained by inspection of the specific acreage or crop involved, that an eligible cause of loss, as opposed to other circumstance, caused the claimed damage or loss.

(d) Producers who file a notice of loss, using the appropriate CCC form, for crop acreage that will not be harvested as intended, such as abandoned, put to another use, replanted to the

same or a different crop, or in the case of forage, acreage intended to be mechanically harvested that will be both mechanically harvested and grazed, must:

(1) Not put the crop to another use or prepare the acreage for replanting or otherwise change any conditions of the crop or acreage until written notification of release of the crop or acreage is received from CCC;

(2) Request, using the appropriate FSA form, an appraisal of the un-harvested acreage for potential production and release of the crop or acreage:

(i) No less than 15 calendar days before replanting or in the case of forage intended to be mechanically harvested, grazing of the crop acreage.

(ii) Within 15 calendar days after the acreage is abandoned, for example, discontinued care for the crop or provided care so insignificant as to provide no benefit to the crop, as determined by CCC.

(iii) No later than the normal harvest date of the crop, as determined by CCC.

(3) Request the loss adjustor on the day the initial appraisal is completed, or request in any manner of written correspondence received in the FSA administrative county office no later than 15 calendar days after the request for initial appraisal is submitted, that the appraisal be deferred until the end of the growing season, the producer be permitted to establish representative sample areas according to paragraph (d)(4) of this section, and that the acreage be released immediately when:

(i) Time is critical for replanting, or other urgent reasons; and

(ii) Producers and loss adjustors cannot resolve disagreement with the initial appraisal of the acreage to be released.

(4) Establish representative sample areas of the acreage according to the loss adjustor's instructions received on the day the initial appraisal is completed or, if the loss adjustor is not available, according to the FCIC Loss Adjustment Manual (LAM) and applicable FCIC crop handbooks. Report the size, number, and location of the areas in any manner of written correspondence received in the FSA administrative county office, no later than 15 calendar days after requesting a deferred appraisal and before the acreage is put to another use or replanted. Representative sample areas must be of adequate construction and numbers to provide acceptable sampling results and maintained in sound condition, as determined by CCC, until released by CCC.

(5) If possible, be present for the appraisal involving un-harvested crop acreage and accept or contest the results of the loss adjustor's appraisal. Producers unable to be present for the appraisal may contest the results of the appraisal in the FSA administrative county office.

(e) For the 2005 and subsequent crop years, crop acreage for which an application for coverage has been filed, that is intended for production of forage seed and for which a notice of loss is filed indicating the crop acreage will not be harvested as seed, will be appraised for potential production of seed when producers provide CCC acceptable evidence of a contract to produce seed for the current crop year or acceptable records of acreage and seed production for three or more of the last 5 consecutive crop years, as determined by CCC.

(f) Forage acreage for which a notice of loss is filed that was intended to be mechanically harvested but will be grazed and not mechanically harvested, or that was intended to be grazed but will be mechanically harvested and not grazed, does not require an appraisal or release of crop acreage.

(g) Producers must apply for payments prior to the earlier of the:

(1) Date an application for coverage is filed for the crop for the subsequent crop year; or

(2) Application closing date for the crop for the subsequent crop year.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13743, Mar. 17, 2006]

### § 1437.11 Average market price and payment factors.

(a) An average market price will be used to calculate assistance under this part and will be:

(1) A dollar value per the applicable unit of measure of the eligible crop;

(2) Determined on a harvested basis without the inclusion of transportation, storage, processing, marketing, or other post-harvest expenses, as determined by CCC;

(3) Comparable with established FCIC prices; and

(4) Determined, as practicable, for each intended use of a crop type within a State, as determined by CCC, for a crop year.

(b) For these purposes, where needed, an Animal-unit-days (AUD) value will be based on the national average price of corn and the daily requirement of 13.6 megacalories of net energy for maintenance of 1 animal unit.

(c) Payment factors will be used to calculate assistance for crops produced with significant and variable harvesting expenses that are not incurred because the crop acreage was prevented planted or planted but not harvested, as determined by CCC.

(d) An adjusted market price will be calculated based on the provisions in this section and others as may apply. A final payment price will be determined by multiplying, as appropriate, the average market price by the applicable payment factor (*i.e.*, harvested, unharvested, or prevented planting) by 55 percent or, by multiplying the applicable AUD (as adjusted, if adjusted) by 55 percent.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13744, Mar. 17, 2006]

### § 1437.12 Crop definition.

(a) For the purpose of providing benefits under this part, CCC will, at its discretion, define crops as specified in this section.

(b) CCC may separate or combine types and varieties as a crop when specific credible information as determined by CCC is provided showing the crop of a specific type or variety has a significantly different or similar value when compared to other types or varieties, as determined by CCC.

(c) CCC may recognize two or more different crops planted on the same acreage intended for harvest during the same crop year as two or more separate crops. The crop acreage may include a crop intended for harvest before planting of a succeeding crop or a succeeding crop interseeded with the preceding crop prior to intended harvest of the preceding crop. The acreage must be in an area where the practice is recognized as a good farming practice, as determined by CCC, and all crops are recognized by CCC as able to achieve the expected yield, as determined by CCC.

(d) CCC may consider crop acreage that is harvested more than once during the same crop year from the same plant as a single crop. The acreage must be in an area where the practice is recognized as a good farming practice, as determined by CCC.

(e) CCC may consider each planting period of multiple planted acreage as a separate crop. The acreage must be in an area where the practice is recognized as a good farming practice, as determined by CCC.

(f) CCC may define forage as separate crops according to the intended method of harvest, either mechanical harvest or grazed.

(g) Forage acreage intended to be grazed may be further defined as warm and cool season forage crops.

(h) Forage acreage intended to be mechanically harvested may be defined as a separate crop from grazed forage and may be separated based upon the commodity used as forage, to the extent such separation is allowed under paragraph (b) of this section.

(i) Crop acreage intended for the production of seed may be considered a separate crop from other intended uses, as determined by CCC, if all the following criteria apply:

(1) The specific crop acreage is seeded, or intended to be seeded, with an intent of producing commercial seed as its primary intended use;

(2) There is no possibility of other commercial uses of production from the same crop without regard to market conditions; and

(3) The growing period of the specific crop acreage is uniquely conducive to the production of commercial seed and not conducive to the production of any other intended use of the crop, (e.g. vernalization in a biennial crop such as carrots and onions) and that accommodation renders the possibility of production for any other intended use of the crop improbable.

### § 1437.13 Multiple benefits.

(a) If a producer is eligible to receive payments under this part and benefits under any other program administered by the Secretary for the same crop

loss, the producer must choose whether to receive the other program benefits or payments under this part, but shall not be eligible for both. The limitation on multiple benefits prohibits a producer from being compensated more than once for the same loss.

(b) The limitation on multiple benefits in paragraph (a) of this section shall not apply in any respect to Emergency Loans under subtitle C of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961 *et seq*).

(c) The restriction on multiple benefits does not relieve the producer from the requirements of making a production and acreage report.

(d) If the other USDA program benefits are not available until after an application for benefits has been filed under this part, the producer may, to avoid this restriction on such other benefits, refund the total amount of the payment to the administrative FSA office from which the payment was received.

### § 1437.14 Payment and income limitations.

(a) NAP payments shall not be made in excess of $100,000 per person per crop year under this part.

(b) NAP payments shall not be made to a person who has qualifying gross revenues in excess of $2 million for the most recent tax year preceding the year for which assistance is requested. Qualifying gross revenue means:

(1) With respect to a person who receives more than 50 percent of such person's gross income from farming, ranching, and forestry operations, the annual gross income for the taxable year from such operations; and

(2) With respect to a person who receives 50 percent or less of such person's gross income from farming, ranching, and forestry operations, the person's total gross income for the taxable year from all sources.

(c) CCC will pay, for up to one year, simple interest on payments to producers which are delayed. Interest will be paid on the net amount ultimately found to be due, and will begin accruing on the 31st day after the date the producer signs, dates, and submits a properly completed application for payment on the designated form, or the 31st day after a disputed application is adjudicated. Interest will be paid unless the reason for failure to timely pay is due to the producer's failure to provide information or other material necessary for the computation of payment, or there was a genuine dispute concerning eligibility for payment.

(d) Rules set out in 7 CFR part 1400 shall apply in implementing the restrictions of this section.

### § 1437.15 Miscellaneous provisions.

(a) To be eligible for benefits under this part, producers must be in compliance with the highly erodible land and wetlands provisions of part 12 of this title.

(b) The provisions of § 718.11 of this title, providing for ineligibility for benefits for offenses involving controlled substances, shall apply.

(c) A person shall be ineligible to receive assistance under this part for the crop year plus two subsequent crop years if it is determined by the State or county committee or an official of FSA that such person has:

(1) Adopted any scheme or other device that tends to defeat the purpose of a program operated under this part;

(2) Made any fraudulent representation with respect to such program; or

(3) Misrepresented any fact affecting a program determination.

(d) All amounts paid by CCC to any such producer, applicable to the crop year in which a violation of this part occurs, must be refunded to CCC together with interest and other amounts as determined appropriate to the circumstances by CCC.

(e) All persons with a financial interest in the operation receiving benefits under this part shall be jointly and severally liable for any refund, including related charges, which is determined to be due CCC for any reason under this part.

(f) In the event that any request for assistance or payments under this part was established as result of erroneous information or a miscalculation, the assistance or payment shall be recalculated and any excess refunded with applicable interest.

(g) The liability of any person for any penalty under this part or for any refund to CCC or related charge arising

in connection therewith shall be in addition to any other liability of such person under any civil or criminal fraud statute or any other provision of law including, but not limited to: 18 U.S.C. 286, 287, 371, 641, 651, 1001 and 1014; 15 U.S.C. 714m; and 31 U. S. C. 3729.

(h) The appeal regulations at parts 11 and 780 of this title apply to decisions made according to this part.

(i) Any payment or portion thereof to any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof.

(j) For the purposes of 28 U.S.C. 3201(e), the Secretary hereby waives the restriction on receipt of funds or benefits under this program but only as to beneficiaries who as a condition of such waiver agree to apply the benefits to reduce the amount of the judgement lien.

(k) The provisions of parts 1400, 1403 and 1404 of this chapter apply to NAP.

(l) In the case of death, incompetence or disappearance of any person who is eligible to receive payments under this part, such payments will be disbursed in accordance with part 707 of this title.

## Subpart B—Determining Yield Coverage Using Actual Production History

### § 1437.101 Actual production history.

Actual production history (APH) is the unit's record of crop yield by crop year for the APH base period. The APH base period consists of ten crop years of actual yield, T-yield, assigned yield, and zero credited yield, immediately preceding the crop year for which an approved yield is calculated in accordance with this part. APH will be used, except as otherwise indicated in this part, as the basis for providing non-insured crop disaster assistance.

[71 FR 13744, Mar. 17, 2006]

### § 1437.102 Yield determinations.

(a) An actual yield is the total amount of harvested and appraised production from unit acreage for the crop year on a per-acre, or other basis, as applicable.

(b) A T-yield (county expected yield):

(1) Is the Olympic average (disregarding the high and low yields) of historical yields of the crop in the county for the five consecutive crop years immediately preceding the previous crop year. For example, for the 2005 crop year, the five consecutive crop years immediately preceding the previous crop year would be 1999 through 2003.

(2) Will be the same as the FCIC transitional yield if crop insurance is available for the crop, (but not necessarily for the cause of loss if excluded by policy provisions), in the administrative county.

(3) Will be calculated so as to be comparable to the FCIC transitional yield most reasonable to the area if crop insurance was available for the crop (but not necessarily for the cause of loss) in contiguous counties, but not in the immediate county.

(4) Will be based on the most representative available historical information, as determined by CCC, from such sources as, but not limited to, actual acreage and production data of participating producers in the county; or in similar areas; National Agricultural Statistics Service data; Cooperative State Research, Education, and Extension Service records, Federal Crop Insurance data, and credible non-government studies. Such data is based on the acreage intended for harvest.

(5) May be adjusted on an administrative county-wide basis for:

(i) Yield variations due to different farming practices in the administrative county such as irrigated, non-irrigated, and organic practices; and

(ii) Cultural practices when such practices in the administrative county are different from those used on acreage to establish the yield.

(6) Will, for all land for those producers who have land physically located in multiple counties and administered in one county office, be based on the administrative county's expected yield for the crop.

(7) May be reduced, on a specific APH basis, when, as determined by CCC, it does not accurately reflect the productive capability of specific crop acreage.

(8) Will be used in the actual production history base period when less than

four consecutive crop years of actual, assigned, or zero-credited yields, as applicable, are available.

(c) An assigned yield is:

(1) Equal to 75 percent of the approved yield calculated for the most recent crop year for which the producer did not certify a report of production.

(2) Used, after the first crop year an approved yield for the crop is calculated, in the actual production history base period when the producer reports acreage for the crop but fails to certify a report of production. Producers may have only one assigned yield in the actual production history base period.

(3) May be replaced with an actual yield when the producers provide a certification of production and acceptable production records for the applicable crop year in accordance with § 1437.7.

(4) May not be used if the acreage of a crop in the administrative county in which the unit is located for the crop year increases by more than 100 percent over any year in the preceding seven crop years, or significantly from the previous crop years, as determined by CCC, unless producers provide:

(i) Detailed documentation of production costs, acres planted, and yield for the crop year for which the producer is requesting assistance, or

(ii) If CCC determines the documentation is inadequate, proof that the eligible crop, had it been harvested, could have been marketed at a reasonable price.

(5) May be used, notwithstanding paragraph (c)(4) of this section, if:

(i) The planted acreage for the crop has been inspected by a third party acceptable to CCC, or

(ii) The FSA county executive director, with the concurrence of the FSA state executive director, makes a recommendation for an exemption from the requirements and CCC approves such recommendation.

(d) A zero-credited yield:

(1) Will be used in the applicable crop year of the actual production history base period for each crop year following the crop year containing an assigned yield, for which producers do not certify a report of acreage or production, as determined by CCC.

(2) May be replaced with an actual yield when the producer provides a certification of production and acceptable production records for the applicable crop year in accordance with § 1437.7.

(e) An approved yield:

(1) Is used in the calculation of the requisite loss and payment.

(2) Is a simple average of a minimum of four base period crop year yields, *i.e.*, actual yield, T-yield, assigned yield, or zero-credited yield. The base period is 10 crop years, except 5 crop years for apples and peaches, immediately preceding the crop year for which an approved yield is calculated, not including any crop year the crop was out of rotation, not planted, or prevented from being planted.

(3) Shall be calculated according to the following criteria when the producer does not have at least four consecutive crop years of actual, assigned, or zero credited yields beginning with the most recent crop year.

(i) If there are no certified acceptable production records of actual production for the most recent crop year, or zero credited or assigned yields in the producer's APH base period, and no formula provided for the producer under paragraphs (e)(3)(ii) through (iv) of this section, then the approved yield for the current crop year will be calculated on the simple average of 65 percent of the applicable T-yield for each of the minimum four APH crop years.

(ii) If certified acceptable production records of actual production are available for only the most recent crop year and there are no zero credited or assigned yields in the producer's APH base period, the approved yield for the current crop year will be calculated on the simple average of the one actual yield plus 80 percent of the applicable T-yield for the remaining three of the minimum four APH crop years.

(iii) If certified acceptable production records of actual production are available for only the two most recent crop years and there are no zero credited or assigned yields in the producer's APH base period, the approved yield for the current crop year will be calculated on the simple average of the two actual yields plus 90 percent of the applicable T-yield for the remaining two of the minimum four APH crop years.

(iv) If certified acceptable production records of actual production are available for only the three most recent crop years and there are no zero credited or assigned yields in the producer's APH base period, the approved yield for the current crop year will be calculated on the simple average of the three actual yields plus 100 percent of the applicable T-yield for the remaining crop year of the minimum four APH crop years.

(f) If, for one or more actual production history crop years used to establish the approved yield, the actual or appraised yield is less than 65 percent of the current crop year T-yield due to losses incurred in a disaster year, as determined by CCC, producers may request CCC replace the applicable yield with a yield equal to 65 percent of the current crop year T-yield.

(g) If approved yields were calculated for any of the 1995 through 2000 crop years, and subsequently in that period production was not certified, producers may request CCC replace the missing yields for such years with yields equal to the higher of 65 percent of the current crop year T-yield or the missing crop years actual yield.

(h) If producers add land in the farming operation and do not have available production records for the added land CCC will calculate an approved yield for the new unit by utilizing the actual production history yields for the existing unit. In the event the crop suffers a loss greater than 50 percent of the initial approved yield for the crop year and unit acreage has increased by more than 75 percent of the historical average acreage, CCC may adjust the approved yield, as determined by CCC.

(i) If a producer is a new producer, the approved yield may be based on unadjusted T-Yields or a combination of actual yields and unadjusted T-Yields. A new producer is a person who has not been actively engaged in farming for a share of the production of the eligible crop in the administrative county for more than two APH crop years. Formation or dissolution of an entity which includes individuals with more than two APH crop years of production history during the base period does not qualify the new entity as a new producer for APH determination purposes.

(j) A producer who has not shared in the risk of the production of the crop for more than two crop years during the base period, as determined by CCC, will have an approved yield calculated based on a combination of 100 percent of the applicable T-yield and any actual yield for the minimum crop years of the producer's APH base period. Producers who have produced the crop for one or two crop years must provide CCC, at the administrative FSA office serving the area in which the crop is located, a certification of production and production records for the applicable crop years in accordance with § 1437.7.

(k) Further adjustments may be made as necessary to accomplish the purposes of this program.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13744, Mar. 17, 2006]

### § 1437.103 Late-planted acreage.

(a) Producers planting crop acreage after the final planting date and during the late planting period, as determined by CCC, may be eligible for reduced coverage.

(b) Multiple-planted crops, crops with a growing period of 60 calendar days or less, value-loss crops, and fall season small grain crops intended only for grain are not eligible for reduced coverage under late planting provisions.

(c) For crops with a growing period of:

(1) 61 to 120 calendar days and planted:

(i) One to five calendar days after the final planting date, production will be assigned equal to 5 percent of expected production of the applicable late-planted crop acreage regardless of the day planted.

(ii) Six to twenty calendar days after the final planting date, production will be assigned equal to 5 percent of expected production of the applicable late-planted crop acreage plus an additional one percent of the expected production of the applicable late-planted crop acreage for each day beyond five days.

(iii) 21 or more calendar days after the final planting date, production will be assigned equal to 50 percent of the

producer's expected production of the applicable late-planted crop acreage.

(2) 121 days and up and planted:

(i) One to five calendar days after the final planting date, production will be assigned equal to 5 percent of expected production of the applicable late-planted crop acreage regardless of the day planted.

(ii) Six to 25 days after the final planting date, production will be assigned equal to 5 percent of expected production of the applicable late-planted crop acreage plus an additional one percent of the applicable late-planted crop acreage for each day beyond five days.

(iii) 26 or more calendar days after the final planting date, production will be assigned equal to 50 percent of the producer's expected production of the applicable late-planted crop acreage.

[71 FR 13745, Mar. 17, 2006]

### § 1437.104 Assigned production.

(a) When determining losses under this section, assigned production will be used to offset the loss of production when, as determined by CCC, any of the following has occurred:

(1) The loss is a result of an ineligible cause of loss and the loss has not been otherwise accounted for.

(2) The unit acreage was destroyed without consent notwithstanding § 1437.10(d).

(3) The producer has a contract to receive a guaranteed payment for all or a portion of the production, as opposed to or regardless of delivery of such production.

(4) The crop is planted after the STC-established final planting date according to § 1437.103.

(5) Irrigation equipment is not capable of supplying adequate water to sustain the expected production of a normal irrigated crop.

(6) For normal irrigated annual, biennial, and perennial crops, the irrigation practice is not used.

(7) For normal irrigated annual and biennial crops, the supply of available water at the beginning of the crop year is not adequate.

(8) For normal irrigated perennial crops, the supply of available water at the beginning of the crop year is not adequate as a result of an ineligible cause of loss.

[71 FR 13745, Mar. 17, 2006]

### § 1437.105 Determining payments for low yield.

(a) Except to the extent that the loss calculation provisions of other subparts apply, and subject to limitations set out elsewhere in this part and in this title and to the availability of funds, payments under this part shall be made on eligible crops with eligible losses by:

(1) Multiplying the total eligible acreage planted to the eligible crop by the producers share, and subject to provisions for specific crops provided elsewhere in this part;

(2) Multiplying the product of paragraph (a)(1) of this section by 50 percent of the approved yield per acre for the commodity for the producer.

(3) Multiplying the net production of the total eligible acreage by the producer's share;

(4) Subtracting the product of paragraph (a)(3) of this section from the product of paragraph (a)(2) of this section;

(5) Multiplying the difference calculated under paragraph (a)(4) of this section by the final payment price calculated under § 1437.11; and

(6) Multiplying the value of salvage and secondary use by the producer's share and subtracting the result from the result of paragraph (a)(5) of this section.

(b) Further adjustments may be made as needed to accomplish the purposes and goals of the program.

[67 FR 12448, Mar. 19, 2002. Redesignated and amended at 71 FR 13745, 13746, Mar. 17, 2006]

### § 1437.106 Honey.

(a) Honey production eligible for benefits under this part includes table and non-table honey produced commercially.

(b) All of a producer's honey will be considered a single crop, regardless of type or variety of floral source or intended use.

(c) The crop year for honey production is the calendar year, January 1 through December 31.

(d) In addition to filing a report of acreage in accordance with §1437.7, honey producers must provide a record of colonies to CCC. The report of colonies must be filed before the crop year for which producers seek to maintain coverage. The report of colonies shall include:

(1) The address of the producer's headquarters and FSA farm serial number, if available;

(2) Names and shares of each person sharing in the honey produced from the unit;

(3) The number of all colonies of bees belonging to the unit;

(4) The names of counties in which colonies of bees are located as of the date of the report; and

(5) A certification of the number of colonies reported including all colonies from which production is expected.

(e) The honey unit shall consist of all the producer's bee colonies, regardless of location.

(f) Producers must designate a FSA office as the control office for the honey operation. Producers must complete the following actions only in the control office:

(1) File an application for coverage;

(2) File a report of colonies;

(3) Report total unit production; and

(4) Request to change a unit's control office.

(g) Actions that may be taken in any Administrative FSA office includes:

(1) Designating or selecting another control office; or

(2) Filing a notice of loss in accordance with §1437.10.

(h) Producers must notify the control office designated in accordance with paragraph (f) of this section within 30 calendar days of the date of:

(1) Any changes in the total number of colonies; and

(2) The movement of any colonies into any additional counties.

(i) Payments will be based on the amount of losses for this community in excess of a 50 percent loss level at a rate determined in accord with this part and the authorizing legislation.

[67 FR 12448, Mar. 19, 2002. Redesignated at 71 FR 13745, Mar. 17, 2006]

**§ 1437.107 Maple sap.**

(a) NAP assistance for maple sap is limited to maple sap produced on private property for sale as sap or syrup. Eligible maple sap must be produced from trees that:

(1) Are located on land the producer controls by ownership or lease;

(2) Are managed for production of maple sap;

(3) Are at least 30 years old and 12 inches in diameter; and

(4) Have a maximum of 4 taps per tree according to the tree's diameter.

(b) The crop year for maple sap production is the calendar year, January 1 through December 31.

(c) If producers file an application for coverage in accordance with §1437.6, tree acreage containing trees from which maple sap is produced or is to be produced must be reported to CCC no later than the beginning of the crop year.

(d) In addition to the applicable records required under §1437.7, producers must report the:

(1) Total number of eligible trees on the unit;

(2) Average size and age of producing trees; and

(3) Total number of taps placed or anticipated for the tapping season.

(e) A maximum county-expected-yield for maple sap shall be 10 gallons of sap per tap per crop year unless acceptable documentary evidence, as determined by CCC, is available to CCC to support a higher county-expected-yield.

(f) The average market price for maple sap must be established for the value of the sap before processing into syrup. If price data is available only for maple syrup, this data must be converted to a maple sap basis. The wholesale price for a gallon of maple syrup shall be multiplied by 0.00936 to arrive at the average market price of a gallon of maple sap.

(g) The actual production history for maple sap shall be recorded on the basis of gallons of sap per tap.

(h) The unit's expected production is determined by:

(1) Multiplying the number of taps placed in eligible trees; by

(2) The approved per tap yield as determined in accordance with §1437.102.

(i) Payments will be based on the amount of losses for this community in excess of a 50 percent loss level at a rate determined in accord with this part and the authorizing legislation.

[67 FR 12448, Mar. 19, 2002. Redesignated at 71 FR 13745, Mar. 17, 2006]

**§§ 1437.108–1437.200 [Reserved]**

## Subpart C—Determining Coverage for Prevented Planted Acreage

**§ 1437.201 Prevented planting acreage.**

(a) In addition to the provisions of this section, the provisions of § 718.103 of this title shall apply.

(b) When determining losses under this section:

(1) Producers must be prevented from planting more than 35 percent of the total eligible acreage intended for planting to the eligible crop and in the case of multiple planting, more than 35 percent of the total eligible acres intended to be planted within the applicable planting period.

(2) Prevented planted acreage will be considered separately from low-yield losses of planted acreage of the same crop.

(c) Acreage and units ineligible for prevented planting coverage includes, but is not limited to:

(1) Value-loss crops, including, but not limited to, Christmas trees, aquaculture, and ornamental nursery;

(2) Tree crops and other perennials, unless:

(i) The producer can prove resources unique to the planting of tree crops and other perennials were available to plant, grow, and harvest the crop, as determined by CCC; and

(ii) CCC has approved the planting period for the crop;

(3) Uninsured crop acreage that is unclassified for insurance purposes;

(4) Any acreage on which a crop was harvested, hayed, or grazed during the crop year;

(5) Acreage of which the producer or any other person received a prevented planted payment for any crop for the same acreage, excluding share arrangements; and

(6) Acreage planted during the late-planting period.

[71 FR 13746, Mar. 17, 2006]

**§ 1437.202 Determining payments for prevented planting.**

(a) Subject to limitations, availability of funds, and specific provisions dealing with specific crops, a payment for prevented planting will be determined by:

(1) Adding the total planted and prevented-planted acres;

(2) Multiplying the sum of paragraph (a)(1) of this section by .35;

(3) Subtracting the product of paragraph (a)(2) of this section from the total prevented planted acres;

(4) Multiplying the producer's share by the approved yield by the positive result of paragraph (a)(3) of this section;

(5) Multiplying the producer's share by the assigned production;

(6) Subtracting the product of paragraph (a)(5) of this section from the product of paragraph (a)(4) of this section; and

(7) Multiplying the result of paragraph (a)(6) of this section by the final payment price calculated under § 1437.11.

(b) Yields for purposes of paragraph (a) of this section shall be calculated in the same manner as for low-yield claims.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13746, Mar. 17, 2006]

**§§ 1437.203–1437.300 [Reserved]**

## Subpart D—Determining Coverage Using Value

**§ 1437.301 Value loss.**

(a) Special provisions are required to assess losses and calculate assistance for a few crops and commodities which do not lend themselves to yield loss situations. Assistance for these commodities is calculated based on the loss of value at the time of disaster. The agency shall determine which crops shall be treated as value-loss crops, but unless otherwise announced, such crops shall be limited to those identified in §§ 1437.303 through 1437.309 as value loss crops. Lost productions of value loss

crops shall be compensable only under this subpart.

(b) The crop year for all value loss crops is October 1 through September 30.

(c) Producers must file an application for coverage in accordance with § 1437.6, and must:

(1) Provide a report of the crop, commodity, and facility to CCC for the acreage or facility, in a form prescribed by CCC, no later than the beginning of the crop year.

(2) Maintain a verifiable inventory of the eligible crop throughout the crop year; and

(3) Provide an accurate accounting of the inventory, as required by CCC.

### § 1437.302 Determining payments.

Subject to all restrictions and the availability of funds, value loss payments for qualifying losses will be determined by:

(a) Multiplying the field market value of the crop before the disaster by 50 percent;

(b) Subtracting the sum of the field market value after the disaster and value of ineligible causes of loss from the result from paragraph (a)(1) of this section;

(c) Multiplying the result from paragraph (a)(2) of this section by the producer's share;

(d) Multiplying the result from paragraph (a)(3) of this section by 55 percent plus whatever factor deemed appropriate to reflect savings from nonharvesting of the damaged crop or other factors as appropriate;

(e) Multiplying the salvage value by the producer's share;

(f) Subtracting the result from paragraph (a)(5) of this section from the result from paragraph (a)(4) of this section.

### § 1437.303 Aquaculture, including ornamental fish.

(a) Aquaculture is a value loss crop and is compensable only in accord with restrictions set in this section. Eligible aquacultural species shall only include:

(1) Any species of aquatic organisms grown as food for human consumption as determined by CCC.

(2) Fish raised as feed for other fish that are consumed by humans; and

(3) Ornamental fish propagated and reared in an aquatic medium.

(b) The aquacultural facility must be:

(1) A commercial enterprise on private property;

(2) Owned or leased by the producer, with readily identifiable boundaries; and

(3) Managed and maintained using good aquacultural growing practices.

(c) Producers must:

(1) Ensure adequate and proper flood prevention, growing medium, fertilization or feeding, irrigation and water quality, predator control, and disease control; and

(2) Have control of the waterbed.

(d) Eligible aquacultural species must be:

(1) Placed in the facility and not be indigenous to the facility; and

(2) Kept in a controlled environment; and

(3) Planted or seeded in containers, wire baskets, net pens, or similar device designed for the protection and containment of the seeded aquacultural species.

(e) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence that the aquacultural species are produced in a facility in accordance with paragraphs (b), (c) and (d) of this section.

### § 1437.304 Floriculture.

(a) Floriculture, except for seed crops as specified in paragraph (d) of this section, is a value loss crop and is compensable only in accord with restrictions set in this section. Eligible floriculture shall be limited to commercial production of:

(1) Field-grown flowers, including flowers grown in containers or other growing medium maintained in a field setting according to industry standards, as determined by CCC; and

(2) Tubers and bulbs, for use as propagation stock of eligible floriculture plants; and

(3) Seed for propagation of eligible floriculture plants.

(b) Floriculture does not include flowering plants indigenous to the location of the floriculture facility or acreage.

(c) Eligible floriculture must be grown in a region or controlled environment conducive to the successful production of flowers, tubers, and bulbs, as determined by CCC.

(d) Claims on losses on the production of flower seed for propagation of eligible floriculture plants will not be treated under "value loss" rules, but under the rules for normal production low yield crops under subpart B of this part.

(e) The facility or acreage for eligible floriculture must be managed and maintained using good floriculture growing practices. At a minimum, producers are responsible for providing a controlled environment and must ensure adequate and proper fertilization, irrigation, weed control, insect and disease control, and rodent and wildlife control.

(f) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence the floriculture is produced in accordance with paragraph (e) of this section.

(g) Flowers having any dollar value shall be counted as having full value for loss calculations. Damaged plants that are determined able to rejuvenate or determined to be merely stunted shall be counted as worth full value.

**§ 1437.305 Ornamental nursery.**

(a) Eligible ornamental nursery stock is a value loss crop and is compensable only in accord with restrictions set out in this section. Eligible ornamental nursery stock is limited to field-grown and containerized decorative plants grown in a controlled environment for commercial sale.

(b) The property upon which the nursery stock is located must be owned or leased by the producer.

(c) The eligible nursery stock must be placed in the ornamental nursery facility and not be indigenous to the facility.

(d) The facility must be managed and cared for using good nursery growing practices for the geographical region. At a minimum producers must provide a controlled environment and ensure adequate and proper flood prevention, growing medium, fertilization, irrigation, insect and disease control, weed control, rodent and wildlife control, and over-winterization storage facilities.

(e) An ornamental plant having any value as an ornamental plant, or a damaged ornamental plant that may rejuvenate and re-establish value as an ornamental plant, shall be considered as worth full value based on the age or size of the plant at the time of disaster.

(f) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence the ornamental nursery is maintained in accordance with this section.

**§ 1437.306 Christmas tree crops.**

(a) A Christmas tree is a value loss crop and may generate a claim for benefits under this part only if the tree was grown exclusively for commercial use as a Christmas tree, and only if other requirements of this section are met.

(b) The unit of measure for all Christmas tree crops is a plant.

(c) A Christmas tree having any value as a Christmas tree, or a damaged Christmas tree that may rejuvenate and re-establish value as a Christmas tree, shall be considered as worth full value based on the age of the tree at the time of disaster.

**§ 1437.307 Mushrooms.**

(a) Eligible mushrooms is a value loss crop and is only compensable in accord with the restrictions of this section. To be eligible, the mushrooms must be grown as a commercial crop in a facility with a controlled environment utilizing good mushroom growing practices. The facility must be located on private property either owned or leased by the producer.

(b) The controlled environment for eligible mushrooms must include primary and backup systems for:

(1) Temperature and humidity controls;

(2) Proper and adequate lighting; and

(3) Positive air pressurization and filtration.

(c) The growing medium must consist of a substrate (a habitat and nutrient base) sterilized by heat treatment.

(d) Good mushroom growing practices must be used, and they consist of

proper and adequate insect and disease control and the maintenance of a sterile environment. Maintaining a sterile environment includes at a minimum:

(1) Adequate hygiene;

(2) Overall cleanliness;

(3) Isolation or minimum contact procedures;

(4) Use of footpaths; and

(5) Availability and frequent utilization of wash-down facilities.

(e) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence the mushrooms are maintained in accordance with this section.

### § 1437.308 Ginseng.

(a) Ginseng is a value loss crop and is compensable only as allowed in this section. Ginseng is eligible only if:

(1) The ginseng includes stratified seeds for use as propagation stock in a commercial ginseng operation or rootlet for commercial sale that are grown in a controlled, cultivatable environment on private property either owned or leased by the producer; and

(2) The ginseng is grown using good ginseng growing practices with all plant needs supplied and under control of the producer;

(b) Ginseng will not be eligible to generate benefits under this part if it:

(1) Is indigenous to the facility;

(2) Is grown solely for medicinal purposes; and

(3) Includes wild ginseng rootlet that is harvested and transplanted from woodland grown ginseng.

(c) Good ginseng growing practices must be followed, and include, but are not limited to:

(1) Adequate drainage;

(2) Proper and adequate shade;

(3) Accurate pH level;

(4) Adequate and timely fertilization, including an adequate supply to ensure nutrient reserves to the ginseng plants and customary application equipment;

(5) Adequate pest control, including but not limited to, weed, rodent, and wildlife control; and

(6) Disease control.

(d) Ginseng producers must:

(1) Provide a report of inventory of all ginseng, as determined by CCC;

(2) Provide production and sales records necessary to determine the value of eligible ginseng;

(3) Allow a CCC-certified loss adjustor to verify loss, including physically removing representative samples;

(4) Maintain and provide, as determined by CCC, adequate records of fertilization, and pest and disease controls used or put into place during the crop year; and

(5) Possess a valid food processing licence issued by the applicable State Department of Agriculture or equivalent and subject to food regulations administered by the Food and Drug Administration.

(e) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence the ginseng was produced in accordance with this section.

### § 1437.309 Turfgrass sod.

(a) Turfgrass sod is a value loss crop and is the upper stratum of soil bound by mature grass and plant roots into a thick mat produced in commercial quantities for sale.

(b) Specific species, types or varieties of grass intended for turfgrass sod will be considered a separate crop without regard to other intended uses.

(c) The unit of measure for all turfgrass sod shall be a square yard.

(d) Turfgrass sod having any value shall be considered as worth full value.

(e) In addition to the records required in § 1437.7, producers seeking payment must provide information to CCC regarding the average number of square yards per acre and all unharvested areas.

### § 1437.310 Sea grass and sea oats.

(a) Sea grass and sea oats are value loss crops and eligibility will be limited to ornamental plants grown for commercial sale and seeds and transplants produced for commercial sale as propagation stock.

(b) An eligible commodity under this section intended for sale on a commercial basis as:

(1) An ornamental plant can produce a claim in the event of a loss due to a qualifying condition only in the same manner and subject to the same conditions as ornamental nursery stock

under § 1437.305 and such claims shall not, as such, be subject to the provisions of paragraphs (c) through (h) of this section, except to the extent that similar provisions apply to claims under § 1437.305.

(2) Propagation stock (seed or transplant) can produce a claim under this part but only in accord with the provisions that follow in this section and subject to other conditions on payment as may be imposed elsewhere in this part.

(c) For purposes of a loss calculation arising under paragraph (b)(2) of this section, the value of:

(1) Seed will be determined on a yield basis made in accordance with subpart B of this part and average market price established in accordance with § 1437.11.

(2) Transplant losses will be determined based on inventory that existed immediately before and after the disaster and average market price established in accordance with § 1437.11.

(d) Transplant producers must have up-to-date inventory and sales records and other documents, sufficient to document actual losses, as determined by CCC.

(e) The land, waterbed, or facility in which the eligible commodity was located at the time of loss must:

(1) Be owned or leased by the producer;

(2) Have readily identifiable boundaries; and

(3) Be managed and maintained using acceptable growing practices for the geographical region, as determined by CCC.

(f) The producer must have control of the land, waterbed, or facility and must ensure adequate and proper:

(1) Flood prevention;

(2) Growing medium;

(3) Fertilization or feeding;

(4) Irrigation and water quality;

(5) Weed control;

(6) Pest and disease control;

(7) Rodent and wildlife control; and

(8) Over-winterization facilities, as applicable.

(g) The eligible commodity must be:

(1) Grown in a region or controlled environment conducive to successful production, as determined by CCC; and

(2) Placed in the waterbed or facility in which the loss occurs and not be indigenous to the waterbed or facility.

(h) Eligible commodities having any dollar value after the disaster shall be considered as having full value when making loss calculations. Also, damaged plants that do not have any value after the disaster but that can be rejuvenated or may, if not fully rejuvenated, reacquire value, shall be counted as worth full value as well.

(i) In the crop year in which a notice of loss is filed, producers may be required, at the discretion of CCC, to provide evidence that the eligible commodity was produced in accordance with paragraphs (e), (f), and (g) of this section and other provisions of this part.

[67 FR 62324, Oct. 7, 2002]

**§§ 1437.311–1437.400 [Reserved]**

## Subpart E—Determining Coverage of Forage Intended for Animal Consumption

### § 1437.401 Forage.

(a) Forage eligible for benefits under this part is limited to mature vegetation, as determined by CCC, produced in a commercial operation in three or more of the last five crop years, except producers who have not produced forage for the minimum period in order to preserve vegetation and prevent erosion, or otherwise mitigate the impact of disaster conditions, as determined by CCC, shall not be penalized. Benefits are not available for first-year seeding of alfalfa and similar vegetation when production is not produced in the seeding year, as determined by CCC. The commercial operation must use acceptable farming, pasture and range management practices for the location necessary to sustain sufficient quality and quantity of the vegetation so as to be suitable for grazing livestock or mechanical harvest as hay or seed. Forage to be mechanically harvested shall be treated under the rules for low-yield crops as calculated under § 1437.103, except claims on forage for grazing benefits will be determined according to paragraph (f) of this section. The provisions in this subpart, however, shall

govern for all claims including forage for mechanical harvest.

(b) Producers of forage must, in addition to the records required in §1437.7, specify the intended method of harvest of all acreage intended as forage for livestock consumption as either mechanically or grazed.

(c) Producers must, in the administrative FSA office for the unit, request an appraisal prior to the onset of grazing of any intended mechanically harvested forage acreage that will be both mechanically harvested and grazed.

(d) Forage acreage reported to CCC as intended to be mechanically harvested, but which is, instead, subsequently grazed, will be considered, for crop definition purposes, as mechanically harvested. Expected production of the specific acreage will be calculated on the basis of carrying capacity. The loss of such grazed forage shall be determined according to paragraph (f) of this section. Except, beginning with the 2005 crop year, for acreage intended to be mechanically harvested which is instead, subsequently grazed, the loss of intended mechanically harvested forage may alternatively be determined based on a review of acceptable production evidence or appraisal of the specific crop acreage. As part of the payment computation for this loss, intended mechanically harvested forage crop acreage that is not mechanically harvested, but instead grazed, shall be deemed to be un-harvested for the purposes of determining a payment factor.

(e) Small grain forage is the specific acreage of wheat, barley, oats, triticale, or rye intended for use as forage. Small grain forage shall be considered separate crops and distinct from any other forage commodities and other intended uses of the small grain commodity. In addition to the records required in §1437.7 producers must specify whether the intended forage crop is intended for fall/winter, spring, or total season forage. In addition to other eligibility requirements, CCC will consider other factors, such as, water sources and available fencing, and adequate fertilization to determine small grain forage eligibility, yields, and production.

(f) CCC will establish forage losses of acreage intended to be grazed including, in some cases, acreage intended to be mechanically harvested but instead subsequently grazed, on the basis of:

(1) The percentages of loss of similar mechanically-harvested forage acreage on the farm, or on similar farms in the area when approved yields have been calculated to determine loss, or

(2) Where there is no similar mechanically-harvested forage acreage on the farm or similar farms in the area, the collective percentage of loss as determined by CCC for the geographical region after consideration of at least two independent assessments of grazed forage acreage conditions. The assessments shall be completed by forage or range specialists in Federal, State, and local government agencies, educational institutions, and private companies not having a financial interest in the outcome of the assessment. Neither the assessments themselves, nor collective loss percentages established pursuant thereto are subject to appeal. CCC's determinations of geographical area for assessments and collective grazing loss are generally applicable to all similarly situated participants farming in such defined geographical region.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13746, Mar. 17, 2006]

### §1437.402 Carrying capacity.

(a) CCC will establish a carrying capacity for all grazed forage present in the county for purposes of administering this program and to that end:

(1) Multiple carrying capacities may be determined for a specific vegetation if factors, such as soil type, elevation, and topography, result in a significant difference of carrying capacity within the county.

(2) CCC may establish separate carrying capacities for irrigated and non-irrigated forage acreage when acreage of traditionally irrigated forage (forage actually irrigated 3 of the last 5 crop years) is present in the county.

(b) Producers may provide evidence that unit forage management and maintenance practices are improvements over those practices generally associated with the established carrying capacity. Based on this evidence, CCC may adjust the expected AUD for the specific forage acreage upward for

the crop year NAP assistance is requested by:

(1) Three percent when at least 1 practice was completed at least 1 time in the previous 5 crop years and such practice can be expected to have a positive impact on the forage's carrying capacity in the crop year NAP assistance is requested;

(2) Five percent when 2 or more practices were completed at least 1 time in the previous 5 crop years and such practices can be expected to have a positive impact on the forage's carrying capacity in the crop year NAP assistance is requested; and

(3) Greater than 5 percent when producers provide acceptable records, as determined by CCC, of higher forage production or an increase in animal units supported on the specific forage acreage in 3 of the 5 crop years immediately before the crop year NAP assistance is requested.

### § 1437.403 Determining payments.

Subject to payment limits, availability of funds, and other limits as may apply, payments for losses of forage reported to FSA as intended to be grazed will be determined by:

(a) Multiplying the eligible acreage by the producer's share;

(b) Dividing the result from paragraph (a) of this section by the carrying capacity or adjusted per day carrying capacity established for the specific acreage, as determined by CCC;

(c) Multiplying the result from paragraph (b) of this section by the number of days established as the grazing period;

(d) Adding adjustments of AUD for practices and production to the product of paragraph (c) of this section;

(e) Multiplying the result from paragraph (d) of this section by the applicable percentage of loss established by CCC;

(f) Multiplying the amount of assigned AUD, as determined by CCC, by the producer's share;

(g) Subtracting the result from paragraph (f) of this section from the result from paragraph (e) of this section;

(h) Multiplying the result from paragraph (d) of this section by 0.50;

(i) Subtracting the result from paragraph (h) of this section from the result from paragraph (g) of this section; and

(j) Multiplying the result from paragraph (i) of this section by the final payment price established in accordance with § 1437.11.

[67 FR 12448, Mar. 19, 2002, as amended at 71 FR 13747, Mar. 17, 2006]

### § 1437.404 Information collection requirements under the Paperwork Reduction Act; OMB control number.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for the regulation in this part is 0560–0175.

## Subpart F—Determining Coverage in the Tropical Region

SOURCE: 71 FR 52739, Sept. 7, 2006, unless otherwise noted.

### § 1437.501 Applicability; definition of "tropical region" and additional definitions.

(a) This subpart shall only apply to covered tropical crops in the tropical region for the 2006 and subsequent crops years, as those terms are defined in this subpart. Benefits under this part may be extended to those crops only to the extent that they are otherwise eligible for assistance under this part. Covered crops shall not apply to "value loss" crops, as defined elsewhere in this part. For those crops that are covered by this subpart, loss and payment determinations for the program covered in this part shall be determined by the rules that otherwise apply to the program subject to the modifications provided by this subpart. The rules that otherwise apply include, but are not limited to, limitations on payments that appear elsewhere in this part.

(b) For purposes of this subpart:

(1) *Tropical region* includes, as may be further limited by the Deputy Administrator: Hawaii, American Samoa, Guam, the U.S. Virgin Islands, Puerto Rico, and the former Trust Territory of the Pacific Islands (the Commonwealth of the Northern Mariana Islands, the

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

(2) *2006 and subsequent crops* means those crops in the ground on or after January 1, 2006.

(3) *Covered tropical crops* means those crops and commodities in the tropical region governed by this subpart, those being all crops and commodities in the tropical region that are otherwise eligible for generating a benefit claim under this part, except for value-loss crops as defined elsewhere in this part.

(c) The Deputy Administrator may adjust requirements for assistance so as to provide a fair transition from previous rules for crop covered by this subpart to those provisions which are provided for in this subpart.

### § 1437.502 Coverage periods and fees for covered tropical crops.

(a) The crop year for all covered tropical crops is the calendar year (January 1 through December 31 beginning in 2006 through subsequent years).

(b) The application closing date for all covered tropical crops is December 1 of the calendar year before the applicable crop year.

(c) For covered tropical crops, per county per crop year, a maximum service fee of $100.00 is required of the producer for coverage of:

(1) With respect to annual and biennial crops, all plantings of the same crop planted during the crop year, as determined by CCC.

(2) With respect to perennial crops, all acreage of the crop existing during the crop year, as determined by CCC.

(d)(1) Multiple planting periods and final planting dates are not applicable for covered tropical crops. However, nothing in this section shall prohibit assigning different production expectations to different fields.

(2) The coverage period for perennial and other crops covered by this subpart begins on January 1 of the relevant crop year and ends on December 31 of that year.

### § 1437.503 Covered losses and recordkeeping requirements for covered tropical crops.

(a) Prevented planting coverage is not available for covered tropical crops, other than in Hawaii and Puerto Rico, except as approved by the Deputy Administrator in special cases.

(b) Except in Hawaii and Puerto Rico, or as otherwise approved by the Deputy Administrator in individual cases, eligible causes of loss for covered tropical crops will only include hurricanes, typhoons, and named tropical storms.

(c) Producers who have applied for coverage on covered tropical crops must maintain for the full coverage period contemporaneous records. Contemporaneous records are those created at the time of planting and harvesting of the crop for which the application for coverage is filed. In this regard:

(1) Producers may be selected on a random or targeted basis for compliance review with this requirement and any other requirements that may apply to this program.

(2) A failure to maintain acceptable contemporaneous records throughout the crop year may be treated by CCC as grounds of ineligibility for benefits under this part.

### § 1437.504 Notice of loss for covered tropical crops.

(a) The provisions of § 1437.10(c) regarding late filed notice of loss do not apply to covered tropical crops.

(b) Where a notice of loss for covered tropical crops is provided according to § 1437.10, producers must provide records maintained according to § 1437.503(c) of the:

(1) Number of acres or other basis of measurement, as applicable, of the crop from which production could be achieved existing on the day the eligible natural disaster occurred or, for prolonged natural disasters, such as a drought and similar damage where applicable, existing on the day the notice of loss is filed.

(2) Amount, including zero, as applicable, of production harvested, before or after the disaster, from those crop plantings (damaged or undamaged) which were in existence on the farm at the time of the disaster including production from the covered plantings (in existence at the time of the loss event) that may occur after the loss event even when, to the extent provided for

in paragraph (c) of this section, the harvest occurs after the end of the crop year. Crop acreage of the covered crop that is in existence at the time of the loss event that can be harvested after the eligible natural disaster must be harvested, or continue to be harvested, and the harvested acres and production reported to FSA according to this subpart, except that for perennial crops the requirement ends with the end of the crop year. For non-perennial crops the obligation to harvest ends with the end of the life-cycle for the plantings that were in existence at the time of the loss event. In this regard:

(i) Except as otherwise determined by FSA, such production, before or after the loss event, will be taken into account in computing eligibilities.

(ii) Production that must be reported under paragraph (b)(2)(i) of this section includes, except in the case of perennial plants, all production irrespective of whether the production occurs in the same crop year.

(iii) For perennial plants, only production in the same crop year must be reported.

(iv) All production that must be reported for covered tropical crops will, except as specified by the Deputy Administrator, be taken into account in the loss determinations made under this part. The producer is obligated to maximize that production. That is, harvesting and other production activities for the plants in the ground at the time of the disaster must be undertaken or continue to be undertaken, to the maximum extent possible, for the full reporting period, that being the period for which production could count against a loss as indicated in this subpart.

(3) Failure to keep sufficient records to allow the computations provided for in this subpart is grounds for denial of the claim.

(c) Producers with coverage of a covered tropical crop for a crop year must, by the earlier of 90 calendar days after the crop year ends or the date a notice of loss is filed, file a certified report setting out the:

(1) Collective acres of the crop acreage planted or in the ground during the crop year.

(2) Total production harvested from the crop acreage for the full crop year in the case of a perennial plant and for the full life of the plants for other crops.

(d) With respect to the report required in paragraph (c) of this section:

(1) If a report is filed before the end of the crop year, an updated crop report must be filed within 90 calendar days from the end of the crop year to supplement the original report;

(2) If the report is for any annual or biennial crops where production continued or could have continued beyond the period covered in the reports otherwise filed under this section, an additional report of production must be filed within 30 days of the end of the last countable production for the covered crop or 30 days after the last date on which such production could have been obtained, whichever is later.

(3) A failure to file an adequate report where a report is required by this section may result in the producer being treated as having a zero yield capability for the crop year involved for purposes of constructing a crop history. Alternatively, the Deputy Administrator may assign another sanction for that failure. In addition to other sanctions as may apply, a failure to file such reports may be grounds for denial of a claim. The Deputy Administrator may adjust crop histories as determined appropriate to create, to the extent practicable, an appropriate crop history for loss computation purposes.

(4) Such reports as are provided for in this subsection must be filed for every crop year for which there is coverage, irrespective of whether a claim is filed for that year.

(e) Unless otherwise specified by the Deputy Administrator, appraisals are not required of crop acreage for covered tropical crops on Guam, Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(f) All crop acreage for covered tropical crops for which a notice of loss is filed must not be destroyed until authorized by CCC.

**§ 1437.505 Application for payment for the tropical region.**

(a) For producers of covered tropical crops in Guam, Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, an application for payment must be filed at the same time as the filing of the notice of loss required under §§ 1437.10 and 1437.504.

(b) For producers in Puerto Rico and Hawaii, an application for payment for such crops must be filed by the later of:

(1) The date on which the notice of loss is filed in accordance with §§ 1437.10 and 1437.502(i), and

(2) The date of the completion of harvest for the specific crop acreage that existed at the time of loss for which the notice of loss was filed.

# PART 1450—BIOMASS CROP ASSISTANCE PROGRAM (BCAP)

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AUTHORITY: 7 U.S.C. 8111.

SOURCE: 75 FR 66234, October 27, 2010, unless otherwise noted.

## Subpart A—Common Provisions

**§ 1450.1 Administration.**

(a) The regulations in this part are administered under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), or a designee. In the field, the regulations in this part will be implemented by the Farm Service Agency (FSA) State and county committees ("State committees" and "county committees," respectively).

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the provisions in this part unless specifically authorized by the FSA Deputy Administrator for Farm Program (Deputy Administrator).

(c) The State committee may take any action authorized or required by this part to be taken by the county committee, but which has not been taken by such committee, such as:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation of authority to a State or county committee will preclude the Executive Vice President, CCC, or a designee, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Data furnished by participants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

**§ 1450.2 Definitions.**

(a) The definitions in part 718 of this chapter apply to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions apply to this part:

*Advanced biofuel* means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and other fuel derived from cellulosic biomass.

*Agricultural land* means cropland, grassland, pastureland, rangeland, hayland, and other land on which food, fiber, or other agricultural products are produced or capable of being produced.

*Animal waste* means the organic animal waste of animal operations such as confined beef or dairy, poultry, or swine operations including manure, contaminated runoff, milking house waste, dead poultry, bedding, and spilled feed. Depending on the poultry system, animal waste can also include litter, wash-flush water, and waste feed.

*Annual payment* means the annual payment specified in the BCAP contract for BCAP project areas that is issued to a participant for placing eligible land in BCAP.

*Beginning farmer or rancher* means, as determined by CCC, a person or entity who:

(1) Has not been a farm or ranch operator or owner for more than 10 years,

(2) Materially and substantially participates in the operation of the farm or ranch, and

(3) If an entity, is an entity in which at least 50 percent of the members or stockholders of the entity meet the first two requirements of this definition.

*Biobased product* means a product determined by CCC to be a commercial or industrial product (other than food or feed) that is:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) An intermediate ingredient or feedstock.

*Bioenergy* means renewable energy produced from organic matter. Organic matter may be used directly as a fuel, be processed into liquids and gases, or be a residual of processing and conversion.

*Biofuel* means a fuel derived from renewable biomass.

*Biomass conversion facility* means a facility that converts or proposes to convert renewable biomass into heat, power, biobased products, or advanced biofuels.

*Conservation district* is as defined in part 1410 of this chapter.

*Conservation plan* means a schedule and record of the participant's decisions and supporting information for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures for eligible crops and the collection or harvesting of eligible material, as appropriate, and addresses natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

*Contract acreage* means eligible land that is covered by a BCAP contract between the producer and CCC.

*Delivery* means the point of delivery of an eligible crop or eligible material, as determined by the CCC.

*Deputy Administrator* means the FSA Deputy Administrator for Farm Programs, or a designee.

*Dry ton* means one U.S. ton measuring 2,000 pounds. One dry ton is the amount of renewable biomass that would weigh one U.S. ton at zero percent moisture content.

*Eligible crop* means a crop of renewable biomass as defined in this section excluding:

(1) Any crop that is eligible to receive payments under Title I, "Commodity Programs," of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber; and

(2) Any plant that CCC has determined to be either a noxious weed or an invasive species. With respect to noxious weeds and invasive species, a list of such plants will be available in the FSA county office.

*Eligible material* is renewable biomass as defined in this section excluding:

(1) Material that is whole grain from any crop that is eligible to receive payments under Title I of the Food, Conservation, and Energy Act of 2008 or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; or material that is mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber;

(2) Animal waste and by-products of animal waste including fats, oils, greases, and manure;

(3) Food waste and yard waste; and

(4) Algae.

*Eligible material owner*, for purposes of the matching payment, means a person or entity having the right to collect or harvest eligible material, who has the risk of loss in the material that is delivered to an eligible facility and who has directly or by agent delivered or intends to deliver the eligible material to a qualified biomass conversion facility, including:

(1) For eligible material harvested or collected from private lands, including cropland, the owner of the land, the operator or producer conducting farming operations on the land, or any other person designated by the owner of the land; and

(2) For eligible material harvested or collected from public lands, a person having the right to harvest or collect eligible material pursuant to a contract or permit with the US Forest Service or other appropriate Federal agency, such as a timber sale contract, stewardship contract or agreement, service contract or permit, or related applicable Federal land permit or contract, and who has submitted a copy of the permit or contract authorizing such collection to CCC.

*Equivalent plan* means a plan approved by a State or other State agency or government entity that is similar to and serves the same purpose as a forest stewardship plan and has similar goals, objectives, and terms. These plans generally address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

*Establishment payment* means the payment made by CCC to assist program participants in establishing the practices required for non-woody perennial crops and woody perennial crops, as specified in a producer contract under the project portion of BCAP.

*Food waste* means, as determined by CCC, a material composed primarily of food items, or originating from food items, or compounds from domestic, municipal, food service operations, or commercial sources, including food processing wastes, residues, or scraps.

*Forest stewardship plan* means a long-term, comprehensive, multi-resource forest management plan that is prepared by a professional resource manager and approved by the State Forester or equivalent State official. Forest stewardship plans address the following resource elements wherever

present, in a manner that is compatible with landowner objectives concerning:

(1) Soil and water;

(2) Biological diversity;

(3) Range;

(4) Aesthetic quality;

(5) Recreation;

(6) Timber;

(7) Fish and wildlife;

(8) Threatened and endangered species;

(9) Forest health;

(10) Archeological, cultural and historic sites;

(11) Wetlands;

(12) Fire; and

(13) Carbon cycle.

*Higher-value product* means an existing market product that is comprised principally of an eligible material or materials and, in some distinct local regions, as determined by the CCC, has an existing market as of October 27, 2010. Higher-value products may include, but are not limited to, products such as mulch, fiberboard, nursery media, lumber, or paper.

*Highly erodible land* means land as determined as specified in part 12 of this title.

*Indian tribe* has the same meaning as in 25 U.S.C. 450b (section 4 of the Indian Self-Determination and Education Assistance Act).

*Institution of higher education* has the same meaning as in 20 U.S.C. 1002(a) (section 102(a) of the Higher Education Act of 1965).

*Intermediate ingredient or feedstock* means an ingredient or compound made in whole or in significant part from biological products, including renewable agricultural material (including plant, animal, and marine material), or forestry material that is subsequently used to make a more complex compound or product.

*Legal entity* has the same meaning as in the regulations in §1400.3 of this chapter.

*Matching payments* means those CCC payments provided for eligible material delivered to a qualified biomass conversion facility.

*Native sod* means land:

(1) On which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

(2) That had never been tilled for the production of an annual crop as of June 18, 2008.

*Nonindustrial private forest land* means, as defined in 16 U.S.C. 2103a (the Cooperative Forestry Assistance Act of 1978, as amended), rural lands with existing tree cover, or suitable for growing trees, where the land is owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity.

*Offer* means, unless otherwise indicated, the per-acre rental payment requested by the owner or operator in such owner's or operator's request to participate in the establishment payment and annual payment component of BCAP.

*Operator* means a person who is in general control of the land enrolled in BCAP, as determined by CCC.

*Participant* means a person who is participating in BCAP—either as a person who has applied for and is eligible to receive payments, has a BCAP contract, or is a project sponsor.

*Payment period* means a contract period of either up to 5 years for annual and non-woody perennial crops, or up to 15 years for woody perennial crops, during which the participant receives an annual payment under the establishment payment and annual payment component of BCAP.

*Person* has the same meaning as in the regulations in §1400.3 of this chapter. In addition, for BCAP, the term "producer" means either an owner or operator of BCAP project acreage that is physically located in a BCAP project area, or a producer of an eligible crop produced on that acreage.

*Producer* means, with respect to subpart B of this part, a person who had the risk of loss in the production of the material that is the subject of the BCAP payment; and with respect to subpart C of this part, an owner or operator of contract acreage that is physically located within a BCAP project area or a producer of an eligible crop produced on that acreage and who has the risk of loss in the relevant crop at the relevant period of time or who will have the risk of loss in crops required to be produced.

*Project area* means a geographic area with specified boundaries submitted by

a project sponsor and approved by CCC under the establishment payment and annual payment component of BCAP.

*Project sponsor* means a group of producers or a biomass conversion facility who proposes a project area.

*Qualified biomass conversion facility* means a biomass conversion facility that meets all the requirements for BCAP qualification, and whose facility representatives enter into a BCAP agreement with CCC.

*Renewable biomass* means:

(1) Appropriate materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Department of the Interior, Bureau of Land Management land that:

(i) Are by-products of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of 16 U.S.C. 6512 (specifically, sections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 and large-tree retention provisions of subsection (f)); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including:

(A) Feed grains;

(B) Other agricultural commodities;

(C) Other plants and trees; or

(D) Algae;

(ii) Waste material, including:

(A) Crop residue;

(B) Other vegetative waste material (including wood waste and wood residues);

(C) Animal waste and byproducts (including fats, oils, greases, and manure); and

(D) Food waste and yard waste.

*Socially disadvantaged farmer or rancher* means, unless other classes of persons are approved by CCC in writing, a farmer or rancher who is a member of a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Groups include:

(1) American Indians or Alaskan Natives;

(2) Asians or Asian Americans;

(3) Blacks or African Americans;

(4) Native Hawaiians or other Pacific Islanders; and

(5) Hispanics.

*Technical assistance* means assistance in determining the eligibility of land and practices for BCAP, implementing and certifying practices, ensuring contract performance, and providing annual rental rate surveys. The technical assistance provided in connection with BCAP to owners or operators, as approved by CCC, includes, but is not limited to: Technical expertise, information, and tools necessary for the conservation of natural resources on land; technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of eligible practices; and technical infrastructure, including activities, processes, tools, and functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Tribal government* means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to 43 U.S.C. 1601–1629h (the Alaska Native Claims Settlement Act), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Violation* means an act by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible to receive or retain all or a portion of BCAP payments.

*Yard waste* means any renewable biomass generated from municipal or residential land, such as urban forestry materials, construction or demolition materials, trimmings from grasses and trees, or biomass removed due to invasive species or weather-related disaster, that can be separated from and has low potential (such as contamination with plastics, metals, chemicals, or other toxic compounds that cannot be removed) for the generation of toxic byproducts resulting from conversion, and that otherwise cannot be recycled for other purposes (such as post-consumer waste paper).

**§ 1450.3 General.**

(a) The objectives of BCAP are to:

(1) Support the establishment and production of eligible crops for conversion to bioenergy and biobased products in selected project areas; and

(2) Assist agricultural and forest landowners and operators with matching payments to support the collection, harvest, storage, and transportation costs of eligible material for use in a biomass conversion facility.

(b) A participant must implement and adhere to a conservation plan, forest stewardship plan, or equivalent plan prepared in accordance with BCAP guidelines, as established and determined by CCC. A conservation plan, forest stewardship plan, or equivalent plan for contract acreage must be implemented by a participant and must be approved by the conservation district in which the lands are located, or, in the case of Federal lands, the appropriate approval authority of jurisdiction. If the conservation district declines to review the conservation plan, forest stewardship plan, or equivalent plan, the provider of technical assistance may take such further action as is needed to account for lack of such review.

(c) Agricultural and forest landowners and operators must comply with any applicable existing conservation plan, forest stewardship plan, or equivalent plan and all other applicable laws, regulations, or Executive Orders for any removal of eligible material for use in a biomass conversion facility to receive matching payments.

(d) Except as otherwise provided in this part, a participant may receive, in addition to any payments under this part, financial assistance, rental or easement payments, tax benefits, or other payments from a State or a private organization in return for enrolling lands in BCAP, without any commensurate reduction in BCAP payments.

**§ 1450.4 Violations.**

(a)(1) If a participant fails to carry out the terms and conditions of a BCAP contract, CCC may terminate the BCAP contract.

(2) If the BCAP contract is terminated by CCC in accordance with this paragraph:

(i) The participant will forfeit all rights to further payments under the contract and must refund all payments previously received, plus interest; and

(ii) The participant must pay liquidated damages to CCC in an amount as specified in the contract.

(b) CCC may reduce a demand for a refund under this section to the extent CCC determines that such relief would be appropriate and would not deter the accomplishment of the purposes of BCAP.

**§ 1450.5 Performance based on advice or action of USDA.**

(a) The provisions of § 718.303 of this title relating to performance based on the action or advice of an authorized representative of USDA applies to this part, and may be considered as a basis to provide relief to persons subject to sanctions under this part to the extent that relief is otherwise permitted by this part.

(b) [Reserved]

**§ 1450.6 Access to land.**

(a) For purposes related to this program, the participant must upon request provide any representative of USDA, or designee thereof, with access to land that is:

(1) The subject of an application for a contract under this part; or

(2) Under contract or otherwise subject to this part.

(b) For land identified in paragraph (a) of this section, the participant must

provide such representatives or designees with access to examine records for the land to determine land classification, eligibility, or for other purposes, and to determine whether the participant is in compliance with the terms and conditions of the BCAP contract.

### § 1450.7 Division of payments and provisions about tenants and sharecroppers.

(a) Payments received under this part will be divided as specified in the applicable contract. CCC may refuse to enter into a contract when there is a disagreement among persons or legal entities seeking enrollment as to a person's or legal entity's eligibility to participate in the contract as a tenant or sharecropper, and there is insufficient evidence, as determined by CCC, to indicate whether the person or legal entity seeking participation as a tenant or sharecropper has an interest in the acreage offered for enrollment in the BCAP.

(b) CCC may remove an operator or tenant from a BCAP contract when:

(1) The operator or tenant requests in writing to be removed from the BCAP contract;

(2) The operator or tenant files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by applicable bankruptcy laws;

(3) The operator or tenant dies during the contract period and the administrator of the estate fails to succeed to the contract within a period of time determined appropriate by CCC; or

(4) A court of competent jurisdiction orders the removal of the operator or tenant from the BCAP contract and such order is received by CCC.

(c) Tenants who fail to maintain tenancy on the acreage under contract for any reason may be removed from a contract by CCC.

### § 1450.8 Payments not subject to claims.

(a) Subject to part 1403 of this chapter, any payment or portion of the payment due any person or legal entity under this part will be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the U.S. Government.

(b) [Reserved]

### § 1450.9 Assignments.

(a) Participants may assign the right to receive cash payments under BCAP, in whole or in part, as provided in part 1404 of this chapter.

(b) [Reserved]

### § 1450.10 Appeals.

(a) Except as provided in paragraph (b) of this section, a person or legal entity applying for participation may appeal or request reconsideration of an adverse determination in accordance with the administrative appeal regulations at parts 11 and 780 of this title.

(b) Determinations by the Natural Resources Conservation Service may be appealed in accordance with procedures established under part 614 of this title or otherwise established by the Natural Resources Conservation Service.

### § 1450.11 Scheme or device.

(a) If CCC determines that a person or legal entity has employed a scheme or device to defeat the purposes of this part, or any part, of any USDA program, payment otherwise due or paid such person or legal entity during the applicable period may be required to be refunded, with interest calculated from the date of disbursement of the funds by CCC, as determined appropriate by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or legal entity of any payments, or obtaining a payment that otherwise would not be payable.

(c) A new owner or operator or tenant of land subject to this part who succeeds to the contract responsibilities must report in writing to CCC any interest of any kind in the land subject to this part that is retained by a previous participant. Such interest may include a present, future, or conditional interest, reversionary interest, or any option, future or present, on such land, and any interest of any lender in such land where the lender has, will, or can legally obtain, a right of occupancy to such land or an interest in the equity in such land other than

an interest in the appreciation in the value of such land occurring after the loan was made. Failure to fully disclose such interest will be considered a scheme or device under this section.

**§ 1450.12 Filing of false claims.**

(a) If CCC determines that any participant has knowingly supplied false information or has knowingly filed a false claim, such participant will be ineligible for payments under this part with respect to the fiscal year in which the false information or claim was filed and the contract may be terminated, in which case CCC may demand a full refund of all prior payments.

(b) False information or false claims include, but are not limited to, claims for payment for practices that do not comply with the conservation plan, forest stewardship plan, or equivalent plan. Any amounts paid under these circumstances must be refunded to CCC, together with interest as determined by CCC, and any amounts otherwise due the participant will be withheld.

(c) The remedies provided for in this section will be in addition to any other remedy available to CCC and in addition to any criminal penalty or any other remedy available to the United States.

**§ 1450.13 Miscellaneous.**

(a) Except as otherwise provided in this part, in the case of death, incompetency, or disappearance of any participant, any payments due under this part may be paid to the participant's successor(s) in accordance with part 707 of this title.

(b) Unless otherwise specified in this part, payments under this part will be subject to the compliance requirements of part 12 of this title concerning highly erodible land and wetland conservation and payments.

(c) Any remedies permitted CCC under this part will be in addition to any other remedy, including, but not limited to, criminal remedies or actions for damages in favor of CCC, or the United States as may be permitted by law.

(d) Absent a scheme or device to defeat the purposes of BCAP, when an owner loses control of BCAP acreage enrolled under subpart C of this part due to foreclosure and the new owner chooses not to continue the contract in accordance with § 1450.215 refunds will not be required from any participant on the contract to the extent that the Deputy Administrator determines that forgiving such repayment is appropriate in order to provide fair and equitable treatment.

## Subpart B—Matching Payments

**§ 1450.100 General.**

(a) A person or legal entity with the right to collect or harvest eligible material for the sale and delivery of such eligible material to a qualified biomass conversion facility, may be eligible for payment under the provisions of this subpart.

(b) [Reserved]

**§ 1450.101 Qualified biomass conversion facility.**

(a) To be considered a qualified biomass conversion facility, a biomass conversion facility must enter into an agreement with CCC and must:

(1) Meet all applicable regulatory and permitting requirements by applicable Federal, State, or local authorities;

(2) Agree in writing to:

(i) Maintain accurate records of all eligible material purchases and related documents regardless of whether matching payments will be sought by the seller; and

(ii) Make available at one place and at all reasonable times for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to BCAP for not less than 3 years after the date that eligible material was delivered to the qualified biomass conversion facility;

(iii) Clearly indicate the actual tonnage delivered on the scale ticket or equivalent to be provided to the eligible material owner;

(iv) Calculate a total dry ton weight equivalent of the actual tonnage delivered and provide that measurement to the eligible material owner;

(v) Use commercial weight scales that are certified for accuracy by applicable State or local authorities and

accurate moisture measurement equipment to determine the dry ton weight equivalent of actual tonnage delivered;

(vi) Pay fair market value for eligible material regardless of whether the seller has applied for or receives a matching payment authorized by this subpart.

(b) For a qualified biomass conversion facility, CCC can:

(1) Periodically inform the public that payments may be available for deliveries of eligible material to such qualified biomass conversion facility;

(2) Maintain a listing of qualified biomass conversion facilities for general public access and distribution that may include general information about the facility and its eligible material needs; and

(3) Suspend, terminate, or take other actions as appropriate when CCC determines a qualified biomass conversion facility fails to comply with the agreement.

**§ 1450.102 Eligible material owner.**

(a) In order to be eligible for a payment under this subpart, a person or legal entity must:

(1) Be a producer of an eligible crop that is produced on contract acreage authorized by subpart C of this part; or

(2) Have the right to collect or harvest eligible material and such person may only receive payment if the risk of loss for the material transferred to that person occurred prior to the time the payment is made that will be used to determine the matching payment that is requested under this subpart; and

(3) Certify that the eligible material for which a payment may be issued according to § 1450.106 has been harvested according to a conservation plan, forest stewardship plan, or equivalent plan, and, if not crop residues, are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

(b) A qualified biomass conversion facility that meets the requirements of paragraph (a) of this section may be considered an eligible material owner if it otherwise meets the definition in this part.

**§ 1450.103 Eligible material that qualifies for payment.**

(a) Except for paragraph (b) of this section, in order to qualify, as determined by CCC, for a payment under this subpart:

(1) Eligible material must be renewable biomass that, at a minimum, meets the definition in § 1450.2 and is listed on the official Web site for BCAP as an eligible material at *http://www.fsa.usda.gov/energy;*

(2) Eligible material must be collected or harvested by the eligible material owner:

(i) Directly from:

(A) National Forest System land, Bureau of Land Management land;

(B) Non-Federal land; or

(C) Land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States;

(ii) Consistent with a conservation plan, forest stewardship plan, or plan that CCC determined to be an equivalent plan, that provides the following:

(A) The purpose of the harvest of the eligible material;

(B) The expected volume of the harvest;

(C) The total number of acres to be harvested;

(D) The name of the eligible material owner(s); and

(E) Any additional information, as determined by CCC; and

(iii) Consistent with Executive Order 13112, "Invasive Species. "

(3) Woody eligible material produced on land other than contract acreage must be:

(i) Byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health; and

(ii) If harvested from Federal lands then done so in accordance with the requirements for old-growth maintenance, restoration, and management direction provided by 16 U.S.C. 6512 for Federal lands; and

(4) Eligible material must be delivered to a qualified biomass conversion facility (as specified in § 1450.101 and other provisions of these regulations).

(b) Notwithstanding paragraph (a) of this section, payments under this subpart are not authorized for:

(1) Any eligible material delivered before October 27, 2010;

(2) Any eligible material for which payment from a biomass conversion facility was received before the application for payment under this subpart is received and approved by the FSA county office, as specified in § 1450.104;

(3) Any woody eligible material collected or harvested outside contract acreage that would otherwise be used for higher-value products; or

(4) Any otherwise eligible material collected or harvested outside contract acreage that, after delivery to a biomass conversion facility, its campus, or its affiliated facilities, must be separated from an eligible material used for a higher-value market product in order to be used for heat, power, biobased products, or advanced biofuels.

**§ 1450.104 Signup.**

(a) Applications for participation and requests for payments under this subpart will be accepted on a continuous basis.

(b) An eligible material owner must apply to participate in the matching payments component of BCAP before payment for the eligible material is received from a qualified biomass conversion facility. The application must be submitted to the FSA county office and approved by CCC before any payment is made by the qualified biomass conversion facility for the eligible material.

(c) Applications must include the following:

(1) Based on information obtained from contracts, agreements, or binding letters of intent:

(i) An estimate of the total dry tons of eligible material expected to be sold to the qualified biomass conversion facility;

(ii) The type(s) of eligible material that is expected to be sold;

(iii) The name of the qualified biomass conversion facility that will purchase the eligible material;

(iv) The expected, fair market, per dry ton payment rate the owner plans to receive for the delivery of the eligible material; and

(v) The date or dates the eligible material is expected to be delivered to the qualified biomass conversion facility.

(2) A new or amended conservation plan, forest stewardship plan, or equivalent plan, as specified in § 1450.103.

(d) Eligible material owners who deliver eligible material to more than one qualified biomass conversion facility must submit separate applications for each facility to which eligible material will be delivered.

(e) After delivery, eligible material owners must notify CCC and request the payment. Payments will be disbursed only after delivery is verified by CCC.

(f) Information that must be submitted to CCC in order to request payments includes settlement, summary, or other acceptable data that provide:

(1) Total actual tonnage delivered and a total dry weight tonnage equivalent amount determined by the qualified biomass conversion facility using standard moisture determinations applicable to the eligible material;

(2) Total payment received, including the per dry-ton payment rate(s) matched with actual and dry weight tonnage delivered; and

(3) The qualified biomass conversion facility's certification as to the authenticity of the information.

**§ 1450.105 Obligations of participant.**

(a) All participants whose payment application was approved must agree to:

(1) Carry out and certify compliance with the terms and conditions of the payment application including adherence to a conservation plan, forest stewardship plan, or equivalent plan, as appropriate; and

(2) Be jointly and severally responsible, if the participant has a share of the payment greater than zero, with other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the BCAP contract and this part.

(b) [Reserved]

### § 1450.106 Payments.

(a) Payments under this subpart will be for a term not to exceed 2 years beginning the date that CCC issues the first payment, under this subpart to the participant and for each participant runs from the date that the participant receives a matching payment from CCC even though the participant may over time change facilities. The Deputy Administrator may further limit the period to reflect participation in BCAP for any time prior to October 27, 2010 as the Deputy Administrator deems appropriate. In addition, where ownership of a source of material has changed, or where it is deemed that other circumstances warrant, the Deputy Administrator may apply the time limit applicable to a person or entity or to another person or entity to assure that the 2-year limit is not avoided by private arrangement or other circumstance.

(b) Payments under this subpart will be paid at a rate of $1 for each $1 per dry ton provided by the qualified biomass conversion facility for the market-based sale of eligible material in an amount up to $45 per dry ton.

## Subpart C—Establishment Payments and Annual Payments

### § 1450.200 General.

(a) As provided in this subpart, establishment payments and annual payments may be provided by CCC to producers of eligible crops within a project area.

(b) [Reserved]

### § 1450.201 Project area proposal submission requirements.

(a) To be considered for selection as a project area, a project sponsor must submit a proposal to CCC that includes, at a minimum:

(1) A description of the sources of renewable biomass, eligible land, and eligible crops that may be enrolled within the proposed project area;

(2) A letter of commitment from a biomass conversion facility stating that the facility will use, for BCAP purposes, eligible crops intended to be produced in the proposed project area;

(3) Information demonstrating that the biomass conversion facility will have sufficient equity available to operate if the facility is not operational at the time the project area proposal is submitted; and

(4) Other information that gives CCC a reasonable assurance that the biomass conversion facility will be in operation in a timely manner so that it will utilize the eligible crops, as determined by CCC.

(b) The project area description required in paragraph (a) of this section needs to specify geographic boundaries and be described in definite terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties.

(c) The project area needs to be physically located near a biomass conversion facility or facilities, as determined by CCC.

(d) Project area proposals may limit the nature and types of eligible crops to be established within a project area.

### § 1450.202 Project area selection criteria.

(a) In selecting project areas, CCC will consider:

(1) The dry tons of the eligible crops proposed to be produced in the proposed project area and the probability that such crops will be used for BCAP purposes;

(2) The dry tons of renewable biomass projected to be available from sources other than the eligible crops grown on contract acres;

(3) The anticipated economic impact in the proposed project area;

(4) The opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed project area;

(5) The participation rate by beginning or socially disadvantaged farmers or ranchers;

(6) The impact on soil, water, and related resources;

(7) The variety in biomass production approaches within a project area, including agronomic conditions, harvest and postharvest practices, and monoculture and polyculture crop mixes;

(8) The range of eligible crops among project areas; and

(9) Any other additional criteria, as determined by CCC.

(b) [Reserved]

### § 1450.203 Eligible persons and legal entities.

(a) In order to be eligible to enter into a BCAP contract for this subpart, a person or legal entity must be an owner, operator, or tenant of eligible land within a project area, as defined in § 1450.204 and be the person or entity with the ability to perform under the terms of the contract.

(b) [Reserved]

### § 1450.204 Eligible land.

(a) For the purposes of this subpart, eligible land must be physically and legally capable of producing an eligible crop and must be:

(1) Agricultural land; or

(2) Nonindustrial private forest land.

(b) For the purposes of this subpart, eligible land is not:

(1) Federal- or State-owned land, including land owned by local governments or municipalities;

(2) Land that is native sod;

(3) Land enrolled in the Conservation Reserve Program operated under part 1410 of this chapter;

(4) Land enrolled in the Wetlands Reserve Program operated under part 1467 of this chapter; or

(5) Land enrolled in the Grassland Reserve Program operated under part 1415 of this chapter.

### § 1450.205 Duration of contracts.

(a) Contracts under this subpart will be for a term of up to:

(1) 5 years for annual and non-woody perennial crops; and

(2) 15 years for woody perennial crops.

(b) The establishment time period may vary due to: Type of crop, agronomic conditions (for example, establishment time frame, winter hardiness), and other factors.

### § 1450.206 Obligations of participant.

(a) All participants subject to a BCAP contract must:

(1) Carry out the terms and conditions of the contract;

(2) Make available to CCC or to an institution of higher education or other entity designated by CCC, such information as CCC determines to be appropriate to promote the production of eligible crops and the development of renewable biomass conversion technology;

(3) Comply with the highly erodible land and wetland conservation requirements of part 12 of this chapter;

(4) Implement a:

(i) Conservation plan,

(ii) Forest stewardship plan, or

(iii) Equivalent plan.

(5) Implement the conservation plan, forest stewardship plan, or equivalent plan which is part of such contract, in accordance with the schedule of dates included in such conservation plan, forest stewardship plan, or equivalent plan, unless CCC determines that the participant cannot fully implement the conservation plan, forest stewardship plan, or equivalent plan for reasons beyond the producer's control and CCC and the participant agree to a modified plan.

(6) Demonstrate compliance with the conservation plan, forest stewardship plan, or equivalent plan through required self-certification subject to compliance spot checks, as determined by CCC.

(7) Establish temporary vegetative cover either within the timeframes required by the conservation plan, forest stewardship plan, or equivalent plan or as determined by the Deputy Administrator, if the eligible crops cannot be timely established; and

(8) If the participant has a share of the payment greater than zero, be jointly and severally responsible with the other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the contract and this part.

(b) Payments may cease and producers may be subject to contract termination for failure to establish eligible crops.

(c) A contract will not be terminated for failure by the participant to establish an approved cover on the land if, as determined by CCC:

(1) The failure to plant or establish such cover was due to a natural disaster such as excessive rainfall, flooding, or drought; and

(2) The participant establishes the approved cover as soon as practicable after the wet or drought conditions that prevented the establishment of such cover subside.

### § 1450.207 Conservation plan, forest stewardship plan, or equivalent plan.

(a) The producer must implement a conservation plan, forest stewardship plan, or equivalent plan that complies with CCC guidelines and is approved by the appropriate conservation district for the land to be entered in BCAP. If the conservation district declines to review the conservation plan, forest stewardship plan, or equivalent plan, or disapproves the conservation plan, forest stewardship plan, or equivalent plan, such approval may be waived by CCC.

(b) The practices and management activities included in a conservation plan, forest stewardship plan, or equivalent plan, and agreed to by the producer, must be implemented in a cost-effective manner that meets BCAP purposes as determined by CCC.

(c) If applicable, a tree planting plan must be developed and included in the conservation plan, forest stewardship plan, or equivalent plan. Such tree planting plan may allow a reasonable time to complete plantings, as determined by CCC.

(d) Each conservation plan, forest stewardship plan, or equivalent plan, and any revision of the plan, will be subject to approval by CCC.

### 1450.208 Eligible practices.

(a) Eligible practices are those practices specified in the conservation plan, forest stewardship plan, or equivalent plan that meet all standards needed to cost-effectively establish:

(1) Annual crops;

(2) Non-woody perennial crops; and

(3) Woody perennial crops.

(b) [Reserved]

### § 1450.209 Signup.

(a) Offers for contracts may be submitted on a continuous basis to CCC as determined by the Deputy Administrator.

(b) [Reserved]

### § 1450.210 Acceptability of offers.

(a) Acceptance or rejection of any contract offered will be at the sole discretion of CCC, and offers may be rejected for any reason as determined appropriate to accomplish the purposes of BCAP.

(b) An offer to enroll land in BCAP will be irrevocable for such period as is determined and announced by CCC. The producer will be liable to CCC for liquidated damages if the applicant revokes an offer during the period in which the offer is irrevocable as determined by CCC. CCC may waive payment of such liquidated damages if CCC determines that the assessment of such damages, in a particular case, is not in the best interest of CCC and BCAP.

### § 1450.211 BCAP contract.

(a) In order to enroll land in BCAP, the participant must enter into a contract with CCC.

(b) The contract is comprised of:

(1) The terms and conditions for participation in BCAP;

(2) The conservation plan, forest stewardship plan, or equivalent plan; and

(3) Any other materials or agreements determined necessary by CCC.

(c) In order to enter into a contract, the producer must submit an offer to participate as specified in § 1450.209;

(d) The contract must, within the dates established by CCC, be signed by:

(1) The producer; and

(2) The owners of the eligible land to be placed in the BCAP and other eligible participants, if applicable.

(e) The Deputy Administrator is authorized to approve contracts on behalf of CCC.

(f) CCC will honor contracts even in the event that a project area biomass conversion facility does not become fully or partially operational.

(g) Contracts may be terminated by CCC before the full term of the contract has expired if:

(1) The owner loses control of or transfers all or part of the acreage

under contract and the new owner does not wish to continue the contract;

(2) The participant voluntarily requests in writing to terminate the contract and obtains the approval of CCC according to terms and conditions as determined by CCC;

(3) The participant is not in compliance with the terms and conditions of the contract;

(4) The BCAP practice fails or is not established after a certain time period, as determined CCC, and the cost of restoring or establishing the practice outweighs the benefits received from the restoration or establishment;

(5) The contract was approved based on erroneous eligibility determinations; or

(6) CCC determines that such a termination is needed in the public interest.

(h) Except as allowed and approved by CCC where the new owner of land enrolled in BCAP is a Federal agency that agrees to abide by the terms and conditions of the terminated contract, the participant in a contract that has been terminated must refund all or part of the payments made with respect to the contract plus interest, as determined by CCC, and must pay liquidated damages as provided for in the contract and this part. CCC may permit the amount(s) to be repaid to be reduced to the extent that such a reduction will not impair the purposes of BCAP. Further, a refund of all payments need not be required from a participant who is otherwise in full compliance with the contract when the land is purchased by or for the United States, as determined appropriate by CCC.

### § 1450.212 Establishment payments.

(a) Establishment payments will be made available upon a determination by CCC that an eligible practice, or an identifiable portion of a practice, has been established in compliance with the appropriate standards and specifications.

(b) Except as otherwise provided for in this part, such payments will be made only for the cost-effective establishment or installation of an eligible practice, as determined by CCC.

(c) Except as provided in paragraph (d) of this section, such payments will not be made to the same owner or operator on the same acreage for any eligible practices that have been previously established, or for which such owner or operator has received establishment assistance from any Federal agency.

(d) Establishment payments may be authorized for the replacement or restoration of practices on land for which assistance has been previously allowed under BCAP, only if the failure of the original practice was due to reasons beyond the control of the participant, as agreed to by CCC.

(e) In addition, CCC may make partial payments when the participant completes identifiable components of the contract. CCC may make supplemental establishment payments, if necessary.

### § 1450.213 Levels and rates for establishment payments.

(a) CCC will pay not more than 75 percent of the actual or average cost (whichever is lower) of establishing non-woody perennial crops and woody perennial crops specified in the conservation plan, forest stewardship plan, or equivalent plan.

(b) The average cost of performing a practice may be determined by CCC based on recommendations from the State Technical Committee. Such cost may be the average cost in a State, a county, or a part of a State or county, as determined by CCC. This means that the calculated 75 percent of the average cost may represent less than 75 percent of the actual cost for an individual participant.

(c) Except as otherwise provided for in this part, a participant may receive, in addition to any payment under this part, establishment assistance, rental payments, or tax benefits from a State or a private organization in return for enrolling lands in BCAP without a commensurate reduction in BCAP establishment payments.

### § 1450.214 Annual payments.

(a) Annual payments will be made in such amount and in accordance with such time schedule as may be agreed upon and specified in the BCAP contract.

(b) Based on the regulations in § 1410.42 of this chapter and as determined by CCC, annual payments include a payment based on all or a percentage of:

(1) A weighted average soil rental rate for cropland;

(2) The applicable marginal pastureland rental rate for all other land except for nonindustrial private forest land;

(3) For forest land, the average county rental rate for cropland as adjusted for forest land productivity for nonindustrial private forest land; and

(4) Any incentive payment as determined by CCC.

(c) The annual payment will be divided among the participants on a single contract as agreed to in such contract, as determined by CCC.

(d) A participant that has an established eligible crop and is therefore not eligible for establishment payments under § 1450.212 may be eligible for annual payments under the provisions of this section.

(e) In the case of a contract succession, annual payments will be divided between the predecessor and the successor participants as agreed to among the participants and approved by CCC. If there is no agreement among the participants, annual payments will be divided in such manner deemed appropriate by the Deputy Administrator and such distribution may be prorated based on the actual days of ownership of the property by each party.

(f) Annual payments will be reduced, as determined by CCC:

(1) By a percentage of the sum of the sale price and payments under subpart B of this part for the crop collected or harvested from the contract acreage as follows:

(i) By 1 percent if the eligible crop is delivered to a biomass conversion facility for conversion to cellulosic biofuels as defined by 40 CFR 80.1401;

(ii) By 10 percent if the eligible crop is delivered to a biomass conversion facility for conversion to advanced biofuels;

(iii) By 25 percent if the eligible crop is delivered to a biomass conversion facility for conversion to heat, power, or biobased products;

(iv) By 100 percent if the eligible crop is used for a purpose other than conversion to heat, power, biobased products, or advanced biofuels;

(2) If the producer violates a term of the contract; or

(3) In other circumstances deemed necessary or appropriate to carry out BCAP.

**§ 1450.215 Transfer of land.**

(a)(1) If a new owner or operator purchases or obtains the right and interest in, or right to occupancy of, land subject to a BCAP contract, such new owner or operator, upon the approval of CCC, may become a participant to a new BCAP contract with CCC for the transferred land.

(2) For the transferred land, if the new owner or operator becomes a successor to the existing BCAP contract, the new owner or operator will assume all obligations of the BCAP contract of the previous participant.

(3) If the new owner or operator is approved as a successor to a BCAP contract with CCC, then, except as otherwise determined by the Deputy Administrator:

(i) Establishment payments will be made to the past or present participant who established the practice; and

(ii) Annual payments to be paid during the fiscal year when the land was transferred will be divided between the new participant and the previous participant in the manner specified in § 1450.214(c).

(b) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a BCAP contract and the new owner or operator does not become a successor to such contract within 60 days of such transfer, or such other time as CCC determines to be appropriate, such contract will be terminated with respect to the affected portion of such land, and the original participant:

(1) Forfeits all rights to any future payments for that acreage;

(2) Must refund all previous payments received under the contract by the participant or prior participants, plus interest, except as otherwise specified by CCC. The provisions of § 1450.211(g) will apply.

(c) Federal agencies acquiring property, by foreclosure or otherwise, that contains BCAP contract acreage cannot be a party to the contract by succession. However, through an addendum to the contract, if the current operator of the property is one of the contract participants, the contract may remain in effect and, as permitted by CCC, such operator may continue to receive payments under such contract if CCC determines that such allowance is in the public interest and:

(1) The property is maintained in accordance with the terms of the contract;

(2) Such operator continues to be the operator of the property; and

(3) Ownership of the property remains with such Federal agency.

# PART 1455—VOLUNTARY PUBLIC ACCESS AND HABITAT INCENTIVE PROGRAM

Sec.

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AUTHORITY: 15 U.S.C. 714b and 714c; 16 U.S.C. 3839.

SOURCE: 75 FR 39140, July 8, 2010, unless otherwise noted.

## § 1455.1 Purpose and administration.

(a) The purpose of this part is to specify requirements and definitions for the Voluntary Public Access and Habitat Incentive Program (VPA–HIP).

(b) VPA–HIP provides, within funding limits, grants to State and tribal governments to encourage owners and operators of privately-held farm, ranch, and forest land to voluntarily make that land available for access by the public for wildlife-dependent recreation, including hunting and fishing under programs administered by State and tribal governments. VPA–HIP is not an entitlement program and no grant will be made unless the application is acceptable to the Commodity Credit Corporation (CCC). CCC may reject a application for any reason deemed sufficient by CCC.

(c) The regulations in this part are administered under the general supervision and direction of the Executive Vice President, CCC, or a designee, or the Deputy Administrator, Farm Programs (Deputy Administrator), Farm Service Agency (FSA).

## § 1455.2 Definitions.

(a) The definitions in part 718 of this chapter apply to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions apply to this part:

*Appropriate wildlife habitat* means habitat that is suitable or proper, as determined by the applicable State or tribal government, to support fish and wildlife populations in the area.

*Farm land* means the land that meets definition of "farmland" in § 718.2 of this title.

*Forest land* means land at least 120 feet wide and 1 acre in size with at least 10 percent cover (or equivalent stocking) by live trees of any size, including land that formerly had such tree cover and that will be naturally or artificially regenerated. Forest land includes transition zones, such as areas between forest and nonforest lands that have at least 10 percent cover (or equivalent stocking) with live trees and forest areas adjacent to urban and built-up lands. Roadside, streamside, and shelterbelt strips of trees must have a crown width of at least 120 feet and continuous length of at least 363 feet to qualify as forest land. Unimproved roads and trails, streams, and clearings in forest areas are classified as forest if they are less than 120 feet wide or an acre in size. Tree-covered areas in agricultural production settings, such as fruit orchards, or tree-covered areas in urban settings, such as city parks, are not considered forest land.

*Privately-held land* means farm, ranch, or forest land that is owned or operated by an individual or entity that is not an entity of any government unit or Tribe.

*Ranch land* means land that meets the definition of "farmland."

*State* or *State government* means any State or local government, including State, city, town, or county government.

*Tribal government* means any Federally-recognized Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Wildlife-dependent recreation* means a land use involving hunting, fishing, wildlife-observation, photography, environmental education and interpretation, or other activities as determined by CCC.

### § 1455.10 Eligible grant applicants.

(a) A State or Tribal government may apply for a VPA–HIP grant.

(b) Any applications received by an individual or entity that is not a State or tribal government will not be considered.

### § 1455.11 Application procedure.

(a) *Request for applications (RFA).* CCC will issue periodic RFAs for VPA–HIP on www.grants.gov, subject to available funding. Unless otherwise specified in the applicable RFA, applicants must file an original and one hard copy of the required forms and an application.

(b) *Single application.* A State or tribal government must include all proposed activity under a single application per RFA review period. Multiple applications from an applicant during a single RFA period will not be considered. The applicant is the individual State or Tribe; any application from any unit of the State or tribal government must be coordinated for a single submission of one application from the State or Tribe.

(c) *Incomplete applications.* Incomplete applications will not be considered for funding. However, incomplete applications may be returned, and may be resubmitted, if time permits.

(d) *Providing data.* Data furnished by grant applicants will be used to determine eligibility for the VPA–HIP benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

(e) *Required forms.* The following forms must be completed, signed, and submitted as part of the application; other forms may be required, as specified in the applicable RFA:

(1) Application for Federal Assistance;

(2) Budget Information—Non-Construction Programs; and

(3) Assurances—Non-Construction Programs.

(f) *Application.* Each application must contain the following elements; additional required elements may be specified in the applicable RFA:

(1) Title page;

(2) Table of contents;

(3) Executive summary, which includes;

(i) *Activities.* Provide a summary of the application that briefly describes activities proposed to be funded under the grant.

(ii) *Objectives, funding, performance, and other resources.* Include objectives and tasks to be accomplished, the amount of funding requested, how the work will be performed, whether organizational staff, consultants or contractors will be used, and whether other resources will be used;

(4) Eligibility certification that certifies that the applicant is a State or tribal government and the individual submitting the application is acting in a representative capacity on behalf of the State or tribal government;

(5) Application narrative that must include, but is not limited to, the following:

(i) *Project title.* The title of the proposed project must be brief (not to exceed 75 characters) yet describe the essentials of the project.

(ii) *Information sheet.* A separate one-page information sheet listing each of the evaluation criteria referenced in the RFA, followed by the page numbers of all relevant material and documentation contained in the application that address or support the criteria.

(iii) *Objectives of the project*. This section must include the following:

(A) A description of how the VPA–HIP funding will be used to encourage public access to private farm, ranch, and forest land for hunting, fishing, and other recreational purposes;

(B) A description of the methods that will be used to achieve the provisions of paragraph (f)(5)(iii)(A) of this section;

(C) A description of how and to what extent the proposed program will meet with widespread acceptance among landowners;

(D) A detailed description of how and to what extent the land enrolled will have appropriate wildlife habitat and how program funds may be used to improve those habitats;

(E) A detailed description of how and to what extent public hunting and other recreational access will be increased on land enrolled under a Conservation Reserve Enhancement Program as specified under §1410.50 of this chapter, or if Conservation Reserve Enhancement Program land is not available, specify that there is no impact;

(F) A detailed description of how any additional Federal, State, tribal government, or private resources will be used to carry out grant activities; and

(G) A detailed description of how the public will be made aware of the location of the land enrolled.

(iv) *Work plan*. Applications must discuss the specific tasks to be completed using grant and matching funds. The work plan should show how customers will be identified, key personnel to be involved with administration of the grant, and the evaluation methods to be used to determine the success of specific tasks and overall objectives of a VPA–HIP grant. The budget must present a breakdown of the estimated costs associated with VPA–HIP activities and allocate these costs to each of the tasks to be undertaken. Additional funds from Federal, State, tribal government, or private resources as well as grant funds and resources provided in kind must be accounted for in the budget.

(v) *Performance evaluation criteria*. Applications should discuss how the State or tribal government will evaluate whether the program for which the grant is being sought will meet the stated goals for the State or tribal program, including but not limited to landowner and recreationist participation, outreach, and cost-effectiveness.

(vii) *Other similar efforts*. The applicant must describe its previous accomplishments and outcomes in public access activities, if any.

(viii) *Qualifications of personnel*. Applicants must describe the qualifications of personnel expected to perform key tasks, and whether these personnel are to be full- or part-time employees or contract personnel.

### §1455.20 Criteria for grant selection.

(a) Incomplete or non-responsive applications will not be evaluated. Applicants may revise their applications and re-submit them prior to the published deadline if there is sufficient time to do so.

(b) After all applications have been evaluated using the evaluation criteria and scored in accordance with the point allocation specified in the RFA, a list of all applications in ranked order, together with funding level recommendations, will be submitted to the Deputy Administrator, FSA.

(c) Unless supplemented in a RFA, applications for grants for VPA–HIP will be evaluated using the criteria listed in this section. The distribution of points to be awarded per criterion will be identified in the RFA.

(1) *Benefits*. The application will be evaluated to determine whether and to what extent the project's anticipated outcomes promote improvement of public access for wildlife-dependent recreation and intended environmental benefits.

(2) *Project description and feasibility*. The application will be evaluated on the extent and quality to which the applicant demonstrates a reasonable approach to the project, sufficient resources to complete the project, and a capability to complete the project in a timely manner.

(3) *Widespread acceptance and maximizing participation of landowners*. The application will be evaluated based on the applicant's plan for encouraging the participation of owners and operators of privately-held farm, ranch, and forest land, and for engaging the public

users. Additionally, the extent to which the applicant has identified and established relationships with the partners necessary to achieve the project's goals will be evaluated.

(4) *Appropriate wildlife habitat*. The application will be evaluated to determine whether the applicant demonstrates expertise in providing technical assistance with respect to establishing and maintaining appropriate wildlife habitat on public access land.

(5) *Strengthening wildlife habitat for lands under the Conservation Reserve Enhancement Program (CREP)*. The application will be evaluated to determine whether the project proposes to provide incentives to increase public hunting and other recreational access on land enrolled under CREP as authorized by § 1410.50.

(6) *Additional private, Federal, State, or tribal government resources*. The application will be evaluated to determine the extent to which the support letters provided by other organizations involved with the project demonstrate specific and quantified commitments to the project. Applications that demonstrate additional resources will receive more points, all else being equal, than those that do not.

(7) *Making available the location of enrolled land*. The application will be evaluated to determine how the project proposes to make available to the public the location of the land enrolled.

(8) *Performance evaluation criteria*. The application will be evaluated to determine whether the applicant has included outcome-based performance measures.

(9) *Administrative capabilities*. The application will be evaluated to determine whether the grant applicant has a track record of administering the project or, in the absence of a track record, the capacity to administer the project. Applicants that have demonstrated capable financial systems and audit controls, personnel and program administration performance measures, and clear rules of governance will receive more points than those not evidencing this capacity.

(10) *Delivery*. The application will be evaluated to determine whether the applicant has a track record in implementing public access or similar programs or, in the absence of an actual track record, the capacity to implement a public access program. The applicant's potential for delivering an effective public access program and the expected effects of that program will also be assessed.

(11) *Work plan and budget*. The work plan will be reviewed for detailed actions and an accompanying timetable for implementing the components of the application. Clear, logical, realistic, and efficient plans will result in a higher score. Budgets will be reviewed for completeness and whether and to what extent additional resources were committed by Federal, State, or tribal government, and private resources.

(12) *Qualifications of those performing the tasks*. The application will be reviewed to determine if key personnel have appropriate knowledge, skills, and abilities with respect to wildlife-dependent recreation including hunting or fishing on privately-held farm, ranch, and forest land, funds control, grants management, performance monitoring and evaluation, or other activities relevant to the success of the proposed public access program.

### § 1455.21 Additional responsibilities of grantee.

(a) Before receiving grant funding, the grantee will be required to sign an agreement similar in form and substance to the form of agreement published within or as an appendix to the RFA. The agreement will require the grantee to commit to do all of the following:

(1) Take all practicable steps to develop continuing sources of financial support from other Federal, State, tribal government, or private resources;

(2) Make arrangements for the monitoring and evaluation of the activities related to implementation of the public access program of the owners or operators that enroll farm, ranch, and forest land; and

(3) Provide an accounting for the money received by the grantee under this subpart.

(b) Grantees will be required to monitor funds or services as specified in paragraph (c) of this section, and must

agree to that monitoring before grant funds are awarded.

(c) The grantee must certify that the grant funds and services will not be used for ineligible purposes. Specifically, grant funds and services may not be used to:

(1) Duplicate or replace current services; however, grant funds may be used to expand the level of effort or service beyond what is currently being provided;

(2) Pay costs of preparing the application for funding under VPA–HIP;

(3) Pay costs of the project incurred prior to the date of grant approval;

(4) Fund political activities;

(5) Pay any judgment or debt owed to the United States;

(6) Pay for the design, repair, rehabilitation, acquisition, or construction of a building or facility (including a processing facility);

(7) Purchase, rent or pay for the installation of fixed equipment, other than property identification signs;

(8) Pay for the repair of privately owned vehicles; or

(9) Pay for research and development not directly related to quantifying the performance of VPA–HIP lands enrolled with funding from VPA–HIP.

(d) Grant agreements under this part will be for a term of up to 3 years.

(e) Grantees that are States will have the grant amount reduced by 25 percent if opening dates for migratory bird hunting in the State are not consistent for residents and non-residents. This paragraph does not apply to grantees that are Tribal governments.

(f) Failure of the grantee to execute a grant agreement in a timely fashion, as determined by the CCC, will be construed to be a withdrawal from VPA–HIP.

### § 1455.30 Reporting requirements.

(a) Grantees must provide the following to FSA:

(1) A "Financial Status Report" listing expenditures according to agreed upon budget categories, on a periodic basis as specified in the grant document.

(2) Annual performance reports that compare accomplishments to the objectives stated in the application, and that also:

(i) Identify all tasks completed to date and provide documentation supporting the reported results;

(ii) If the original schedule provided in the work plan is not being met, the report must discuss the problems or delays that may affect completion of the project;

(iii) List objectives for the next reporting period; and

(iv) Discuss compliance with any special conditions on the use of award funds. Reports are due as provided in paragraph (a)(1) of this section.

(3) Final project performance reports, inclusive of supporting documentation. The final performance report is due within 90 days of the completion of the project.

(b) All reports submitted to the Agency will be held in confidence to the extent permitted by law.

### § 1455.31 Miscellaneous.

(a) *Inspection*. Grantees must permit periodic inspection of the program operations by a CCC representative, as determined by CCC.

(b) *Performance evaluation*. CCC will incorporate performance criteria in grant award documentation and will regularly evaluate the progress and performance of grant awardees.

(c) *Suspend, terminate, or require refund*. CCC may elect to suspend or terminate a grant in all or part, or funding of a particular workplan activity, and require refund of part or all of the grant, with interest, where CCC has determined:

(1) That the grantee or subrecipient of grant funds has demonstrated insufficient progress in complying with the terms of the grant agreement;

(2) The opening dates for migratory bird hunting in a State have been changed so as to be not consistent for residents and non-residents during the term of the grant;

(3) There is reasonable evidence that shows joint funding has not been or will not be forthcoming on a timely basis; or

(4) Such other cause as CCC identifies in writing to the grantee based on reasonable evidence (including but not limited to the use of Federal grant funds for ineligible purposes).

(d) *Advance or reimbursement*. Grantees must use the request for advance or reimbursement form, which will be provided by CCC, to request advances or reimbursements;

(e) *Appeals*. Appeals will be handled according to 7 CFR parts 11 and 780.

(f) *Environmental review*. All grants made under this subpart are subject to the requirements of 7 CFR part 799.

Applicants for grant funds must consider and document within their plans the important environmental factors within the planning area and the potential environmental impacts of the plan on the planning area, as well as the alternative planning strategies that were reviewed.

(g) *Civil rights*. CCC prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or a part of an individual's income is derived from any public assistance program. VPA–HIP will also be administered in accordance with all other applicable civil rights law.

(h) *Other USDA regulations*. The grant program under this part is subject to the provisions of the following regulations, as applicable:

(1) 7 CFR part 3015, Uniform Federal Assistance Regulations;

(2) 7 CFR part 3016, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments;

(3) 7 CFR part 3017, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants);

(4) 7 CFR part 3018, New Restrictions on Lobbying;

(5) 7 CFR part 3019, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations; and

(6) 7 CFR part 3052, Audits of States, Local Governments and Non-profit Organizations.

(i) *Audit*. Grantees must comply with the audit requirements of 7 CFR part 3052. The audit requirements apply to the years in which grant funds are received and years in which work is accomplished using grant funds.

(j) *Change in scope or objectives*. The Grantee must obtain prior approval from FSA for any change to the scope or objectives of the approved project. Failure to obtain prior approval of changes to the scope of work or budget may result in suspension, termination, or recovery of grant funds.

(k) *Exceptions*. CCC may, in individual cases, make an exception to any requirement or provision of this part, provided that any such exception is not inconsistent with any applicable law or opinion of the Comptroller General, and provided further, that CCC determines that the application of the requirement or provision would adversely affect the Federal Government's interest.

(l) *Enforcement and refunds; liens and schemes or devices*. Grantees must comply with all conditions of the grant and any monies not spent or improperly spent must be returned immediately with interest to run at the normal rate for CCC obligations. Interest charges will be computed from the date of the CCC disbursement. Grantees must insure that parties that receive funds from the grantee comply with the grantee's application and return funds made available by the grantee where there is no such compliance. Any scheme or device to avoid any limits of this part will be considered to be a program violation with respect to any grant to which that scheme or device is related. Grant funds will be made available to the States or Tribes that are grantees under this part without regard to the claims of others, unless CCC determines otherwise.

# PART 1463—2005–2014 TOBACCO TRANSITION PROGRAM

## Subpart A—Tobacco Transition Assessments

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### Subpart C—Miscellaneous Provisions

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AUTHORITY: 7 U.S.C. 518–519a, 714b, and 714c.

SOURCE: 70 FR 7011, Feb. 10, 2005, unless otherwise noted.

## Subpart A—Tobacco Transition Assessments

### § 1463.1 General.

The Commodity Credit Corporation (CCC) will levy assessments from January 1, 2005 through September 30, 2014 on certain domestic manufacturers and importers of tobacco products as provided for in this subpart in order to fund the issuance of payments made under subpart B of this part and to fund other activities authorized by Title VI of the American Jobs Creation Act of 2004. The total amount of assessments that may be collected under this part shall not exceed $10.140 billion.

### § 1463.2 Administration.

The provisions of this subpart will be administered under the general supervision of the Executive Vice President, CCC.

### § 1463.3 Definitions.

The definitions in this section shall apply for all purposes of administering the provisions of this subpart:

*Act* means Title VI of the America Jobs Creation Act of 2004 (Public Law 108–357).

*Adjusted market share* means the market share of a manufacturer of tobacco products or an importer of tobacco products adjusted to reflect such entity's share of a class of tobacco during the immediately preceding calendar year quarter. With respect to the 39th and 40th quarterly payments due on September 30, 2014, the adjusted market share will be the entity's share of a class of tobacco during the April 1–June 30, 2014 quarter.

*Base period* means the period July 1 through June 30 immediately preceding the beginning of a fiscal year.

*CCC's point of contact* means, for items physically sent to CCC, "Fibers, Peanuts, and Tobacco Analysis Group, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture (USDA), STOP 0515, Room 3720–S, 1400 Independence Avenue, SW., Washington, DC 20250–0515" unless otherwise specified by CCC through actual notice.

*Calendar year* means the period January 1 through December 31.

*Class of tobacco* means each of the following types of tobacco and tobacco products for which taxes are required to be paid for the removal of such into domestic commerce: cigarettes; cigars; snuff; roll-your-own tobacco; chewing tobacco; and pipe tobacco.

*Domestic manufacturer of tobacco products* means an entity that is required to obtain a permit from the Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury with respect to the production of tobacco products under title 27 of the Code of Federal Regulations.

*Fiscal year* means the period October 1 through September 30.

*Gross domestic volume* means the volume of tobacco products removed, as defined by section 5702 of the Revenue Code, and not exempt from tax under chapter 52 of such code at the time of

their removal under that chapter or the Harmonized Tariff Schedule of the United States.

*Importer of tobacco products* means an entity that is required to obtain a permit from the Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury with respect to the importation of tobacco products under title 27 of the Code of Federal Regulations.

*Market share* means the share of each domestic manufacturer and importer of a class of tobacco product, to the fourth decimal place, of the total volume of domestic sales of the class of tobacco product in the base period. Such sales shall be determined by CCC by using the total volume of such class of tobacco product that is removed into domestic commerce in the base period.

*National assessment* means the total amount of funding that CCC has determined to be necessary to collect in a year from domestic manufacturer and importer of tobacco products in order to reimburse CCC for expenditures that it will incur in the year for expenses incurred under sections 622 and 623 of the Act in making payments under subpart B of this part; losses sustained by CCC in the disposition of tobacco acquired under price support loan agreements as provided in section 641(c) of the Act; and costs incurred by CCC in the utilization of financial institutions in administering sections 622 and 623 of the Act.

*Revenue Code* means the Internal Revenue Code of 1986.

*Tobacco Trust Fund* means an account established for deposit of assessments collected under this subpart, plus interest that accrues on such assessments, to be used to implement this subpart.

[70 FR 7011, Feb. 10, 2005, as amended at 70 FR 17158, Apr. 4, 2005; 73 FR 23066, Apr. 29, 2008]

### § 1463.4 National assessment.

Annually, CCC will make a determination of a national assessment in as far in advance of when the first assessment is due as CCC determines to be practicable. Based upon the amount of assessments received and expenditures incurred in a calendar year quarter, CCC may adjust the national assessment for one or more classes of tobacco established for a particular year with respect to succeeding calendar year quarters.

### § 1463.5 Division of national assessment among classes of tobacco.

(a) Except as provided in paragraph (b) of this section, the national assessment will be divided by CCC among each class of tobacco based upon CCC's determination of each class's share of the excise taxes paid using for all years the tax rates that applied in fiscal year 2005. The value of the excise taxes paid for each class of tobacco will be based upon the reports filed by domestic manufacturers and importers of tobacco products with the Department of the Treasury and the Department of Homeland Security:

(b) For fiscal year 2005, the national assessment will be divided as follows:

(1) Cigarettes, 96.331 percent;

(2) Cigars, 2.783 percent;

(3) Snuff, 0.539 percent;

(4) Roll-your-own tobacco products, 0.171 percent;

(5) Chewing tobacco, 0.111 percent; and

(6) Pipe tobacco, 0.066 percent.

(c) For fiscal years 2006 through 2014, the division of the national assessment for each class of tobacco will be adjusted annually.

[70 FR 7011, Feb. 10, 2005, as amended at 75 FR 76923, Dec. 10, 2010]

### § 1463.6 Determination of persons liable for payment of assessments.

(a) All domestic manufacturers and importers of tobacco products are required to pay to CCC their proportionate share of a calendar year's national assessment. Such entities are those that import or manufacture tobacco products in a calendar year and are required to report to the United States Department of the Treasury or to the Department of Homeland Security the removal of tobacco products into domestic commerce under the Revenue Code or are required to pay taxes under chapter 52 of such code.

(b)(1) Such entities must provide to CCC's point of contact:

(i) Entity name; mailing address of the entity's principal place of business; an office or individual that CCC may

contact for further information; an e-mail address and postal address at which they wish to receive notifications required by the Act to be made to them by CCC; and

(ii) On a monthly basis for each class of tobacco, the total amount of tobacco products, summarized by employer identification number or such other method as may be prescribed by CCC, that are required to be reported to the United States Department of the Treasury or to the Department of Homeland Security in each month beginning October 1, 2004, and ending September 30, 2014.

(2) The information required to be submitted to CCC under paragraph (b)(1) of this section must be submitted by:

(i) With respect to fiscal year 2005 activities occurring prior to February 10, 2005, by February 25, 2005; and

(ii) With respect to all other activities, on the same date the information was required to be submitted to the United States Department of the Treasury or to the Department of Homeland Security.

### § 1463.7 Division of class assessment to individual entities.

(a) In order to determine the assessment owed by an entity, that portion of the national assessment assigned to each class of tobacco will be further divided at the entity level. The amount of the assessment for each class of tobacco to be paid by each domestic manufacturer and importer of tobacco products will be determined by multiplying:

(1) With respect to each class of tobacco, the adjusted market share of such manufacturer or importer; by

(2) The total amount of the assessment for that class of tobacco for the calendar year quarter.

(b) For purposes of determining the volume of domestic sales of each class of tobacco products and for each entity, such sales shall be based upon the reports filed by domestic manufacturers and importers of tobacco with the Department of Treasury and the Department of Homeland Security and shall correspond to the quantity of the tobacco product that is removed into domestic commerce by each such entity:

(1) For cigarettes and cigars, on the number of cigarettes and cigars reported on such reports;

(2) For all other classes of tobacco, on the number of pounds of those products.

(c) In determining the adjusted market share of each manufacturer or importer of a class of tobacco products, except for cigars, CCC will determine to the fourth decimal place an entity's share of excise taxes paid of that class of tobacco product during the immediately prior calendar year quarter. With respect to cigars, CCC will determine the adjusted market share for each manufacturer or importer of a class of tobacco products based on the number of such products removed into domestic commerce.

(d) The amount of a quarterly assessment owed by a domestic manufacturer or importer of tobacco products that must be remitted to CCC by the end of a calendar year quarter is based upon the application of the manufacturer's or importer's adjusted market share to the amount of the national assessment that has been allocated to one of the six specified tobacco product sectors under § 1463.5. As provided in § 1463.3, this adjusted market share is determined by the actions of such manufacturer or importer in a prior calendar year quarter. Accordingly, this amount must be remitted to CCC whether or not the manufacturer or importer is engaged in the removal of tobacco or tobacco products into commerce in the calendar year quarter in which it receives notification of the amount of assessment owed to CCC.

[70 FR 7011, Feb. 10, 2005, as amended at 70 FR 17158, Apr. 4, 2005]

### § 1463.8 Notification of assessments.

(a) Once CCC has determined a national assessment, CCC will collect that amount on a quarterly basis from all domestic manufacturers and importers of tobacco products subject to § 1463.5.

(b) 30 calendar days prior to the end of each calendar year quarter domestic manufacturers and importers of tobacco products will receive notification of:

(1) The national assessment;

(2) The percentage of the national assessment that has been allocated to each class of tobacco product and the total amount of assessments due from each such class;

(3) Any adjustments that have been from the prior fiscal year with respect to the allocation of the gross domestic volume determined for use in a fiscal year among the classes of tobacco products;

(4) An adjustment in the national assessment if CCC determines that the assessments imposed will result in insufficient funds due to changes in the amount of expenditures that CCC has determined will be made in a calendar year;

(5) The volume of gross sales of each class of tobacco that CCC has allocated to the domestic manufacturer or importer of tobacco products for the purposes of determining such entity's adjusted market share. The volume of gross sales of each class of tobacco allocated to such an entity shall correspond to the quantity of the tobacco product that is removed into domestic commerce by each such entity;

(6) The total volume of gross sales of each class of tobacco that CCC has allocated to a class of tobacco, within the gross domestic volume determined for use in a fiscal year, that was used for the purpose of determining a tobacco manufacturer's or tobacco importer's adjusted market share. The total volume of gross sales of each such class of tobacco shall correspond to the total quantity of the tobacco product that is removed into domestic commerce.

(7) For that quarter, the adjusted market share of the domestic manufacturer or importer of tobacco products;

(8) Beginning with the 2nd quarter of 2008, or as soon as practicable thereafter, the applied market share for that quarter of each other manufacturer and importer, for the applicable class of tobacco product of those manufacturers and importers that have provided such information to CCC in accordance with the provisions of § 1463.6, as determined by the Deputy Administrator, Farm Service Agency.

(9) The manner in which assessments are to be remitted to CCC; and

(10) Identification of those Department of the Treasury and Department of Homeland Security forms filed by the domestic manufacturer or importer of tobacco products that are used to calculate assessments.

[70 FR 7011, Feb. 10, 2005, as amended at 70 FR 17158, Apr. 4, 2005; 73 FR 23066, Apr. 29, 2008]

### § 1463.9 Payment of assessments.

(a) Assessments under this subpart are imposed for the expenditures CCC has determined it will incur in the 2005 through 2014 calendar years. Except as provided in paragraph (c) of this section, payment of such assessments are due to CCC no later than the end of each calendar year quarter. If prior to 30 calendar days before the end of a calendar year quarter CCC has not notified an entity of the amount that is required to be remitted in that quarter, no interest will be assessed by CCC under paragraph (d) of this section until 30 calendar days have elapsed from the date CCC provided notification of the amount owed.

(b) Payments due under this subpart must be submitted to CCC by electronic fund transfer unless prior written approval has been obtained from CCC.

(c) The final two calendar year quarterly payments due to CCC under this part shall be due to CCC on September 30, 2014.

(d) Notwithstanding any other provision of this chapter, if CCC has not received payment of assessments determined to be owed at the end of a calendar year quarter, CCC will assess interest on such unpaid amount beginning on the first day of the calendar year quarter immediately following the end of such prior quarter. Such interest will be at the rate CCC assesses on delinquent debts in accordance with part 1403 of this title.

(e) With respect to funds placed in escrow that are refunded to the domestic manufacturer or importer of tobacco products due to the resolution of an appeal, interest will be paid on such amount from the date of receipt by CCC until the date of the refund. Such interest rate will be at the rate charged by the U.S. Treasury for CCC's

borrowing that is in effect on the date of receipt by CCC of such funds.

### § 1463.10 Civil penalties and criminal penalties.

(a) Any person who knowingly fails to provide information required to be filed under this subpart, or provides false information under this subpart, may be subject to the penalties prescribed in 15 U.S.C. 714m, 18 U.S.C. 1003, and such other civil and criminal statutes as the United States determines to be appropriate.

(b) In addition to an action that may be taken under paragraph (a) of this section, with respect to any person who knowingly fails to provide information required to be filed under this subpart, or that provides false information under this subpart, a person may be subject to assessment of a civil penalty by CCC. Such civil penalty will be imposed by CCC taking into account the severity of the action; whether the action is of a repetitive nature; and the disruption the action has caused with respect to other parties subject to this subpart. Any such civil penalty will not exceed two percent of the value of the kind of tobacco products manufactured or imported by such entity in the fiscal year in which the violation occurred.

### § 1463.11 Appeals and judicial review.

(a) An entity may appeal any adverse determination made under this subpart, including with respect to the amount of the assessment, by submitting a written statement that sets forth the basis of the dispute by submitting such a request to the Executive Vice President, CCC, at 1400 Independence Avenue, SW., Room 4080–S, Washington DC 20250–0514, within 30 business days of the date of receipt of the notification by CCC of its determination.

(b) The Executive Vice President shall assign a person to act as the hearing officer on behalf of CCC. The duty of the hearing officer will be to develop an administrative record that will provide the Executive Vice President, or a designee, with sufficient information to render a final determination on the matter in dispute. The hearing to be conducted by the hearing officer will be an informal hearing at which the appellant may present oral and written evidence in support of the appellant's position. A copy of the rules of conduct that will be applicable to the proceeding will be provided to the appellant upon receipt of the appeal by CCC.

(c) With respect to any appeal filed under this section regarding an assessment imposed on a domestic manufacturer or importer of tobacco products, the rules of conduct will provide that within 30 calendar days of receiving the final submission of material by the appellant, CCC will render a final administrative decision. In the event CCC has not rendered a decision by such date, all administrative remedies available to the appellant shall be deemed to be exhausted.

(d) Any domestic manufacturer or importer of tobacco products aggrieved by a determination made by CCC under this subpart may seek review of the determination upon the exhaustion of the administrative remedies provided by this part in the United States District Court for the District of Columbia, or for the district in which such importer or manufacturer has its principal place of business.

## Subpart B—Tobacco Transition Payment Program

SOURCE: 70 FR 17159, Apr. 4, 2005, unless otherwise noted.

### § 1463.100 General.

(a) The Commodity Credit Corporation (CCC) will make payments to tobacco quota holders and tobacco producers as provided in this subpart with respect to farms for which a tobacco marketing quota had been established by the Farm Service Agency (FSA). To be eligible for a payment, such person must meet all provisions of this part; submit to CCC an application provided by CCC to enter into a contract for payment; and submit other information as may be required by CCC. Payments will be made by CCC annually over a 10-year period.

(b) As provided in this part, a tobacco quota holder or tobacco producer who is not the subject of an outstanding claim established by the United States may, under the terms and conditions

established by CCC and with the prior approval of CCC, enter into a successor in interest contract with another person or entity. Upon approval by CCC, all rights and obligations of the quota holder or producer, with respect to payments made by CCC under this part, will be terminated and transferred to the successor party.

(c) As provided in this part, a tobacco quota holder or tobacco producer who may, under the terms and conditions established by CCC, and with the prior approval of CCC, may assign the right to receive a payment to be made under this part by executing an assignment as provided in § 1463.111.

(d) Notwithstanding any other provision of this chapter, the provisions of 7 CFR parts 723 and 1464 shall not be applicable to the 2005 and subsequent crops and the 2005 and subsequent marketing years.

**§ 1463.101 Administration.**

(a) The program will be administered under the general supervision of the Executive Vice President, CCC, and shall be carried out by FSA State and county committees (State and county committees).

(b) State and county committees and their representatives and employees have no authority to modify or waive provisions of this subpart.

(c) The State committee shall take any action required by the regulations of this subpart that has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee that is not in accordance with this subpart; or

(2) Require a county committee to withhold taking any action that is not in accordance with this subpart.

(d) No provision or delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, or designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee. Further, the Executive Vice-President, CCC, or designee, may modify any deadline in this subpart to the extent doing so is determined to be appropriate and consistent with the purposes of the program.

(e) A representative of CCC may execute a contract for a transition payment only under the terms and conditions of this part, and as determined and announced by the Executive Vice President, CCC. Any contract that is not executed in accordance with such terms and conditions, including any purported execution prior to the date authorized by the Executive Vice President, CCC, is null and void and shall not be considered to be a contract between CCC and any person executing the contract.

**§ 1463.102 Definitions.**

The definitions in this section shall apply for all purposes of administering the Tobacco Transition Payment Program (TTPP) authorized by this subpart.

*Act* means the Fair and Equitable Tobacco Reform Act of 2004.

*Actual marketings* means tobacco that was disposed of in raw or processed form by voluntary or involuntary sale, barter, or exchange, or by gift between living persons.

*Actual undermarketings* means the amount by which the effective quota is more than the amount of tobacco marketed.

*Assignee* means the person designated by a tobacco quota holder or tobacco producer on the correct CCC form to receive a payment to be made by CCC under this subpart.

*Assignor* means the owner of a farm, or a producer on a farm, who has been determined by CCC to be eligible for a payment under this subpart and who has elected to assign to another person on the correct CCC form, the payment to be made by CCC under this subpart.

*Average production yield* means, for each kind of tobacco, other than burley (type 31) and flue-cured (types 11–14), the average of the production of a kind of tobacco in a county, on a per-acre basis, for the 2001, 2002, and 2003 crop years. For quota holders only, if no records are available to provide the average production of a kind of tobacco in a county, the average yield will be the production yield established by the National Agricultural Statistical Service of the Department of Agriculture

(NASS) for the 2002 marketing year for the applicable kind of tobacco.

*Basic allotment* means the factored allotment plus and minus permanent adjustments.

*Basic quota* means the factored quota plus permanent adjustments.

*Base Quota Level (BQL)* means the payment pounds as determined under this subpart.

*Calendar year* means the twelve-months from January 1 through December 31.

*Claim* means any amount of money determined by any Federal agency to be owed by a tobacco quota holder or a tobacco producer to the United States, or any agency or instrumentality thereof, that has been the subject of a completed debt collection activity that is in compliance with the Debt Collection Improvement Act of 1996.

*Considered planted* means tobacco that was planted but failed to be produced as a result of a natural disaster, as determined by CCC.

*Contract* means a Tobacco Transition Payment Quota Holder Contract, a Tobacco Transition Payment Producer Contract, a Tobacco Transition Payment Quota Holder Successor In Interest Contract, or a Tobacco Transition Payment Producer Successor In Interest Contract.

*Contract payment* means a payment made under a contract entered into under this subpart.

*Dependent* means an offspring child who is under 18 years of age.

*Disaster lease* means, as approved by FSA, a written transfer by lease under certain natural disaster conditions of flue-cured or burley tobacco when the transferring farm has suffered a loss of production due to drought, excessive rain, hail, wind, tornado, or other natural disasters. A disaster transfer of flue-cured tobacco must have occurred after June 30 and on or before November 15. A disaster transfer of burley tobacco must have occurred after July 1 and on or before February 16 of the following calendar year.

*Effective allotment* means the basic farm allotment plus or minus temporary adjustments.

*Effective quota* means the current year farm marketing quota plus or minus any temporary quota adjustments.

*Effective undermarketings* means the smaller of the actual undermarketings or the sum of the previous year's basic quota plus pounds of quota temporarily transferred to the farm for the previous year.

*Eligible quota holder* means only a person who, as of October 22, 2004, has either a fee simple interest or life estate interest in the farm for which FSA established a farm basic marketing quota for the 2004 marketing year. An eligible quota holder does not include any other person who: claims a lien, security interest or other similar equitable interest in the farm or in any personal asset of the owner of the farm or a producer on the farm; has a remainder interest or any other contingent interest in the farm or in any personal asset of the owner of the farm or a producer on the farm; or who may have caused any such marketing quota to have been transferred to the farm.

*Eligible tobacco producer* means an owner, operator, landlord, tenant, or sharecropper who shared in the risk of producing tobacco on a farm where tobacco was produced, or considered planted, pursuant to a tobacco poundage quota or acreage allotment assigned to the farm for the 2002, 2003 or 2004 marketing years and who otherwise meets the requirements in § 1463.104.

*Experimental tobacco* means tobacco grown by or under the direction of a publicly-owned agricultural experiment station for experimental purposes.

*Factored allotment* means allotment that has been factored to equate it to the 2002 basic allotment level.

*Factored quota* means quota that has been factored to equate it to the 2002 basic quota level.

*Family member* means a parent; grandparent or other direct lineal ancestor; child or other direct lineal descendent; spouse; or sibling of a tobacco quota holder or tobacco producer.

*Farm* means a farm as defined in part 718 of this title.

*Fiscal year* means the twelve-month period from October 1 through September 30.

*Marketing year* means, for flue-cured tobacco, the period beginning July 1 of the current year and ending June 30 of the following year. For kinds of tobacco other than flue-cured, the period beginning October 1 of the current year and ending September 30 of the following year.

*NASS* means the National Agricultural Statistics Service of USDA.

*New farm* means a farm for which a basic marketing quota was established for the 2003 or 2004 year from the national reserve that is set aside for such purposes from the national marketing quota established for the applicable year for the kind of tobacco.

*Overmarketings* means the pounds by which the pounds marketed exceed the effective farm marketing quota.

*Permanent quota adjustments* means adjustments made by FSA under part 723 of this title for:

(1) Old farm adjustments from reserve;

(2) Pounds of quota transferred to the farm from the eminent domain pool;

(3) Pounds of quota transferred to or from the farm by sale; or

(4) Pounds of forfeited quota.

*Secretary* means the Secretary of the United States Department of Agriculture.

*Share in the risk of production* means having a direct financial interest in the successful production of a crop of tobacco through ownership of a direct share in the actual proceeds derived from the marketing of the crop, which share is conditional upon the success of that marketing.

*Successor party* means the means the person who has assumed all rights and obligations of a quota holder or tobacco producer arising under this part by executing a TTPP contract.

*Temporary quota adjustments* means adjustments made by FSA under part 723 of this title for:

(1) Effective undermarketings;

(2) Overmarketings from any prior year;

(3) Reapportioned quota from quota released from farms in the eminent domain pool;

(4) Quota transferred by lease or by owner, for all kinds of tobacco except flue-cured and cigar tobacco; except for flue-cured disaster lease;

(5) Violations of the provisions of part 723 of this title and part 1464 of this chapter.

*Tobacco* means the following kinds of tobacco: Burley tobacco (type 31); cigar-filler and cigar binder tobacco (types 42, 43, 44, 53, 54, and 55); dark air-cured tobacco (types 35 and 36), fire-cured tobacco (types 21, 22 and 23); flue-cured tobacco (types 11, 12, 13 and 14); and Virginia sun-cured tobacco (type 37).

*TTPP effective quota* means effective quota plus or minus temporary adjustments because of disaster lease and transfer and before adjustment to the 2002 level for establishment of BQL.

*United States* includes any agency and instrumentality thereof.

### § 1463.103 Eligible quota holder.

(a) CCC will make a payment under this subpart to a person determined by CCC to be an eligible quota holder, as defined in § 1463.102.

(b) The wetlands and highly erodible land provisions of part 12 of this title, the controlled substance provisions of part 718 of this title, and the payment limitation provisions of part 1400 of this chapter shall not be applicable to payments made under this part to an eligible quota holder.

### § 1463.104 Eligible tobacco producer.

(a) CCC will make a payment under this subpart to a person determined by CCC to be an eligible tobacco producer, as defined in § 1463.102.

(b) The wetlands and highly erodible land provisions of part 12 of this title and the controlled substance provisions of part 718 of this title shall be applicable to payments made under this part to an eligible tobacco producer. However, the payment limitation provisions of part 1400 of this chapter shall not be applicable to payments made under this part to an eligible tobacco producer.

(c) For purposes of determining if an eligible tobacco producer has shared in the risk of producing a crop in the 2002, 2003, or 2004 crop years, CCC will consider evidence presented by a producer that includes, but is not limited to: written leases; contracts for the purchase of tobacco; crop insurance documents; or receipts for the purchase of

items used in the production of tobacco.

**§ 1463.105 Base quota levels for eligible quota holders.**

(a) The BQL is determined separately for each kind of tobacco for each farm for which a 2004 basic marketing year quota was established under part 723 of this title. Any marketing quota assigned by FSA to a new farm in 2003 or 2004, other than through transfer from another farm, shall not be considered when determining the BQL.

(b) For burley tobacco quota holders BQL is established according to the following table, except as adjusted under paragraph (e) of this section:

(1) Farm BQL. The 2004 basic quota, multiplied by the BQL adjustment factor 1.071295. (NOTE: The factor adjusts the 2004 basic quota to the 2002 basic quota level.)

(2) Quota holder BQL. The farm BQL multiplied by the quota holder's ownership share in the farm. (NOTE: In the case of undivided tract ownership, BQL must be distributed among the tract quota holders by the tract owners.)

(c) For flue-cured tobacco quota holders the BQL is established according to the following table, except as adjusted under paragraph (e) of this section:

(1) Farm BQL. The 2004 basic quota, multiplied by the BQL adjustment factor 1.23457. (NOTE: The factor adjusts the 2004 basic quota to the 2002 level.)

(2) Quota holder BQL. The farm BQL multiplied by the quota holder's ownership share in the farm. (NOTE: In the case of undivided tract ownership, BQL must be distributed among the tract quota holders by the tract owner.)

(d) For quota holders of all other kinds of tobacco the BQL is established according to the following table, except as adjusted under paragraph (e) of this section:

(1) Farm BQL. The basic allotment established for the farm in 2002 multiplied by the county average production yield. The following NASS yields are to be used for any county without production:

(i) Fire-cured (type 21)—1746 lbs.

(ii) Fire-cured (types 22–23)—2676 lbs.

(iii) Dark Air-cured (types 35–36)—2475 lbs.

(iv) Virginia Sun-cured (type 37)—1502 lbs.

(v) Cigar Filler/Binder (types 42–44, 54, 55)—2230 lbs.

(2) Quota holder BQL. The farm BQL multiplied by the quota holder's ownership share in the farm. (NOTE: In the case of undivided tract ownership, BQL must be distributed among the tract quota holders by the tract owner.)

(e)(1) CCC will divide the BQL for the farm between the parties to the agreement as CCC determines to be fair and equitable, taking into consideration the proportionate amounts of cropland sold, if:

(i) On or before October 22, 2004, the owner of a farm had entered into an agreement for the sale of all or a portion of a farm for which a farm marketing quota was established for the 2004 marketing year; and

(ii) Such agreement had not been fulfilled or terminated prior to that date; and

(iii) The parties to the agreement are unable to agree to the disposition of the contract payment to be made with respect to the farm.

(2) If, on or before October 22, 2004, the owner of a farm had entered into an agreement for the permanent transfer of all or a portion of a tobacco marketing quota and the transfer had not been completed by such date, the owner of the farm to which such quota was to be transferred shall be considered to be the owner of the marketing quota for the purposes of this subpart. The BQL's for the transferring farm and the receiving farm will be adjusted to reflect this transfer.

(f) Any tobacco marketing quota preserved under part 1410 of this chapter as the result of the enrollment of a farm in the Conservation Reserve Program shall be included in the determination of the BQL of the farm.

**§ 1463.106 Base quota levels for eligible tobacco producers.**

(a) BQL is determined separately, for each of the years 2002, 2003 and 2004, for each kind of tobacco and for each farm for which a 2002 farm marketing quota had been established under part 723 of this title.

(b) The BQL for producers of burley tobacco is established as follows:

(1) The 2002-crop year BQL for burley producers is the 2002 effective quota pounds actually marketed, adjusted for disaster lease and transfer, and considered-planted undermarketings and overmarketings. The BQL is then multiplied by the producer's share in the 2002 crop to determine the producer's 2002 BQL. The adjustments for disaster lease and transfer and considered-planted undermarketings and overmarketings are made as follows:

(i) Disaster-leased pounds are added to the marketings of the transferring farm and deducted from the marketings of the receiving farm;

(ii) Considered-planted pounds are added to the farm's actual marketings, and includes only undermarketings that were not part of the farm's 2003 effective quota.

(iii) Pounds actually marketed as overmarketings and sold penalty-free are added to the farm BQL after the BQL adjustment factor of 1.12486 has been applied to the overmarketed pounds.

(2) The 2003-crop year BQL for burley producers is the 2003 effective quota pounds actually marketed, adjusted for disaster lease and transfer and considered-planted undermarketings and overmarketings, as follows:

(i) Disaster leases are added to the marketings of the transferring farm and deducted from the marketings of receiving farm.

(ii) Considered-planted pounds are added to the farm's actual marketings, and includes only undermarketings that were not part of the farm's 2004 effective quota.

(iii) Pounds actually marketed as overmarketings and sold penalty-free are added to the farm BQL after the BQL adjustment factor of 1.071295 has been applied to the overmarketed pounds.

(iv) After these adjustments the BQL is calculated as follows:

| Step | Calculation |
|---|---|
| 1 | Subtract all 2002 undermarketings from the 2003 marketings, including undermarketings from the parent farm in any special tobacco combinations. Leased pounds are apportioned undermarketing history by dividing the transferring farm's undermarketings by the transferring farm's effective quota, before any temporary transfers, resulting in the percentage of undermarketings that were leased. |
| 2 | Multiply the 2003 marketings remaining after Step 1 times 1.12486 (the 2003-BQL adjustment factor). |
| 3 | Add the undermarketings that were subtracted in Step 1 to the sum of Step 2 to determine the farm 2003 BQL. |
| 4 | Multiply the sum from Step 3 times the producer's share in the 2003 crop to determine the producer's 2003 BQL. |

(3) The 2004-crop year BQL for burley producers is the 2004 effective quota before disaster lease and transfer is calculated as follows:

| Step | Calculation |
|---|---|
| 1 | Subtract all 2003 undermarketings from the 2004 effective quota, including undermarketings from the parent farm in any special tobacco combinations. Leased pounds are apportioned undermarketing history by dividing the transferring farm's undermarketings by the transferring farm's effective quota, before any temporary transfers, resulting in the percentage of undermarketings that were leased. |
| 2 | Multiply the 2004 effective quota remaining after Step 1 times 1.071295 (the 2004 BQL adjustment factor). |
| 3 | Multiply the undermarketings that were subtracted in Step 1 times 1.12486 (the 2003 BQL adjustment factor). |
| 4 | Add the effective quota from Step 2 to the undermarketings in Step 3 to determine the farm 2004 BQL. |
| 5 | Multiply the sum from Step 4 times the producer's share in the 2004 crop to determine the producer's 2004 BQL. |

(c) The BQL for producers of flue-cured tobacco is established by year, as follows:

(1) The 2002-crop year BQL for flue-cured producers is the effective 2002 quota actually marketed, adjusted for disaster lease and transfer and considered-planted undermarketings and overmarketings. The BQL is then multiplied by the producer's share in the 2002 crop to determine the producer's 2002 BQL. Adjustments for disaster lease and transfer and considered-planted undermarketings and overmarketings are calculated as follows:

(i) Disaster-leased pounds are added to the marketings of the transferring farm and deducted from the marketings of the receiving farm;

(ii) Considered-planted pounds are added to the farm's actual marketings, and include only undermarketings that

were not part of the farm's 2003 effective quota.

(iii) Pounds actually marketed as overmarketings and sold penalty-free are added to the farm BQL after the BQL adjustment factor of 1.10497 has been applied to the overmarketed pounds.

(2) The 2003-crop year BQL for flue-cured producers is the 2003 effective quota actually marketed, adjusted for disaster lease and transfer and considered-planted undermarketings and overmarketings, as follows:

(i) Disaster leases are added to the marketings of the transferring farm and deducted from the marketings of the receiving farm.

(ii) Considered-planted pounds are added to the farm's actual marketings, and includes only undermarketings that were in not part of the farm's 2004 effective quota.

(iii) Pounds actually marketed as overmarketings and sold penalty-free are added to the farm BQL after the BQL adjustment factor of 1.23457 has been applied to the overmarketed pounds.

(iv) After these adjustments the BQL is calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Subtract all 2002 undermarketings from the 2003 marketings, including undermarketings from the parent farm in any special tobacco combinations. |
| 2 ..... | Multiply the 2003 marketings remaining after Step 1 times 1.10497 (the 2003 BQL adjustment factor). |
| 3 ..... | Add the undermarketings that were subtracted in Step 1 to the sum of Step 2 to determine the farm 2003 BQL. |
| 4 ..... | Multiply the sum from step 3 times the producer's share in the 2003 crop to determine the producer's 2003 BQL. |

(3) The 2004-crop year BQL for flue-cured producers is the 2004 effective quota before disaster lease and transfer. The 2004 BQL is calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Subtract all 2003 undermarketings from the 2004 effective quota, including undermarketings from the parent farm in any special tobacco combinations. |
| 2 ..... | Multiply the 2004 effective quota remaining after Step 1 times 1.23457 (the 2004 BQL adjustment factor). |
| 3 ..... | Multiply the undermarketings that were subtracted in Step 1 times 1.10497 (the 2003 BQL adjustment factor). |
| 4 ..... | Add the effective quota from Step 2 to the undermarketings in Step 3 to determine the farm 2004 BQL. |
| 5 ..... | Multiply the sum from Step 4 times the producer's share in the 2004 crop to determine the producer's 2004 BQL. |

(d) The BQL for producers of cigar filler and binder tobacco is established by years, as follows:

(1) The 2002-crop year BQL for cigar filler and binder tobaccos is calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2004 farm base pounds total. |
| 2 ..... | Multiply any 2002 special tobacco combination acres times the 2002-equivalence factor of 1.000. |
| 3 ..... | Multiply the sum from Step 2 times the farm's average yield for 2001, 2002, and 2003 to get the 2002 farm special tobacco combination pounds total. |
| 4 ..... | Add the sum from Step 1 to the sum from Step 3 to get the 2004 farm BQL total. |
| 5 ..... | Multiply the sum from Step 4 times the producer's share in the 2002 crop to get the producer 2002 BQL. |

(2) The 2003-crop year BQL for cigar filler and binder tobaccos is calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2003 farm base pounds total. |
| 2 ..... | Multiply any 2003 special tobacco combination acres times the 2003 BQL adjustment factor of 0.8929. |

| Step | Calculation |
|---|---|
| 3 ..... | Multiply the sum from Step 2 times the farm's average yield for 2001, 2002, and 2003 to get the 2003 farm special tobacco combination pounds total. |
| 4 ..... | Add the sum from Step 1 to the sum from Step 3 to get the 2003 farm BQL total. |
| 5 ..... | Multiply the sum from Step 4 times the producer's share in the 2003 crop to get the producer 2003 BQL. |

(3) The 2004-crop year BQL for cigar-filler and binder tobaccos is calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2004 farm base pounds total. |
| 2 ..... | Multiply any 2004 special tobacco combination acres times the 2004 BQL adjustment factor of 0.9398. |
| 3 ..... | Multiply the sum from Step 2 times the farm's average yield for 2001, 2002, and 2004 to get the 2003 farm special tobacco combination pounds total. |
| 4 ..... | Add the sum from Step 1 to the sum from Step 3 to get the 2004 farm BQL total. |
| 5 ..... | Multiply the sum from Step 4 times the producer's share in the 2004 crop to get the producer 2004 BQL. |

(e) The BQL's for producers of all kinds of tobacco other than burley, flue-cured and cigar filler and binder, are established by year, as follows.

(1) The 2002-crop year BQL's for these kinds of tobaccos are calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2002 farm base pounds total. |
| 2 ..... | Multiply any 2002 special tobacco combination acres times the farm's average yield for 2001, 2002, and 2003 to get the 2002 special tobacco combinations pounds total. |
| 3 ..... | Add the sum from Step 1 to the sum from Step 2. |
| 4 ..... | Multiply any 2002 acres leased to or from the farm times the farm's average yield for 2001, 2002, and 2003 to get the 2002 lease pounds total. Then, to the sum from either:<br>(i) Step 3, add pounds leased to the farm to get the farm 2002 BQL total<br>(ii)Step 3, subtract pounds leased from the farm to get the farm 2002 BQL total. |
| 5 ..... | Multiply the result from Step 4 times the producer's share in the 2002 crop to get the producer 2002 BQL. |

(2) The 2003-crop year BQL's for these kinds of tobaccos are calculated as follows:

| Step | Calculation |
|---|---|
| 1 ..... | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2003 farm base pounds total. |
| 2 ..... | Multiply any 2003 special tobacco combinations acres times the applicable 2003 BQL adjustment factor:<br>(i) Fire-cured (type 21)—1.0000<br>(ii) Fire-cured (types 22–23)—.980392<br>(iii) Dark Air-cured (35–36)—.952381<br>(iv) Virginia Sun-cured (type 37) 1.0000 |
| 3 ..... | Multiply the sum from Step 2 times the farm's average yield for 2001, 2002, and 2003 to get the 2003 farm special tobacco combination pounds total. |
| 4 ..... | Add the sum from Step 1 to the sum from Step 3. |
| 5 ..... | Multiply any 2003 acres leased times the applicable 2003 BQL adjustment factor:<br>(i) Fire-cured (type 21) 1.0000<br>(ii) Fire-cured (types 22–23)—.980392<br>(iii) Dark Air-cured (35–36)—.952381<br>(iv) Virginia Sun-cured (type 37) 1.0000 |
| 6 ..... | Multiply the sum from Step 5 times the farm's average yield for 2001, 2002, and 2003 to get the 2003 lease pounds total. |
| 7 ..... | To the sum from Step 4 either:<br>(i) Add pounds from Step 6 leased to the farm to get the farm 2003 BQL total<br>(ii) Subtract pounds from Step 6 leased from the farm to get the farm 2003 BQL total. |
| 8 ..... | Multiply the sum from Step 7 times the producer's share in the 2003 crop to get the producer 2003 BQL total. |

(3) The 2004-crop year BQL's for these kinds of tobaccos are calculated as follows:

| Step | Calculation |
|---|---|
| 1 | Multiply the 2002 farm's basic allotment times the farm's average yield for 2001, 2002, and 2003 to get the 2004 farm base pounds total. |
| 2 | Multiply any 2004 special tobacco combinations acres times the applicable 2004 BQL adjustment factor:<br>(i) Fire-cured (type 21) 1.0000<br>(ii) Fire-cured (types 22–23)—.951837<br>(iii) Dark Air-cured (35–36)—.94264<br>(iv) Virginia Sun-cured (type 37) 1.0000 |
| 3 | Multiply the sum from Step 2 times the farm's average yield for 2001, 2002, and 2003 to get the 2004 farm special tobacco combination pounds total. |
| 4 | Add the sum from Step 1 to the sum from Step 3. |
| 5 | Multiply any 2004 acres leased times the applicable 2004 BQL adjustment factor:<br>(i) Fire-cured (type 21) 1.0000<br>(ii) Fire-cured (types 22–23)—.951837<br>(iii) Dark Air-cured (35–36)—.92464<br>(iv) Virginia Sun-cured (type 37) 1.0000 |
| 6 | Multiply the sum from Step 5 times the farm's average yield for 2001, 2002, and 2003 to get the 2004 lease pounds total. |
| 7 | To the sum from Step 4 either:<br>(i) Add pounds from Step 6 leased to the farm to get the farm 2004 BQL total<br>(ii) Subtract pounds from Step 6 leased from the farm to get the farm 2004 BQL total. |
| 8 | Multiply the sum from Step 7 times the producer's share in the 2004 crop to get the producer 2004 BQL total. |

### § 1463.107 Payment to eligible quota holders.

(a) The total amount of contract payments that may be made to an eligible quota holder shall be the product obtained by multiplying:

$7.00 per pound × the BQL for the quota holder as determined under § 1463.105 for each kind of tobacco

(b) During each of the fiscal years 2005 through 2014, CCC will make a payment to each eligible quota holder in an amount equal to 10 percent of the total amount due under a contract entered into under this subpart, except that in the case an application was filed after June 17, 2005, the applicant will receive only the TTPP payments that have not been made as of the date the contract is approved. However, in order for the contract participant to receive the 2005 TTPP payment an application to enter into a TTPP contract must be filed no later than June 17, 2005. CCC may, in its discretion, extend any deadline set forth in this paragraph. However, CCC will make the FY 2005 payment between June and September of 2005, and subsequent payments will be made in January, to the extent practicable, of each FY.

### § 1463.108 Payment to eligible tobacco producers.

(a) Subject to paragraph (b) of this section, the total amount of contract payments that may be made to an eligible tobacco producer shall be the product obtained by multiplying:

$3.00 per pound × the BQL for the producer determined under § 1463.106 for each kind of tobacco

(b) Payments to an eligible producer shall be equal to:

(1) For an eligible producer that produced tobacco that was marketed or considered by CCC as planted under a marketing quota in all of the 2002, 2003, and 2004 marketing years, 100 percent of the rate specified in paragraph (a) of this section;

(2) For an eligible producer that produced tobacco that was marketed or considered by CCC as planted under a marketing quota in any two of the 2002, 2003, and 2004 marketing years, 2/3 of the rate specified in paragraph (a) of this section; and

(3) For an eligible producer that produced tobacco that was marketed, or considered by CCC as planted under a marketing quota in any one of the 2002, 2003, and 2004 marketing years, 1/3 of the rate specified in paragraph (a) of this section.

(c) During each of the fiscal years 2005 through 2014, CCC will make a payment to each eligible producer in an amount equal to 10 percent of the total amount due under a contract entered into under this subpart except that in the case an application was filed after June 17, 2005, the applicant will receive only the TTPP payments that have not been made as of the date the contract is approved. However, in order for the contract participant to receive the 2005 TTPP payment, an application to enter into a TTPP contract must be filed no later than June 17, 2005. CCC may, in its discretion, extend any deadline set forth in this paragraph. However, CCC will make the FY 2005 payment between June and September of 2005, and subsequent payments will be made in January, to the extent practical, of each FY.

**§ 1463.109 Contracts.**

(a) CCC will enter into a contract with eligible tobacco quota holders and producers. To the extent a person has filed such a contract with CCC, but a final administrative decision has not been made with respect to such person's status as an eligible quota holder or tobacco producer prior to the final enrollment date, CCC will enter into such a contract only upon the issuance of a final determination of eligibility and the passing of any deadline for any administrative appeal under parts 780 and 11 of this title.

(b)(1) If contracts or other written claims are provided to CCC by June 3, 2005, by two or more persons with respect to the same tobacco BQL used to calculate a program payment, CCC will not issue such payment until CCC has determined the eligibility status of each claimant.

(2) If CCC has made a payment to a person after June 3, 2005, a person who is not an eligible holder or producer, as identified on FSA records, for such farm, or claims to be an eligible tobacco holder or producer and submits a contract or other written claim with CCC for the same quota used to issue the initial payment, CCC will issue no further payments for such farm until CCC has determined the eligibility status of each person who has submitted a contract or other written claim for such farm and the occurrence of the repayment of the initial payment made by CCC.

**§ 1463.110 Misrepresentation and scheme or device.**

A person must refund all payments received on all contracts entered into under this subpart, plus interest as determined in accordance with part 1403 of this chapter, and pay to CCC liquidated damages as specified in the contract, if CCC determines the person has:

(a) Erroneously represented any fact affecting a program determination made in accordance with this subpart;

(b) Adopted any scheme or device that tends to defeat the purpose of the program; or

(c) Made any fraudulent representation affecting a program determination made in accordance with this subpart.

**§ 1463.111 Offsets and assignments.**

(a) TTPP payments made to any person under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the tobacco quota, tobacco marketing allotment, or the farm for which a tobacco quota had been established under part 723 of this title by any creditor or any other person.

(b) The provisions of part 1404 of this title shall not apply to this part.

(c) A quota holder or tobacco producer who is eligible to receive a payment under this part may assign a payment, or a portion thereof, to be made under this part to another person using the correct CCC form. Such an assignment will become effective upon approval by CCC. In order to provide for the orderly issuance of payments under this part, CCC may limit, in its sole discretion, the number of assignments that may be made with respect to a contract.

(d)(1) CCC will establish, after consultation with the Department of the Treasury, a discount rate that reflects the value of any remaining payments due under this part if such payments were to be made as a lump sum payment in the current year. Unless there is consideration for such contract in an amount equal to or greater than the

discounted value of the payments, subject to the assignment, based on the discount rate established for such payments by CCC, CCC will not approve any assignment other than to:

(i) A family member; or

(ii) A party who had purchased a tobacco marketing quota prior to October 22, 2004 and had placed the quota on a farm with the owner's consent prior to that date in the manner that had been prescribed by FSA under part 723 of this chapter.

(2) The discount rate established by CCC will be determined by adding 200 basis points to the prime lending rate, as determined by CCC. If this sum is a fraction of a number, CCC will round the discount rate to the nearest whole number. Rounding of a half percent will be to the next higher whole number.

(e) CCC will issue a payment to an assignee only to the extent and amount of payment that CCC would otherwise have issued to the quota holder or producer in the absence of the assignment. In accordance with part 1403 of this title, any claim owed by the assignor to the United States will be deducted from any payment made under this part prior to the issuance of the payment to the assignee.

(f) CCC will report to the Internal Revenue Service any payment assigned under this section as income earned by the assignor.

### § 1463.112 Successor in interest contracts.

(a) A quota holder or tobacco producer who is eligible to receive a payment under this part, and for whom a claim has not been established by the United States, may enter into a successor in interest contract with another party using the correct CCC form. Such successor in interest contract will become effective upon approval by CCC, and will not include the 2005 payment. Only one such successor in interest contract may be entered into by a quota holder or tobacco producer with respect to a farm for each kind of tobacco.

(b) Annually, CCC will establish, after consultation with the Department of the Treasury, a discount rate that reflects the value of any remaining payments due under this part if such payments were to be made as a lump sum payment in the current year. This discount rate will be determined as provided in §1463.111(d)(2). Unless there is consideration for such contract in an amount equal to or greater than the discounted value of the payments, subject to the successor in interest or contract, based on the discount rate established for such payments by CCC, CCC will not approve any succession in interest contract other than to:

(1) A family member; or

(2) A party who had purchased a tobacco marketing quota prior to October 22, 2004 and had placed the quota on a farm with the owner's consent prior to that date in the manner that had been prescribed by FSA under part 723 of this chapter.

(c) CCC will issue a payment, except the 2005 payment, to a successor party only if such party is otherwise in compliance with all other applicable regulations, which includes for successors to producer contracts only the wetlands and highly erodible land provisions of part 12 of this chapter. In accordance with part 1403 of this title, any claim owed by the successor party to the United States will be deducted from any payment made under this part prior to the issuance of the payment to the successor party.

(d) CCC will report to the Internal Revenue Service any payment made under a successor in interest contract as income earned by the successor party.

### § 1463.113 Issuance of payments in event of death.

If a quota holder or tobacco producer who is eligible to receive a payment under this subpart dies, the right to receive payments shall be transferred to the estate of the quota holder or tobacco producer unless such person is survived by a spouse or one or more dependents, in which case the right to receive the payments shall be transferred to the surviving spouse.

### § 1463.114 Appeals.

A person may obtain reconsideration and review of any adverse determination made under this subpart in accordance with the appeal regulations found at parts 11 and 780 of this title.

## Subpart C—Miscellaneous Provisions

### § 1463.201 Refunds of importer assessments.

Assessments paid on imported flue-cured or burley tobacco under sections 106A and 106B of the Agricultural Act of 1949 with respect to imports in the 2004 and prior marketing years may be refunded by CCC in accordance with the provisions of 7 CFR 1464.105 that were in effect prior to March 30, 2005, so long as such request for refunds are filed in accordance with such part no later than:

(a) August 1, 2005 for flue-cured tobacco; and

(b) November 1, 2005 for burley tobacco.

[70 FR 17159, Apr. 4, 2005]

# PART 1465—AGRICULTURAL MANAGEMENT ASSISTANCE

## Subpart A—General Provisions

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AUTHORITY: 7 U.S.C. 1524(b).

SOURCE: 74 FR 64595, Dec. 8, 2009, unless otherwise noted.

## Subpart A—General Provisions

### § 1465.1 Purposes and applicability.

Through the Agricultural Management Assistance program (AMA), the Natural Resources Conservation Service (NRCS) provides financial assistance funds annually to producers in 16 statutorily designated States to: Construct or improve water management structures or irrigation structures; plant trees to form windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices including soil erosion control, integrated pest management, or the transition to organic farming. AMA is applicable in Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

### § 1465.2 Administration.

(a) Administration and implementation of AMA's conservation provisions for the Commodity Credit Corporation (CCC) is assigned to NRCS, using the funds, facilities, and authorities of the CCC. Accordingly, where NRCS is mentioned in this part, it also refers to the CCC's funds, facilities, and authorities, where applicable.

(b) NRCS will:

(1) Provide overall management and implementation leadership for AMA;

(2) Establish policies, procedures, priorities, and guidance for implementation;

(3) Establish payment limits;

(4) Determine eligible practices;

(5) Develop and approve AMA plans of operation and contracts with selected participants;

(6) Provide technical leadership for implementation, quality assurance, and evaluation of performance;

(7) Make AMA allocation and contract funding decisions; and

(8) Issue payments for completed conservation practices.

(c) No delegation in this part to lower organizational levels will preclude the Chief of NRCS from determining any issues arising under this part or from reversing or modifying any determination made under this part.

**§ 1465.3 Definitions.**

The following definitions apply to this part and all documents used in accordance with this part, unless specified otherwise:

*Agricultural land* means cropland, grassland, rangeland, pasture, and other agricultural land on which agricultural or forest-related products or livestock are produced. Other agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

*Agricultural operation* means a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management and production, forestry, or cultivation practices that are substantially separate from other operations.

*AMA plan of operations (APO)* means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the resource concerns and program purposes. The APO is part of the AMA contract.

*Applicant* means a person, legal entity, joint operation, or Indian Tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in AMA.

*Beginning farmer or rancher* means a person or legal entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch consistent with the practices in the county or State where the farm or ranch is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

*Conservation district* means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "natural resource district," "land conservation committee," or similar name.

*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that achieve program purposes.

*Contract* means a legal document that specifies the rights and obligations of any participant accepted into the program. An AMA contract is an agreement for the transfer of assistance from USDA to the participant to share

in the costs of applying conservation practices.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for AMA administration in a specific area.

*Historically underserved producer* means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or nonindustrial private forest landowner who meets the beginning, socially disadvantaged, or limited resource qualifications set forth in this section.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Indian land* is an inclusive term describing all lands held in trust by the United States for individual Indians or Tribes, or all lands, titles to which are held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy, and benefit of certain Tribes. For purposes of this part, the term Indian land also includes land for which the title is held in fee status by Indian Tribes and the United States Government-owned land under the Bureau of Indian Affairs (BIA) jurisdiction.

*Joint operation* means, as defined in 7 CFR part 1400, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

*Legal entity* means, as defined in 7 CFR part 1400, an entity created under Federal or State law that: (1) Owns land or an agricultural commodity, product, or livestock; or (2) produces an agricultural commodity, product, or livestock.

*Lifespan* means the period of time in which a conservation practice should be operated and maintained and used for the intended purpose.

*Limited resource farmer or rancher* means:

(1) A person with direct or indirect gross farm sales of not more than $155,200 in each of the previous 2 years (adjusted for inflation using the Prices Paid by Farmer Index as compiled by the National Agricultural Statistics Service), and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Commerce Department data).

*Liquidated damages* means a sum of money stipulated in the AMA contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Livestock* means all animals produced on farms and ranches, as determined by the Chief.

*Natural Resources Conservation Service* is an agency of USDA which has responsibility for administering AMA using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forest land* means rural land that has existing tree cover or is suitable for growing trees and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

*Operation and maintenance* means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its

original condition if one or more components fail.

*Operation and maintenance (O&M) agreement* means the document that, in conjunction with the APO, specifies the operation and maintenance responsibilities of the participants for conservation practices installed with AMA assistance.

*Participant* means a person, legal entity, joint operation, or Indian Tribe that is receiving payment or is responsible for implementing the terms and conditions of an AMA contract.

*Payment* means the financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for the designated conservation practices.

*Person* means, as defined in 7 CFR part 1400, an individual, natural person and does not include a legal entity.

*Producer* means a person, legal entity, joint operation, or Indian Tribe that has an interest in the agricultural operation, according to 7 CFR part 1400, or who is engaged in agricultural production or forestry management.

*Resource concern* means a specific natural resource problem that represents a significant concern in a State or region and is likely to be addressed successfully through the implementation of the conservation practices by participants.

*Secretary* means the Secretary of USDA.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

*State Conservationist* means the NRCS employee authorized to direct and supervise NRCS activities in a State, Caribbean Area, or Pacific Islands Area.

*Structural practice* means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

*Technical assistance* means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Technical Service Provider* (TSP) means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants or in lieu of, or on behalf of NRCS.

### § 1465.4 National priorities.

(a) The Chief, with advice from State Conservationists, will identify national priorities to achieve the conservation objectives of AMA.

(b) National priorities will be used to guide annual funding allocations to States. (c) State Conservationists will use national priorities in conjunction with State and local priorities to prioritize and select AMA applications for funding.

(d) NRCS will undertake periodic reviews of the national priorities and the effects of program delivery at the State and local levels to adapt the program to address emerging resource issues.

### § 1465.5 Program requirements.

(a) Participation in AMA is voluntary. The participant, in cooperation

with the local conservation district, applies for practice installation for the agricultural operation. NRCS provides payments through contracts to apply needed conservation practices within a time schedule specified in the APO.

(b) The Chief determines the funds available for financial assistance according to the purpose and projected cost for which the financial assistance is provided in a fiscal year. The Chief allocates the funds available to carry out AMA in consideration of national priorities established under § 1465.4.

(c) To be eligible to participate in AMA, an applicant must:

(1) Own or operate an agricultural operation within an applicable State, as listed in 1465.1;

(2) Provide NRCS with written evidence of ownership or legal control for the life of the proposed contract, including the O&M agreement. An exception may be made by the Chief:

(i) In the case of land allotted by the BIA, Tribal land, or other instances in which the Chief determines that there is sufficient assurance of control; or

(ii) If the applicant is a tenant of the land involved in agricultural production, the applicant will provide NRCS with the written concurrence of the landowner in order to apply a structural practice(s);

(3) Submit an application form NRCS–CPA–1200;

(4) Agree to provide all information to NRCS determined to be necessary to assess the merits of a proposed project and to monitor contract compliance;

(5) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment;

(6) With regard to contracts with Indian Tribes or Indians represented by the BIA, payments if a BIA or Tribal official certify in writing that no one individual, directly or indirectly, will receive more than the payment limitation. The Tribal entity must also provide, annually, a listing of individuals and payments made by social security or tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The BIA or Tribal entity must also provide, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation practice implementation.

(7) Supply other information, as required by NRCS, to determine payment eligibility as established by 7 CFR part 1400, Adjusted Gross Income;

(8) With regard to any participant that utilizes a unique identification number as an alternative to a tax identification number, the participant will utilize only that identifier for any and all other AMA contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1465.25;

(9) States, political subdivisions, and entities thereof will not be persons eligible for payment. Any cooperative association of producers that markets commodities for producers will not be considered to be a person eligible for payment;

(10) Be in compliance with the terms of all other USDA-administered conservation program agreements to which the participant is a party; and

(11) Develop and agree to comply with an APO and O&M agreement, as described in § 1465.3.

(d) Land may only be considered for enrollment in AMA if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is a working component of the participant's agricultural and forestry operation; and

(ii) The participant has control of the land for the term of the contract; and

(iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern; or

(3) The land is Indian land.

### § 1465.6 AMA plan of operations.

(a) All conservation practices in the APO must be approved by NRCS and

developed and carried out in accordance with the applicable NRCS technical guidance.

(b) The participant is responsible for implementing the APO.

(c) The APO must include:

(1) A description of the participant's specific conservation and environmental objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation and environmental objectives;

(3) A description of one or more conservation practices in the conservation system, including conservation planning, design, or installation activities to be implemented to achieve the conservation and environmental objectives;

(4) A description of the schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives.

(d) An APO may be modified in accordance with § 1465.24.

### § 1465.7 Conservation practices.

(a) The State Conservationist will determine the conservation practices eligible for AMA payments. To be considered eligible conservation practices, the practices must meet the purposes of the AMA as set out in § 1465.1. A list of eligible practices will be available to the public.

(b) The APO includes the schedule of operations, activities, and payment rates of the practices needed to solve identified natural resource concerns.

### § 1465.8 Technical services provided by qualified personnel not affiliated with USDA.

(a) NRCS may use the services of qualified TSPs in performing its responsibilities for technical assistance.

(b) Participants may use technical services from qualified personnel of other Federal, State, local agencies, Indian Tribes, or individuals who are certified as TSPs by NRCS.

(c) Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to: conservation planning; conservation practice survey, layout, design, installation, and certification; and information, education, and training for producers, and related technical services as defined in 7 CFR part 652.

(d) NRCS retains approval authority of work done by non-NRCS personnel for the purpose of approving AMA payments.

## Subpart B—Contracts

### § 1465.20 Applications for participation and selecting applications for contracting.

(a) Any producer who has eligible land may submit an application for participation in AMA at a USDA service center. Producers who are members of a joint operation will file a single application for the joint operation.

(b) NRCS will accept applications throughout the year. The State Conservationist will distribute information on the availability of assistance, national priorities, and the State-specific goals. Information will be provided that explains the process to request assistance.

(c) The State Conservationist will develop ranking criteria and a ranking process to select applications, taking into account national, State, Tribal, and local priorities.

(d) The State Conservationist, or designated conservationist, using a locally-led process will evaluate, rank, and select applications for contracting based on the State-developed ranking criteria and ranking process.

(e) The State Conservationist, or designated conservationist, will work with the applicant to collect the information necessary to evaluate the application using the ranking criteria.

### § 1465.21 Contract requirements.

(a) In order for a participant to receive payments, the participant will enter into a contract agreeing to implement one or more eligible conservation practices. Costs for technical services may be included in the contract.

(b) An AMA contract will:

(1) Encompass all portions of an agricultural operation receiving AMA assistance;

(2) Have a minimum duration of one year after completion of the last practice, but not more than 10 years;

(3) Incorporate all provisions required by law or statute, including participant requirements to:

(i) Not conduct any practices on the agricultural operation that would tend to defeat the purposes of the contract according to § 1465.25;

(ii) Refund any AMA payments received with interest, and forfeit any future payments under AMA, on the violation of a term or condition of the contract, consistent with the provisions of § 1465.25;

(iii) Refund all AMA payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including operation and maintenance of the AMA contract's conservation practices, consistent with the provisions of § 1465.24; and

(iv) Supply information as required by NRCS to determine compliance with the contract and requirements of AMA.

(4) Specify the participant's requirements for operation and maintenance of the applied conservation practices consistent with the provisions of § 1465.22; and

(5) Specify any other provision determined necessary or appropriate by NRCS.

(c) The participant must apply the practice(s) according to the schedule set out in the APO.

### § 1465.22 Conservation practice operation and maintenance.

(a) The contract will incorporate the O&M agreement that addresses the operation and maintenance of the conservation practices applied under the contract.

(b) NRCS expects the participant to operate and maintain each conservation practice installed under the contract for its intended purpose for the conservation practice lifespan as specified in the O&M agreement.

(c) NRCS may periodically inspect the conservation practice(s) during the contract duration to ensure that operation and maintenance requirements are being carried out, and that the conservation practice is fulfilling its intended objectives.

(d) Conservation practices installed before the contract execution, but included in the contract to obtain the environmental benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

(e) If NRCS finds during the contract that a participant is not operating and maintaining practices in an appropriate manner, NRCS may terminate and request a refund of payments made for that conservation practice under the contract.

(f) In the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice, at the rates established in accordance with § 1465.23, provided such payments do not exceed the payment limitation requirements as set forth in § 1465.23.

### § 1465.23 Payments.

(a) The Federal share of payments to a participant will be:

(1) Up to 75 percent of the estimated incurred cost or 100 percent of the estimated income foregone of an eligible practice, except as provided in (a)(2) of this section.

(2) In the case of historically underserved producers, the payment rate will be the applicable rate and an additional rate that is not less than 25 percent above the applicable rate, provided that this increase does not exceed 90 percent of the estimated incurred costs or estimated income foregone.

(3) In no instance will the total financial contributions for an eligible practice from other sources exceed 100 percent of the estimated incurred cost of the practice.

(b) Participants may contribute their portion of the estimated costs of practices through in-kind contributions, including labor and materials, providing the materials contributed meet the NRCS standard and specifications for the practice being installed.

(c) Payments for practices applied prior to application or contract approval—

(1) Payments will not be made to a participant for a conservation practice that was applied prior to application for the program.

(2) Payments will not be made to a participant for a conservation practice that was initiated or implemented prior to contract approval, unless the participant obtained a waiver from the State Conservationist, or designated conservationist, prior to practice implementation.

(d) The total amount of payments paid to a person or legal entity under this part may not exceed $50,000 for any fiscal year.

(e) For purposes of applying the payment limitations provided for in this section, NRCS will use the provisions in 7 CFR part 1400, Payment Limitation and Payment Eligibility.

(f) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice on the same land under any other conservation program administered by USDA.

(g) The participant and NRCS must certify that a conservation practice is completed in accordance with the contract before NRCS will approve any payment.

(h) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

### § 1465.24 Contract modifications, extensions, and transfers of land.

(a) The participant and NRCS may modify a contract if both parties agree to the contract modification, the APO is revised in accordance with NRCS requirements, and the designated conservationist approves the modified contract.

(b) It is the participant's responsibility to notify NRCS when he or she either anticipates the voluntary or involuntary loss of control of the land.

(c) The participant and NRCS may mutually agree to transfer a contract to another party.

(1) To receive an AMA payment, the transferee must be determined by NRCS to be eligible to participate in AMA and will assume full responsibility under the contract, including the O&M agreement for those conservation practices already installed and those conservation practices to be installed as a condition of the contract.

(2) With respect to any and all payment owed to participants who wish to transfer ownership or control of land subject to a contract, the division of payment will be determined by the original party and the party's successor. In the event of a dispute or claim on the distribution of payments, NRCS may withhold payments without the accrual of interest pending a settlement or adjudication on the rights to the funds.

(d) NRCS may require a participant to refund all or a portion of any assistance earned under AMA if the participant sells or loses control of the land under an AMA contract, and the successor in interest is not eligible or refuses to accept future payments to participate in the AMA or refuses to assume responsibility under the contract.

(e) The contract participants will be jointly and severally responsible for refunding the payments with applicable interest pursuant to paragraph (d) of this section.

### § 1465.25 Contract violations and termination.

(a) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or other documents incorporated into the contract, NRCS will give the participant notice and 60 days, unless otherwise determined by the State Conservationist, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, the State Conservationist may terminate the AMA contract.

(b) Notwithstanding the provisions of (a) of this section, a contract termination will be effective immediately upon a determination by the State Conservationist that the participant has submitted false information or filed a false claim, or engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1465.35, or in a case in which the actions of the

party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(c) If NRCS terminates a contract, the participant will forfeit all rights to future payments under the contract and refund all or part of the payments received, plus interest. Participants violating AMA contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) The State Conservationist may require only a partial refund of the payments received if the State Conservationist determines that a previously installed conservation practice can function independently and is not affected by the violation or the absence of other conservation practices that would have been installed under the contract.

(2) If NRCS terminates a contract due to breach of contract, or the participant voluntarily terminates the contract before any contractual payments have been made, the participant will forfeit all rights for further payments under the contract and will pay such liquidated damages as prescribed in the contract. The State Conservationist will have the option to waive the liquidated damages depending upon the circumstances of the case.

(i) When making all contract termination decisions, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If the participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) The participant may voluntarily terminate a contract if NRCS agrees based on NRCS' determination that termination is in the public interest.

(iii) In carrying out NRCS' role in this section, NRCS may consult with the local conservation district.

## Subpart C—General Administration

### § 1465.30 Appeals.

(a) A participant may obtain administrative review of an adverse decision under AMA in accordance with 7 CFR parts 11 and 614, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

(1) Payment rates, payment limits;

(2) Funding allocations;

(3) Eligible conservation practices; and

(4) Other matters of general applicability, including:

(i) Technical standards and formulas;

(ii) Denial of assistance due to lack of funds or authority; or

(iii) Science-based formulas and criteria.

### § 1465.31 Compliance with regulatory measures.

Participants who carry out conservation practices will be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

### § 1465.32 Access to operating unit.

Any authorized NRCS representative will have the right to enter an operating unit or tract for the purpose of determining eligibility and for ascertaining the accuracy of any representations related to contracts and performance. Access will include the right to provide technical assistance; determine eligibility; inspect any work undertaken under the contracts, including the APO and O&M agreement; and collect information necessary to evaluate the conservation practice performance as specified in the contracts. The NRCS representative will make an effort to contact the participant prior to exercising this provision.

### § 1465.33 Equitable relief.

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, the participant may be eligible for equitable relief under 7 CFR part 635, section 635.3. The financial or technical liability for any action by a participant that was taken based on the advice of an NRCS certified TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment.

(b) If a participant has been found in violation of a provision of the AMA contract or any document incorporated by reference through failure to comply fully with that provision, the participant may be eligible for equitable relief under 7 CFR part 635, section 635.4.

### § 1465.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any participant will be made without regard to questions of Title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 will be applicable to contract payments.

(b) AMA participants may assign any payments in accordance with 7 CFR part 1404.

### § 1465.35 Misrepresentation and scheme or device.

(a) A participant who is determined to have erroneously represented any fact affecting an AMA determination made in accordance with this part will not be entitled to contract payments and must refund to NRCS all payments plus interest, as determined in accordance with 7 CFR part 1403.

(b) A participant will refund to NRCS all payments, plus interest, as determined by NRCS with respect to all NRCS contracts to which they are a party if they are determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of AMA;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting an AMA determination.

(c) Where paragraph (a) or (b) of this section applies, the participant's interest in all contracts will be terminated. In accordance with § 1465.25(c), NRCS may determine the producer ineligible for future funding from any NRCS conservation programs.

### § 1465.36 Environmental services credits for conservation improvements.

NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through AMA, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an AMA contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance requirements for AMA-funded improvements are met, consistent with § 1465.21 and § 1465.22. Where activities may impact the land under an AMA contract, participants are highly encouraged to request an operation and maintenance compatibility determination prior to entering into any credit agreements. The AMA conservation program contract may be modified in accordance with policies outlined in § 1465.24 provided the modifications meet AMA purposes and are in compliance with this part.

# PART 1466—ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

## Subpart A—General Provisions

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AUTHORITY: 15 U.S.C. 714b and 714c; 16 U.S.C. 3839aa–3839–8

SOURCE: 68 FR 32348, May 30, 2003, unless otherwise noted.

## Subpart A—General Provisions

SOURCE: 74 FR 2308, Jan. 15, 2009, unless otherwise noted.

### § 1466.1 Applicability.

(a) The purposes of the Environmental Quality Incentives Program (EQIP) are to promote agricultural production, forest management, and environmental quality as compatible goals, and to optimize environmental benefits. Through EQIP, the Natural Resources Conservation Service (NRCS) provides assistance to eligible farmers and ranchers to address soil, water, and air quality, wildlife habitat, surface and groundwater conservation, energy conservation, and related natural resource concerns. EQIP's financial and technical assistance helps producers comply with environmental regulations and enhance agricultural and forested lands in a cost-effective and environmentally beneficial manner. The purposes of the program are achieved by planning and implementing conservation practices on eligible land.

(b) EQIP is available in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

### § 1466.2 Administration.

(a) The funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS for carrying out EQIP. Accordingly, where NRCS is mentioned in this Part, it also refers to the CCC's funds, facilities, and authorities where applicable.

(b) NRCS supports "locally led conservation" by using State Technical Committees at the State level and local working groups at the county or parish level to advise NRCS on issues relating to the EQIP implementation such as:

(1) Identification of priority resource concerns;

(2) Identification of which conservation practices should be eligible for financial assistance; and

(3) Establishment of payment rates.

(c) No delegation in this Part to lower organizational levels shall preclude the Chief from making any determinations under this Part, or from reversing or modifying any determination made under this Part.

(d) NRCS may enter into agreements with other Federal or State agencies, Indian tribes, conservation districts, units of local government, public or private organizations, and individuals to assist NRCS with implementation of the program in this Part.

### § 1466.3 Definitions.

The following definitions will apply to this Part and all documents issued in accordance with this Part, unless specified otherwise:

*Agricultural land* means cropland, grassland, rangeland, pasture, and other agricultural land, on which agricultural and forest-related products, or livestock are produced and resource

concerns may be addressed. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

*Agricultural operation* means a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management, and production, forestry, or cultivation practices that are substantially separate from other operations.

*Animal waste management facility* means a structural conservation practice, implemented in the context of a Comprehensive Nutrient Management Plan and consistent with the Field Office Technical Guide, which is used for storing, treating, or handling animal waste or byproducts, such as animal carcasses.

*Applicant* means a person, legal entity, joint operation, or tribe that has an interest in an agricultural operation, as defined in part 1400 of this chapter, who has requested in writing to participate in EQIP.

*At-risk species* means any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline.

*Beginning Farmer or Rancher* means a person or legal entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity, who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

*Comprehensive Nutrient Management Plan (CNMP)* means a conservation system that is unique to an animal feeding operation (AFO). A CNMP is a grouping of conservation practices and management activities which, when implemented as part of a conservation system, will help to ensure that both production and natural resource protection goals are achieved. A CNMP incorporates practices to use animal manure and organic by-products as a beneficial resource. A CNMP addresses natural resource concerns dealing with soil erosion, manure, and organic byproducts and their potential impacts on all natural resources including water and air quality, which may derive from an AFO. A CNMP is developed to assist an AFO owner/operator in meeting all applicable local, Tribal, State, and Federal water quality goals or regulations. For nutrient impaired stream segments or water bodies, additional management activities or conservation practices may be required by local, Tribal, State, or Federal water quality goals or regulations.

*Conservation district* means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," "natural resource district," or similar name.

*Conservation Innovation Grants* means competitive grants made under EQIP to individuals and governmental and non-governmental organizations to stimulate and transfer innovative technologies and approaches, to leverage Federal funds, and to enhance and protect the environment, in conjunction with agricultural production and forest management.

*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management practices, and other improvements that achieve the program purposes, including such items as CNMPs, agricultural energy management plans, dryland transition plans, forest management plans, integrated pest management, and other plans determined acceptable by the Chief.

*Contract* means a legal document that specifies the rights and obligations of any participant accepted into the program. An EQIP contract is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.

*Cost-effectiveness* means the least costly option for achieving a given set of conservation objectives.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for EQIP administration in a specific area.

*EQIP plan of operations* means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the priority resource concerns, optimize environmental benefits, and address program purposes as defined in *§ 1466.1*. The EQIP plan of operations is part of the EQIP contract.

*Estimated income foregone* means an estimate of the net income loss associated with the adoption of a conservation practice, including from a change in land use or land taken out of production or the opportunity cost associated with the adoption of a conservation practice. This shall not include losses of income due to disaster or other events unrelated to the conservation practice.

*Field office technical guide (FOTG)* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Forest management plan* means a site-specific plan that is prepared by a professional resource manager, in consultation with the participant, and is approved by the State Conservationist. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a); another practice plan approved by the State Forester; or another plan determined appropriate by the State Conservationist. The plan is intended to comply with Federal, State, tribal, and local laws, regulations, and permit requirements.

*Historically underserved producer* means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, or limited resource farmer or rancher.

*Indian land* means:

(1) Land held in trust by the United States for individual Indians or Indian tribes; or

(2) Land, the title to which is held by individual Indians or Indian Tribes subject to Federal restrictions against alienation or encumbrance; or

(3) Land which is subject to rights of use, occupancy and/or benefit of certain Indian Tribes; or

(4) Land held in fee title by an Indian, Indian family or Indian Tribe.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Integrated Pest Management* means a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.

*Joint operation* means, as defined in part 1400 of this chapter, a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.

*Legal entity* means, as defined in part 1400 of this chapter, an entity created under Federal or State law that:

(1) Owns land or an agricultural commodity, product, or livestock; or

(2) Produces an agricultural commodity, product, or livestock.

*Lifespan* means the period of time during which a conservation practice should be maintained and used for the intended purpose.

*Limited Resource Farmer or Rancher* means:

(1) A person with direct or indirect gross farm sales not more than $155,200 in each of the previous two years (adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service), and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data).

*Liquidated damages* means a sum of money stipulated in the EQIP contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Livestock* means all animals produced on farms or ranches, as determined by the Chief.

*Livestock production* means farm or ranch operations involving the production, growing, raising, or reproduction of livestock or livestock products.

*Local Working Group* means the advisory body as defined in part 610 of this title.

*National measures* mean measurable criteria identified by the Chief, with the advice of other Federal agencies and State Conservationists, to help EQIP achieve the national priorities and statutory requirements.

*National Organic Program* means the national program, administered by the Agricultural Marketing Service, which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to sell an agricultural product as organically produced.

*National priorities* means resource issues identified by the Chief, with advice from other Federal agencies and State Conservationists, which will be used to determine the distribution of EQIP funds and guide local EQIP implementation.

*Natural Resources Conservation Service* is an agency of the USDA, which has responsibility for administering EQIP using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forest land* means rural land, as determined by the Secretary, that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

*Operation and maintenance* means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Operation and maintenance (O&M) agreement* means the document that, in conjunction with the EQIP plan of operations, specifies the operation and maintenance responsibilities of the participant for conservation practices installed with EQIP assistance.

*Organic System Plan* means a management plan for organic production or for an organic handling operation that has been agreed to by the producer or handler and the certifying agent. The Organic System Plan includes all written plans that govern all aspects of agricultural production or handling.

*Participant* means a person, legal entity, joint operation, or tribe that is receiving payment or is responsible for implementing the terms and conditions of an EQIP contract.

*Payment* means financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for: planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for designated conservation practices.

*Person* means, as defined in part 1400 of this chapter, an individual, natural person, and does not include a legal entity.

*Priority resource concern(s)* means a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee, as a priority for a State, geographic area, or watershed level.

*Producer* means a person, legal entity, or joint operation who has an interest in the agricultural operation, according to part 1400 of this chapter, or who is engaged in agricultural production or forestry management.

*Regional Assistant Chief* means the NRCS employee authorized to direct and supervise NRCS activities in an NRCS region.

*Resource Concern* means a specific natural resource problem that represents a significant concern in a State or region, and is likely to be addressed successfully through the implementation of the conservation activities by producers.

*Secretary* means the Secretary of the USDA.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

*State Conservationist* means the NRCS employee authorized to implement EQIP and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Island Area.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

*Structural practice* means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

*Technical assistance* means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Technical Service Provider (TSP)* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants, in lieu of or on behalf of NRCS.

*Wildlife* means non-domesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals.

### § 1466.4 National priorities.

(a) The following national priorities, consistent with statutory resource concerns that include soil, water, wildlife,

air quality, and related resource concerns, will be used in EQIP implementation:

(1) Reductions of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds consistent with total maximum daily loads (TMDLs) where available; the reduction of surface and groundwater contamination; and the reduction of contamination from agricultural point sources, such as concentrated animal feeding operations;

(2) Conservation of ground and surface water resources;

(3) Reduction of emissions, such as particulate matter, nitrogen oxides, volatile organic compounds, and ozone precursors and depleters that contribute to air quality impairment violations of National Ambient Air Quality Standards;

(4) Reduction in soil erosion and sedimentation from unacceptable levels on agricultural land; and

(5) Promotion of at-risk species habitat conservation.

(b) In consultation with other Federal agencies, NRCS will undertake periodic reviews of the national priorities and the effects of program delivery at the State and local level to adapt the program to address emerging resource issues. NRCS will:

(1) Use the national priorities to guide the allocation of EQIP funds to the NRCS State offices,

(2) Use the national priorities in conjunction with State and local priorities to assist with prioritization and selection of EQIP applications, and

(3) Periodically review and update the national priorities utilizing input from the public and affected stakeholders to ensure that the program continues to address priority resource concerns.

### § 1466.5 National allocation and management.

The Chief allocates EQIP funds to the State Conservationists to implement EQIP at the State and local level. In order to optimize the overall environmental benefits over the program duration, the Chief will:

(a) Use an EQIP fund allocation formula that reflects national priorities and that uses available natural resource and resource concerns data to distribute funds to the State level. This procedure will be updated periodically to reflect adjustments to national priorities and information about resource concerns and program performance. The data used in the allocation formula will be updated as they become available.

(b) Provide a performance incentive to NRCS in States that demonstrate a high level of program accomplishment in implementing EQIP. The Chief shall consider factors such as strategically planning EQIP implementation, effectively addressing national priorities and measures, State and local resource concerns, the program delivery effectiveness, the use of TSPs, and the number of contracts with historically underserved producers.

(c) Establish State level EQIP performance goals based on national, regional, and State priorities.

(d) Ensure that national, State and local level information regarding program implementation such as resource priorities, eligible practices, ranking processes, payment schedules, fund allocation, and program achievements are made available to the public.

(e) Consult with other Federal agencies with the appropriate expertise and information when evaluating the considerations described in this section.

(f) Authorize the State Conservationist, with advice from the State Technical Committee and local working groups, to determine how funds will be used and how the program will be administered to achieve national priorities in each State.

(g) Utilize assessment, evaluation, and accountability procedures based on actual natural resource and environmental outcomes and results.

### § 1466.6 State allocation and management.

The State Conservationist will:

(a) Identify State priority resource concerns, with the advice of the State Technical Committee, which directly contribute toward meeting national priorities and measures, and will use NRCS's accountability system and other accountability tools to establish local level goals and treatment objectives;

(b) Identify, as appropriate and necessary, designated conservationists who are NRCS employees that are assigned the responsibility to administer EQIP in specific areas; and

(c) Use the following to determine how to manage EQIP and how to allocate funds within a State:

(1) The nature and extent of priority resource concerns at the State and local level;

(2) The availability of human resources, incentive programs, educational programs, and on-farm research programs from public, private, and Tribal sources, to assist with the activities related to the priority resource concerns;

(3) The existence of multi-county and/or multi-State collaborative efforts to address regional priority resource concerns;

(4) Program performance and results;

(5) The degree of difficulty that producers face in complying with environmental laws; and

(6) The presence of additional priority resource concerns and specialized farming operations, including but not limited to, specialty crop producers, organic producers, and small-scale farms.

### § 1466.7 Outreach activities.

NRCS will establish program outreach activities at the national, State, and local levels in order to ensure that producers whose land has environmental problems and priority resource concerns are aware and informed that they may be eligible to apply for program assistance. Special outreach will be made to eligible producers with historically low participation rates, including but not restricted to, limited resource, socially disadvantaged, small-scale, or beginning farmers or ranchers, Indian Tribes, Alaska Natives, and Pacific Islanders.

### § 1466.8 Program requirements.

(a) Program participation is voluntary. The applicant must develop an EQIP plan of operations for the agricultural or nonindustrial private forest land to be treated that serves as the basis for the EQIP contract. NRCS provides participants with technical assistance and payments to plan and apply needed conservation practices.

(b) To be eligible to participate in EQIP, an applicant must:

(1) Be in compliance with the highly erodible land and wetland conservation provisions found at part 12 of this title;

(2) Have an interest in the agricultural operation as defined in part 1400 of this chapter;

(3) Have control of the land for the term of the proposed contract period;

(i) The Chief may determine that land administered by the Bureau of Indian Affairs (BIA), Indian land, or other such circumstances provides sufficient assurance of control,

(ii) If the applicant is a tenant of the land involved in agricultural production or forestry management, the applicant shall provide the Chief with the written concurrence of the landowner in order to apply a structural conservation practice,

(4) Submit an EQIP plan of operations or plan developed for the purposes of acquiring an air or water quality permit, provided these plans contain elements equivalent to those elements required by an EQIP plan of operations and are acceptable to the State Conservationist as being consistent with the purposes of the program;

(5) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information to verify the applicant's status as a limited resource, beginning farmer or rancher, and payment eligibility as established by part 1400 of this chapter; and

(6) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(c) Eligible land includes agricultural land and nonindustrial private forest land, and other land on which agricultural products, livestock, or forest-related products are produced and resource concerns may be addressed. Other agricultural lands include cropped woodland, marshes, incidental

areas included in the agricultural operation, and other types of agricultural land used for production of livestock. However, land may be considered for enrollment in EQIP only if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is a working component of the participant's agricultural and forestry operation, and

(ii) The participant has control of the land for the term of the contract, and

(iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern; or

(3) Indian land.

(d) Sixty percent of available EQIP financial assistance will be targeted to conservation practices related to livestock production, including practices on grazing lands and other lands directly attributable to livestock production, as measured at the national level.

(e) NRCS will establish a national target to set aside five percent of EQIP funds for socially disadvantaged farmers or ranchers and an additional five percent of EQIP funds for beginning farmers or ranchers.

[68 FR 32348, May 30, 2003, as amended at 74 FR 25617, May 29, 2009]

### § 1466.9 EQIP plan of operations.

(a) All conservation practices in the EQIP plan of operations must be approved by NRCS and developed and carried out in accordance with the applicable NRCS technical guidance.

(b) The participant is responsible for implementing the EQIP plan of operations.

(c) The EQIP plan of operations must include:

(1) A description of the participant's specific conservation and environmental objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation, natural resource, and environmental objectives;

(3) A description of one or more conservation practices in the conservation management system, including conservation planning, design, or installation activities, to be implemented to achieve the conservation and environmental objectives;

(4) A description of the schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives.

(d) If an EQIP plan of operations includes an animal waste storage or treatment facility, the participant must agree to develop and implement a CNMP or demonstrate to the satisfaction of the designated conservationist that a CNMP has been implemented.

(e) If an EQIP plan of operations addresses forestland, the participant must develop and implement a forest management plan.

(f) A participant may receive assistance to implement an EQIP plan of operations for water conservation only if the assistance will facilitate a reduction in ground and surface water use on the agricultural operation, unless the producer is participating in a watershed-wide project, as approved by the State Conservationist, which will effectively conserve water in accordance with § 1466.20.

## Subpart B—Contracts and Payments

### § 1466.10 Conservation practices.

(a) NRCS will determine the conservation practices for which participants may receive program payments. A list of eligible practices will be available to the public.

(b) Payments will not be made to a participant for a conservation practice that either the applicant or another producer has applied prior to application for the program. Payments will not be made for a conservation practice that has been initiated or implemented prior to contract approval, unless a waiver was granted by the State Conservationist or designated conservationist prior to the practice implementation.

(c) A participant will be eligible for payments for water conservation and

irrigation related conservation practices only on land that has been irrigated for two of the last five years prior to application for assistance.

(d) Where new technologies or management approaches that provide a high potential for optimizing environmental benefits have been developed, NRCS may approve interim conservation practice standards that incorporate the new technologies and provide financial assistance for pilot work to evaluate and assess the performance, efficiency, and effectiveness of the new technology or management approach.

[74 FR 2313, Jan. 15, 2009]

### § 1466.11 Technical services provided by qualified personnel not affiliated with USDA.

(a) NRCS may use the services of qualified TSPs in performing its responsibilities for technical assistance.

(b) Participants may use technical services from qualified personnel of other Federal, State, and local agencies, Indian Tribes, or individuals who are certified as TSPs by NRCS.

(c) Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to: conservation planning; conservation practice survey, layout, design, installation, and certification; and information; education; and training for producers.

(d) NRCS retains approval authority of work done by non-NRCS personnel for the purpose of approving EQIP payments.

[74 FR 2313, Jan. 15, 2009]

### § 1466.20 Application for contracts and selecting applications.

(a) In evaluating EQIP applications, the State Conservationist or designated conservationist, with advice from the State Technical Committee or local working group, takes into account the following guidelines:

(1) Any producer who has eligible land may submit an application for participation in EQIP. Applications are accepted throughout the year. Producers who are members of a joint operation may file a single application for the joint operation.

(2) The State Conservationist, to the greatest extent practicable, will group applications of similar crop, forestry, and livestock operations for evaluation purposes.

(3) The State Conservationist will evaluate applications within each established grouping.

(b) In selecting EQIP applications, the State Conservationist or designated conservationist, with advice from the State Technical Committee or local working group, may establish ranking pools to address a specific resource concern, geographic area, or agricultural operation type or develop a ranking process to prioritize applications for funding that address national, State, and local priority resource concerns, taking into account the following guidelines:

(1) The State Conservationist or designated conservationist will periodically select the highest ranked applications for funding based on applicant eligibility, fund availability, and the NRCS ranking process. The State Conservationist or designated conservationist will rank all applications according to the following factors:

(i) The degree of cost-effectiveness of the proposed conservation practices;

(ii) The magnitude of the expected environmental benefits resulting from the conservation treatment and the priority of the resource concerns that have been identified at the local, State, and national levels;

(iii) How effectively and comprehensively the project addresses the designated resource concern or resource concerns;

(iv) Use of conservation practices that provide long-term environmental enhancements;

(v) Compliance with Federal, State, Tribal, or local regulatory requirements concerning soil, water and air quality; wildlife habitat; and ground and surface water conservation;

(vi) Willingness of the applicant to complete all conservation practices in an expedited manner;

(vii) The ability to improve existing conservation practices or systems, which are in place at the time the application is accepted, or that complete a conservation system;

(viii) Other locally defined pertinent factors, such as the location of the conservation practice, the extent of natural resource degradation, and the degree of cooperation by local producers to achieve environmental improvements.

(2) For applications that include water conservation or irrigation efficiency practices, the State Conservationist will give priority to those applications where:

(i) Consistent with State law in which the producer's eligible land is located, there is a reduction in water use in the agricultural operation, or where the producer agrees not to use any associated water savings to bring new land under irrigation production, other than incidental land needed for efficient operations.

(ii) A producer who brings new land under irrigated production may be excluded from this latter condition if the producer is participating in a watershed-wide project that will effectively conserve water. The State Conservationist will designate eligible watershed-wide projects that effectively conserve water, using the following criteria:

(A) The project area has a current, comprehensive water resource assessment;

(B) The project plan has demonstrated effective water conservation management strategies; and

(C) The project sponsors have consulted relevant State and local agencies.

(3) If the State Conservationist determines that the environmental values of two or more applications for payments are comparable, the State Conservationist will not assign a higher priority to the application solely because it would present the least cost to the program.

(4) The ranking will not give preferential treatment to applications based on size of the operation.

(5) The ranking process will determine the order in which applications will be selected for funding. The approving authority for EQIP contracts will be the State Conservationist or designee, except that the approving authority for any EQIP contract greater than $150,000 and up to $300,000 will be the appropriate NRCS Regional Assistant Chief.

(6) The State Conservationist will make available to the public all information regarding priority resource concerns, the list of eligible practices, payment rates, and how the EQIP program is implemented in the State.

[74 FR 2313, Jan. 15, 2009]

### § 1466.21 Contract requirements.

(a) In order for a participant to receive payments, the participant must enter into a contract agreeing to implement one or more conservation practices. Technical services may be included in the contract.

(b) An EQIP contract will:

(1) Identify all conservation practices to be implemented, the timing of practice installation, the operation and maintenance requirements for the practices, and applicable payments allocated to the practices under the contract;

(2) Be for a minimum duration of one year after completion of the last practice, but not more than 10 years;

(3) Incorporate all provisions as required by law or statute, including requirements that the participant will:

(i) Not implement any practices within the agricultural or forestry operation that would defeat the program's purposes;

(ii) Refund any program payments received with interest, and forfeit any future payments under the program, on the violation of a term or condition of the contract, consistent with the provisions of § 1466.26;

(iii) Refund all program payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including operation and maintenance of the EQIP contract's conservation practices, consistent with the provisions of § 1466.25;

(iv) Implement a comprehensive nutrient management plan when the EQIP contract includes an animal waste management facility;

(v) Implement a forest management plan when the EQIP plan of operations addresses nonindustrial private forest land;

(vi) Supply information as may be required by NRCS to determine compliance with the contract and program requirements;

(vii) Specify the participant's responsibilities for operation and maintenance of the applied conservation practices, consistent with the provisions of § 1466.22; and

(4) Specify any other provision determined necessary or appropriate by NRCS.

(c) The participant must start at least one financially assisted practice within the first 12 months of signing a contract. If a participant, for reasons beyond their control, is unable to start conservation practice within the first year of the contract, the participant can request a waiver from the State Conservationist.

(d) Each contract will be limited to no more than $300,000. The Chief may waive this contract limitation to allow up to $450,000 for projects of special environmental significance that include methane digesters, other innovative technologies, and projects that will result in significant environmental improvements. Projects of special environmental significance must meet the following criteria, as determined by the Chief:

(1) Site-specific evaluation documents have been completed, documenting that the project will have substantial positive impacts on critical resources in or near the project area (e.g., impaired water bodies, at-risk species, drinking water supplies, or air quality attainment);

(2) The project clearly addresses a national priority and State, Tribal, or local priority resource concerns, as applicable; and

(3) The project assists the participant in complying with Federal, State, and local regulatory requirements.

[74 FR 2313, Jan. 15, 2009]

### § 1466.22 Conservation practice operation and maintenance.

(a) The contract will incorporate the O&M agreement that addresses the operation and maintenance of conservation practices applied under the contract.

(b) NRCS expects the participant to operate and maintain each conservation practice installed under the contract for its intended purpose for the conservation practice lifespan as specified in the O&M agreement.

(c) Conservation practices installed before the contract execution, but included in the contract to obtain the environmental benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

(d) NRCS may periodically inspect the conservation practice during the contract duration as specified in the O&M agreement to ensure that operation and maintenance requirements are being carried out, and that the conservation practice is fulfilling its intended objectives.

(e) If NRCS finds during the contract that a participant is not operating and maintaining practices in an appropriate manner, NRCS may terminate and request a refund of payments made for that conservation practice under the contract.

[74 FR 2313, Jan. 15, 2009]

### § 1466.23 Payment rates.

(a) The State Conservationist or designated conservationist will develop a list of conservation practices, eligible for payment under the program, which considers:

(1) The conservation practice cost-effectiveness, implementation efficiency, and innovation,

(2) The degree and effectiveness in treating priority resource concerns,

(3) The number of resource concerns the practice will address,

(4) The longevity of the practice's environmental benefits,

(5) The conservation practice's ability to assist producers in meeting regulatory requirements, and

(6) Other pertinent local considerations.

(b) Payment rates will be established by the State Conservationist or designated conservationist, with advice from the State Technical Committee and local working groups.

(c) Determining payment rates. (1) A payment to a producer for performing a practice may not exceed, as determined by the State or designated conservationist:

(i) 75 percent of the estimated costs incurred by implementing the conservation practice;

(ii) 100 percent of the estimated income foregone; or

(iii) Both conditions in paragraphs (c)(1)(i) and (ii) of this section, where a producer incurs costs in implementing a conservation practice and foregoes income related to that practice implementation.

(iv) When determining payments for income foregone, the State Conservationist may give higher priority to the following conservation practices:

(A) Residue management;

(B) Nutrient management;

(C) Air quality management;

(D) Invasive species management;

(E) Pollinator habitat development or improvement;

(F) Animal carcass management technology; or

(G) Pest management.

(2) Notwithstanding paragraph (c)(1)(ii) of this section, a farmer or rancher meeting the historically underserved producer designation in §1466.3 may be awarded the applicable payment rate and an additional rate that is not less than 25 percent above the applicable rate, provided this increase does not exceed 90 percent of the incurred costs estimated for the conservation practice.

(3) The payments to a participant will be reduced proportionately below the rate established by the State Conservationist or designated conservationist, to the extent that total financial contributions for a conservation practice from other sources exceed 100 percent of the estimated costs incurred for implementing or performing the conservation practice.

(4) The State Conservationist shall provide payments for conservation practices on some or all of the operations of a producer related to organic production and the transition to organic production. Payments may not be made to cover the costs associated with organic certification or for practices that are eligible for cost-share payments under the National Organic Program (7 U.S.C. 6523).

(d) Practice payment rates greater than 50 percent for estimated costs incurred, excluding those described in paragraph (c)(2) of this section, are to be approved by the Chief.

(e) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

[74 FR 2313, Jan. 15, 2009]

### §1466.24 EQIP payments.

(a) Except for contracts entered into prior to October 1, 2008, or as provided in paragraph (b) of this section, the total amount of payments paid to a person or legal entity under this Part may not exceed an aggregate of $300,000, directly or indirectly, for all contracts, including prior year contracts, entered into during any 6-year period. For the purpose of applying this requirement, the 6-year period will include those payments made in fiscal years 2009–2014. Payments received for technical assistance shall be excluded from this limitation.

(b) The Chief may waive the $300,000 payment limitation, allowing up to $450,000 per person or legal entity for projects of special environmental significance, as defined in §1466.21(d).

(c) Payments for conservation practices related to organic production to a person or legal entity, directly or indirectly, may not exceed in aggregate $20,000 per year or $80,000 during any 6-year period.

(d) To determine eligibility for payments, NRCS will use the following criteria:

(1) The provisions in part 1400 of this chapter, Payment Limitation and Payment Eligibility, subparts A and G.

(2) States, political subdivisions, and entities thereof will not be considered to be persons or legal entities eligible for payment.

(3) To be eligible to receive an EQIP payment, all legal entities or persons applying, either alone or as part of a joint operation, must provide a tax identification number and percentage interest in the legal entity. In accordance with 7 CFR 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' social security numbers and percentage interest

in the joint operation or legal entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(4) With regard to contracts with Indian tribes or Indians represented by BIA, payments exceeding the payment limitation may be made to the Tribal participant if a BIA or Tribal official certifies in writing that no one individual, directly or indirectly, will receive more than the payment limitation. The Tribal entity must also provide, annually, a listing of individuals and payments made, by social security or tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The BIA or Tribal entity must also produce, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation practice implementation.

(5) Any cooperative association of producers that markets commodities for producers will not be considered to be a person eligible for payment.

(6) Eligibility for payments in accordance with part 1400, subpart G of this chapter, average adjusted gross income limitation, will be determined prior to contract approval.

(7) To be eligible for payments for conservation practices related to organic production or the transition to organic production, a participant will develop and implement an organic system plan as defined in § 1466.3.

(8) Eligibility for higher payments in accordance with paragraph (b) of this section will be determined at the time of contract approval.

(9) Any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other EQIP contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1466.35.

(10) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice on the same land under any other conservation program administered by USDA.

(11) The State Conservationist may issue advance payments to historically underserved producers up to 30 percent of the anticipated amount of the costs incurred for the purpose of purchasing materials or services to implement a conservation practice.

(12) Before NRCS will approve and issue final payment, the participant must certify that the conservation practice has been completed in accordance with the contract, and NRCS, or an approved TSP, must certify that the practice has been carried out in accordance with the applicable NRCS technical guidance.

[68 FR 32348, May 30, 2003, as amended at 74 FR 10675, Mar. 12, 2009]

### § 1466.25 Contract modifications and transfers of land.

(a) The participant and NRCS may modify a contract if both parties agree to the contract modification, the EQIP plan of operations is revised in accordance with NRCS requirements, and the contract is approved by the designated conservationist.

(b) It is the participant's responsibility to notify NRCS when he/she either anticipates the voluntary or involuntary loss of control of the land covered by an EQIP contract.

(c) The participant and NRCS may agree to transfer a contract to another party.

(1) To receive an EQIP payment, the transferee must be determined by NRCS to be eligible to participate in EQIP and must assume full responsibility under the contract, including the O&M agreement for those conservation practices already installed and those conservation practices to be installed as a condition of the contract.

(2) If the transferee is ineligible or refuses to accept future payments, NRCS will terminate the contract and may require the transferor to refund and/or forfeit all payments received.

(d) NRCS may require a participant to refund all or a portion of any financial assistance earned under EQIP if the participant sells or loses control of the land covered by an EQIP contract and the new owner or controller is not

eligible to participate in the program or refuses to assume responsibility under the contract.

(e) In the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the practice, at the rates established in accordance with § 1466.23, provided such payments do not exceed the payment limitation requirements as set forth § 1466.24.

[74 FR 2313, Jan. 15, 2009]

**§ 1466.26 Contract violations and terminations.**

(a) The State Conservationist may terminate, or by mutual consent with the parties, terminate the contract where:

(1) The parties to the contract are unable to comply with the terms of the contract as the result of conditions beyond their control;

(2) Termination of the contract would, as determined by the State Conservationist, be in the public interest; or

(3) A participant fails to correct a contract violation within the time period defined by NRCS.

(b) If a contract is terminated in accordance with the provisions of paragraphs (a)(1) and (a)(2) of this section, the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the contract. If a participant claims hardship, such claims must be clearly documented and cannot have existed when the applicant applied for participation in the program.

(c) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or documents incorporated by reference into the contract, NRCS shall give the participant a period of time, as determined by NRCS, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, NRCS may terminate the EQIP contract in accordance with § 1466.26(e).

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination shall be effective immediately upon a determination by NRCS that the participant has submitted false information or filed a false claim, or engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1466.35, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(e) If NRCS terminates a contract due to breach of contract, the participant will forfeit all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest. Participants violating EQIP contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation practice can function independently, is not adversely affected by the violation or the absence of other conservation practices that would have been installed under the contract.

(2) The State Conservationist will have the option to reduce or waive the liquidated damages, depending upon the circumstances of the case.

(i) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If a participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) In carrying out its role in this section, NRCS may consult with the local conservation district.

(f) The State Conservationist, in consultation with the State Technical Committee, may terminate a contract

whereby a producer is receiving payments for conservation practices related to organic production, if the designated conservationist determines that the producer is not pursuing organic certification, or has been decertified.

[74 FR 2313, Jan. 15, 2009]

### § 1466.27 Conservation Innovation Grants (CIG).

(a) *Definitions*. In addition to the terms defined in §1466.3 of this part, the following definitions shall be applicable to this section:

(1) *EQIP eligible* means any farming entity, land, and practice that meets the definitions of EQIP as defined in 7 CFR 1466.

(2) *Grant agreement* means a document describing a relationship between NRCS and a State or local government, or other recipient whenever the principal purpose of the relationship is the transfer of a thing of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal law, and substantial Federal involvement is not anticipated.

(3) *Grant Review Board* consists of the NRCS Deputy Chief for Programs, Deputy Chief for Science and Technology, Deputy Chief for Soil Survey and Resource Assessment, one Regional Assistant Chief, and one State Conservationist. The Review Board makes recommendations for grant awards to the Chief.

(4) *Peer Review Panel* means a panel consisting of Federal and non-Federal technical advisors who possess expertise in a discipline or disciplines deemed important to provide a technical evaluation of project proposals submitted under this notice.

(5) *Project* means the activities as defined within the scope of the grant agreement.

(6) *Project Director* means the individual responsible for the technical direction and management of the project as designated in the application.

(b) *Purpose and scope*—(1) *Purpose*. The purpose of CIG is to stimulate the development and adoption of innovative conservation approaches and technologies while leveraging Federal investment in environmental enhancement and protection, in conjunction with agricultural production. Notwithstanding any limitation of this part, NRCS will administer CIG in accordance with this section. Unless otherwise provided for in this section, the provisions of 7 CFR 3015 and related Departmental regulations will be used to administer grants under CIG.

(2) *Geographic scope*. Applications for CIG are accepted from the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(3) *Program scope*. Grants will be awarded using a two-tiered process. A nationwide grants competition will be announced in the FEDERAL REGISTER. In addition, at the Chief's discretion, each State Conservationist may implement a separate State-level component of CIG.

(4) *Program focus*. Applications for CIG should demonstrate the use of innovative approaches and technologies to leverage Federal investment in environmental enhancement and protection, in conjunction with agricultural production. CIG will fund projects that promote innovative on-the-ground conservation, including pilot projects and field demonstrations of promising approaches or technologies. CIG projects are expected to lead to the transfer of conservation technologies, management systems, and innovative approaches (such as market-based systems) into NRCS technical manuals and guides, or to the private sector. Technologies and approaches eligible for funding in a project's geographic area through EQIP are not eligible for CIG funding except where the use of those technologies and approaches demonstrates clear innovation. The burden falls on the applicant to sufficiently describe the innovative features of the proposed technology or approach.

(5) *Innovative conservation projects or activities*. For the purposes of CIG, the proposed innovative project or activity must encompass the development and field testing, evaluation, and implementation of:

(i) Conservation adoption incentive systems, including market-based systems; or,

(ii) Promising conservation technologies, practices, systems, procedures, and approaches.

To be given priority consideration, the innovative project or activity:

(iii) Will have been studied sufficiently to indicate a good probability for success;

(iv) Demonstrates, tests, evaluates, or verifies environmental (soil, water, air, plants, and animal) effectiveness, utility, affordability, and usability in the field;

(v) Adapts conservation technologies, practices, systems, procedures, approaches, and incentive systems to improve performance, and encourage adoption;

(vi) Introduces conservation systems, approaches, and procedures from another geographic area or agricultural sector; and

(vii) Adapts conservation technology, management, or incentive systems to improve performance.

(c) *Availability of funding.* (1) CIG funding will be available for single-or multi-year projects. Funding for CIG will be announced in the FEDERAL REGISTER through a Request for Proposals (RFP). The Chief will determine the funding level for CIG on an annual basis. Funds for CIG are derived from funds made available for EQIP. The Chief may establish funding limits for individual grants.

(2) Selected applicants may receive grants of up to 50 percent of the total project cost. Applicants must provide non-Federal funding for at least 50 percent of the project cost, of which up to one-half (25 percent of total project cost) may be from in-kind contributions. An exception regarding matching funds may be made for grants that are awarded to either a Beginning or Limited Resource Farmer or Rancher, or Indian Tribe, or a community-based organization comprised of or representing these entities. Up to 75 percent of the required matching funds for these projects may derive from in-kind contributions.

(3) CIG is designed to provide financial assistance to grantees. Procurement of any technical assistance required to carry out a project is the responsibility of the grantee. Technical oversight for grant projects will be provided by a Federal grant representative, who will be designated by NRCS.

(4) There are some costs that grantees may not cover using CIG funds, such as costs incurred prior to the effective date of the grant, entertainment costs, any indirect cost exceeding fifteen percent, or renovation or refurbishment of facilities. A detailed list of costs not allowed will be published in the Request for Proposals.

(d) *Natural resource conservation concerns.* CIG applications must describe the use of innovative approaches or technologies to address a natural resource conservation concern or concerns. The natural resource concerns for CIG will be identified by the Chief, and may change each year. The natural resource concerns will be published in the RFP.

(e) *Eligibility information*—(1) *Organization or individual eligibility.* To be eligible, CIG applicants must be an Indian Tribe; State or local unit of government; non-governmental organization; or individual.

(2) *Project eligibility.* To be eligible, projects must involve landowners who meet the eligibility requirements of §1466.8(b)(1) through (3) of this part. Further, all agricultural producers receiving a direct or indirect payment through participation in a CIG project must meet those eligibility requirements.

(3) *Beginning and Limited Resource Farmers and Ranchers, and Indian Tribes.* Up to 10 percent of the total funds available for CIG may be set-aside for applications from either a Beginning or Limited Resource Farmer or Rancher, or Indian Tribe, or a community-based organization comprised of or representing these entities. Funds not awarded from the set-aside pool will revert back into the general CIG funding pool.

(f) *Application and submission information.* The CIG RFP will contain guidance on how to apply for the grants competition. CIG will be advertised through the FEDERAL REGISTER, the NRCS Web site, and *grants.gov.* Grant applications will be available on the NRCS Web site, or by contacting NRCS

at the address provided in the RFP. CIG grant applications will consist of standard cover sheet and budget forms, in addition to a narrative project description and required legal declarations and certifications.

(g) *Application review and grant awards.* Complete applications will be evaluated by a peer review panel and scored based on the Criteria for Proposal Evaluation identified in the RFP. Scored applications will be forwarded to a Grant Review Board. The Grant Review Board will make recommendations for awards to the Chief. Final award selections will be made by the Chief. Grant awards will be made by the NRCS National Office after selection of the grantees is made and after the grantee agrees to the terms and conditions of the NRCS Grant document.

(h) *State component.* (1) At the discretion of the Chief, each State Conservationist has the option of implementing a State-level CIG component. A State program will follow the requirements of this section, except for those features described in this paragraph (h).

(2) Funding availability, application, and submission information for State competitions will be announced through public notices (and on the State NRCS Web site), separately from the national program. The State component will emphasize projects that cover limited geographic areas, including individual farms, multi-county areas, or small watersheds.

(3) The State Conservationist will determine the funding level for the grants competition, with individual grants not to exceed $75,000.

(4) The State Conservationist may choose to adhere to the CIG national natural resource concerns, or may select a subset of those concerns that more closely match the natural resource concerns in his or her State.

(5) Applications will be scored by the State Technical Committee, or a subcommittee thereof, based on the national Criteria for Proposal Evaluation published in the CIG RFP. Scored applications will be forwarded to the State Conservationist, who will make the award selections.

(6) In addition to abiding by the in-kind contribution exception for Limited Resource and Beginning Farmers and Ranchers, and Indian Tribes in paragraph (c)(2) of this section, the State Conservationist in each participating State will determine if and how to provide additional special consideration to underserved groups.

(i) *Grant agreement.* The CCC, through NRCS, will use a grant agreement with selected grantees to document participation in CIG.

(j) *Patents and inventions.* Allocation of rights to patents and inventions shall be in accordance with USDA regulation 7 CFR 3019.36. This regulation provides that small businesses normally may retain the principal worldwide patent rights to any invention developed with USDA support. In accordance with 7 CFR 3019.2, this provision will also apply to commercial organizations for the purposes of CIG. USDA receives a royalty-free license for Federal Government use, reserves the right to require the patentee to license others in certain circumstances, and requires that anyone exclusively licensed to sell the invention in the United States must normally manufacture it domestically.

(k) *Violations.* A person found in violation of this section is subject to the provisions contained in 7 CFR part 3015 and related Departmental regulations.

[69 FR 16397, Mar. 29, 2004; 70 FR 1791, Jan. 11, 2005; 74 FR 2316, Jan. 15, 2009]

## Subpart C—General Administration

SOURCE: 74 2316, Jan. 15, 2009, unless otherwise noted.

### § 1466.30 Appeals.

A participant may obtain administrative review of an adverse decision under EQIP in accordance with parts 11 and 614 of this title. Determination in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation practices are not subject to appeal.

### § 1466.31 Compliance with regulatory measures.

Participants who carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

### § 1466.32 Access to operating unit.

Any authorized NRCS representative shall have the right to enter an agricultural operation or tract for the purposes of determining eligibility and for ascertaining the accuracy of any representations related to contract performance. Access shall include the right to provide technical assistance, determine eligibility, inspect any work undertaken under the contract, and collect information necessary to evaluate the conservation practice performance, specified in the contract. The NRCS representative shall make an effort to contact the participant prior to the exercising this provision.

### § 1466.33 Equitable relief.

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, NRCS may accept the advice or action as meeting program requirements and may grant relief, to the extent it is deemed desirable by NRCS, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant. The financial or technical liability for any action by a participant that was taken based on the advice of a NRCS certified non-USDA TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment. Where a participant believes that detrimental reliance on the advice or action of a NRCS representative resulted in an ineligibility or program violation, but the participant believes that a good faith effort to comply was made, the participant may request equitable relief under § 635.3 in chapter VI of this title.

(b) If, during the term of an EQIP contract, a participant has been found in violation of a provision of the EQIP contract, the O&M agreement, or any document incorporated by reference through failure to fully comply with that provision, the participant may be eligible for equitable relief under § 635.4 in chapter VI of this title.

### § 1466.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person, joint venture, legal entity or tribe shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this chapter shall be applicable to contract payments.

(b) EQIP participants may assign any payments in accordance with part 1404 of this chapter.

### § 1466.35 Misrepresentation and scheme or device.

(a) A person, joint venture, legal entity or tribe that is determined to have erroneously represented any fact affecting a program determination made in accordance with this Part shall not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) A producer who is determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination, shall refund to NRCS all payments, plus interest determined in accordance with 7 CFR

1403, received by such producer with respect to all contracts. The producer's interest in all contracts shall be terminated.

(c) In accordance with §1466.26(e), NRCS may determine the producer ineligible for future conservation programs funding.

### §1466.36 Environmental credits for conservation improvements.

NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through EQIP, and environmental credits may be gained as a result of implementing activities compatible with the purposes of an EQIP contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance (O&M) requirements for EQIP-funded improvements are met, consistent with §§1466.21 and 1466.22. Where activities may impact the land under an EQIP contract, participants are highly encouraged to request an O&M compatibility determination from NRCS prior to entering into any credit agreements.

## PART 1467—WETLANDS RESERVE PROGRAM

Sec.

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AUTHORITY: 16 U.S.C. 3837 *et seq.*

SOURCE: 74 FR 2328, Jan. 15, 2009, unless otherwise noted.

### §1467.1 Applicability.

(a) The regulations in this part set forth the policies, procedures, and requirements for the Wetlands Reserve Program (WRP) as administered by the Natural Resources Conservation Service (NRCS) for program implementation.

(b) The Chief, NRCS, may implement WRP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

### §1467.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief.

(b) The Chief is authorized to modify or waive a provision of this part if the Chief deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the environmental and cost-efficiency goals of the WRP. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part that is required by applicable law.

(c) The State Conservationist will seek advice from the State Technical Committee on the development of the geographic area rate caps of compensation for an easement, a priority ranking process, and related policy matters.

(d) NRCS may delegate at any time easement management, monitoring, and enforcement responsibilities to other Federal or State agencies that have the appropriate authority, expertise, and technical and financial resources, as determined by NRCS to carry out such delegated responsibilities.

(e) NRCS may enter into cooperative agreements with Federal or State agencies, conservation districts, and private conservation organizations to assist NRCS with program implementation, including the provision of technical assistance.

(f) NRCS shall consult with the U.S. Department of the Interior's Fish and Wildlife Service (FWS) at the local

level in determinations of land eligibility and as appropriate throughout the program implementation process. NRCS may consult Federal or State agencies, conservation districts, or other organizations in program administration. No determination by these agencies or organizations shall compel NRCS to take any action which NRCS determines will not serve the purposes of the program established by this part.

(g) The Chief may allocate funds for purposes related to: Encouraging enrollment by historically underserved producers as authorized by 16 U.S.C. 3844; special pilot programs for wetland management and monitoring; acquisition of wetland easements with emergency funding; cooperative agreements with other Federal or State agencies for program implementation; coordination of easement enrollment across State boundaries; coordination of the development of conservation plans; or, for other goals of the WRP found in this part. NRCS may designate areas as conservation priority areas where environmental concerns are especially pronounced and to assist landowners in meeting nonpoint source pollution requirements and other conservation needs.

### § 1467.3 Definitions.

The following definitions are applicable to this part:

*30-year Contract* means a contract that is for a duration of 30 years and is limited to acreage owned by Indian Tribes.

*Acreage Owned by Indian Tribes* means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, Tribe or the Bureau of Indian Affairs (BIA).

*Activity* means an action other than a conservation practice that is included in the WRPO or restoration cost-share agreement, as applicable, and that has the effect of alleviating problems or improving treatment of the resources, including ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through an easement, contract, or restoration cost-share agreement.

*Agreement* means the document that specifies the obligations and rights of NRCS and any person or legal entity who is participating in the program.

*Agricultural commodity* means any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or sugarcane planted and produced in a State.

*Beginning Farmer or Rancher* means an individual or legal entity who has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of a legal entity, and who will materially and substantially participate in the operation of the farm or ranch. In the case of an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located. In the case of a legal entity or joint operation, material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of the Natural Resources Conservation Service or the person delegated authority to act for the Chief.

*Commenced conversion wetland* means a wetland or converted wetland for which the Farm Service Agency has determined that the wetland manipulation was contracted for, started, or for which financial obligation was incurred before December 23, 1985.

*Conservation district* means any district or unit of State or local government formed under State or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource

conservation district," "natural resource district," "land conservation committee," or a similar name.

*Conservation practice* means a specified treatment, such as a vegetative, structural, or land management practice, that is planned and applied according to NRCS standards and specifications.

*Conservation Reserve Program (CRP)* means the program administered by the Commodity Credit Corporation pursuant to 16 U.S.C. 3831–3836.

*Contract* means the legal document that specifies the obligations and rights of NRCS and any person or legal entity accepted to participate in the program. A WRP contract is an agreement for the transfer of assistance from NRCS to the participant for conducting the prescribed program implementation actions.

*Converted wetland* means a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose, or to have the effect of, making the production of an agricultural commodity possible if such production would not have been possible but for such action; and before such action such land was wetland; and such land was neither highly erodible land nor highly erodible cropland.

*Cost-share payment* means the payment made by NRCS to a participant to carry out conservation practices and to achieve the protection of wetland functions and values, including necessary activities, as set forth in the Wetlands Reserve Plan of Operations (WRPO).

*Easement* means a reserved interest easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys all rights, title, and interests in a property to the grantee, but the landowner retains those rights, title, and interests in the property which are specifically reserved to the landowner in the easement deed.

*Easement* area means the land encumbered by an easement.

*Easement payment* means the consideration paid to a landowner for an easement conveyed to the United States under the WRP, or the consideration paid to an Indian Tribe or tribal members for entering into 30-year contracts.

*Easement Restoration Agreement* means the agreement used to implement the Wetland Restoration Plan of Operations for projects enrolled through the permanent easement, 30-year easement, or 30-year contract enrollment options.

*Farm Service Agency (FSA)* is an agency of the United States Department of Agriculture.

*Fish and Wildlife Service (FWS)* is an agency of the United States Department of the Interior.

*Historically Underserved Producer* means a beginning, limited resource, or socially disadvantaged farmer or rancher.

*Indian Tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landowner* means a person or legal entity having legal ownership of eligible land. Landowner may include all forms of collective ownership including joint tenants, tenants in common, and life tenants. The term landowner includes trust holders of acreage owned by Indian Tribes.

*Lands substantially altered by flooding* means areas where flooding has created wetland hydrologic conditions which, with a high degree of certainty, will develop wetland soil and vegetation characteristics over time.

*Legal entity* means an entity that is created under Federal or State law and that owns land or an agricultural commodity; or produces an agricultural commodity.

*Limited Resource Farmer or Rancher* means a person with direct or indirect gross farm sales not more than $100,000 in each of the previous two years (to be increased to adjust for inflation using

Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS)), and who has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using U.S. Department of Commerce data).

*Maintenance* means work performed to keep the enrolled area functioning for program purposes for the duration of the enrollment period. Maintenance includes actions and work to manage, prevent deterioration, repair damage, or replace conservation practices on enrolled lands, as approved by NRCS.

*Natural Resources Conservation Service (NRCS)* is an agency of the United States Department of Agriculture, including when NRCS carries out program implementation using the funds, facilities, or authorities of the Commodity Credit Corporation (CCC).

*Option agreement to purchase* means the legal document that is the equivalent of a real estate option contract for purchasing land. The landowner signs the option agreement to purchase, which is authorization for NRCS to proceed with the easement acquisition process, and to incur costs for surveys, where applicable, title clearance and closing procedures on the easement. The option becomes a contract for sale and obligates CCC funding after it is executed by NRCS and transmitted to the landowner.

*Participant* means a person or legal entity who has been accepted into the program and who is receiving payment or who is responsible for implementing the terms and conditions of an option to purchase agreement, 30-year contract, or restoration cost-share agreement, and the associated WRPO.

*Permanent easement* means an easement that lasts in perpetuity.

*Person* means a natural person, a legal entity, or an Indian Tribe, but does not include governments or their political subdivisions.

*Prairie Pothole Region* means the counties designated as part of the Prairie Pothole National Priority Area for the Conservation Reserve Program (CRP) as of June 18, 2008.

*Private land* means land that is not owned by a governmental entity, and includes acreage owned by Indian Tribes, as defined in this Part.

*Restoration Cost-Share Agreement* means the legal document that describes the rights and obligations of participants who have been accepted to participate in WRP restoration cost-share enrollment option that is used to implement conservation practices and activities to protect, restore, or enhance wetlands values and functions to achieve the purposes of the program. The restoration cost-share agreement is an agreement between NRCS and the participant to share in the costs of implementing the Wetland Restoration Plan of Operations.

*Riparian areas* means areas of land that occur along streams, channels, rivers, and other water bodies. These areas are normally distinctly different from the surrounding lands because of unique soil and vegetation characteristics, may be identified by distinctive vegetative communities that are reflective of soil conditions normally wetter than adjacent soils, and generally provide a corridor for the movement of wildlife.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

*State Technical Committee* means a committee established by the Secretary of the United States Department of Agriculture (USDA) in a State pursuant to 16 U.S.C. 3861.

*Wetland* means land that:

(1) Has a predominance of hydric soils;

(2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

(3) Supports a prevalence of such vegetation under normal circumstances.

*Wetland functions and values* means the hydrological and biological characteristics of wetlands and the socioeconomic value placed upon these characteristics, including:

(1) Habitat for migratory birds and other wildlife, in particular at risk species;

(2) Protection and improvement of water quality;

(3) Attenuation of water flows due to flood;

(4) The recharge of ground water;

(5) Protection and enhancement of open space and aesthetic quality;

(6) Protection of flora and fauna which contributes to the Nation's natural heritage; and

(7) Contribution to educational and scientific scholarship.

*Wetland restoration* means the rehabilitation of degraded or lost habitat in a manner such that:

(1) The original vegetation community and hydrology are, to the extent practical, re-established; or

(2) A community different from what likely existed prior to degradation of the site is established. The hydrology and native self-sustaining vegetation being established will substantially replace original habitat functions and values and does not involve more than 30 percent of the wetland restoration area.

*Wetlands Reserve Plan of Operations (WRPO)* means the conservation plan that identifies how the wetland functions and values will be restored, improved, and protected and which is approved by NRCS.

### § 1467.4 Program requirements.

(a) *General*. (1) Under the WRP, NRCS may purchase conservation easements from, or enter into 30-year contracts or restoration cost-share agreements with, eligible landowners who voluntarily cooperate to restore, protect, or enhance wetlands on eligible private and Tribal lands. The 30-year contract enrollment option is only available to acreage owned by Indian Tribes.

(2) To participate in WRP, a landowner must agree to the implementation of a WRPO, the effect of which is to restore, protect, enhance, maintain, and manage the hydrologic conditions of inundation or saturation of the soil, native vegetation, and natural topography of eligible lands. NRCS may provide cost-share assistance through a restoration cost-share agreement or an easement restoration agreement for the conservation practices and activities that promote the restoration, protection, enhancement, maintenance, and management of wetland functions and values. For easement transactions, NRCS may implement such conservation practices and activities through an agreement with the landowner, a contract with a vendor, or a cooperative agreement with a cooperating entity. Specific restoration, protection, enhancement, maintenance, and management actions may be undertaken by the landowner, NRCS, or other designee.

(b) *Acreage limitations*. (1) Except for areas devoted to windbreaks or shelterbelts after November 28, 1990, no more than 25 percent of the total cropland in any county, as determined by the FSA, may be enrolled in the CRP and the WRP, and no more than 10 percent of the total cropland in the county may be subject to an easement acquired through the WRP.

(2) NRCS and FSA shall concur before a waiver of the 25 percent limit of this paragraph can be approved for an easement proposed for enrollment in the WRP. Such a waiver will only be approved if the waiver will not adversely affect the local economy, and operators in the county are having difficulties complying with the conservation plans implemented under 16 U.S.C. 3812.

(c) *Landowner eligibility*. To be eligible to enroll in the WRP, a person, legal entity, or Indian Tribe must be in compliance with the highly erodible land and wetland conservation provisions in 7 CFR part 12. Persons or legal entities must be in compliance with the Adjusted Gross Income Limitation provisions at Subpart G of 7 CFR part 1400, and:

(1) Be the landowner of eligible land for which enrollment is sought;

(2) For easement applications, have been the landowner of such land for the 7-year period prior to the time the land is determined eligible for enrollment unless it is determined by the State Conservationist that:

(i) The land was acquired by will or succession as a result of the death of the previous landowner;

(ii) The ownership change occurred due to foreclosure on the land and the

owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law; or

(iii) The land was acquired under circumstances that give adequate assurances, as determined by NRCS, that such land was not acquired for the purposes of placing it in the program, such as demonstration of status as a beginning farmer or rancher.

(3) Agree to provide such information to NRCS as the agency deems necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(d) When a parcel of land that has been accepted for enrollment into the WRP is sold or transferred prior to the easement being perfected, the application or option agreement to purchase will be cancelled and acres will be removed from enrollment. If the new landowner wishes to continue enrollment, a new application must be filed so that all eligibility criteria may be examined and documented.

(e) *Land eligibility*. (1) Only private land or land owned by Indian Tribes may be considered for enrollment into WRP.

(2) NRCS shall determine whether land is eligible for enrollment and whether, once found eligible, the lands may be included in the program based on the likelihood of successful restoration of wetland functions and values when considering the cost of acquiring the easement and the cost of the restoration, protection, enhancement, maintenance, and management.

(3) Land shall only be considered eligible for enrollment in the WRP if NRCS determines, in consultation with the FWS, that:

(i) The enrollment of such land maximizes wildlife benefits and wetland values and functions;

(ii) Such land is—

(A) Farmed wetland or converted wetland, together with adjacent lands that are functionally dependent on the wetlands; or

(B) Cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of a closed basin lake or pothole, together with the adjacent land, where practicable, that is functionally dependent on the cropland or grassland; and

(iii) The likelihood of the successful restoration of such land and the resultant wetland values merit inclusion of such land in the program, taking into consideration the cost of such restoration.

(4) Land may be considered farmed wetland or converted wetland under paragraph (3)(ii)(A) of this section if such land is identified by NRCS as:

(i) Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, farmed wetland pastures, and lands substantially altered by flooding so as to develop wetland functions and values; or

(ii) Former or degraded wetlands that occur on lands that have been used or are currently being used for the production of food and fiber, including rangeland and forest production lands, where the hydrology has been significantly degraded or modified and will be substantially restored.

(5) Land under paragraph (e)(3)(ii)(B) of this section may be considered for enrollment into 30-year easements if it meets the criteria under paragraph (e)(3) of this section, it is located in the Prairie Pothole Region as defined under §1467.3 of this part, and the size of the parcel offered for enrollment is a minimum of 20 contiguous acres. Such land meets the requirement of likelihood of successful restoration only if the soils are hydric and the depth of water is 6.5 feet or less.

(6) If land offered for enrollment is determined eligible under paragraph (e)(3) and (e)(5) of this section, then NRCS may also enroll land adjacent or contiguous to such eligible land together with the eligible land, if such land maximizes wildlife benefits and:

(i) Is farmed wetland and adjoining lands enrolled in CRP, with the highest wetland functions and values, and is likely to return to production after it leaves CRP;

(ii) Is a riparian area along streams or other waterways that links or, after restoring the riparian area, will link wetlands which are protected by an

easement or other device or circumstance that achieves the same objectives as an easement; or

(iii) Land adjacent to the eligible land that would contribute significantly to wetland functions and values, such as buffer areas, wetland creations, non-cropped natural wetlands, and restored wetlands, but not more than the State Conservationist, in consultation with the State Technical Committee, determines is necessary for such contribution.

(7) To be enrolled in the program, eligible land must be configured in a size and with boundaries that allow for the efficient management of the area for program purposes and otherwise promote and enhance program objectives, as determined by NRCS.

(f) *Enrollment of CRP lands*. Land subject to an existing CRP contract may be enrolled in the WRP only if the land and landowner meet the requirements of this part, and the enrollment is requested by the landowner and agreed to by NRCS. To enroll in WRP, the CRP contract for the property must be terminated or otherwise modified subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.

(g) *Ineligible land*. The following land is not eligible for enrollment in the WRP:

(1) Converted wetlands if the conversion was commenced after December 23, 1985;

(2) Land that contains timber stands established under a CRP contract or pastureland established to trees under a CRP contract;

(3) Lands owned by an agency of the United States, other than held in trust for Indian Tribes;

(4) Lands owned in fee title by a State, including an agency or a subdivision of a State, or a unit of local government;

(5) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection of wetland functions and values as would be provided by enrollment in WRP; and

(6) Lands where implementation of restoration practices would be undermined due to on-site or off-site conditions, such as risk of hazardous substances either on-site or off-site, proposed or existing rights of way, either on-site or off-site, for infrastructure development, or adjacent land uses, such as airports, that would either impede complete restoration or prevent wetland functions and values from being fully restored.

[74 FR 2328, Jan. 15, 2009, as amended at 74 FR 26284, June 2, 2009]

### § 1467.5 Application procedures.

(a) *Application for participation*. To apply for enrollment, a landowner must submit an Application for Participation in the WRP.

(b) *Preliminary agency actions*. By filing an Application for Participation, the landowner consents to an NRCS representative entering upon the land for purposes of assessing the wetland functions and values, and for other activities, such as the development of the preliminary WRPO, that are necessary or desirable for NRCS to evaluate applications. The landowner is entitled to accompany an NRCS representative on any site visits.

(c) *Voluntary reduction in compensation*. In order to enhance the probability of enrollment in WRP, a landowner may voluntarily offer to accept a lesser payment than is being offered by NRCS.

### § 1467.6 Establishing priority for enrollment of properties in WRP.

(a) When evaluating easement, 30-year contract, or restoration cost-share agreement offers from landowners, the NRCS, with advice from the State Technical Committee, may consider:

(1) The conservation benefits of obtaining an easement, or other interest in the land;

(2) The cost effectiveness of each easement or other interest in eligible land, so as to maximize the environmental benefits per dollar expended;

(3) Whether the landowner or another person is offering to contribute financially to the cost of the easement or other interest in the land to leverage Federal funds;

(4) The extent to which the purposes of the easement program would be achieved on the land;

(5) The productivity of the land; and

(6) The on-farm and off-farm environmental threats if the land is used for the production of agricultural commodities.

(b) To the extent practicable, taking into consideration costs and future agricultural and food needs, NRCS shall give priority to:

(1) Obtaining permanent easements over shorter term easements; and

(2) Acquiring easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wildlife, in consultation with FWS.

(c) NRCS, in consultation with the State Technical Committee, may place higher priority on certain geographic regions of the State where restoration of wetlands may better achieve State and regional goals and objectives.

(d) Notwithstanding any limitation of this part, the State Conservationist may, at any time, exclude enrollment of otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the wetlands and those adjacent landowners are unwilling or ineligible to participate. The State Conservationist may coordinate with other Federal, State, and nonprofit organizations to encourage the restoration of wetlands on adjacent ineligible lands, especially in priority geographic areas.

(e)(1) The Chief will conduct an assessment during fiscal year 2008 and each subsequent fiscal year for the purpose of determining the interest and allocations for the Prairie Pothole Region to enroll land determined eligible under §1467.4(d)(5) of this part into 30-year easements. Annually, the Chief will provide specific instructions for the assessment in writing to the applicable State Conservationists.

(2) The Chief will make an adjustment to the allocation for an applicable State for a fiscal year, based on the results of the assessment conducted under paragraph (e)(1) of this section for the State during the previous fiscal year.

### §1467.7 Enrollment process.

(a) *Tentative Selection*. Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program.

(b) *Effect of notice of tentative selection*. The notice of tentative acceptance into the program does not bind NRCS or the United States to enroll the proposed project in WRP, nor does it bind the landowner to continue with enrollment in the program. The notice informs the landowner of NRCS' intent to continue the enrollment process on their land unless otherwise notified by the landowner.

(c) *Acceptance and effect of offer of enrollment*.(1) *Easement*. For applications requesting enrollment through an easement, an option agreement to purchase will be presented by NRCS to the landowner, which will describe the easement area; the easement compensation amount; the easement terms and conditions; and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the option agreement to purchase. NRCS will continue with easement acquisition activities after the property has been enrolled.

(2) *Restoration cost-share agreement*. For applications requesting enrollment through the restoration cost-share agreement option, a restoration cost-share agreement shall be presented by NRCS to the landowner, which will describe the enrolled area, the agreement terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the restoration cost-share agreement. NRCS will proceed with implementation of the WRPO after the property has been enrolled.

(3) *30-year contract*. For applications requesting enrollment through the 30-year contract option, a 30-year contract shall be presented by NRCS to the landowner, which will describe the contract area, the contract terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the 30-year contract. NRCS will proceed with implementation of the WRPO after the property has been enrolled.

(d) *Restoration responsibility and the scope of enrollment*. (1) The enrollment

document establishes the terms of enrollment consistent with the terms and conditions of this part, and identifies the:

(i) Scope of the agreement between NRCS and the landowner;

(ii) Basis for NRCS to obligate funds; and

(iii) Nature and method through which NRCS will provide WRP technical and financial assistance to the landowner.

(2) The option agreement to purchase between NRCS and the landowner under the easement option constitutes the agreement for:

(i) Granting an easement on the enrolled land as set forth under § 1467.11;

(ii) Implementing a WRPO which provides for the restoration and protection of the functions and values of wetlands;

(iii) Recording the easement in accordance with applicable State law; and

(iv) Ensuring the title to the easement is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by NRCS.

(3) The terms of the easement identified in paragraph (d)(2)(i) of this section includes the landowner's agreement to the implementation of a WRPO identified in paragraph (d)(2)(ii) of this section. In particular, the easement deed identifies that NRCS has the right to enter the easement area to undertake, on a cost-share basis with the landowner or other entity, any activities to restore, protect, manage, maintain, enhance, and monitor the wetland and other natural values of the easement area.

(4) At the time NRCS enters into an agreement to purchase, NRCS agrees, subject to paragraph (e) of this section, to acquire and provide for restoration of the land enrolled into the program.

(e) *Withdrawal of offer of enrollment* Prior to execution of the easement deed by the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, sale of the land, risk of hazardous substance contamination, or other reasons. The offer of enrollment to the landowner shall be void if not executed by the landowner within the time specified.

[74 FR 2328, Jan. 15, 2009, as amended at 74 FR 26284, June 2, 2009]

### § 1467.8 Compensation for easements and 30-year contracts.

(a) *Determination of easement payment rates.* (1) Compensation for an easement under this part shall be made in cash in such amount as is agreed to and specified in the option agreement to purchase or 30-year contract.

(2) Payments for non-permanent easements or 30-year contracts shall be not more than 75 percent of that which would have been paid for a permanent easement as determined by the methods listed in paragraph (a)(3) of this section.

(3) NRCS shall pay as compensation the lowest of the following:

(i) The fair market value of the land using the Uniform Standards for Professional Appraisal Practices, or based on an area-wide market analysis or survey;

(ii) The geographic area rate cap determined under paragraph (a)(4) of this section; or

(iii) The landowner offer.

(4) The State Conservationist, in consultation with the State Technical Committee, shall establish one or more geographic area rate caps within a state. The State Conservationist shall submit geographic area rate caps and supporting documentation to the Chief for approval. Each State Conservationist will determine the geographic area rate cap using the best information which is readily available in that State. Such information may include: Soil types, type(s) of crops capable of being grown, production history, location, real estate market values, and tax rates and assessments.

(b) *Acceptance of offered easement compensation.* (1) NRCS will not acquire any easement unless the landowner accepts the amount of the easement payment offered by NRCS. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement. By voluntarily participating in the program, a landowner waives any claim to additional

compensation based on fair market value.

(2)(i) For easements or 30-year contracts valued at $500,000 or less, NRCS will provide compensation in up to 30 annual payments, as requested by the participant, as specified in the option agreement to purchase or 30-year contract between NRCS and the participant.

(ii) For easements or 30-year contracts valued at more than $500,000, the Secretary may provide compensation in at least 5, but not more than 30 annual payments. NRCS may provide compensation in a single payment for such easements or 30-year contracts when, as determined by the Chief, it would further the purposes of the program. The applicable payment schedule will be specified in the option agreement to purchase, warranty easement deed, or 30-year contract between NRCS and the participant.

(c) *Reimbursement of a landowner's expenses*. For completed easement conveyances, NRCS will reimburse participants for their fair and reasonable expenses, if any, incurred for legal boundary surveys and other related costs, as determined by NRCS. The State Conservationist, in consultation with the State Technical Committee, may establish maximum payments to reimburse participants for reasonable expenses, if incurred.

(d) *Tax implications of easement conveyances*. Subject to applicable regulations of the Internal Revenue Service, a participant may be eligible for a bargain sale tax deduction which is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the participant. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(e) *Per acre basis calculations*. If easement payments are calculated on a per acre basis, adjustment to stated easement payment will be made based on final determination of acreage.

### § 1467.9 Wetlands Reserve Enhancement Program.

(a) *Wetlands Reserve Enhancement Program (WREP)*. (1) The purpose of WREP is to target and leverage resources to address high priority wetlands protection, restoration, and enhancement objectives through agreements with States (including a political subdivision or agency of a State), nongovernmental organizations, and Indian Tribes.

(2) Funding for WREP agreements will be announced in the FEDERAL REGISTER.

(i) The announcement will provide details on the priorities for funding, required level of partner matching funds, ranking criteria, level of available funding, and additional criteria as determined by the Chief.

(ii) The Chief will determine the funding level for WREP on an annual basis. Funds for WREP are derived from funds available for WRP.

(3) Proposals will be submitted to the State Conservationist of the State in which the majority of the project area resides.

(i) State Conservationists will evaluate proposals based on the ranking criteria established in the announcement and provide proposals recommended for funding to the Chief.

(ii) The Chief will evaluate proposals recommended for funding and make final funding selections, in accordance with ranking factors identified in the announcement.

(4) Selected proposals and associated funding will be provided to the State Conservationist to enter into WREP agreements with the eligible partner to carry out the project.

(b) *Reserved Rights Pilot*. (1) The Chief shall carry out a reserved rights pilot subject to the requirements established in this part.

(2) Under the reserved rights pilot, a landowner may reserve grazing rights in the warranty easement deed or 30-year contract, if the State Conservationist determines that the reservation and use of the grazing rights:

(i) Is compatible with the land subject to the easement or 30-year contract; and

(ii) Is consistent with the long-term wetland protection and enhancement goals for which the easement or 30-year contract was established; and

(iii) Complies with a WRPO developed with NRCS.

(3) The State Conservationist will provide public notice of the availability of the reserved rights pilot and the reserved rights template deed or 30-year contract, approved by the Chief, to be used in the pilot.

(4) Compensation for easements or 30-year contracts entered into under the reserved rights pilot will be based on the method described in §1467.8 with the following exceptions:

(i) Section 1467.8(a)(3)(i) is adjusted to reduce the fair market value of the land by an amount equal to the value of the retained grazing rights as determined by a Uniform Standards for Professional Appraisal Practices appraisal or a market survey; and

(ii) Section 1467.8(a)(3)(ii) is adjusted to reduce the geographic area rate cap determined as described in §1467.8(a)(4) by an amount equal to the value of the retained grazing rights.

### § 1467.10 Cost-share payments.

(a) NRCS may share the cost with participants of implementing the WRPO on the enrolled land. The amount and terms and conditions of the cost-share assistance shall be subject to the following restrictions on the costs of establishing or installing conservation practices or activities specified in the WRPO:

(1) On enrolled land subject to a permanent easement, NRCS will offer to pay at least 75 percent but not more than 100 percent of such costs; and

(2) On enrolled land subject to a non-permanent easement, 30-year contract, or restoration cost-share agreement, NRCS will offer to pay at least 50 percent but not more than 75 percent of such costs.

(3) The total amount of payments that a person or legal entity may receive, directly or indirectly, for one or more restoration cost-share agreements, for any year, may not exceed $50,000.

(b) Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or component of the conservation practice has been implemented in compliance with appropriate NRCS standards and specifications; or an eligible activity has been implemented in compliance with the appropriate requirements detailed in the WRPO. Identified conservation practices or activities may be implemented by the participant, NRCS, or other NRCS designee.

(c) Cost-share payments may be made for replacement of an eligible conservation practice, if NRCS determines that the practice is still needed and that the failure of the original conservation practice was due to reasons beyond the control of the participant.

(d) A participant may seek additional cost-share assistance from other public or private organizations as long as the conservation practices or activities funded are in compliance with this part. In no event shall the participant receive an amount that exceeds 100 percent of the total actual cost of the restoration.

[74 FR 2328, Jan. 15, 2009, as amended at 74 FR 26284, June 2, 2009]

### § 1467.11 Easement and 30-year contract participation requirements.

(a) *Easement requirements.* (1) To enroll land in WRP through the permanent or non-permanent easement option, a landowner shall grant an easement to the United States. The easement shall require that the easement area be maintained in accordance with WRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of wetland and other land functions and values.

(2) For the duration of its term, the easement shall require, at a minimum, that the participant, and the participant's heirs, successors and assigns, shall, consistent with the terms of this part, cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the warranty easement deed and with the terms of the WRPO. In addition, the easement shall grant to the United States, through NRCS:

(i) A right of access to the easement area;

(ii) The right to permit compatible uses of the easement area, including such activities as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection

and enhancement of the wetland resources for which the easement was established;

(iii) All rights, title and interest in the easement area; and

(iv) The right to restore, protect, enhance, maintain, and manage activities on the easement area.

(3) The participant shall convey title to the easement in a manner that is acceptable to NRCS. The participant shall warrant that the easement granted to the United States is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by NRCS.

(4) The participant shall:

(i) Comply with the terms of the easement;

(ii) Comply with all terms and conditions of any associated contract or agreement;

(iii) Agree to the permanent retirement of any existing cropland base and allotment history for the easement area under any program administered by the Secretary, as determined by the FSA;

(iv) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements;

(v) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any participant responsibilities on the easement area; and

(vi) Agree that each person or legal entity that is subject to the easement shall be jointly and severally responsible for compliance with the easement and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the easement or the provisions of this part.

(b) *30-year contract requirements.* (1) To enroll land in WRP through the 30-year contract option, a landowner shall enter into a contract with NRCS. The contract shall require that the enrolled area be maintained in accordance with WRP goals and objectives for the duration of the contract, including the restoration, protection, enhancement, maintenance, and management of wetland and other land functions and values.

(2) For the 30-year duration, the contract shall require, at a minimum, that the participant, and the participant's heirs, successors and assigns, shall, consistent with the terms of this part, cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the contract and with the terms of the WRPO. In addition, the contract shall grant to NRCS:

(i) A right of access to the contract area;

(ii) The right to permit compatible uses of the contract area, including such activities as a traditional Tribal use of the land, hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the wetland resources for which the contract was established; and

(iii) The right to restore, protect, enhance, maintain, and manage activities on the enrolled area.

(3) The participant shall:

(i) Comply with the terms of the contract;

(ii) Comply with all terms and conditions of any associated agreement;

(iii) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the enrolled area in accordance with the terms of the contract and related agreements;

(iv) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any participant responsibilities on the enrolled area;

(v) Agree that each person or legal entity that is subject to the contract shall be jointly and severally responsible for compliance with the contract and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the contract or the provisions of this part.

[74 FR 2328, Jan. 15, 2009, as amended at 74 FR 26284, June 2, 2009]

### § 1467.12 The WRPO development.

(a) The development of the WRPO will be made through the local NRCS representative, in consultation with the State Technical Committee, with consideration of site-specific technical

input from FWS and the Conservation District.

(b) The WRPO will specify the manner in which the enrolled land shall be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program. The WRPO will be developed to ensure that cost-effective restoration and maximization of wildlife benefits and wetland functions and values will result. Specifically, the WRPO will consider and address, to the extent practicable, the on-site alternations and the off-site watershed conditions that adversely impact the hydrology and associated wildlife and wetland functions and values. NRCS will review, revise, and supplement the WRPO as needed throughout the duration of the enrollment to ensure that program goals are fully and effectively achieved.

[74 FR 2328, Jan. 15, 2009, as amended at 74 FR 26285, June 2, 2009]

### § 1467.13 Modifications.

(a) *Easements*. (1) After an easement has been recorded, no modification will be made in the easement except by mutual agreement with the Chief and the participant. The Chief will consult with FWS and the Conservation District prior to making any modifications to easements.

(2) Approved modifications will be made only in an amended easement, which is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation.

(3) The Chief may approve modifications to facilitate the practical administration and management of the easement area or the program so long as the modification will not adversely affect the wetland functions and values for which the easement was acquired or when adverse impacts will be mitigated by enrollment and restoration of other lands that provide greater wetland functions and values at no additional cost to the government.

(4) Modifications must result in equal or greater environmental and economic values to the United States and address a compelling public need, as determined by the Chief.

(b) *WRPO*. Insofar as is consistent with the easement and applicable law, the State Conservationist may approve modifications to the WRPO that do not affect provisions of the easement in consultation with the participant and with consideration of site specific technical input from the FWS and the Conservation District. Any WRPO modification must meet WRP regulations and program objectives, comply with the definition of wetland restoration as defined in § 1467.3, must result in equal or greater wildlife benefits, wetland functions and values, and ecological and economic values to the United States.

### § 1467.14 Transfer of land.

(a) *Offers voided*. Any transfer of the property prior to the enrollment of the easement, 30-year contract, or restoration cost-share agreement contract, including the landowner entering into a contract or purchase agreement to sell the land subject to offer, shall void the offer of enrollment.

(b) *Payments to landowners*. For easements with multiple annual payments, any remaining easement payments will be made to the original participant unless NRCS receives an assignment of proceeds.

(c) *Claims to payments*. With respect to any and all payments owed to participants, NRCS shall bear no responsibility for any full payments or partial distributions of funds between the original participant and the participant's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

### § 1467.15 Violations and remedies.

(a) *Easement violations*. (1) In the event of a violation of the easement, 30-year contract, or any restoration cost-share agreement involving the participant, the participant shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation at the landowner's expense.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important wetland functions and values or other rights of the United States under the easement. The participant shall be liable for any costs incurred by the United States as a result of the participant's negligence or failure to comply with easement or contractual obligations.

(3) At any time there is a material breach of the easement covenants or any associated agreement, the easement shall remain in force and NRCS may withhold or require the refund of any easement and cost-share payments owed or paid to participants. Such withheld or refunded funds may be used to offset costs incurred by the United States in any remedial actions or retained as damages pursuant to court order or settlement agreement. This remedy is in addition to any and all legal or equitable remedies available to the United States under applicable Federal or State law.

(4) The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

(b) *30-year Contract and Restoration Cost-Share Agreement violations.* (1) If the NRCS determines that a participant is in violation of the terms of a 30-year contract, or restoration cost-share agreement, or documents incorporated by reference into the 30-year contract or restoration cost-share agreement, the participant shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation. If the violation continues, the State Conservationist may terminate the 30-year contract or restoration cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a restoration cost-share agreement or 30-year contract termination is effective immediately upon a determination by the State Conservationist that the participant has:

(i) Submitted false information;

(ii) Filed a false claim;

(iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part; or

(iv) Taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(3) If NRCS terminates a restoration cost-share agreement or 30-year contract, the participant will forfeit all rights for future payments under the restoration cost-share agreement or 30-year contract, and must refund all or part, as determined by NRCS, of the payments received, plus interest.

### § 1467.16 Payments not subject to claims.

Any cost-share, contract, or easement payment or portion thereof due any person under this part shall be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

### § 1467.17 Assignments.

Any person entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

### § 1467.18 Appeals.

(a) A person participating in the WRP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

(b) Before a person may seek judicial review of any administrative action taken under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision shall be a final Agency action except a decision of the Chief of the NRCS under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by the NRCS in determining

property value are considered confidential information, and shall only be disclosed as determined at the sole discretion of the NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by the NRCS in furtherance of its federally held property rights are under the jurisdiction of the federal courts and not subject to review under administrative appeal regulations.

### § 1467.19 Scheme and device.

(a) If it is determined by the NRCS that a participant has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such participant during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for cost-share practices, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A participant who succeeds to the responsibilities under this part shall report in writing to the NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

### § 1467.20 Market-based conservation initiatives.

(a) *Acceptance and use of contributions*. Section 1241(e) of the Food Security Act of 1985, as amended, (16 U.S.C. 3841(e)), allows the Chief to accept and use contributions of non-Federal funds to support the purposes of the program. These funds shall be available without further appropriation and until expended, to carry out the program.

(b) *Ecosystem Services Credits for Conservation Improvements*. (1) USDA recognizes that environmental benefits will be achieved by implementing conservation practices and activities funded through WRP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a WRP easement, 30-year contract, or restoration cost-share agreement. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure that the requirements of the WRPO, contract, and easement deed are met. Where activities required under an environmental credit agreement may affect land covered under a WRP easement, 30-year contract, or restoration cost-share agreement, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such agreements.

(2) Section 1222(f)(2) of the Food Security Act of 1985 as amended, does not allow wetlands restored with Federal funds to be utilized for Food Security Act wetland mitigation purposes.

## PART 1468—CONSERVATION FARM OPTION

### Subpart A—General Provisions

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AUTHORITY: 16 U.S.C. 3839bb.

SOURCE: 63 FR 51786, Sept. 29, 1998, unless otherwise noted.

## Subpart A—General Provisions

### § 1468.1 Purpose.

(a) Through the Conservation Farm Option (CFO), the Commodity Credit Corporation (CCC) provides financial assistance to eligible farmers and ranchers to address soil, water, and related natural resource concerns, water quality protection or improvement; wetland restoration and protection; wildlife habitat development and protection; and other similar conservation purposes on their lands in an environmentally beneficial and cost-effective manner. The Natural Resources Conservation Service (NRCS) may provide technical assistance, upon request by the producer or landowner.

(b) The CCC provides a single contract and annual payments for implementation of innovative and environmentally-sound methods for addressing natural resource concerns for producers of wheat, feed grains, cotton, and rice, resulting in consolidation of payments that would have been available under the Conservation Reserve Program (CRP), the Wetlands Reserve Program cost-share agreements (WRP), and the Environmental Quality Incentives Program (EQIP). CFO participation is determined through two step process: first, the Chief, with FSA concurrence, selects CFO pilot project areas based on proposals submitted by the public; then CCC accepts applications from eligible producers or owners within the selected pilot project area.

### § 1468.2 Administration.

(a) CFO is carried out using Commodity Credit Corporation funds and will be administered on behalf of CCC by the Natural Resources Conservation Service (NRCS) and the Farm Service Agency (FSA) as set forth below.

(b) NRCS will:

(1) Provide overall program management and implementation for CFO;

(2) Establish policies, procedures, priorities, and guidance for program implementation, including determination of pilot project areas;

(3) Establish annual payment rates consistent with EQIP, CRP, and WRP payment rates;

(4) Make funding decisions and determine allocations of program funds, with FSA concurrence;

(5) Determine eligibility of practices;

(6) Provide technical leadership for conservation planning and implementation, quality assurance, and evaluation of program performance.

(c) FSA will:

(1) Be responsible for the administrative processes and procedures including applications, contracting, and financial matters, such as payments to participants, assistance in determining participant eligibility, and program accounting; and

(2) Provide leadership for establishing, implementing, and overseeing administrative processes for applications, contracts, payment processes, and administrative and financial performance reporting.

(d) NRCS and FSA will cooperate in establishing program policies, priorities, and guidelines related to the implementation of this part.

(e) No delegation herein to lower organizational levels shall preclude the Chief of NRCS, or the Administrator of FSA, or a designee, from determining any question arising under this part or from reversing or modifying any determination made under this part that is the responsibility of their respective agencies.

### § 1468.3 Definitions.

The following definitions apply to this part and all documents issued in accordance with this part, unless specified otherwise:

*Applicant* means a producer or owner in an approved pilot project area who has requested in writing to participate in CFO.

*Chief* means the Chief of NRCS, or designee.

*Conservation district* means a political subdivision of a State, Indian tribe, or territory, organized pursuant to the State or territorial soil conservation district law, or tribal law. The subdivision may be a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource

district, land conservation committee, or similar legally constituted body.

*Conservation farm plan* means a record of a participant's decisions, and supporting information for treatment of a unit of land or water as a result of the planning process, that meets the local NRCS Field Office Technical Guide (FOTG) criteria for each natural resource and takes into account economic and social considerations. The plan describes the schedule of operations and activities needed to solve identified natural resource problems, and take advantage of opportunities, at a conservation management system level. In the conservation farm plan, the needs of the client, the resources, and Federal, state, Tribal, and local requirements will be met.

*Conservation practice* means a specified treatment, such as structural, vegetative, or a land management practice, which is planned and applied according to NRCS standards and specifications.

*Contract* means a legal document that specifies the rights and obligations of any person who has been accepted for participation in the program.

*County executive director* means the FSA employee responsible for directing and managing program and administrative operations in one or more FSA county offices.

*Farm Service Agency county committee* means a committee elected by the agricultural producers in the county or area, in accordance with Sec. 8(b) of the Soil Conservation and Domestic Allotment Act, as amended, or designee.

*Field office technical guide* means the official NRCS guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. The guide contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared. A copy of the guide for that area is available at the appropriate NRCS field office.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Innovative technology* means the use of new management techniques, specific treatments, or procedures such as structural or vegetative measures used in field trials or as interim conservation practice standards that have the purpose of solving or reducing the severity of natural resource use problems or that take advantage of resource opportunities. Innovative technologies used by program participants must be able to achieve the required level of resource protection.

*Land management practice* means conservation practices that primarily require site-specific management techniques and methods to conserve, protect from degradation, or improve soil, water, or related natural resources in the most cost-effective manner. Land management practices include, but are not limited to nutrient management, manure management, integrated pest management, integrated crop management, irrigation water management, tillage or residue management, stripcropping, contour farming, grazing management, wildlife management, resource conserving crop rotations, cover crop management, and organic matter and carbon sink management.

*Liquidated damages* means a sum of money stipulated in the contract which the participant agrees to pay, in addition to refunds and other charges, if the participant breaches the contract, and represents an estimate of the anticipated or actual harm caused by the breach, and reflects the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

*Local work group* means representatives of FSA, the Cooperative State Research, Education, and Extension Service (CSREES), the conservation district, and other Federal, State, and local government agencies, including Tribes and Resource Conservation and Development councils, with expertise in natural resources who consult with NRCS on decisions related to CFO implementation.

*Operation and maintenance* means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during its life span. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Participant* means an applicant who is a party to a CFO contract.

*Secretary* means the Secretary of the United States Department of Agriculture.

*State conservationist* means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Basin Area.

*State technical committee* means a committee established by the Secretary in a state pursuant to 16 U.S.C. 3861.

*Technical assistance* means the personnel and support resources needed to conduct conservation planning; conservation practice survey, layout, design, installation, and certification; training, certification, and quality assurance for professional conservationists; and evaluation and assessment of the program.

*Unit of concern* means a parcel of agricultural land that has natural resource conditions that are of concern to the participant.

### § 1468.4 Establishing Conservation Farm Option (CFO) pilot project areas.

(a) CCC may periodically solicit proposals from the public to establish pilot project areas in the FEDERAL REGISTER.

(b) Pilot projects may involve one or more participants. Each owner or producer within an approved pilot project area must submit an application in order to be considered for enrollment in the CFO. This pilot project area may be a watershed, a subwatershed, an area, or an individual farm that can be geographically described and has specific environmental sensitivities or significant soil, water, and related natural resource concerns. The pilot project area must have acreage enrolled in a production flexibility contract, which is authorized by the Agricultural Marketing and Transition Act of 1996. After these pilot project area proposals are received, the Chief, with FSA concurrence, will select proposals for funding.

(c) CCC will select pilot project areas based on the extent the individual proposal:

(1) Demonstrates innovative approaches to conservation program delivery and administration;

(2) Proposes innovative conservation technologies and system;

(3) Provides assurances that the greatest amount of environmental benefits will be delivered in a cost effective manner;

(4) Ensures effective monitoring and evaluation of the pilot effort;

(5) Considers multiple stakeholder participation (partnerships) within the pilot area;

(6) Provides additional non-Federal funding; and

(7) Addresses the following:

(i) Conservation of soil, water, and related natural resources,

(ii) Water quality protection or improvement,

(iii) Wetland restoration and protection, and

(iv) Wildlife habitat development and protection,

(v) Or other similar conservation purposes.

### § 1468.5 General provisions.

(a) Program participation is voluntary.

(b) Participation in the CFO is limited to producers of wheat, feed grains, cotton, or rice who have a production flexibility contract, in accordance with part 1412 of this chapter, on the farm enrolling in CFO and who are eligible for either CRP (7 CFR part 1410), EQIP (7 CFR part 1466), or WRP (7 CFR part 1467).

(c) The participant is responsible for the development of a conservation farm plan for the farm or ranch and may request assistance from NRCS or a third party in writing both the conservation farm plan and installing the

practices outlined within the plan. Conservation practices in the conservation farm plan that would have been eligible for payment under CRP, EQIP, or cost-share agreements under WRP are eligible for CFO payment. The provisions for determining eligibility for payment and the calculation of payment under CFO will be similar to those specified for the eligible conservation practices under CRP, EQIP, or cost-share agreements under WRP. For land retirement payments, the CRP payment schedule in effect for the applicable soils at the time the CFO contract is signed will be utilized. CCC will provide annual payments to a participant for such conservation practices as specified in the time schedule set forth in the conservation farm plan.

### § 1468.6 Practice eligibility provisions.

(a) Practices may be eligible for payment under CFO if the conservation practice specified in the conservation farm plan is determined to be an eligible practice, as determined by the Chief, in accordance with:

(1) 7 CFR part 1410 for land retirement rental payments and practices that are eligible under CRP;

(2) 7 CFR part 1467 for wetland restoration or protection practices that are eligible under WRP; or

(3) 7 CFR part 1466 for conservation practices that are eligible under EQIP.

(b) For practices that are installed on retired land, the CRP cost-share rate for practices must be utilized.

### § 1468.7 Participant eligibility provisions.

Participants in the CFO must at the time of enrollment:

(a) Have a production flexibility contract in accordance with part 1412 of this chapter on the farm enrolling in CFO.

(b) Agree to forgo earning future payments under the Conservation Reserve Program authorized by part 1410 of this chapter, the Wetlands Reserve Program cost-share payments authorized by part 1467 of this chapter, and Environmental Quality Incentives Program authorized by part 1466 of this chapter, on the farm enrolled in the CFO for the term of the CFO contract.

(c) Be in compliance with the highly erodible land and wetland conservation provisions found at part 12 of this title;

(d) Have control of the land for the term of the proposed contract period;

(1) An exception may be made by the Chief in the case of land allotted by the Bureau of Indian Affairs (BIA), tribal land, or other instances in which the Chief determines that there is sufficient assurance of control.

(2) If the applicant is a tenant of the land involved in agricultural production the applicant shall provide CCC with the written authorization by the landowner to apply the structural or vegetative practice.

(3) If the applicant is a landowner, the landowner is presumed to have control.

(e) Submit a proposed conservation farm plan to CCC that is in compliance with the terms and conditions of the program. To receive payment under the CFO, the participant must also meet the eligibility requirements, as determined by the Chief, in:

(1) 7 CFR part 1410 if the land retirement rental payment and practice determined eligible in accordance with § 1468.6(a);

(2) 7 CFR part 1467 if the wetland restoration or protection practice was determined eligible in accordance with § 1468.6(b), or

(3) 7 CFR part 1466, if the conservation practice was determined eligible in accordance with § 1468.6(c).

(4) Comply with the provisions at § 1412.304 of this chapter for protecting the interests of tenants and sharecroppers, including provisions for sharing, on a fair and equitable basis, payments made available under this part, as may be applicable.

(5) Supply information as required by CCC to determine eligibility for the program.

(6) Comply with all the provisions of the CFO contract which includes the conservation farm plan approved by the local conservation district.

### § 1468.8 Land eligibility provisions.

Land may be eligible for enrollment in CFO, if CCC determines that the farm or ranch is enrolled in a production flexibility contract, authorized by the Agricultural Marketing Transition

Act of 1996 and if the land upon which the CFO conservation practice, will be applied is determined to be eligible land as determined by the Chief, in accordance with:

(a) 7 CFR part 1410, if the practice was determined an eligible land retirement rental payment and cost-share practice similar to CRP in accordance with §1468.6(a);

(b) 7 CFR part 1467, if the practice was determined an eligible wetland restoration or protection practice similar to WRP in accordance with §1468.6(b); or

(c) 7 CFR part 1466, if the practice was determined an eligible conservation practice similar to EQIP in accordance with §1468.6(c).

**§1468.9 Conservation farm plan.**

(a) The conservation farm plan forms the basis of the CFO contract. Prior to contract approval, a conservation farm plan must be written and approved. In deciding whether to approve a conservation farm plan, CCC may consider whether:

(1) The participant will use conservation practices to solve the natural resource concerns that will maximize environmental benefits per dollar expended, and

(2) The conservation practice would have been eligible for enrollment in the CRP, EQIP, or under the WRP cost-share agreements.

(b) The conservation farm plan for the farm or ranch unit of concern shall:

(1) Describe any resource conserving crop rotation, and all other conservation practices, to be implemented and maintained on the acreage that is subject to contract during the contact period;

(2) Address the resource concerns identified in the CFO pilot project area proposal;

(3) Contain a schedule for the implementation and maintenance of the practices described in the conservation farm plan;

(4) Ensure that net environmental benefits under a CRP contract are maintained or exceeded for the whole farm, as constituted by FSA, when terminating a CRP contract and enrolling in a CFO contract; and

(5) Meet the objectives of the pilot project area.

(c) The conservation farm plan is part of the CFO contract.

(d) The conservation farm plan must allow the participant to achieve a cost-effective resource management system, or some appropriate portion of that system, identified in the applicable NRCS field office technical guide or as approved by the State Conservationist.

(e) Participants are responsible for implementing the conservation farm plan in compliance with this part.

(f) Upon a participant's request, the NRCS may provide technical assistance to a participant.

(1) Participants may, at their own cost, use qualified professionals, other than NRCS personnel, to provide technical assistance. NRCS retains approval authority over the technical adequacy of work done by non-NRCS personnel for the purpose of determining CFO contract compliance.

(2) Technical and other assistance provided by qualified personnel not affiliated with NRCS may include, but not limited to: conservation planning; conservation practice survey, layout, design, and installation; information, education, and training for producers; and training and quality assurance for professional conservationists.

(g) All conservation practices scheduled in the conservation farm plan are to be carried out in accordance with the applicable NRCS Field Office Technical Guide. The State Conservationist may approve use of innovative conservation measures that are not contained in the NRCS Field Office Technical Guide.

(h)(1) To simplify the conservation planning process for the participant, the conservation farm plan may be developed, at the request of the participant, as a single plan that incorporates, other Federal, state, Tribal, or local government program or regulatory requirements. CCC development or approval of a conservation farm plan shall not constitute compliance with program, statutory and regulatory requirements administered or enforced by a non-USDA agency, except as agreed to by the participant and the relevant Federal, state, local or tribal entities.

(2) CCC may accept an existing conservation plan developed and required for participation in any other CCC or USDA program if the conservation plan otherwise meets the requirements of this part. When a participant develops a single conservation farm plan for more than one program, the participant shall clearly identify the portions of the plan that are applicable to the CFO contract. It is the responsibility of the participant to ascertain and comply with all applicable statutory and regulatory requirements.

## Subpart B—Contracts

### § 1468.20 Application for CFO program participation.

(a) Any eligible owner or producer within an approved pilot project area may submit an application for participation in the CFO to a service center or other USDA county or field office(s) of FSA or NRCS, where the pilot project area is located.

(b) CCC will accept applications throughout the fiscal year. CCC will rank and select the offers of applicants periodically, as determined appropriate by the State Conservationist. The application period will begin after a pilot project area has been approved.

(c) The designated conservationist, in consultation with the local work group, will develop ranking criteria to prioritize applications within a pilot project area which consists of more than one owner or producer. NRCS will prioritize applications from the same pilot project area using the criteria specific to the area. The FSA county committee, with the assistance of the designated conservationist and designated FSA official, will approve for funding the application in a pilot project area based on eligibility factors of the applicant and the NRCS ranking.

(d) The designated conservationist will work with the applicant to collect the information necessary to evaluate the application using the ranking criteria. An applicant has the option of offering and accepting less than the maximum program payments allowed, offering to apply more conservation practices to the land in order to increase the likelihood of being enrolled. In evaluating the applications, the designated conservationist will take into consideration the following factors:

(1) Soil erosion;

(2) Water quality;

(3) Wildlife benefits;

(4) Soil productivity;

(5) Conservation compliance considerations;

(6) Likelihood to remain in conserving uses beyond the contract period, including tree planting and permanent wildlife habitat;

(7) State water quality priority areas;

(8) The environmental benefits per dollar expended; and

(9) The degree to which application is consistent with the pilot project proposal.

(e) If two or more applications have an equal rank, the application that will result in the least cost to the program will be given greater consideration.

### § 1468.21 Contract requirements.

(a) In order for an applicant to receive annual payments, the applicant must enter into a contract agreeing to implement a conservation farm plan. The FSA county committee, with NRCS concurrence, will use the NRCS ranking consistent with the provisions of § 1468.20 and grant final approval of the contract.

(b) A CFO contract will:

(1) Incorporate by reference all portions of a conservation farm plan applicable to CFO;

(2) Be for a duration of 10 years, and may be renewed, subject to the availability of funds, for a period not to exceed 5 years upon mutual agreement of CCC and the participant;

(3) Provide that the participant will:

(i) Not conduct any practices on the farm or ranch unit of concern consistent with the goals of the contract that would tend to defeat the purposes of the contract, or reduce net environmental and societal benefits;

(ii) Refund with interest any program payments received and forfeit any future payments under the program, on the violation of a term or condition of the contract, in accordance with the provisions of § 1468.25 of this part;

(iii) Refund all program payments received on the transfer of the right and interest of the producer in land subject

to the contract, unless the transferee of the right and interest agrees to assume all obligations of the contract, in accordance with the provisions of § 1468.24 of this part;

(iv) Agree to forego participation in CRP, EQIP, and the cost-share agreements under WRP, along with future payments associated with these programs, with regard to the land under the CFO contract;

(v) Supply information as required by CCC to determine compliance with the contract and requirements of the program;

(4) Specify the participant's requirements for operation and maintenance of the applied conservation practices in accordance with the provisions of § 1468.22 of this part, and

(5) Include any other provision determined necessary or appropriate by CCC.

(c) There is a limit of one CFO contract at any one time for each farm, as constituted by FSA.

(d) The contract will incorporate the operation and maintenance of conservation practices applied under the contract, including those practices transferred from terminated CRP and EQIP contracts and WRP cost-share agreements. For persons wishing to transfer from CRP, EQIP, or WRP to CFO, practices included in CRP or EQIP contracts or WRP cost-share agreements must be included in a CFO contract if an owner or producer wishes to participate, unless otherwise stated in the conservation farm plan.

(e) Acreage that is subject to a WRP easement will not be included in the CFO contract.

(f) Upon completion, the participant must certify that a conservation practice is completed in accordance with the conservation farm plan to establish compliance with the contract.

### § 1468.22 Conservation practice operation and maintenance.

(a) The participant will operate and maintain the conservation practice for its intended purpose for the life span of the conservation practice, as identified in the conservation farm plan. Conservation practices installed before the execution of a CFO contract, but needed in the contract to obtain the environmental benefits agreed upon, are to be operated and maintained as specified in the contract. NRCS may periodically inspect the conservation practice during the lifespan of the practice as specified in the contract to ensure that the operation and maintenance is occurring.

(b) For those persons who are signatories to existing CRP or EQIP contracts, or WRP cost-share agreements, practices will be transferred from EQIP and CRP contracts or WRP cost-share agreements, as agreed upon in the CFO conservation farm plan and CFO contract. Remaining rights and obligations under CRP, EQIP, or WRP will be incorporated into the new CFO contract. Practices included in CRP, EQIP, or WRP will be incorporated into the new CFO contract. Practices included in CRP or EQIP contracts or WRP cost-share agreements must be included in a CFO contract if an owner or producer wishes to participate. Participants in CFO with CRP, EQIP, or WRP practices incorporated into CFO contracts are responsible for operating and maintaining these practices for the balance of the period specified in the original program contract, unless otherwise stated in the conservation farm plan and CFO contract.

### § 1468.23 Annual payments.

(a) CCC will determine annual payments, subject to the availability of funds, based on the value of the expected payments that would have been paid to the participant for that practice as specified in:

(1) Part 1410 of this chapter, if the practice is a land retirement rental payment or cost-share practice which would have qualified for payment under CRP in accordance with § 1468.6(a);

(2) Part 1467 of this chapter, if the practice is a wetland restoration or protection practice which would have qualified for payment under WRP which was determined eligible in accordance with § 1468.6(b);

(3) Part 1466 of this chapter, if the practice was a conservation practice which would have qualified for payment under EQIP which was determined eligible in accordance with § 1468.6(c);

(b) The maximum amount of annual payments which a person may receive under the CFO for any fiscal year shall not exceed the total of the amounts calculated in accordance with paragraph (a) of this section after being limited as follows:

(1) The payment calculated in accordance with paragraph (a)(1) of this section is limited in accordance with CRP payment limitation provisions set forth in part 1410 of this chapter.

(2) The payment calculated in accordance with § 1467.9(a)(2) of this chapter is not limited.

(3) The payment calculated in accordance with § 1466.23(a)(3) of this chapter is limited in accordance with EQIP payment limitation provisions in § 1466.23(b) of this chapter.

(c) The regulations set forth at part 1400 of this chapter will be applicable in making payment eligibility determinations for CFO and in making person determination as they apply to the limitation of payments determined in accordance with paragraph (b) of this section.

(d) The CCC cost-share payments to a participant shall be reduced so that total financial contributions for a structural or vegetative practice from all public and private entity sources do not exceed the cost of the practice.

(e) A landowner or producer that enrolls in CFO and terminates a CRP or EQIP contract or WRP cost-share agreement will be eligible to receive payments for practices which have been determined, established, or completed by the technical agency under those contracts or agreements. Once the CFO contract is effective, all payments for practices, including any practice transferred from the terminated contract agreement will be made under the CFO contract, except for payments already earned under prior contracts or cost-share agreements.

(f) Payments will not be made to a participant who has applied or initiated the application of a conservation practice for the purposes of CFO prior to approval of the CFO contract.

(g) When requested by the State Conservationist on a case-by-case basis, the Chief may approve, based upon availability of funding, cost share on the reapplication of a practice to replace or repair practice destroyed by unusual circumstances beyond the control of the landowner.

(h) The participant and NRCS must certify that a conservation practice is completed in accordance with the conservation farm plan to establish compliance with the contract before the CCC will approve the payment of any cost-share, incentive, or land retirement payment.

### § 1468.24 Contract modifications and transfers of land.

(a) The participant and CCC may modify a contract if the participant and CCC agree to the contract modification and the conservation farm plan is revised in accordance with CCC requirements and is approved by the conservation district.

(b) The participant may agree to transfer a contract to another eligible owner or operator with the agreement of CCC. The transferee shall assume full responsibility under the contract, including operation and maintenance of those conservation practices already installed and to be installed as a condition of the contract. By agreeing to participate in CFO, CCC may require operation and maintenance of those conservation practices installed under CRP, EQIP, or WRP.

(c) CCC may require a participant to refund all or a portion of any assistance earned under a CRP or EQIP contract, or WRP cost-share agreement that was terminated as a condition of participation in CFO, if the participant sells or loses control of the land under a CFO contract and the new owner or controller does not assume responsibility under the contract.

### § 1468.25 Contract violations and termination.

(a)(1) If it is determined that a participant is in violation of the provisions of this part, or the terms of the contract including portions of the contract that incorporate transferred obligations from CRP or EQIP contracts, or WRP cost-share agreements, CCC will give the participant written notice of a reasonable time to correct the violation and comply with the terms of the contract and attachments thereto,

as determined by the FSA county committee, in consultation with NRCS. If a participant continues in violation after the time to comply has elapsed, the FSA county committee may, in consultation with NRCS, terminate the CFO contract.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, a contract termination shall be effective immediately upon a determination by the FSA county committee, in consultation with NRCS, that the participant has submitted false information, filed a false claim, or engaged in any act for which a finding of ineligibility for payments is permitted under the provisions of §1468.35 of this part, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(b)(1) If CCC terminates a contract, the participant shall forfeit all rights for future payments under the contract and shall refund all or part of the payments received, plus interest, determined in accordance with part 1403 of this chapter. CCC has the option of requiring only partial refund of the payments received if a previously installed conservation practice can function independently, is not affected by the violation or other conservation practices that would have been installed under the contract, and the participant agrees to operate and maintain the installed conservation practice for the life span of the practice.

(2) If CCC terminates a contract for any reason stated above, before any contractual payments have been made, the participant shall forfeit all rights for further payments under the contract and shall pay such liquidated damages as are prescribed in the contract.

(3) When making all contract termination decisions, CCC may reduce the amount of money owed by the participant by a proportion which reflects the good-faith effort of the participant to comply with the contract, or the hardships beyond the participant's control that have prevented compliance with the contract.

(4) The participant may voluntarily terminate a contract without penalty, if CCC determines that such termination would be in the public interest.

## Subpart C—General Administration

### §1468.30 Appeals.

(a) An applicant or participant may obtain administrative review of an adverse decision made with respect to this part and the CFO contract in accordance with parts 11 and 614 of this title, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

(1) CCC funding allocations;

(2) Eligible conservation practices;

(3) Payment rates, and cost-share percentages;

(4) Science-based formulas and factor values;

(5) Soils mapping and information; and

(6) Other matters of general applicability.

### §1468.31 Compliance with regulatory measures.

Participants who carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

### §1468.32 Access to operating unit.

Any authorized CCC representative shall have the right to enter an operating unit or tract for the purpose of ascertaining the accuracy of any representations made in a contract or in anticipation of entering a contract, or as to the performance of the terms and conditions of the contract. Access shall include the right to provide technical assistance and inspect any work undertaken under the contract. The CCC representative shall make a reasonable effort to contact the participant prior to the exercise of this right to access.

### § 1468.33 Performance based upon advice or action of representatives of CCC.

If a participant relied upon the advice or action of any authorized representative of CCC, and did not know or have reason to know that the action or advice was improper or erroneous, the FSA county committee, in consultation with NRCS, may accept the advice or action as meeting the requirements of the program and may grant relief, to the extent it is deemed desirable, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant.

### § 1468.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any participant shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States. The regulations governing offsets and withholdings found at part 1403 of this chapter shall apply to contract payments.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at part 1404 of this chapter.

### § 1468.35 Misrepresentation and scheme or device.

(a) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part shall not be entitled to contract payments and must refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) An applicant or participant who is determined to have knowingly adopted any scheme or device that tends to defeat the purpose of the program; made any fraudulent representation; or misrepresented any fact affecting a program determination, shall refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter, received by such applicant or participant with respect to CFO contracts.

# PART 1469—CONSERVATION SECURITY PROGRAM

## Subpart A—General Provisions

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AUTHORITY: 16 U.S.C. 3830 *et seq.*

SOURCE: 70 FR 15212, Mar. 25, 2005, unless otherwise noted.

## Subpart A—General Provisions

### § 1469.1 Applicability.

(a) This part sets forth the policies, procedures, and requirements for the Conservation Security Program (CSP) as administered by the Natural Resources Conservation Service (NRCS) for enrollment during calendar year 2004 and thereafter.

(b) CSP is applicable only on privately owned or Tribal lands in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico,

Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Marianna Islands.

(c) The Commodity Credit Corporation (CCC), by and through the NRCS, provides financial assistance and technical assistance to participants for the conservation, protection, and improvement of soil, water, and other related resources, and for any similar conservation purpose as determined by the Secretary.

**§ 1469.2 Administration.**

(a) The regulations in this part will be administered under the general supervision and direction of the Chief, Natural Resources Conservation Service (NRCS), who is a Vice President of the CCC.

(b) The Chief may modify or waive a provision of this part if the Chief determines that the application of such provision to a particular limited situation is inappropriate and inconsistent with the goals of the program.

(c) The Chief determines fund availability to provide financial and technical assistance to participants according to the purpose and projected cost of contracts in a fiscal year. The Chief allocates the funds available to carry out CSP to the NRCS State Conservationist. Contract obligations will not exceed the funding available to the Agency.

(d) The State Conservationist may obtain advice from the State Technical Committee and local workgroups on the development of State program technical policies, payment related matters, outreach efforts, and other program issues.

(e) NRCS may enter into agreements with Federal agencies, State and local agencies, conservation districts, Indian Tribes, private entities, and individuals to assist NRCS with educational efforts, outreach efforts, and program implementation assistance.

(f) For lands under the jurisdiction of an Indian Tribe or Tribal Nation, certain items identified in paragraph (d) of this section may be determined by the Indian Tribe or Tribal Nation and the NRCS Chief.

**§ 1469.3 Definitions.**

The following definitions apply to this part and all documents issued in accordance with this part, unless specified otherwise:

*Activity* means an action other than a conservation practice that is included as a part of a conservation stewardship contract; such as a measure, incremental movement on a conservation index or scale, or an on-farm demonstration, pilot, or assessment.

*Agricultural land* means cropland, rangeland, pastureland, hayland, private non-industrial forest land if it is an incidental part of the agricultural operation, and other land on which food, fiber, and other agricultural products are produced. Areas used for strip-cropping or alley-cropping and silvopasture practices will be included as agricultural land. This includes land of varying cover types, primarily managed through a low input system, for the production of food, fiber or other agricultural products.

*Agricultural operation* means all agricultural land and other lands determined by the Chief, whether contiguous or noncontiguous, under the control of the applicant and constituting a cohesive management unit, that is operated with equipment, labor, accounting system, and management that is substantially separate from any other. The minimum size of an agricultural operation is a field.

*Applicant* means a producer as defined in this rule who has requested in writing to participate in CSP.

*Beginning farmer or rancher* means an individual or entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years, as defined in 7 U.S.C. 1991(a). This requirement applies to all members of an entity; and

(2) Will materially and substantially participate in the operation of the farm or ranch.

(i) In the case of a contract with an individual, solely, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in

the county or State where the farm is located.

(ii) In the case of a contract with an entity, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Benchmark condition inventory* means the documentation of the resource condition or situation pursuant to §1469.7(a) that NRCS uses to measure an applicant's existing level of conservation activities in order to determine program eligibility, to design a conservation stewardship contract, and to measure the change in resource conditions resulting from conservation treatment.

*Certified Conservation Planner* means an individual certified by NRCS who possesses the necessary skills, training, and experience to implement the NRCS nine-step planning process to meet client objectives in solving natural resource problems. The certified conservation planner has demonstrated skill in assisting producers to identify resource problems, to express the client's objectives, to propose feasible solutions to resource problems, and assists the producers select and implement an effective alternative that treats resource concerns and consistent with client's objectives.

*Chief* means the Chief of NRCS, USDA or designee.

*Conservation district* means any district or unit of State or local government formed under State, territorial, or Tribal law for the express purpose of developing and carrying out a local soil and water conservation program. Such a district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," or similar name.

*Conservation practice* means a specified treatment, such as a structural or land management practice, that is planned and applied according to NRCS standards and specifications.

*Conservation Reserve Program (CRP)* means the Commodity Credit Corporation program administered by the Farm Service Agency pursuant to 16 U.S.C. 3831–3836.

*Conservation stewardship contract* means a legal document that specifies the rights and obligations of any participant who has been accepted to receive assistance through participation in CSP.

*Conservation stewardship plan* means the conservation planning document that builds on the inventory of the benchmark condition documenting the conservation practices currently being applied; those practices needing to be maintained; and those practices, treatments, or activities to be supported under the provisions of the conservation stewardship contract.

*Conservation system* means a combination of conservation practices, measures and treatments for the treatment of soil, water, air, plant, or animal resource concerns.

*Conservation treatment* means any and all conservation practices, measures, and works of improvement that have the purpose of alleviating resource concerns, solving or reducing the severity of natural resource use problems, or taking advantage of resource opportunities.

*Considered to be planted* means a long term rotation of alfalfa or multi-year grasses and legumes; summer fallow; typically cropped wet areas, such as rice fields, rotated to wildlife habitat; or crops planted to provide an adequate seedbed for re-seeding.

*Cropland* means a land cover/use category that includes areas used for the production of adapted crops for harvest, including but not limited to land in row crops or close-grown crops, forage crops that are in a rotation with row or close-grown crops, permanent hayland, horticultural cropland, orchards, and vineyards.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for administration of CSP in a specific area.

*Enhancement payment* means CSP payments available to all tiers as described in §1469.23(d).

*Enrollment categories* means a classification system used to sort out applications for payment. The enrollment category mechanism will create distinct classes for funding defined by resource concerns, levels of treatment, and willingness to achieve additional environmental performance.

*Existing practice component of CSP payments* means the component of a CSP payment as described in §1469.23(b).

*Field* means a part of an agricultural operation which is separated from the balance of the agricultural operation by permanent boundaries, such as fences, permanent waterways, woodlands, and crop-lines in cases where farming practices make it probable that such crop-line is not subject to change, or other similar features.

*Field Office Technical Guide (FOTG)* means the official local NRCS source of resource information and the interpretations of guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared. Guides can be reviewed at the local USDA Service Center or online at*http://www.nrcs.usda.gov/technical/efotg*.

*Forage and animal balance* means that the total amount of available grazing forage and the addition of any roughage supply (hay, silage, or green chop) is balanced with the amount consumed by the total number of livestock and wildlife to meet their daily consumption needs.

*Forest land* means a land cover/use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 4 meters (13 feet) tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cut over forest or abandoned farmland) that is not currently developed for nonforest use. Ten percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater. The minimum area for classification as forest land is 1 acre, and the area must be at least 100 feet wide. Exceptions may be made by the Chief for land primarily managed through a low-input system for food, fiber or other agricultural products.

*Hayland* means a subcategory of "cropland" managed for the production of forage crops that are machine harvested. The crop may be grasses, legumes, or a combination of both.

*Incidental forest land* means forested land that includes all nonlinear forested riparian areas (*i.e.*, bottomland forests), and small associated woodlots located within the bounds of working agricultural land or small adjacent areas and that are managed to maximize wildlife habitat values and are within the NRCS FOTG standards for a wildlife practice. However, silvopasture that meets NRCS practice standards will be considered as pasture or range land and not incidental forestland since silvopasture is one type of intense grazing system. Areas of incidental forest land that are not part of a linear conservation practice are limited individually in size to 10 acres or less and limited to 10 percent in congregate of the total offered acres.

*Indian Tribe* means any Indian Tribe, band, Nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Indian trust lands* means real property in which:

(1) The United States holds title as trustee for an Indian or Tribal beneficiary; or

(2) An Indian or Tribal beneficiary holds title and the United States maintains a trust relationship.

*Joint operation* means a general partnership, joint venture, or other similar business arrangement as defined in 7 CFR 718.2.

*Land cover/use* means a term that includes categories of land cover and categories of land use. Land cover is the vegetation or other kind of material

that covers the land surface. Land use is the purpose of human activity on the land; it is usually, but not always, related to land cover. The National Resources Inventory uses the term land cover/use to identify categories that account for all the surface area of the United States.

*Land management practice* means conservation practices and measures that primarily use site-specific management techniques and methods to conserve, protect from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Land management practices include, but are not limited to, nutrient management, energy management, manure management, integrated pest management, integrated crop management, resource conserving crop rotations, irrigation water management, tillage or residue management, stripcropping, contour farming, grazing management, and wildlife habitat management.

*Limited resource producer* means a producer:

(1) With direct or indirect gross farm sales not more than $100,000 in each of the previous two years (to be increased starting in FY 2004 to adjust for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS)); and

(2) Who has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Commerce Department Data).

*Liquidated damages* means a sum of money stipulated in the conservation stewardship contract which the participant agrees to pay NRCS if the participant fails to adequately complete the contract. The sum represents an estimate of the anticipated or actual harm caused by the failure, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Local work group* means representatives of local offices of FSA, the Cooperative State Research, Education, and Extension Service, the conservation district, and other Federal, State, and local government agencies, including Indian Tribes, with expertise in natural resources who advise NRCS on decisions related to implementation of USDA conservation programs.

*Maintenance* means work performed to keep the applied conservation practice functioning for the intended purpose during its life span. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Management intensity* means the degree and scope of practices or measures taken by a producer which are beyond the quality criteria for a given resource concern or beyond the minimum requirements of a management practice, and which may qualify as additional effort necessary to receive an enhancement payment.

*Measure* means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the resources.

*Minimum level of treatment* means the specific conservation treatment NRCS requires that addresses a resource concern to a level that meets or exceeds the quality criteria according to NRCS technical guides or the minimum tier requirements to address resource concerns as defined in § 1469.5(e).

*Nationally significant resource concerns* means the significant resource concerns identified by NRCS in this rule and in the sign-up notice as basic program eligibility requirements.

*New practice payment* means the payment as described in § 1469.23(c).

*Operator* means an individual, entity, or joint operation who is in general control of the farming operations on the farm at the time of application.

*Participant* means a producer who is accepted into CSP and any signatory to a CSP contract.

*Pastured cropland* means a land cover/use category that includes areas used for the production of pasture in grass-based livestock production systems that could support adapted crops for harvest, including but not limited to land in row crops or close-grown crops, and forage crops that are in a rotation with row or close-grown crops.

Pastured cropland will receive the same stewardship payment as cropland.

*Pastureland* means a land cover/use category of land managed primarily for the production of introduced forage plants for grazing animals and includes improved pasture. Pastureland cover may consist of a single species in a pure stand, a grass mixture, or a grass-legume mixture. Management usually consists of cultural treatments: fertilization, weed control, reseeding or renovation, and control of grazing.

*Practice life span* means the time period in which the conservation practices are to be used and maintained for their intended purposes as defined by NRCS technical references.

*Priority resource concern* means nationally significant resource concerns and local resource concerns, approved by the Chief, for which enhancement payments will be available.

*Producer* means an owner, operator, landlord, tenant, or sharecropper who shares in the risk of producing any crop or livestock; and is entitled to share in the crop or livestock available for marketing from a farm (or would have shared had the crop or livestock been produced).

*Quality criteria* means the minimally acceptable level of treatment as defined in the technical guide of NRCS, required to achieve a resource management system for identified resource considerations for a particular land use.

*Rangeland* means a land cover/use category on which the climax or potential plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing, and introduced forage species that are managed like rangeland. This term would include areas where introduced hardy and persistent grasses are planted and such practices as deferred grazing, burning, chaining, and rotational grazing are used, with little or no chemicals or fertilizer being applied. Grasslands, savannas, prairie, many wetlands, some deserts, tundra, coastal marshes and wet meadows are considered to be rangeland. Certain communities of low forbs and shrubs, such as mesquite, chaparral, mountain shrub, and pinyon-juniper, are also included as rangeland.

*Resource concern* means the condition of natural resources that may be sensitive to change by natural forces or human activity. Resource concerns include the resource considerations listed in Section III of the FOTG, such as soil erosion, soil condition, soil deposition, water quality, water quantity, animal habitat, air quality, air condition, plant suitability, plant condition, plant management, and animal habitat and management.

*Resource-conserving crop rotation* means a crop rotation that reduces erosion, maintains or improves soil fertility and tilth, interrupts pest cycles, or conserves soil moisture and water and that includes at least one resource-conserving crop, such as a perennial grass, a legume grown for use as forage, seed for planting, or green manure, a legume-grass mixture, a small grain grown in combination with a grass or legume, whether inter-seeded or planted in rotation.

*Resource management system* means a system of conservation practices and management relating to land or water use that is designed to prevent resource degradation and permit sustained use of land, water, and other natural resources, as defined in accordance with the technical guide of NRCS.

*Secretary* means the Secretary of the U.S. Department of Agriculture.

*Sharecropper* means an individual who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of such crop in return for the provision of such labor.

*Sign-up notice* means the public notification document that NRCS provides to describe the particular requirements for a specific CSP sign-up.

*Significant resource concerns* means the list of resource concerns, identified by NRCS, associated with an agricultural operation that is subject to applicable requirements under CSP, such as the additional Tier II contract requirement.

*Soil quality* means resource concerns and/or opportunities related to depletion of soil organic matter content through soil disturbance or by sheet, rill, and wind erosion, and the physical

condition of the soil relative to ease of tillage, fitness as a seedbed, the impedance to seedling emergence or root penetration, salinity, and overall soil productivity.

*State Conservationist* means the NRCS employee authorized to direct and supervise NRCS activities within a specified State, the Pacific Basin, or the Caribbean Area.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

*Stewardship payment* means the CSP base payment component of the payment as described in § 1469.23(a).

*Structural practice* means a land-based conservation practice, including vegetative practices, that involves establishing, constructing, or installing a site-specific measure to conserve, protect from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Examples include, but are not limited to, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree planting, wildlife habitat, and capping of abandoned wells.

*Technical assistance* means the activities as defined in 7 CFR part 1466.

*Technical Service Provider* means an individual, private-sector entity, or public agency certified or approved by NRCS to provide technical services through NRCS or directly to program participants, as defined in 7 CFR part 652.

*Tenant* means one who rents land from another in consideration of the payment of a specified amount of cash or amount of a commodity; or one (other than a sharecropper) who rents land in consideration of the payment of a share of the crops or proceeds there from.

*Tier* means one of the three levels of participation in CSP.

*Water quality* means resource concerns or opportunities, including concerns such as excessive nutrients, pesticides, sediment, contaminants, pathogens and turbidity in surface waters, and excessive nutrients and pesticides in ground waters, and any other concerns identified by state water quality agencies.

*Watershed or regional resource conservation plan* means a plan developed for a watershed or other geographical area defined by the stakeholders. The plan addresses identified resource problems, contains alternative solutions that meet the stakeholder objectives for each resource, and addresses applicable laws and regulations as defined in the NRCS National Planning Procedures Handbook.

*Wetlands Reserve Program (WRP)* means the Commodity Credit Corporation program administered by NRCS pursuant to 16 U.S.C. 3837–3837f.

### § 1469.4 Significant resource concerns.

(a) Soil quality and water quality are nationally significant resource concerns for all land uses.

(b) For each sign-up, the Chief may determine additional nationally significant resource concerns for all land uses. Such significant resource concerns will reflect pressing conservation needs and emphasize off-site environmental benefits. In addition, the Chief may approve other priority resource concerns for which enhancement payments will be offered for specific locations and land uses.

### § 1469.5 Eligibility requirements.

(a) In general—To be eligible to participate in CSP:

(1) Applicants must meet the requirements for eligible applicants, including any additional eligibility criteria and contract requirements that may be included in a CSP sign-up notice pursuant to § 1469.6(c);

(2) Land must meet the definition of eligible land; and

(3) The application must meet the conservation standards established pursuant to this section.

(b) *Applicants may submit only one application for each sign-up.* Producers who are participants in an existing conservation stewardship contract are not eligible to submit another application.

(c) *Eligible applicants.* To be eligible to participate, an applicant must—

(1) Be in compliance with the highly erodible land and wetland conservation provisions found in 7 CFR Part 12;

(2) Have control of the land for the life of the proposed contract period.

(i) The Chief may make an exception for land allotted by the Bureau of Indian Affairs (BIA), Tribal land, or other instances in which the Chief determines that there is sufficient assurance of control; and

(ii) If the applicant is a tenant, the applicant must provide NRCS with the written evidence or assurance of control from the landowner;

(3) Share in risk of producing any crop or livestock and be entitled to share in the crop or livestock available for marketing from the agricultural operation (landlords and owners are ineligible to submit an application for exclusively cash rented agricultural operations);

(4) Complete a benchmark condition inventory for the entire agricultural operation or the portion being enrolled in accordance with §1469.7(a); and

(5) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to information related to eligibility criteria in the sign-up notice, and information to verify the applicant's status as a beginning or a limited resource farmer or rancher.

(d) Eligible land:

(1) To be eligible for enrollment in CSP, land must be:

(i) Private agricultural land;

(ii) Private non-industrial forested land that is an incidental part of the agricultural operation;

(iii) Agricultural land that is Tribal, allotted, or Indian trust land;

(iv) Other incidental parcels, as determined by NRCS, which may include, but are not limited to, land within the bounds of working agricultural land or small adjacent areas (such as center pivot corners, field borders, linear practices, turn rows, intermingled small wet areas or riparian areas); or

(v) Other land on which NRCS determines that conservation treatment will contribute to an improvement in an identified natural resource concern, including areas outside the boundary of the agricultural land such as farmsteads, ranch sites, barnyards, feedlots, equipment storage areas, material handling facilities, and other such developed areas. Other land must be treated in Tier III contracts; and

(vi) A majority of the agricultural operation must be within a watershed selected for sign-up.

(2) The following land is not eligible for enrollment in CSP:

(i) Land enrolled in the Conservation Reserve Program;

(ii) Land enrolled in the Wetlands Reserve Program;

(iii) Land enrolled in the Grassland Reserve Program;

(iv) Public land including land owned by a Federal, State or local unit of government;

(v) Land referred to in paragraphs (d)(2)(i), (ii) (iii) and (iv) of this section may not receive CSP payments, but the conservation work on this land may be used to determine if an applicant meets the minimum level of treatment on the eligible land and may be described in the conservation stewardship plan.

(3) The following land is not eligible for any payment component in CSP: Land that is used for crop production after May 13, 2002, that had not been planted, considered to be planted, or devoted to crop production, as determined by NRCS, for at least 4 of the 6 years preceding May 13, 2002.

(4) Delineation of the agricultural operation.

(i) The applicant will delineate the agricultural operation to include all agricultural lands, other incidental parcels identified in paragraph (d)(1)(iv) of this section, and other lands, identified in paragraph (d)(1)(v) of this section under the control of the applicant and constituting a cohesive management unit, and is operated with equipment, labor, accounting system, and management that is substantially separate from any other land.

(ii) In delineating the agricultural operation, USDA farm boundaries may be used. If farm boundaries are used in the application, the entire farm area must be included within the delineation. An applicant may offer one farm or aggregate farms into one agricultural operation and any other additional eligible land not within a farm boundary.

(e) *Conservation standards*—(1) Minimum tier eligibility requirements:

(i) An applicant is eligible to participate in CSP Tier I only if the benchmark condition inventory demonstrates to the satisfaction of NRCS that the applicant has addressed the nationally significant resource concerns of Water Quality and Soil Quality to the minimum level of treatment as specified in paragraphs (e)(2) and (3) of this section on part of the eligible land uses within the agricultural operation. Only the acreage meeting such requirements is eligible for stewardship and existing practice payments in CSP.

(ii) An applicant is eligible to participate in CSP Tier II only if the benchmark condition inventory demonstrates to the satisfaction of NRCS that the applicant has addressed the nationally significant resource concerns of water quality and soil quality to the minimum level of treatment as specified in paragraphs (e)(2) and (3) of this section for all eligible land uses on the entire agricultural operation. Under Tier II, the entire agricultural operation must be enrolled in CSP.

(iii) An applicant is eligible to participate in CSP Tier III only if the benchmark condition inventory demonstrates to the satisfaction of NRCS that the applicant has addressed all of the applicable resource concerns to the minimum level of treatment as specified in paragraph (e)(4) of this section for all eligible land uses on the entire agricultural operation. Practices or activities shall not be required for participation in the program unless they would have an ultimate conservation benefit as demonstrated by the Conservation Practice Physical Effects matrix in the FOTG. Under Tier III, the entire agricultural operation is enrolled in CSP including other land as defined in §1469.5(d)(1)(v).

(2) The minimum level of treatment on cropland for Tier I and Tier II:

(i) The minimum level of treatment for soil quality on cropland is considered achieved when the Soil Conditioning Index value is positive.

(ii) The minimum level of treatment for water quality on cropland is considered achieved if the benchmark inventory indicates that the current level of treatment addresses the risks that nutrients, pesticides, sediment, and salinity present to water quality by meeting or exceeding the quality criteria for the specific resource concerns of nutrients, pesticides, sediment and salinity for surface water and nutrients, pesticides and salinity for ground water.

(iii) The Chief may make minor exceptions to criteria for areas, such as tropical and tundra regions, where technology tools are being refined or testing is needed to review performance data.

(3) The minimum level of treatment on pastureland and rangelands for Tier I and Tier II is vegetation and animal management accomplished by following a grazing management plan that provides for:

(i) A forage-animal balance;

(ii) Proper livestock distribution;

(iii) Timing of use; and

(iv) Managing livestock access to water courses.

(4) The minimum level of treatment for Tier III:

(i) The minimum level of treatment for Tier III is having a fully implemented resource management system that meets the quality criteria for the local NRCS FOTG for all applicable resource concerns and considerations with the following exceptions:

(A) The minimum requirement for soil quality on cropland is considered achieved when the Soil Conditioning Index value is positive;

(B) The minimum requirement for water quantity—irrigation water management on cropland or pastureland is considered achieved when the current level of treatment and management for the system results in a water use index value of at least 50; and

(C) The minimum requirement for wildlife is considered achieved when the current level of treatment and management for the system results in an index value of at least 0.5 using a general or species specific habitat assessment guide; and

(ii) All riparian corridors, including streams and natural drainages, within the agricultural operation are buffered to restore, protect, or enhance riparian resources. Riparian corridors, as appropriate, will be managed or designed to intercept sediment, nutrients, pesticides, and other materials in surface

runoff; reduce nutrients and other pollutants in shallow subsurface water flow; lower water temperature; and provide litter fall or structural components for habitat complexity or to slow out-of-bank floods.

(5) In the instance of a significant natural event, such as drought, wildfire, pestilence, or flooding which would prevent the participant or applicant from achieving the minimum requirements, those requirements will be considered met so long as the participant or applicant can provide documentation of their stewardship prior to such an event.

### § 1469.6 Enrollment criteria and selection process.

(a) *Selection and funding of priority watersheds.* (1) NRCS will prioritize watersheds based on a nationally consistent process using existing natural resource, environmental quality, and agricultural activity data along with other information that may be necessary to efficiently operate the program. The watershed prioritization and identification process will consider several factors, including but not limited to:

(i) Potential of surface and ground water quality to degradation;

(ii) Potential of soil to degradation;

(iii) Potential of grazing land to degradation;

(iv) State or national conservation and environmental issues e.g., location of air non-attainment zones or important wildlife/fisheries habitat; and

(v) Local availability of management tools needed to more efficiently operate the program, such as digital soils information.

(2) Priority watersheds selected, in which producers would be potentially eligible for enrollment, will be announced in the sign-up notice.

(b) *Enrollment categories.* The Chief may limit new program enrollments in any fiscal year to enrollment categories designed to focus on priority conservation concerns and enhancement measures. NRCS will utilize enrollment categories to determine which contracts will be funded in a given sign-up.

(1) Enrollment categories may be defined by criteria related to resource concerns and levels of historic conservation treatment, including the producer's willingness to achieve additional environmental performance or conduct enhancement activities.

(2) All applications which meet the sign-up criteria within the priority watersheds will be placed in an enrollment category regardless of available funding.

(3) NRCS will develop subcategories within each enrollment category and include them in the sign-up notice. The development of subcategories may consider several factors, including:

(i) Willingness of the applicant to participate in local conservation enhancement activities;

(ii) Targeting program participation for Limited Resource Producers;

(iii) Targeting program participation to water quality priority areas for nutrient or pest management;

(iv) Targeting program participation for locally important wildlife/fisheries habitat creation and protection; and

(v) Other priorities as determined by the Secretary.

(4) At the beginning of each sign-up, the Chief will announce the order in which categories and subcategories are eligible to be funded.

(5) All eligible applications will be placed in the highest priority enrollment category and sub-category for which the application qualifies.

(6) Enrollment categories and subcategories will be funded in priority order until the available funds specified in the CSP sign-up notice are exhausted.

(c) *Sign-up process.* (1) NRCS will publish a CSP sign-up notice with sufficient time for producers to consider the benefits of participation prior to the opening of the sign-up period. In the public sign-up notice, the Chief will announce and explain the rationale for decisions for the following information:

(i) Any additional program eligibility criteria that are not listed in § 1469.5;

(ii) Any additional nationally significant resource concerns that are not listed in § 1469.4(a) that will apply;

(iii) Any additional requirements that participants must include in their CSP applications and contracts that are not listed in § 1469.21;

(iv) Information on the priority order of enrollment categories and subcategories for funding contracts;

(v) Specific information on the level of funding that NRCS estimates will go toward stewardship, existing practice, and enhancement payments;

(vi) An estimate of the total funds NRCS expects to obligate under new contracts during a given sign-up, and an estimate for the number of enrollment categories and contracts NRCS expects to be able to fund; and

(vii) The schedule for the sign-up process, including the deadline(s) for applying.

(2) NRCS will accept applications according to the timeframes specified in the sign-up notice.

(d) *Selection of contracts.* (1) NRCS will determine whether the application meets the eligibility criteria, and will place applications into an enrollment category and subcategory based on the criteria specified in the sign-up notice and into a Tier based on the criteria in 1469.5(e). Enrollment categories will be funded in the order designated in the sign-up notice until the available funding is exhausted. NRCS will determine the number of categories that can be funded in accordance with the sign-up notice, and will inform the applicant of its determinations.

(2) NRCS will develop a conservation stewardship contract for the selected applications. If the contract falls within the enrollment categories and subcategories funded in the given sign-up, NRCS will make payments as described in the contract in return for the implementation and/or maintenance of a specified level of conservation treatment on all or part of the agricultural operation.

### § 1469.7 Benchmark condition inventory and conservation stewardship plan.

(a) The benchmark condition inventory and associated case file information must include:

(1) A map, aerial photograph, or overlay that delineates the entire agricultural operation, including land use and acreage;

(2) A description of the applicant's production system(s) on the agricultural operation to be enrolled;

(3) The existing conservation practices and resource concerns, problems, and opportunities on the operation;

(4) Other information needed to document existing conservation treatment and activities, such as, grazing management, nutrient management, pest management, and irrigation water management plans;

(5) A description of the significant resource concerns and other resource concerns that the applicant is willing to address in their contract through the adoption of new conservation practices and measures; and,

(6) A list of enhancements that the applicant may be willing to undertake as part of their contract.

(b) *Conservation stewardship plan.* (1) The conservation stewardship plan and associated case file information must include:

(i) To the extent practicable, a quantitative and qualitative description of the conservation and environmental benefits that the conservation stewardship contract will achieve;

(ii) A plan map showing the acreage to be enrolled in CSP;

(iii) A verified benchmark condition inventory as described in § 1469.7(a);

(iv) A description of the significant resource concerns and other resource concerns to be addressed in the contract through the adoption of new conservation measures;

(v) A description and implementation schedule of—

(A) Individual conservation practices and measures to be maintained during the contract, consistent with the requirements for the tier(s) of participation and the relevant resource concerns and with the requirements of the sign-up,

(B) Individual conservation practices and measures to be installed during the contract, consistent with the requirements for the tier(s) of participation and the relevant resource concerns,

(C) Eligible enhancement activities as selected by the applicant and approved by NRCS, and

(D) A schedule for transitioning to higher tier(s) of participation, if applicable;

(vi) A description of the conservation activities that is required for a contract to include a transition to a higher tier of participation;

(vii) Information that will enable evaluation of the effectiveness of the plan in achieving its environmental objectives; and

(viii) Other information determined appropriate by NRCS and described to the applicant.

(2) The conservation stewardship plan may be developed with assistance from NRCS or NRCS-certified Technical Service Providers.

(3) All additional conservation practices in the conservation stewardship plan for which new practice payments will be provided must be carried out in accordance with the applicable NRCS FOTG.

### § 1469.8 Conservation practices and activities.

(a) *Conservation practice and activity selection*. (1) The Chief will provide a list of structural and land management practices and activities eligible for each CSP payment component. If the Chief's designee provides the list, it will be approved by the Director of the Financial Assistance Programs Division of NRCS. When determining the lists of practices and activities and their associated rates, the Chief will consider:

(i) The cost and potential conservation benefits;

(ii) The degree of treatment of significant resource concerns;

(iii) The number of resource concerns the practice or activity will address;

(iv) Locally available technology;

(v) New and emerging conservation technology;

(vi) Ability to address the resource concern based on site specific conditions; and,

(vii) The need for cost-share assistance for specific practices and activities to help producers achieve higher management intensity levels or to advance in tiers of eligibility.

(2) To address unique resource conditions in a State or region, the Chief may make additional conservation practices, measures, and enhancement activities eligible that are not included in the national list of eligible CSP practices.

(3) NRCS will make the list of eligible practices and activities and their individual payment rates available to the public.

(b) NRCS will consider the qualified practices and activities in its computation of CSP payments except as provided for in paragraph (d) of this section.

(c) NRCS will not make new practice payments for a conservation practice the producer has applied prior to application to the program.

(d) New practice payments will not be made to a participant who has implemented or initiated the implementation of a conservation practice prior to approval of the contract, unless a waiver was granted by the State Conservationist or the Designated Conservationist prior to the installation of the practice.

(e) Where new technologies or conservation practices that show high potential for optimizing environmental benefits are available, NRCS may approve interim conservation practice standards and financial assistance for pilot work to evaluate and assess the performance, efficacy, and effectiveness of the technology or conservation practices.

(f) NRCS will set the minimum level of treatment within land management practices at the national level; however, the State Conservationist may supplement specific criteria to meet localized conditions within the State or areas.

### § 1469.9 Technical assistance.

(a) NRCS may use the services of NRCS-approved or certified Technical Service Providers in performing its responsibilities for technical assistance.

(b) Technical assistance may include, but is not limited to: Assisting applicants during sign-up, processing and assessing applications, assisting the participant in developing the conservation stewardship plan; conservation practice survey, layout, design, installation, and certification; information, education, and training for producers; and quality assurance activities.

(c) NRCS retains approval authority over the certification of technical assistance done by non-NRCS personnel.

(d) NRCS retains approval authority of the conservation stewardship contracts and contract payments.

(e) Conservation stewardship plans will be developed by NRCS certified conservation planners.

## Subpart B—Contracts and Payments

### § 1469.20 Application for contracts.

(a) Applications must include:

(1) A completed self-assessment workbook;

(2) Benchmark condition inventory and conservation stewardship plan in accordance with § 1469.7 for the eligible land uses on the entire operation or, if Tier I, for the portion being enrolled;

(3) Any other requirements specified in the sign-up notice;

(4) For Tier I, clear indication of which acres the applicant wishes to enroll in the CSP; and,

(5) A certification that the applicant will agree to meet the relevant contract requirements outlined in the sign-up notice.

(b) Producers who are members of a joint operation, trust, estate, association, partnership or similar organization must file a single application for the joint operation or organization.

(c) Producers can submit only one application per sign-up.

(d) Participants can only have one active contract at any one time.

### § 1469.21 Contract requirements.

(a) To receive payments, each participant must enter into a conservation stewardship contract and comply with its provisions. Among other provisions, the participant agrees to maintain at least the level of stewardship identified in the benchmark inventory for the portion of land being enrolled for the entire contract period, as appropriate, and implement and maintain any new practices or activities required in the contract.

(b) Program participants will only receive payments from one conservation stewardship contract.

(c) CSP participants must address the following requirements or additional resource concerns to the minimum level of treatment by the end of their conservation stewardship contract:

(1) Tier I contract requirement: additional practices and activities as included by the applicant in the conservation stewardship plan and approved by NRCS, over the part of the agricultural operation enrolled in CSP.

(2) Tier II contract requirements:

(i) Address an additional locally significant resource concern, as described in section III of the NRCS FOTG over the entire agricultural operation. Applicants may satisfy this requirement by demonstrating that the locally significant resource concern is not applicable to their operation or that they have already addressed it in accordance with NRCS'; quality criteria; and

(ii) Additional practices and activities as included by the applicant in the conservation stewardship plan and approved by NRCS, over the entire agricultural operation, where applicable.

(3) Tier III contract requirement: additional practices and activities as included by the applicant in the conservation stewardship plan and approved by NRCS, over the entire agricultural operation, where applicable.

(d) *Transition to a higher tier of participation.* (1) Upon agreement by NRCS and the participant, a conservation stewardship contract may include provisions that lead to a higher tier of participation during the contract period. Such a transition does not require a contract modification if that transition is laid out in the schedule of contract activities. In the event that such a transition begins with Tier I, only the land area in the agricultural operation that meets the requirements for enrollment in Tier I can be enrolled in the contract until the transition occurs. Upon transition from Tier I to a higher tier of participation, the entire agricultural operation must be incorporated into the contract. All requirements applicable to the higher tier of participation would then apply. NRCS will calculate all stewardship, existing practice, new practice payments, and enhancement payments using the applicable enrolled acreage at the time of the payment.

(2) A contract which transitions to higher tier(s) of participation must include:

(i) A schedule for the activities associated with the transition(s);

(ii) A date certain by which time the transition(s) must occur; and,

(iii) A specification that the CSP payment will be based on the current Tier of participation, which may change over the life of the contract.

(3) A contract which transitions to a higher tier will be modified to receive the higher payments once the required level of treatment has been achieved and field verified by NRCS.

(4) A contract which includes a transition from Tier I to Tier II or III may be adjusted in length up to 10 years beginning from the original contract date.

(e) A conservation stewardship contract must:

(1) Incorporate by reference the conservation stewardship plan;

(2) Be for 5 years for Tier I, and 5 to 10 years for Tier II or Tier III;

(3) Incorporate all provisions as required by law or statute, including participant requirements to—

(i) Implement and maintain the practices as identified and scheduled in the conservation stewardship plan, including those needed to be eligible for the specified tier of participation and comply with any additional sign-up requirements,

(ii) Not conduct any practices on the farm or ranch that tend to defeat the purposes of the contract,

(iii) Comply with the terms of the contract, or documents incorporated by reference into the contract. NRCS will give the participant a reasonable time, as determined by the State Conservationist, to correct any violation and comply with the terms of the contract and attachments thereto. If a violation continues, the State Conservationist may terminate the conservation stewardship contract, and

(iv) Supply records and information as required by CCC to determine compliance with the contract and requirements of CSP;

(4) Specify the requirements for operation and maintenance of the applied conservation practices;

(5) Specify the schedule of payments under the life of the contract, including how those payments—

(i) Relate to the schedule for implementing additional conservation measures as described in the conservation stewardship plan,

(ii) Relate to the actual implementation of additional conservation measures as described in the conservation stewardship plan, and

(iii) May be adjusted by NRCS if the participant's management decisions change the appropriate set or schedule of conservation measures on the operation; and,

(6) Incorporate any other provisions determined necessary or appropriate by NRCS, or included as a requirement for the sign-up.

(f) Practices scheduled in contracts must be applied and maintained within the timelines specified in the contract.

(g) Contracts expire on September 30 in the last year of the contract.

(h) Participants must:

(1) Implement the conservation stewardship contract approved by NRCS;

(2) Make available to NRCS, appropriate records showing the timely implementation of the contract;

(3) Comply with the regulations of this part; and

(4) Not engage in any activity that interferes with the purposes of the program, as determined by NRCS.

(i) NRCS will determine the payments under the contract as described in § 1469.23.

(j) For contracts encompassing the entire agricultural operation, the geographic boundaries of the acreage enrolled in the contract must include all fields and facilities under the participant's direct control, as determined by NRCS.

### § 1469.22 Conservation practice operation and maintenance.

(a) The contract will incorporate the operation and maintenance of the conservation practice(s) applied under the contract.

(b) The participant must operate and maintain any new conservation practice(s) for which a payment was received to ensure that the new practice or enhancement achieves its intended

purpose for the life span of the conservation treatment, as identified in the contract or conservation stewardship plan, as determined by NRCS.

(c) Conservation practices that are installed before the execution of a contract, but are needed in the contract to obtain the intended environmental benefits, must be operated and maintained as specified in the contract whether or not an existing practice payment is made.

(d) NRCS may periodically inspect the conservation practices during the practice lifespan as specified in the contract to ensure that operation and maintenance are being carried out, and that the practice is fulfilling its intended objectives. When NRCS finds that a participant is not operating and maintaining practices installed through the CSP in an appropriate manner, NRCS will initiate contract violation procedures as specified in §1469.25. If an existing practice is part of a system that meets the quality criteria, but does not technically meet NRCS minimum practice standards, the practice must be modified or updated to meet the standard according the FOTG as specified in §1469.25(a) of this part.

**§1469.23 Program payments.**

(a) *Stewardship component of CSP payments.* (1) The conservation stewardship plan, as applicable, divides the land area to be enrolled in the CSP into land use categories, such as irrigated and non-irrigated cropland, irrigated and non-irrigated pasture, pastured cropland and range land, among other categories.

(2) NRCS will determine an appropriate stewardship payment rate for each land use category using the following methodology:

(i) NRCS will initially calculate the average 2001 rates using the Agriculture Foreign Investment Disclosure Act (AFIDA) Land Value Survey, the National Agriculture Statistics Service (NASS) land rental data, and Conservation Reserve Program (CRP) rental rates.

(ii) Where typical rental rates for a given land use vary widely within a State or between adjacent States, NRCS will adjust the county-level rates to ensure local and regional consistency and equity.

(iii) The State Conservationists can also contribute additional local data, with advice from the State Technical Committee.

(iv) The final stewardship payment rate will be the adjusted regional rates described in paragraph (a)(2)(i) through (iii) of this section multiplied by a reduction factor of 0.25 for Tier I, 0.50 for Tier II, and 0.75 for Tier III.

(v) Pastured cropland will receive the same stewardship payment as cropland.

(3) NRCS will compute the stewardship component of the CSP payment as the product of: the number of acres in each land use category (not including "other" or land not in the applicant's control); the corresponding stewardship payment rate for the applicable acreage; and a tier-specific percentage. The tier-specific percentage is 5 percent for Tier I payments, 10 percent for Tier II payments, and 15 percent for Tier III payments.

(4) Other incidental parcels as defined in §1469.5(d)(1)(iv) may be given a stewardship rate as though they were the land use to which they are contiguous if they are serving a conservation purpose, such as wildlife habitat. Payment is limited to not more than ten percent of the contract acres. Minimum treatment requirements for the contract tier apply.

(5) Other land, as defined in §1469.5(d)(1)(v), is not included in the stewardship payment computation.

(6) NRCS will publish the stewardship payment rates at the announcement of each program sign-up.

(b) *Existing practice component of CSP payments.* (1) The Chief will determine and announce which practices will be eligible for existing practice payments in accordance with §1469.8(a).

(2) With exceptions including, but not limited to, paragraph (b)(3) and (4) of this section, NRCS may pay the participant a percentage of the average 2001 county cost of maintaining a land management, and structural practice that is documented in the benchmark condition inventory as existing upon enrollment in CSP. The Chief may offer alternative payment methods such as paying a percentage of the stewardship payment as long as the payment will

not exceed 75 percent (or, in the case of a beginning farmer or rancher, 90 percent) of the average 2001 county costs of installing the practice in the 2001 crop year. NRCS will post the rates for payment at the time of the sign-up notices on the NRCS website and in USDA Service Centers.

(3) NRCS will not pay for maintenance of equipment.

(4) NRCS will not pay an existing practice component of CSP payments for any practice that is required to meet conservation compliance requirements found in 7 CFR Part 12.

(5) Existing practice payments are not intended to pay for routine maintenance activities related to production practices or practices considered typical in farm and ranch operations for a specific location.

(6) Existing practice payments will be made only on practices that meet or exceed the practice standards described in the FOTG.

(7) The Chief may reduce the rates in any given sign-up notice.

(c) *New practice payments.* (1) The Chief will determine and announce which practices will be eligible for new practice payments in accordance with § 1469.8(a).

(2) If the conservation stewardship contract requires the implementation of a new structural or land management practice, NRCS may pay a percentage of the cost of installing the new practice. NRCS will provide the list of approved practices and the percentage cost-share rate for each practice at the time of each CSP sign-up notice.

(3) Participants may contribute to their share of the cost of installing a new practice through in-kind sources, such as personal labor, use of personal equipment, or donated materials. Contributions for a participant's share of the practice may also be provided from non-Federal sources, as determined by the Chief.

(4) Cost-share payments may be provided by other programs; except that payments may not be provided through CSP and another program for the same practice on the same land area.

(5) If additional practices are installed or implemented to advance a contract from one tier of participation to a higher tier, the practice must be certified as meeting FOTG practice standards by NRCS.

(6) In no instance will the total financial contributions for installing a practice from all public and private entity sources exceed 100 percent of the actual cost of installing the practice.

(7) NRCS will not pay a new practice payment for any practice that is required to meet the conservation compliance plan requirements found in 7 CFR Part 12.

(8) The Chief may reduce the rates in any given sign-up notice.

(d) *Enhancement component of CSP payments.* (1) The Chief will establish a list of conservation practices and activities that are eligible for enhancement payments for a given sign-up. State Conservationists, with advice from the State Technical Committees, will tailor the list to meet the needs of the selected watersheds and submit to the Chief for concurrence.

(2) NRCS may pay an enhancement component of a CSP payment if a conservation stewardship plan demonstrates to the satisfaction of NRCS that the plan's activities will increase conservation performance including activities related to energy management as a result of additional effort by the participant and result in:

(i) The improvement of a resource concern by implementing or maintaining multiple conservation practices or measures that exceed the minimum eligibility requirements for the contract's Tier of participation as outlined in the sign-up notice and as described in § 1469.5(e) and the contract requirements in § 1469.21; or

(ii) An improvement in a local resource concern based on local priorities and in addition to the national significant resource concerns, as determined by NRCS.

(3) NRCS may also pay an enhancement component of a CSP payment if a participant:

(i) Participates in an on-farm conservation research, demonstration, or pilot project as outlined in the sign-up notice; or

(ii) Cooperates with other producers to implement watershed or regional resource conservation plans that involve

at least 75 percent of the producers in the targeted area; or

(iii) Carries out assessment and evaluation activities relating to practices included in the conservation stewardship plan as outlined in the sign-up notice.

(4) NRCS will not pay the enhancement component of a CSP payment for any practice that is required to meet the conservation compliance plan requirements found in 7 CFR Part 12.

(5) *Eligible enhancement payments.* (i) State Conservationists, with advice from the State Technical Committees, will develop proposed enhancement payment amounts for each practice and activity.

(ii) An enhancement payment will be made to encourage a producer to perform or continue a management practice or activity, resource assessment and evaluation project, or field-test a research, demonstration, or pilot project that produces enhanced environmental performance and benefits or produces information and data to improve a resource concern or update the NRCS technical guides. Enhancement payments will be:

(A) For activities where NRCS can demonstrate the economic value of the environmental benefits, based on a given activity's expected environmental benefit value. The payment may not exceed the activity's expected economic value; or

(B) For activities where NRCS cannot demonstrate the economic value of the environmental benefits, a rate that will not exceed a producer's cost to implement a given activity.

(iii) NRCS will post the list of approved enhancement activities and payment amounts for each activity concurrent with the CSP sign-up notice.

(6) The Chief may set a not-to-exceed limit or variable payment rate for the enhancement payment in any given sign-up notice.

(7) Enhancements above the minimum criteria for the resource concern that are included in the benchmark inventory may be included in the first CSP payment.

(e) Contracts will be limited as follows:

(1) $20,000 per year for a Tier I conservation stewardship contract,

(2) $35,000 per year for a Tier II conservation stewardship contract, or

(3) $45,000 per year for a Tier III conservation stewardship contract.

(4) Stewardship components of CSP payments cannot exceed $5,000 per year for Tier I, $10,500 per year for Tier II, or $13,500 per year for Tier III.

(5) The new practice payment will not exceed 50 percent of the average county costs of installing the practice (or a similar practice, if new) in the 2001 crop year with the exception of beginning and limited resource producers, in which case the new practice payment may be up to 65 percent.

(f) The new practice and enhancement components of the conservation stewardship contract payment may increase once the participant applies and agrees to maintain additional conservation practices and activities as described in the conservation stewardship plan.

(g) The Chief of NRCS may limit the stewardship, practice, and enhancement components of CSP payments in order to focus funding toward targeted activities and conservation benefits the Chief identifies in the sign-up notice and any subsequent addenda.

(h) In the event that annual funding is insufficient to fund existing contract commitments, the existing contracts will be pro-rated in that contract year.

(i) NRCS may not make any payments to participants for:

(1) Practices within their conservation stewardship plan that are required to meet conservation compliance requirements found in 7 CFR Part 12;

(2) Practices that are included in maintenance agreements (with financial reimbursements for maintenance) that existed prior to the conservation stewardship contract approval;

(3) Construction or maintenance of animal waste storage or treatment facilities or associated waste transport or transfer devices for animal feeding operations;

(4) The purchase or maintenance of equipment;

(5) A non-land based structure that is not integral to a land based practice, as determined by the Chief; or

(6) New practices that were applied with cost-share assistance through other USDA cost-share programs.

**§ 1469.24 Contract modifications and transfers of land.**

(a) Contracts may be modified:

(1) At the request of the participant, if the modification is consistent with the purposes of the conservation security program, or;

(2) As required by the State Conservationist due to changes to the type, size, management, or other aspect of the agricultural operation that would interfere with achieving the purposes of the program.

(b) Participants may request a modification to their contract to change their tier of participation under a conservation stewardship contract once the measures determined necessary by NRCS to meet the next tier level have been established.

(c) Contract transfers are permitted when there is agreement among all parties to the contract and the contract area remains intact.

(1) NRCS must be notified within 60 days of the transfer of interest and the transferee's acceptance of the contract terms and conditions, or the contract will be terminated.

(2) The transferee must be determined by NRCS to be eligible and must assume full responsibility under the contract, including operation and maintenance of those conservation practices and activities already undertaken and to be undertaken as a condition of the contract.

**§ 1469.25 Contract violations and termination.**

(a) If the NRCS determines that a participant is in violation of the terms of a contract, or documents incorporated by reference into the contract, NRCS will give the participant a reasonable time, as determined by the State Conservationist, to correct the violation and comply with the terms of the contract and attachments thereto. If the violation continues, the State Conservationist may terminate the conservation stewardship contract.

(b) Notwithstanding the provisions of paragraph (a) of this section, a contract termination is effective immediately upon a determination by the State Conservationist that the participant has: submitted false information; filed a false claim; engaged in any act for which a finding of ineligibility for payments is permitted under this part; or taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(c) If NRCS terminates a contract due to breach of contract, the participant will forfeit all rights for future payments under the contract, and must refund all or part of the payments received, plus interest, and liquidated damages as determined in accordance with part 1403 of this chapter. The State Conservationist may require only partial refund of the payments received if a previously installed conservation practice can function independently, is not affected by the violation or other conservation practices that would have been installed under the contract, and the participant agrees to operate and maintain the installed conservation practice for the life span of the practice.

(d) If NRCS terminates a contract due to breach of contract, or the participant voluntarily terminates the contract before any contractual payments have been made, the participant will forfeit all rights for further payments under the contract, and must pay such liquidated damages as are prescribed in the contract. The State Conservationist has the option to waive the liquidated damages, depending upon the circumstances of the case.

(e) When making any contract termination decisions, the State Conservationist may reduce the amount of money owed by the participant by a proportion which reflects the good faith effort of the participant to comply with the contract, or the hardships beyond the participant's control that have prevented compliance with the contract including natural disasters or events.

(f) The participant may voluntarily terminate a contract, without penalty or repayment, if the State Conservationist determines that the contract terms and conditions have been fully complied with before termination of the contract.

(g) In carrying out this section, the State Conservationist may consult with the local conservation district.

## Subpart C—General Administration

### § 1469.30 Fair treatment of tenants and sharecroppers.

Payments received under this part must be divided in the manner specified in the applicable contract or agreement, and NRCS will ensure that potential participants who would have an interest in acreage being offered receive treatment which NRCS deems to be equitable, as determined by the Chief. NRCS may refuse to enter into a contract when there is a disagreement among multiple applicants seeking enrollment as to an applicant's eligibility to participate in the contract as a tenant.

### § 1469.31 Appeals.

(a) An applicant or a participant may obtain administrative review of an adverse decision under CSP in accordance with parts 11 and 614, Subparts A and C, of this title, except as provided in paragraph (b) of this section.

(b) Participants cannot appeal the following decisions:

(1) Payment rates, payment limits, and cost-share percentages;

(2) Eligible conservation practices; and,

(3) Other matters of general applicability.

(c) Before a participant can seek judicial review of any action taken under this part, the participant must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision will be a final agency action except a decision of the Chief under these procedures.

### § 1469.32 Compliance with regulatory measures.

Participants who carry out conservation practices are responsible for obtaining the authorities, permits, easements, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants must comply with all laws and are responsible for all effects or actions resulting from their performance under the contract.

### § 1469.33 Access to agricultural operation.

Any authorized NRCS representative has the right to enter an agricultural operation for the purpose of ascertaining the accuracy of any representations made in a contract or in anticipation of entering a contract, as to the performance of the terms and conditions of the contract. Access includes the right to provide technical assistance, inspect any work undertaken under the contract, and collect information necessary to evaluate the performance of conservation practices in the contract. The NRCS representative will make a reasonable effort to contact the participant prior to the exercise of this provision.

### § 1469.34 Performance based on advice or action of representatives of NRCS.

If a participant relied upon the advice or action of any authorized representative of CCC, and did not know or have reason to know that the action or advice was improper or erroneous, the State Conservationist may accept the advice or action as meeting the requirements of CSP. In addition, the State Conservationist may grant relief, to the extent it is deemed desirable by CCC, to provide a fair and equitable treatment because of the good faith reliance on the part of the participant.

### § 1469.35 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, NRCS will make any payment or portion thereof to any participant without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 are applicable to contract payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing

assignment of payment found at 7 CFR part 1404.

### § 1469.36 Misrepresentation and scheme or device.

(a) If the Department determines that a participant erroneously represented any fact affecting a CSP determination made in accordance with this part, the participant's conservation stewardship contract will be terminated immediately in accordance with § 1469.25(b). The participant will forfeit all rights for future contract payments, and must refund payments received, plus interest, and liquidated damages as described in § 1469.25.

(b) A producer who is determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of CSP;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a CSP determination, must refund to NRCS all payments, plus interest, and liquidated damages as determined in accordance with § 1469.25 received by such participant with respect to all contracts. In addition, NRCS will terminate the participant's interest in all conservation stewardship contracts.

(c) If the producer acquires land subsequent to enrollment in CSP, that land is not considered part of the agricultural operation; however, if the land was previously owned or controlled by them before the date of enrollment and after May 13, 2002, then NRCS will conduct an investigation into the activity to see if there was a scheme or device.

# PART 1470—CONSERVATION STEWARDSHIP PROGRAM

## Subpart A—General Provisions

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AUTHORITY: 16 U.S.C. 3838d–3838g.

SOURCE: 75 FR 31653, June 3, 2010, unless otherwise noted.

## Subpart A—General Provisions

### § 1470.1 Applicability.

(a) This part sets forth the policies, procedures, and requirements for the Conservation Stewardship Program (CSP) as administered by the Natural Resources Conservation Service (NRCS), for enrollment during fiscal year (FY) 2009 and thereafter.

(b) The purpose of CSP is to encourage producers to address resource concerns in a comprehensive manner by:

(1) Undertaking additional conservation activities; and

(2) Improving, maintaining, and managing existing conservation activities.

(c) CSP is applicable in any of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands of the United States, American Samoa, and Commonwealth of the Northern Mariana Islands.

(d) NRCS provides financial assistance and technical assistance to participants for the conservation, protection, and improvement of soil, water, and other related natural resources, and for any similar conservation purpose as determined by NRCS.

**§ 1470.2 Administration.**

(a) The regulations in this part will be administered under the general supervision and direction of the Chief, NRCS, who is a Vice President of the Commodity Credit Corporation (CCC).

(b) The Chief is authorized to modify or waive a provision of this part if the Chief deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the purposes of the program. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part which is required by applicable law.

(c) To achieve the conservation goals of CSP, NRCS will:

(1) Make the program available nationwide to eligible applicants on a continuous application basis with one or more ranking periods to determine enrollments. One of the ranking periods will occur in the first quarter of each fiscal year, to the extent practicable; and

(2) Develop conservation measurement tools (CMT) for the purpose of carrying out the program.

(d) During the period beginning on October 1, 2008, and ending on September 30, 2017, NRCS will, to the maximum extent practicable:

(1) Enroll in CSP an additional 12,769,000 acres for each fiscal year; and

(2) Manage CSP to achieve a national average rate of $18 per acre, which includes the costs of all financial and technical assistance and any other expenses associated with program enrollment and participation.

(e) The State Conservationist will:

(1) Obtain advice from the State Technical Committee and local working groups on the development of State-level technical, outreach, and program matters, including:

(i) Establishment of ranking pools appropriate for the conduct of CSP within the State to ensure program availability and prioritization of conservation activities. Ranking pools may be based on watersheds, geographic areas, or other appropriate regions within a State and may consider high-priority regional and State-level resource concern areas;

(ii) Identification of not less than three, nor more than five priority resource concerns in particular watersheds, geographic areas, or other appropriate regions within a State;

(iii) Identification of resource-conserving crops that will be part of resource-conserving crop rotations;

(iv) Development of design protocols and participation procedures for participation in on-farm research, and demonstration and pilot projects; and

(v) Evaluation of Cooperative Conservation Partnership Initiative (CCPI) projects and allowable program adjustments for the conduct of projects.

(2) Assign NRCS employees as designated conservationists to be responsible for CSP at the local level; and

(3) Be responsible for the program in their assigned State.

(f) NRCS may enter into agreements with Federal, State, and local agencies, conservation districts, Indian tribes, private entities, and individuals to assist NRCS with program implementation.

**§ 1470.3 Definitions.**

The following definitions will apply to this part and all documents issued in accordance with this part, unless specified otherwise:

*Agricultural land* means cropland, rangeland, and pastureland on which agricultural products or livestock are produced and resource concerns may be addressed. Agricultural lands may also include other land and incidental areas included in the agricultural operation as determined by NRCS. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

*Agricultural operation* means all agricultural land and other land, as determined by NRCS, whether contiguous or noncontiguous:

(1) Which is under the effective control of the applicant; and

(2) Which is operated by the applicant with equipment, labor, management, and production or cultivation practices that are substantially separate from other operations.

*Animal waste storage or treatment facility* means a structural conservation practice used for storing or treating animal waste.

*Applicant* means a person, legal entity, joint operation, or Indian tribe that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in CSP.

*Beginning farmer or rancher* means:

(1) An individual or legal entity who:

(i) Has not operated a farm, ranch, or nonindustrial private forest land (NIPF), or who has operated a farm, ranch, or NIPF for not more than 10 consecutive years (this requirement applies to all members of a legal entity); and

(ii) Will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with a legal entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of NRCS, or designee.

*Conservation activities* means conservation systems, practices, or management measures needed to address a resource concern or improve environmental quality through the treatment of natural resources, and includes structural, vegetative, and management activities as determined by NRCS.

*Conservation district* means any district or unit of State, tribal, or local government formed under State, tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," "natural resource district," or similar name.

*Conservation measurement tool* means procedures developed by NRCS to estimate the level of environmental benefit to be achieved by a producer using the proxy of conservation performance.

*Conservation planning* means using the planning process outlined in the applicable National Planning Procedures Handbook (NPPH).

*Conservation practice* means a specified treatment, such as a structural or vegetative practice or management technique, commonly used to meet a specific need in planning and carrying out conservation programs for which standards and specifications have been developed. Conservation practices are in the NRCS Field Office Technical Guide, section IV, which is based on the National Handbook of Conservation Practices.

*Conservation stewardship plan* means a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved. Associated supporting information that identifies and inventories resource concerns and existing conservation activities, establishes benchmark data, and documents the participant's conservation objectives will be maintained with the plan.

*Conservation system* means a combination of conservation practices, management measures, and enhancements used to address natural resource and environmental concerns in a comprehensive, holistic, and integrated manner.

*Contract* means a legal document that specifies the rights and obligations of any participant who has been accepted into the program. A CSP contract is an agreement for the transfer of assistance from NRCS to the participant for installing, adopting, improving, managing, and maintaining conservation activities.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for CSP at the local level.

*Effective control* means possession of the land by ownership, written lease, or other legal agreement and authority to act as decisionmaker for the day-to-day management of the operation both at the time the applicant enters into a stewardship contract and for the required period of the contract.

*Enhancement* means a type of conservation activity used to treat natural resources and improve conservation performance. Enhancements are installed at a level of management intensity that exceeds the sustainable level for a given resource concern, and those enhancements directly related to a practice standard are applied in a manner that exceeds the minimum treatment requirements of the standard.

*Enrollment* means for the initial sign-up for FY 2009, NRCS will consider a participant "enrolled" in CSP based on the fiscal year the application is submitted, once NRCS approves the participant's contract. For subsequent ranking cut-off periods, NRCS will consider a participant enrolled in CSP based on the fiscal year the contract is approved.

*Field office technical guide* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and standards for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Indian lands* means all lands held in trust by the United States for individual Indians or Indian tribes, or all land titles held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or lands subject to the rights of use, occupancy, or benefit of certain Indian tribes. This term also includes lands for which the title is held in fee status by Indian tribes and the U.S. Government-owned land under the Bureau of Indian Affairs (BIA) jurisdiction.

*Indian Tribe* means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Joint operation* means, as defined in part 1400 of this chapter, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

*Legal entity* means, as defined in part 1400 of this chapter, an entity created under Federal or State law.

*Limited Resource Farmer or Rancher* means:

(1) A person with direct or indirect gross farm sales not more than the current indexed value in each of the previous 2 years ($142,000 is the amount for 2010, adjusted for inflation using Prices Paid by Farmer Index as compiled by the National Agricultural Statistical Service); and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using Department of Commerce Data).

*Liquidated damages* means a sum of money stipulated in the CSP contract that the participant agrees to pay NRCS if the participant fails to fulfill the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Local working group* means the advisory body as described in 7 CFR part 610.

*Management measure* means one or more specific actions that is not a conservation practice, but has the effect of alleviating problems or improving the treatment of the natural resources.

*National Organic Program* means the program, administered by the Department of Agriculture (USDA) Agricultural Marketing Service, which regulates the standards for any farm, wild crop harvesting, or handling operation

that wants to market an agricultural product as organically produced.

*Natural Resources Conservation Service* means an agency of USDA which has responsibility for administering CSP using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forest land* means rural land that has existing tree cover or is suitable for growing trees, and is owned by an individual, group, association, corporation, Indian tribe, or other private legal entity that has definitive decisionmaking authority over the land.

*Operation and maintenance* means work performed by the participant to maintain existing conservation activities to at least the level of conservation performance identified at the time the application is obligated into a contract, and maintain additional conservation activities installed and adopted over the contract period.

*Participant* means a person, legal entity, joint operation, or Indian tribe that is receiving payment or is responsible for implementing the terms and conditions of a CSP contract.

*Payment* means financial assistance provided to the participant under the terms of the CSP contract.

*Person* means, as defined in part 1400 of this chapter, an individual, natural person and does not include a legal entity.

*Priority resource concern* means a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee and local working groups, as a priority for a State, or the specific geographic areas within a State.

*Producer* means a person, legal entity, joint operation, or Indian tribe who has an interest in the agricultural operation, as defined in part 1400 of this chapter, or who is engaged in agricultural production or forest management.

*Resource concern* means a specific natural resource problem that is likely to be addressed successfully through the implementation of conservation activities by producers.

*Resource-conserving crop* means a crop that is one of the following:

(1) A perennial grass;

(2) A legume grown for use as forage, seed for planting, or green manure;

(3) A legume-grass mixture;

(4) A small grain grown in combination with a grass or legume, whether inter-seeded or planted in rotation.

*Resource-conserving crop rotation* means a crop rotation that:

(1) Includes at least one resource-conserving crop as determined by the State Conservationist;

(2) Reduces erosion;

(3) Improves soil fertility and tilth;

(4) Interrupts pest cycles; and

(5) In applicable areas, reduces depletion of soil moisture or otherwise reduces the need for irrigation.

*Secretary* means the Secretary of USDA.

*Socially disadvantaged farmer or rancher* means a producer who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities. A socially disadvantaged group is a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group, without regard to their individual qualities. These groups consist of American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics. A socially disadvantaged applicant is an individual or entity who is a member of a socially disadvantaged group. For an entity, at least 50 percent ownership in the farm business must be held by socially disadvantaged individuals.

*State Conservationist* means the NRCS employee authorized to implement CSP and direct and supervise NRCS activities in a State, Caribbean Area, or Pacific Islands Area.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

*Stewardship threshold* means the level of natural resource conservation and environmental management required, as determined by NRCS using the CMT, to conserve and improve the quality and condition of a natural resource.

*Technical assistance* means technical expertise, information, and tools necessary for the conservation of natural

resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, forest producers, and other eligible entities, such as conservation planning, technical consultation, preparation of forest stewardship management plans, and assistance with the design and implementation of conservation activities; and

(2) Technical infrastructure, including processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Technical Service Provider* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of, or on behalf of, NRCS as referenced in 7 CFR part 652.

### § 1470.4 Allocation and management.

(a) The Chief will allocate acres and associated funds to State Conservationists:

(1) Primarily on each State's proportion of eligible land to the total amount of eligible land in all States; and

(2) On consideration of:

(i) The extent and magnitude of the conservation needs associated with agricultural production in each State based on natural resource factors that consider national, regional, and State-level priority ecosystem areas,

(ii) The degree to which implementation of the program in the State is, or will be, effective in helping producers address those needs, and

(iii) Other considerations determined by the Chief to achieve equitable geographic distribution of program participation.

(b) The State Conservationist will allocate acres to ranking pools, to the extent practicable, based on the same factors the Chief considers in making allocations to States.

(c) Of the acres made available for each of fiscal years 2009 through 2012 to carry out CSP, NRCS will use, as a minimum:

(1) Five percent to assist beginning farmers or ranchers, and

(2) Five percent to assist socially disadvantaged farmers or ranchers.

(d) In any fiscal year, allocated acres that are not enrolled by a date determined by NRCS may be reallocated with associated funds for use in that fiscal year under CSP. As part of the reallocation process, NRCS will consider several factors, including demand from applicants, national and regional conservation priorities, and prior-year CSP performance in States.

(e) Of the CSP funds and acres made available for each fiscal year:

(1) The Chief will reserve 6 percent of funds and acres to ensure an adequate source of funds and acres for the CCPI. Of the funds and acres reserved, the Chief will allocate:

(i) Ninety percent to projects based on the direction of State Conservationists, with the advice of State Technical Committees; and

(ii) Ten percent to projects based on a national competitive process established by the Chief. In determining funding allocation decisions for these projects, NRCS will consider the extent to which they address national and regional conservation priorities.

(2) Any funds and acres reserved for the CCPI in a fiscal year that are not obligated by April 1 of that fiscal year may be used to carry out other CSP activities during the remainder of that fiscal year.

### § 1470.5 Outreach activities.

(a) NRCS will establish program outreach activities at the national, State, and local levels to ensure that potential applicants who control eligible land are aware and informed that they may be eligible to apply for program assistance.

(b) Special outreach will be made to eligible producers with historically low participation rates, including but not restricted to, beginning farmers or ranchers, limited resource farmers or ranchers, and socially disadvantaged farmers or ranchers.

(c) NRCS will ensure that outreach is provided so as not to limit producer participation because of size or type of operation or production system, including specialty crop and organic production.

(d) NRCS will conduct focused outreach in regions of national significance in order to maximize program participation. These areas could include landscapes such as the Chesapeake Bay watershed and Great Lakes basin.

**§ 1470.6 Eligibility requirements.**

(a) *Eligible applicant*. To be an eligible applicant for CSP, a producer must be the operator in the Farm Service Agency (FSA) farm records management system. Potential applicants that are not in the FSA farm records management system must establish records with FSA. Potential applicants whose records are not current in the FSA farm records management system must update those records prior to the close of the evaluation period to be considered eligible. NRCS may grant exceptions to the "operator of record" requirement for producers, tenants, and owners in the FSA farm records management system that can demonstrate, to the satisfaction of NRCS, they will operate and have effective control of the land. Applicants must also meet all of the following requirements:

(1) Have effective control of the land unless an exception is made by the Chief in the case of land administered by the BIA, Indian lands, or other instances in which the Chief determines that there is sufficient assurance of control;

(2) Be in compliance with the highly erodible land and wetland conservation provisions found at 7 CFR part 12;

(3) Be in compliance with Adjusted Gross Income provisions found at 7 CFR part 1400;

(4) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information related to eligibility requirements and ranking factors; conservation activity and production system records; information to verify the applicant's status as a historically underserved producer, if applicable; and payment eligibility as established by 7 CFR part 1400; and

(5) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(b) *Eligible land*. A contract application must include all of the eligible land on an applicant's agricultural operation, except as identified in paragraph (b)(3) of this section. A participant may submit an application(s) to enter into an additional contract(s) for newly acquired eligible land, which would then compete with other applications in a subsequent ranking period. The land as described below is part of the agricultural operation and eligible for enrollment in the CSP:

(1) Private agricultural land;

(2) Agricultural Indian lands;

(3) NIPF:

(i) By special rule in the statute, NIPF is eligible land,

(ii) No more than 10 percent of the acres enrolled nationally in any fiscal year may be NIPF,

(iii) The applicant will designate by submitting a separate application if they want to offer NIPF for funding consideration,

(iv) If designated for funding consideration, then the NIPF component of the operation will include all the applicant's NIPF. If not designated for funding consideration, then the applicant's NIPF will not be part of the agricultural operation; and

(4) Other private agricultural land, as determined by the Chief, on which resource concerns related to agricultural production could be addressed by enrolling the land in CSP.

(c) *Ineligible land*. The following ineligible lands are part of the agricultural operation, but ineligible for inclusion in the contract or for payment in CSP:

(1) Land enrolled in the Conservation Reserve Program (CRP), 7 CFR part 1410;

(2) Land enrolled in the Wetlands Reserve Program (WRP), 7 CFR part 1467;

(3) Land enrolled in the Grassland Reserve Program (GRP), 7 CFR part 1415;

(4) Land enrolled in the Conservation Security Program, 7 CFR part 1469;

(5) Public land including land owned by a Federal, State, or local unit of government; and

(6) Land used for crop production after June 18, 2008, that had not been planted, considered to be planted, or devoted to crop production for at least 4 of the 6 years preceding that date, unless that land:

(i) Had previously been enrolled in CRP,

(ii) Has been maintained using long-term crop rotation practices as determined by the designated conservationist, or

(iii) Is incidental land needed for efficient operation of the farm or ranch as determined by the designated conservationist.

### § 1470.7 Enhancements and conservation practices.

(a) Participant decisions describing the additional enhancements and conservation practices to be implemented under the conservation stewardship contract will be recorded in the conservation stewardship plan.

(b) NRCS will make available to the public the list of enhancements and conservation practices available to be installed, adopted, maintained, and managed through the CSP.

(c) NRCS will make available bundled suites of conservation activities for participants to voluntarily select to include as part of their conservation stewardship plans. The bundles will be designed to coordinate the installation and adoption of enhancements with each other to address resource concerns in a more comprehensive and cost-effective manner.

(d) CSP encourages the use of other NRCS programs to install conservation practices that are required to meet agreed-upon stewardship thresholds, but the practices may not be compensated through CSP.

### § 1470.8 Technical and other assistance.

(a) NRCS may provide technical assistance to an eligible applicant or participant either directly or through a technical service provider (TSP) as set forth in 7 CFR part 652.

(b) NRCS retains approval authority over certification of work done by non-NRCS personnel for the purpose of approving CSP payments.

(c) NRCS will ensure that technical assistance is available and program specifications are appropriate so as not to limit producer participation because of size or type or operation or production system, including specialty crop and organic production. In providing technical assistance to specialty crop and organic producers, NRCS will provide appropriate training to field staff to enable them to work with these producers and to utilize cooperative agreements and contracts with nongovernmental organizations with expertise in delivering technical assistance to these producers.

(d) NRCS will assist potential applicants dealing with the requirements of certification under the National Organic Program and CSP requirements concerning how to coordinate and simultaneously meet eligibility standards under each program.

(e) NRCS may utilize the services of State foresters and existing technical assistance programs such as the Forest Stewardship Program of the U.S. Forest Service, in coordinating assistance to NIPF owners.

## Subpart B—Contracts and Payments

### § 1470.20 Application for contracts and selecting offers from applicants.

(a) *Submission of contract applications.* Applicants may submit an application to enroll all of their eligible land into CSP on a continuous basis.

(b) *Stewardship threshold requirement.* To be eligible to participate in CSP, an applicant must submit to the designated conservationist for approval, a contract application that:

(1) Indicates the applicant's conservation activities, at the time of application, are meeting the stewardship threshold for at least one resource concern;

(2) Would, at a minimum, meet or exceed the stewardship threshold for at least one priority resource concern in addition to the resource concern described in paragraph (b)(1) of this section by the end of the conservation stewardship contract by:

(i) Installing and adopting additional conservation activities, and

(ii) Improving, maintaining, and managing conservation activities present on the agricultural operation at the time the contract application is accepted by NRCS;

(3) Provides a map, aerial photograph, or overlay that:

(i) Identifies the applicant's agricultural operation and NIPF component of the operation, and

(ii) Delineates eligible land with associated acreage amounts; and

(4) If the applicant is applying for on-farm research and demonstration activities or for pilot testing, describes the nature of the research, demonstration, or pilot testing in a manner consistent with design protocols and application procedures established by NRCS.

(c) *Evaluation of contract applications.* NRCS will conduct one or more ranking periods each fiscal year.

(1) To the extent practicable, one ranking period will occur in the first quarter of the fiscal year;

(2) In evaluating CSP applications, the State Conservationist or designated conservationist will rank applications based on the following factors, using the CMT, to the maximum extent practicable:

(i) Level of conservation treatment on all applicable priority resource concerns at the time of application,

(ii) Degree to which the proposed conservation treatment on applicable priority resource concerns effectively increases conservation performance,

(iii) Number of applicable priority resource concerns proposed to be treated to meet or exceed the stewardship threshold by the end of the contract, and

(iv) Extent to which other resource concerns, in addition to priority resource concerns, will be addressed to meet or exceed the stewardship threshold by the end of the contract period;

(3) In the event that application ranking scores from (2) above are similar, the application that represents the least cost to the program will be given higher priority; and

(4) The State Conservationist or designated conservationist may not assign a higher priority to any application because the applicant is willing to accept a lower payment than the applicant would otherwise be eligible to receive.

(d) *Weighting of ranking factors.* To the extent the CSP objective of additional conservation is not being achieved, as determined by the Chief, NRCS will adjust the weighting of ranking factors in order to place emphasis on increasing net conservation benefits.

(e) *State and local priorities.* The Chief may develop and use additional criteria for evaluating applications that are determined necessary to ensure that national, State, and local conservation priorities are effectively addressed.

(f) *Ranking pools.* Ranking pools will be established in accordance with § 1470.2(e)(1)(i).

(1) NIPF will compete in ranking pools separate from agricultural land. An applicant with both NIPF and agricultural land will have the options to submit:

(i) One application for NIPF;

(ii) One application for agricultural land; or

(iii) Two applications, one for each land type.

(2) An applicant with an agricultural operation or NIPF component of the operation that crosses ranking pool boundaries will make application and be ranked in the ranking pool where the largest acreage portion of their operation occurs.

(3) Within each State or established ranking pool, the State Conservationist will address conservation access for certain farmers or ranchers, including:

(i) Socially disadvantaged farmers or ranchers; and

(ii) Beginning farmers or ranchers.

(g) *Application pre-approval.* The State Conservationist or designated conservationist will make application pre-approval determinations during established ranking periods based on eligibility and ranking score.

(h) *Field verification.* NRCS will conduct onsite field verification prior to obligation of contract funding to substantiate the accuracy of the information provided by pre-approved applicants during the application process.

**§ 1470.21 Contract requirements.**

(a) After a determination that the application will be approved and a conservation stewardship plan will be developed in accordance with § 1470.22, the State Conservationist or designee will enter into a conservation stewardship contract with the participant to enroll all of the eligible land on a participant's agricultural operation.

(b) The conservation stewardship contract will:

(1) Provide for payments over a period of 5 years;

(2) Incorporate by reference the conservation stewardship plan;

(3) State the payment amount NRCS agrees to make to the participant annually, subject to the availability of funds;

(4) Incorporate all provisions as required by law or statute, including requirements that the participant will:

(i) Implement the conservation stewardship plan approved by NRCS during the term of the contract,

(ii) Operate and maintain conservation activities on the agricultural operation consistent with § 1470.23,

(iii) Comply with the terms of the contract or documents incorporated by reference into the contract,

(iv) Refund as determined by NRCS, any program payments received with interest, and forfeit any future payments under the program, upon the violation of a term or condition of the contract, consistent with § 1470.27,

(v) Refund as determined by NRCS, all program payments received with interest, upon the transfer of the right and interest of the participant, in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations of the contract, consistent with § 1470.25,

(vi) Maintain and make available to NRCS upon request, appropriate records documenting applied conservation activity and production system information, and provide evidence of the effective and timely implementation of the conservation stewardship plan and contract, and

(vii) Not engage in any action during the term of the conservation stewardship contract on the eligible land covered by the contract that would interfere with the purposes of the conservation stewardship contract;

(5) Permit all economic uses of the land that:

(i) Maintain the agricultural or forestry nature of the land, and

(ii) Are consistent with the conservation purposes of the contract;

(6) Include a provision to ensure that a participant will not be considered in violation of the contract for failure to comply with the contract due to circumstances beyond the control of the participant, including a disaster or related condition, as determined by the State Conservationist; and

(7) Include such other provisions as NRCS determines necessary to ensure the purposes of the program are achieved.

**§ 1470.22 Conservation stewardship plan.**

(a) NRCS will use the conservation planning process as outlined in the NPPH to encourage participants to address resource concerns in a comprehensive manner.

(b) The conservation stewardship plan will contain a record of the participant's decisions that describes the schedule of conservation activities to be implemented, managed, or improved under the conservation stewardship contract.

(c) Associated supporting information maintained with the participant's plan will include:

(1) CMT documentation that will be the basis for:

(i) Identifying and inventorying resource concerns,

(ii) Establishing benchmark data on the condition of existing conservation activities, and

(iii) Documenting the participant's conservation objectives to reach and exceed stewardship thresholds;

(2) A plan map delineating enrolled land with associated acreage amounts;

(3) In the case where a participant wishes to initiate or retain organic certification, documentation that will support the participant's transition to or participation in the National Organic Program;

(4) In the case where a participant is approved for the on-farm research and demonstration or pilot testing option,

a research, demonstration, or pilot testing plan consistent with design protocols and application procedures established by NRCS; and

(5) Other information as determined appropriate by NRCS.

### § 1470.23 Conservation activity operation and maintenance.

The participant will maintain and manage existing conservation activities on the agricultural operation to at least the level of conservation performance identified at the time the application is obligated into a contract for the conservation stewardship contract period, and additional activities installed and adopted over the term of the conservation stewardship contract.

### § 1470.24 Payments.

(a) *Annual payments.* Subject to the availability of funds, NRCS will provide, as appropriate, annual payments under the program to compensate a participant for installing and adopting additional conservation activities, and improving, maintaining, and managing existing conservation activities. A split-rate annual payment structure will be used to provide separate payments for additional and existing conservation activities in order to place emphasis on implementing additional conservation.

(1) To receive annual payments, a participant must:

(i) Install and adopt additional conservation activities as scheduled in the conservation stewardship plan. At least one additional enhancement must be scheduled, installed, and adopted in the first fiscal year of the contract. All enhancements must be scheduled, installed, and adopted by the end of the third fiscal year of the contract, and

(ii) As a minimum, maintain existing activities to the level of existing conservation performance identified at the time the application is obligated into a contract for the conservation stewardship contract period;

(2) To earn annual payments for an eligible land use, a participant must schedule, install, and adopt at least one additional conservation activity on that land-use type. Eligible land-use types that fail to have at least one additional conservation activity scheduled, installed, and adopted will not receive annual payments;

(3) A participant's annual payments will be determined using the conservation performance estimated by the CMT and computed by land-use type for eligible land earning payments. Conservation performance is prorated over the contract term so as to accommodate, to the extent practicable, participants earning equal annual payments in each fiscal year;

(4) The annual payment rates will be based to the maximum extent practicable, on the following factors:

(i) Costs incurred by the participant associated with planning, design, materials, installation, labor, management, maintenance, or training,

(ii) Income foregone by the participant, and

(iii) Expected environmental benefits, determined by estimating conservation performance improvement using the CMT;

(5) The annual payment method will accommodate some participant operational adjustments without the need for contract modification.

(i) Enhancements may be replaced with similar enhancements without adjustment of annual payment as long as the conservation performance is determined by NRCS to be equal to or better than the conservation performance of the additional enhancements offered at enrollment. An enhancement replacement that results in a decline below that conservation performance level will not be allowed, and

(ii) Adjustments to existing activities may occur consistent with conservation performance requirements from § 1470.23; and

(6) Enhancements may be applied on other land included in an agricultural operation, as determined by NRCS.

(b) *Supplemental payments.* Subject to the availability of funds, NRCS will provide a supplemental payment to a participant receiving annual payments, who also agrees to adopt a resource-conserving crop rotation.

(1) The State Conservationist will determine whether a resource-conserving crop rotation is eligible for supplemental payments based on whether the resource-conserving crop rotation is

designed to provide natural resource conservation and production benefits;

(2) A participant must agree to adopt and maintain a beneficial resource-conserving crop rotation for the term of the contract to be eligible to receive a supplemental payment. A resource-conserving crop rotation is considered adopted when the resource-conserving crop is planted on at least one-third of the rotation acres. The resource-conserving crop must be adopted by the third fiscal year of the contract and planted on all rotation acres by the fifth fiscal year of the contract; and

(3) The supplemental payment is set at a rate needed to encourage a producer to adopt a resource-conserving crop rotation and will be based, to the maximum extent practicable, on costs incurred and income foregone by the participant and expected environmental benefits, determined by estimating conservation performance improvement using the CMT.

(c) *On-farm research and demonstration or pilot testing*. A participant may be compensated through their annual payment for:

(1) On-farm research and demonstration activities; or

(2) Pilot testing of new technologies or innovative conservation activities.

(d) *Minimum contract payment*. NRCS will make a minimum contract payment to participants who are socially disadvantaged farmers or ranchers, beginning farmers or ranchers, or limited resource farmers or ranchers, at a rate determined by the Chief in any fiscal year that a contract's payment amount total is less than $1,000. Definitions of socially disadvantaged farmers or ranchers, beginning farmers or ranchers, and limited resource farmers or ranchers are contained in § 1470.3.

(e) *Timing of payments*. NRCS will make payments as soon as practicable after October 1 of each fiscal year for activities carried out in the previous fiscal year. For newly enrolled contracts, payments will be made as soon as practicable after October 1 following the fiscal year of enrollment.

(f) *Non-compensatory matters*. A CSP payment to a participant will not be provided for:

(1) New conservation practices or enhancements applied with financial assistance through other USDA conservation programs;

(2) The design, construction, or maintenance of animal waste storage or treatment facilities, or associated waste transport or transfer devices for animal feeding operations; or

(3) Conservation activities for which there is no cost incurred or income foregone by the participant.

(g) *Payment limits*. A person or legal entity may not receive, directly or indirectly, payments that, in the aggregate, exceed $40,000 during any fiscal year for all CSP contracts entered into, and $200,000 for all CSP contracts entered into during any 5-year period, excluding funding arrangements with federally recognized Indian tribes or Alaska Native corporations, regardless of the number of contracts entered into under the CSP by the person or legal entity.

(h) *Contract limits*. Payments under a conservation stewardship contract with joint operations will be limited to $80,000 per fiscal year and $400,000 over the term of the initial contract period, excluding funding arrangements with federally recognized Indian tribes or Alaska Native corporations. The payment limits for contracts with persons or legal entities are contained in § 1470.24(g).

(i) *Payment limitation provisions for individual Indians and Indian tribes*. Payment limitations apply to individual tribal member(s) when applying and subsequently being granted a contract as an individual(s). Contracts with Indian tribes or Alaska Native corporations are not subject to payment or contract limitations. Indian tribes and BIA will certify in writing that no one individual, directly or indirectly, will receive more than the payment limitation. Certification provided at the time of contract obligation will cover the entire contract period. The tribal entity must also provide, upon request from NRCS, a listing of individuals and payment made, by Social Security number or other unique identification number, during the previous year for calculation of overall payment limitations.

(j) *Tax Identification Number*. To be eligible to receive a CSP payment, all

legal entities or persons applying, either alone or as part of a joint operation, must provide a tax identification number and percentage interest in the legal entity. In accordance with 7 CFR part 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' Social Security numbers and percentage of interest in the joint operation or legal entity. Payments will be directly attributed to legal entity members for the purpose of complying with § 1470.24(g).

(k) *Unique tax identification numbers.* Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment. Any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other CSP contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1470.36.

(l) *Payment data.* NRCS will maintain detailed and segmented data on CSP contracts and payments to allow for quantification of the amount of payments made for:

(1) Installing and adopting additional activities;

(2) Improving, maintaining, and managing existing activities;

(3) Participation in research and demonstration or pilot projects; and

(4) Development and periodic assessment and evaluation of conservation stewardship plans developed under this rule.

### § 1470.25 Contract modifications and transfers of land.

(a) NRCS may allow a participant to modify a conservation stewardship contract if NRCS determines that the modification is consistent with achieving the purposes of the program.

(b) NRCS will allow modification to a conservation stewardship contract to remove contract acres enrolled in the CRP, WRP, or GRP or other Federal or State programs that offer greater natural resource protection. Such modifications are consistent with the purposes of CSP. Participants will not be subject to liquidated damages or refund of payments received for enrolling land in these programs.

(c) NRCS will not allow a participant to modify a conservation stewardship contract to increase the contract obligation beyond the amount of the initial contract, with exception for contracts approved by NRCS for renewal or other exceptional cases as determined by the Chief.

(d) Land under contract will be considered transferred if the participant loses control of the acreage for any reason.

(1) The participant is responsible to notify NRCS prior to any voluntary or involuntary transfer of land under contract;

(2) If all or part of the land under contract is transferred, the contract terminates with respect to the transferred land unless:

(i) The transferee of the land provides written notice within 60 days to NRCS that all duties and rights under the contract have been transferred to, and assumed by, the transferee, and

(ii) The transferee meets the eligibility requirements of the program; and

(e) Contract payment adjustments due to modifications will be reflected in the fiscal year following the modification.

### § 1470.26 Contract renewal.

(a) At the end of an initial conservation stewardship contract, NRCS may allow a participant to renew the contract to receive payments for one additional 5-year period, subject to the availability of funds, if they meet criteria from paragraph (b) of this section.

(b) To be considered for contract renewal, the participant must:

(1) Be in compliance with the terms of their initial contract as determined by NRCS;

(2) Add any newly acquired eligible land that is part of the agricultural operation and meets minimum treatment criteria as established and determined by NRCS;

(3) At a minimum, meet stewardship thresholds for at least two priority resource concerns; and

(4) Agree to adopt additional conservation activities to address at least one additional priority resource concern during the term of the renewed conservation stewardship contract.

### § 1470.27 Contract violations and termination.

(a) The State Conservationist may terminate, or by mutual consent with the participants, terminate a contract where:

(1) The participants are unable to comply with the terms of the contract as the result of conditions beyond their control; or

(2) As determined by the State Conservationist, it is in the public interest.

(b) If a contract is terminated in accordance with the provisions of paragraph (a) of this section, the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or in cases of hardship, where forces beyond the participant's control prevented compliance with the contract. If a participant claims hardship, such claims must be clearly documented and cannot have existed when the applicant applied for participation in the program.

(c) If NRCS determines that a participant is in violation of the contract terms or documents incorporated therein, NRCS will give the participant a period of time, as determined by NRCS, to correct the violation and comply with the contract terms and attachments thereto. If a participant continues in violation, NRCS may terminate the CSP contract in accordance with paragraph (e) of this section.

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination will be effective immediately upon a determination by NRCS that the participant:

(1) Has submitted false information or filed a false claim;

(2) Engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1470.36; or

(3) Engaged in actions that are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(e) If NRCS terminates a contract, the participant will forfeit all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest. Participants violating CSP contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation activity has achieved the expected conservation performance improvement, is not adversely affected by the violation or the absence of other conservation activities that would have been installed under the contract, and has met the associated operation and maintenance requirement of the activity; and

(2) NRCS will have the option to reduce or waive the liquidated damages, depending upon the circumstances of the case—

(i) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If a participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program, and

(ii) In carrying out its role in this section, NRCS may consult with the local conservation district.

## Subpart C—General Administration

### § 1470.30 Fair treatment of tenants and sharecroppers.

Payments received under this part must be divided in the manner specified in the applicable contract. NRCS will ensure that tenants and sharecroppers who would have an interest in acreage being offered receive treatment which NRCS deems to be equitable, as determined by the Chief.

NRCS may refuse to enter into a contract when there is a disagreement among joint applicants seeking enrollment as to an applicant's eligibility to participate in the contract as a tenant.

### § 1470.31 Appeals.

A participant may obtain administrative review of an adverse decision under this part in accordance with 7 CFR parts 11 and 614. Determinations in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation activities are not subject to appeal.

### § 1470.32 Compliance with regulatory measures.

Participants will be responsible for obtaining the authorities, rights, easements, permits, or other approvals or legal compliance necessary for the implementation, operation, and maintenance associated with the conservation stewardship plan. Participants will be responsible for compliance with all laws and for all effects or actions resulting from the implementation of the contract.

### § 1470.33 Access to agricultural operation.

NRCS, or its authorized representative, will have the right to enter an agricultural operation for the purpose of determining eligibility and for ascertaining the accuracy of any representations, including natural resource information provided by an applicant for the purpose of evaluating a contract application. Access will include the right to provide technical assistance, determine eligibility, assess natural resource conditions, inspect any work undertaken under the contract, and collect information necessary to evaluate the implementation of conservation activities in the contract. NRCS, or its authorized representative, will make an effort to contact the participant prior to the exercise of this provision.

### § 1470.34 Equitable relief.

(a) If a participant relied upon the advice or action of NRCS and did not know, or have reason to know, that the action or advice was improper or erroneous, the participant may be eligible for equitable relief under 7 CFR part 635. The financial or technical liability for any action by a participant that was taken based on the advice of a TSP will remain with the TSP and will not be assumed by NRCS.

(b) If a participant has been found in violation of a provision of the conservation stewardship contract or any document incorporated by reference through failure to comply fully with that provision, the participant may be eligible for equitable relief under 7 CFR part 635.

### § 1470.35 Offsets and assignments.

(a) Any payment or portion thereof due to any participant under this part will be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 will be applicable to contract payments.

(b) Any participant entitled to any payment may assign such payments in accordance with regulations governing assignment of payment found at 7 CFR part 1404.

### § 1470.36 Misrepresentation and scheme or device.

(a) If NRCS determines that an applicant intentionally misrepresented any fact affecting a CSP determination, the application will be determined ineligible immediately.

(b) A participant who is determined to have erroneously represented any fact affecting a program determination made in accordance with this part will not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403.

(c) A participant will refund to NRCS all payments, plus interest determined in accordance with 7 CFR part 1403, received by such participant with respect to all CSP contracts if they are determined to have:

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination.

(d) Participants determined to have committed actions identified in paragraph (c) of this section will:

(1) Have their interest in all CSP contracts terminated; and

(2) In accordance with §1470.27(e), may be determined by NRCS to be ineligible for future NRCS-administered conservation program funding.

### §1470.37 Environmental credits for conservation improvements.

NRCS believes that environmental benefits will be achieved by implementing conservation activities funded through CSP. These environmental benefits may result in opportunities for the program participant to sell environmental credits. Any requirements related to these environmental credits must be compatible with the purposes of the contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance (O&M) requirements for CSP-funded improvements are met, consistent with §1470.21 and §1470.23. Where actions may impact the land and conservation activities under a CSP contract, NRCS will at the request of the participant, assist with the development of an O&M compatibility assessment prior to the participant entering into any credit agreement.

# PART 1484—PROGRAMS TO HELP DEVELOP FOREIGN MARKETS FOR AGRICULTURAL COMMODITIES

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## Subpart A—General Information

### § 1484.10 What is the effective date of this part?

This part applies to activities that are conducted in accordance with the Cooperators' FY 2000 and subsequent marketing plan years. The Cooperator Program is administered by personnel of the Foreign Agricultural Service.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, Feb. 25, 2000]

### § 1484.11 Has the Office of Management and Budget reviewed the paperwork and record keeping requirements contained in this part?

The paperwork and record keeping requirements imposed by this part have been submitted to the Office of Management and Budget (OMB) for emergency review and reinstatement under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously assigned control number 0551–0026 for this information collection.

### § 1484.12 What is the Cooperator program?

(a) Under the Foreign Market Development Cooperator (Cooperator) Program, FAS enters into project agreements with eligible nonprofit U.S. trade organizations to share the costs of certain overseas marketing and promotion activities that are intended to create, expand, or maintain foreign markets for U.S. agricultural commodities and products. FAS does not provide brand promotion assistance to Cooperators under this program.

(b) FAS enters into project agreements with those eligible nonprofit U.S. trade organizations that have the broadest possible producer representation of the commodity being promoted and gives priority to those organizations that are nationwide in membership and scope. Project agreements involve the promotion of agricultural commodities on a generic basis. Project agreements do not involve activities targeted directly toward consumers purchasing as individuals. Activities must contribute to the maintenance or growth of demand for the agricultural commodities and generally address long-term foreign import constraints and export growth opportunities by focusing on matters such as reducing infra-structural or historical market impediments; improving processing capabilities; modifying codes and standards; and identifying new markets or new applications or uses for the agricultural commodity or product in the foreign market.

(c) The Cooperator program generally operates on a reimbursement basis.

(d) FAS policy is to ensure that benefits generated by Cooperator agreements are broadly available throughout the relevant agricultural sector and no one entity gains an undue advantage or sole benefit from program activities.

### § 1484.13 What special definitions apply to the Cooperator program?

For purposes of this part the following definitions apply:

*Activity*—a specific market development effort undertaken by a Cooperator to address a constraint or opportunity.

*Administrator*—the Vice President, CCC, who also serves as Administrator, FAS, USDA, or designee.

*Agricultural commodity*—an agricultural commodity, food, feed, fiber, wood, livestock or insect, and any product thereof; and fish harvested from a U.S. aquaculture farm, or harvested by a vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

*Attache/Counselor*—the FAS employee representing USDA interests in the foreign country in which promotional activities are conducted.

*Commodity Division*—the office within the Foreign Agricultural Service responsible for the commodity covered by the project agreement.

*Compliance Review Staff*—the office within the Foreign Agricultural Service responsible for performing periodic reviews of Cooperators to ensure compliance with this part.

*Constraint*—a condition in a particular country or region which needs to be addressed in order to develop, expand, or maintain exports of a specific U.S. agricultural commodity.

*Consumer promotion*—activities that are designed to directly influence consumers by changing attitudes or purchasing behaviors towards U.S. agricultural products.

*Contribution*—the cost-share expenditure made by a Cooperator or the U.S. industry in support of an activity; e.g., money, personnel, materials, services, facilities, or supplies.

*Cooperator* or *U.S. Cooperator*—a nonprofit U.S. agricultural trade organization which has entered into a foreign market development agreement with FAS.

*Cooperator Program*—the Foreign Market Development Cooperator Program.

*Deputy Administrator*—the Deputy Administrator, Commodity and Marketing Programs, FAS, USDA, or designee.

*Division Director*—the director of a commodity division, Commodity and Marketing Programs, FAS, USDA.

*Eligible commodity*—an agricultural commodity that is comprised of at least 50 percent U.S. origin content by weight, exclusive of added water.

*Eligible trade organization*—a United States trade organization that promotes the exports of one or more United States agricultural commodities or products and does not have a business interest in or receive remuneration from specific sales of agricultural commodities or products.

*Expenditure*—transfer of funds.

*FAS*—Foreign Agricultural Service, USDA.

*Foreign third party*—a foreign entity that assists, in accordance with this part, in promoting the export of a U.S. agricultural commodity.

*Generic promotion*—a promotion that does not involve the exclusive or predominant use of a single company name or logo(s) or brand name(s) of a single company.

*Market*—a country or region in which an activity is conducted.

*Marketing plan year*—the program year beginning on October 1 and ending on September 30, during which Cooperators can undertake activities, consistent with this part and their agreements with FAS, and seek reimbursement. For example, marketing plan year 2000 begins on October 1, 1999, and ends on September 30, 2000.

*Project agreement*—a contract between FAS and a Cooperator in which the basic working relationship is described including the program and financial obligations of each.

*Project funds*—the funds made available to a Cooperator under a project agreement, and authorized for expenditure in accordance with this part.

*Property*—furniture or equipment having a useful life of over one year and an acquisition cost of $500 or more.

*STRE*—sales and trade relations expenditures.

*Trade team*—a group of individuals engaged in an activity intended to promote the interests of an entire agricultural sector rather than to result in specific sales by any of its members.

*USDA*—the United States Department of Agriculture.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, Feb. 25, 2000]

### § 1484.14 Is my organization eligible to participate in the Cooperator program?

(a) To participate in the Cooperator program, an entity must be a nonprofit U.S. agricultural trade organization and contribute at least 50 percent of the value of resources provided by FAS for activities conducted under the project agreement.

(b) FAS may require that a project agreement include a contribution level greater than that specified in paragraph (a) of this section. In requiring a higher contribution level, FAS will take into account such factors as past Cooperator contributions, previous Cooperator program funding levels, the length of time an entity participates in the program, and the entity's ability to increase its contribution.

(c) FAS will enter into Cooperator agreements only for the promotion of eligible commodities.

## Subpart B—Application and Fund Allocation

### § 1484.20 How can my organization apply to the Cooperator program?

FAS will publish a Notice in the FEDERAL REGISTER that it is accepting applications for participation in the Cooperator program for a specified marketing plan year. Applications shall be submitted in accordance with the terms and requirements specified in the Notice. An application shall contain basic information about the applicant and the proposed program, a strategic plan, and performance measures. FAS may request any additional information which it deems necessary to evaluate a Cooperator program application.

(a) *Basic applicant and program information.* All Cooperator program applications shall contain:

(1) The name and address of the applicant;

(2) The name of the Chief Executive Officer (or designee);

(3) The name and telephone number of the applicant's primary contact person;

(4) A description of management and administrative capability;

(5) The name(s) of the person(s) responsible for managing the program;

(6) A description of prior export promotion experience;

(7) A description of the organization, its membership, and membership criteria;

(8) A list of affiliated organizations;

(9) The applicant's Federal Tax Identification Number;

(10) The dollar amount of FAS resources requested under the Cooperator program;

(11) The value of the applicant's contribution, stated in dollars or as a percentage of paragraph (a)(10) of this section;

(12) The value of contributions from other sources, stated in dollars or as a percentage of paragraph (a)(10) of this section;

(13) A description of the eligible commodity(s); the associated commodity aggregate code(s), obtained from FAS; and the percentage of U.S. origin content by weight, exclusive of added water; and

(14) A certification statement, and, if requested by the Deputy Administrator, a written explanation supporting the certification, that any funds received will supplement, but not supplant, any private or industry funds or other contributions to program activities. The written explanation, if necessary, shall indicate why the Cooperator is unlikely to carry out the activities without Federal financial assistance. The certification shall also state that information contained in the application is true and accurate and that all records supporting the claim that project funds do not supplant other funds will be made available to authorized officials of the U.S. Government.

(b) *Strategic plan and performance measures.* All Cooperator program applications shall also contain:

(1) A description of the U.S. and world market situation for the eligible commodity;

(2) Data summarizing historical and projected U.S. production, U.S. exports to the world, world trade, and U.S. market share;

(3) A summary of proposed activity budgets by country or region;

(4) A summary of proposed administrative budgets by country or region;

(5) A list of all countries that define any designated region;

(6) For each country or region for which activities are proposed:

(i) A market assessment, including the constraint(s) impeding U.S. exports, the export growth opportunities, the performance of competing suppliers, expected changes in demand, etc.;

(ii) The long-term strategy that will be used to counteract the constraints and achieve additional U.S. exports;

(iii) Previous activities, performance, and evaluation results;

(iv) Projected export goals and U.S. market share; and

(v) Performance indicators against which future success in addressing the constraint(s) or opportunities may be measured;

(7) A description of all proposed activities, including the requested FAS resources and the specific goals and benchmarks to be used to measure the effectiveness of each activity;

(8) A justification for any new overseas office, including a list of job titles, corresponding position descriptions, salary ranges, and any request for approval of salaries above the Foreign Service National (FSN) salary plan. To request approval of a salary above the FSN salary plan, the Cooperator shall include a detailed description of both the duties and responsibilities of the position, and of the qualifications and background of the individual concerned. The Cooperator shall also justify, based on a verifiable local salary survey or other documented local salary information, why the highest FSN salary level is inappropriate.

### § 1484.21 How does FAS determine which Cooperator program applications are approved?

(a) *General.* FAS allocates funds in a manner that effectively supports the strategic decision-making initiatives of the Government Performance and Results Act (GPRA) of 1993. In deciding whether a proposed project will contribute to the effective creation, expansion, or maintenance of foreign markets, FAS seeks to identify those projects that would demonstrate a clear, long-term agricultural trade strategy by market or product and a program effectiveness time line against which results can be measured at specific intervals using quantifiable product or country or region goals. These performance indicators are part of FAS' resource allocation strategy to fund applicants which can demonstrate performance based on a long-term strategic plan and address the performance measurement objectives of the GPRA.

(b) *Approval criteria.* FAS will consider a number of factors when reviewing proposed projects, including:

(1) The ability of the organization to provide an experienced U.S.-based staff with technical and international trade expertise to ensure adequate development, supervision, and execution of the proposed project;

(2) The organization's willingness to contribute resources, including cash and goods and services of the U.S. industry and foreign third parties;

(3) The conditions or constraints affecting the level of U.S. exports and market share for the agricultural commodities and products;

(4) The degree to which the proposed project is likely to contribute to the creation, expansion, or maintenance of foreign markets;

(5) The degree to which the strategic plan is coordinated with other private or U.S. government-funded market development projects;

(6) Past program results and evaluations, if applicable; and

(7) Previous Cooperator program funding.

### § 1484.22 How are Cooperator program funds allocated?

After determining which applications to recommend for approval, the Commodity Divisions recommend funding levels for the approved applicants within their respective divisions. Applications then compete for funds on the basis of the following allocation criteria (the number in parentheses represents a percentage weight factor). Data used in the calculations for contribution levels, past export performance and past demand expansion performance will cover not more than a 6-year period, to the extent such data is available. The method for applying the following criteria will be described in the Cooperator program announcement in the FEDERAL REGISTER:

(a) Contribution Level (40%).

(b) Past Export Performance (20%).

(c) Past Demand Expansion Performance (20%).

(d) Future Demand Expansion Goals (10%).

(e) Accuracy of Past Demand Expansion Projections (10%).

## Subpart C—Program Operations

### § 1484.30 How does FAS formalize its working relationship with approved Cooperators?

FAS will notify each applicant in writing of the final disposition of its application. FAS will send a program agreement, allocation approval letter, and a signature card to each approved applicant. The allocation approval letter will specify any special terms and conditions applicable to a Cooperator's program, including the required level

of Cooperator contribution. An applicant that accepts the terms and conditions contained in the program agreement and allocation approval letter should so indicate by having its Chief Executive Officer sign the program agreement and submit the signed agreement to the Director, Marketing Operations Staff, FAS, USDA. Final agreement shall occur when the Administrator signs the agreement on behalf of FAS. The application, the program agreement, the allocation approval letter, and this part shall establish the terms and conditions of a Cooperator agreement between FAS and the approved applicant.

### § 1484.31 Who acts on behalf of each Cooperator?

The Cooperator shall designate at least two individuals in its organization to sign program agreements, reimbursement claims, and requests. The Cooperator shall submit the signature card signed by those designated individuals and by the Cooperator's Chief Executive Officer to the Director, Marketing Operations Staff, FAS, USDA, prior to the start of the marketing plan year. The Cooperator shall immediately notify the Director of any changes in signatories (e.g., removal or addition of individuals, name changes, etc.), and shall submit a revised signature card accordingly.

### § 1484.32 Must Cooperators follow specific employment practices?

(a) A Cooperator shall enter into written contracts with all overseas employees and shall ensure that all terms, conditions, and related formalities of such contracts conform to governing local law.

(b) A Cooperator shall, in its overseas offices, conform its office hours, work week, and holidays to local law and to the custom generally observed by U.S. commercial entities in the local business community.

(c) A Cooperator may pay salaries or fees in any currency (U.S. or foreign) in conformance with contract specifications. Cooperators are cautioned to consult local laws regarding currency restrictions.

### § 1484.33 Must Cooperators follow certain financial management guidelines?

(a) A Cooperator shall implement and maintain a financial management system that conforms to generally accepted accounting principles.

(b) A Cooperator shall institute internal controls and provide written guidance to commercial entities participating in its activities to ensure their compliance with these provisions. Each Cooperator shall maintain all original records and documents relating to program activities for 5 calendar years following the end of the applicable marketing plan year and shall make such records and documents available upon request to authorized officials of the U.S. Government. A Cooperator shall also maintain all documents related to employment, such as employment applications, contracts, position descriptions, leave records, and salary changes; and all records pertaining to contractors. A Cooperator shall also maintain adequate documentation related to the proper disposition of all property purchased by the Cooperator and for which the Cooperator is reimbursed with program funds.

(c) A Cooperator shall maintain its records of expenditures and contributions in a manner that allows it to provide information by marketing plan year, country or region, activity number, and cost category. Such records shall include:

(1) Receipts for all STRE (actual vendor invoices or restaurant checks, rather than credit card receipts);

(2) Original receipts for any other program related expenditure in excess of $25.00;

(3) The exchange rate used to calculate the dollar equivalent of each expenditure made in a foreign currency and the basis for such calculation;

(4) Copies of reimbursement claims;

(5) An itemized list of claims charged to the Cooperator's FMD account;

(6) Documentation with accompanying English translation supporting each reimbursement claim, including original evidence to support the financial transactions, such as canceled checks, receipted paid bills, contracts

or purchase orders, per diem calculations, and travel vouchers; and

(7) Documentation supporting contributions including: the date(s), purpose, and location(s) of each activity for which cash, goods, or services were claimed as a contribution; who conducted the activity; the participating groups or individuals; and the method of computing the claimed contributions. Cooperators must retain, and make available for audit, documentation related to claimed contributions.

(d) Upon request, a Cooperator shall provide to FAS the original documents which support the Cooperator's reimbursement claims. FAS may deny a claim for reimbursement if the claim is not supported by adequate documentation.

### § 1484.34 Must Cooperators adhere to specific standards of ethical conduct?

(a) A Cooperator shall conduct its business in accordance with the laws and regulations of the country(s) in which each activity is carried out.

(b) Neither a Cooperator nor its affiliates shall make export sales of agricultural commodities covered under the terms of a project agreement. Neither a Cooperator nor its affiliates shall charge a fee for facilitating an export sale. For the purposes of this paragraph, "affiliate" means any partnership, association, company, corporation, trust, or any other such party in which the Cooperator has an investment, other than a mutual fund. A Cooperator may collect check-off funds and membership fees that are required for membership in the Cooperator's organization.

(c) The Cooperator shall not use program activities or program funds to promote private self interests or conduct private business, except as members of sales teams.

(d) A Cooperator shall select U.S. agricultural industry representatives to participate in activities such as trade teams or trade fairs based on criteria that ensure participation on an equitable basis by a broad cross section of the U.S. industry. If requested, a Cooperator shall submit such selection criteria to FAS for approval.

(e) All Cooperators should endeavor to ensure fair and accurate fact-based advertising. Deceptive or misleading promotions may result in cancellation or termination of a project agreement.

(f) The Cooperator must report any actions or circumstances that have a bearing on the propriety of program activities to the Attache/Counselor and the Cooperator's U.S. office shall report such actions in writing to the appropriate Division Director.

### § 1484.35 Must Cooperators follow specific contracting procedures?

(a) Cooperators have full and sole responsibility for the legal sufficiency of all contracts and assume financial liability for any costs or claims resulting from suits, challenges, or other disputes based on contracts entered into by the Cooperator. Neither FAS nor any other agency of the United States Government or any official or employee of FAS or the United States Government has any obligation or responsibility with respect to Cooperator contracts with third parties.

(b) Cooperators are responsible for ensuring to the extent possible that the terms, conditions, and costs of contracts constitute the most economical and effective use of project funds.

(c) All fees for professional and consulting services paid in any part with project funds must be covered by written contracts.

(d) A Cooperator shall:

(1) Ensure that all expenditures for goods and services in excess of $25.00, which are reimbursed with project funds, are documented by a purchase order, invoice, or contract;

(2) Ensure that no employee or officer participates in the selection or award of a contract in which such employee or officer, or the employee's or officer's family or partners has a financial interest;

(3) Conduct all contracting in an open manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids, or requests for proposals for procurement of any goods or services shall be excluded from competition for such procurement;

(4) Base each solicitation for professional or consulting services on a clear

and accurate description of the requirements for the services to be procured;

(5) Perform some form of price or cost analysis, such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered prices; and

(6) Document the decision-making process.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, Feb. 25, 2000]

### § 1484.36 How do Cooperators dispose of disposable property?

(a) Property purchased by the Cooperator, and for which the Cooperator is reimbursed with project funds, that is unusable, unserviceable, or no longer needed for project purposes shall be disposed of in one of the following ways. The Cooperator may:

(1) Exchange or sell the property, provided that it applies any exchange allowance, insurance proceeds, or sales proceeds toward the purchase of other property needed in the project;

(2) With FAS approval, transfer the goods to other Cooperators for their activities, or to a foreign third party; or

(3) Upon Attache/Counselor approval, donate the goods to a local charity, or convey the goods to the Attache/Counselor, along with an itemized inventory list and any documents of title.

(b) A Cooperator shall maintain an inventory of all property valued at $500 or more which was acquired in furtherance of program activities. The inventory shall list and number each item and include the date of purchase or acquisition, cost of purchase, replacement value, serial number, make, model, and electrical requirements.

(c) The Cooperator shall insure all property which was acquired with program funds and safeguard such property against theft, damage, and unauthorized use. The Cooperator shall promptly report any loss, theft, or damage of such property to the insurance company.

(d) The Cooperator is responsible for reimbursing FAS for the value of any uninsured property at the time of the loss or theft of the property.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, 9996, Feb. 25, 2000]

### § 1484.37 Must Cooperators adhere to Federal Travel Regulations?

Travel shall conform to the U.S. Federal Travel Regulation (41 CFR Chapters 300 through 304) and air travel shall conform to the requirements of the "Fly America Act" (49 U.S.C. 1517). The Cooperator shall notify the Attache/Counselor in the destination countries in writing in advance of any proposed travel. The timing of such notice should be far enough in advance to enable the Attache/Counselor to schedule appointments, make preparations, or otherwise provide any assistance being requested. Failure to provide advance notification of travel may result in disallowance of the expenses related to the travel.

### § 1484.38 Can a Cooperator keep proceeds generated from an activity?

Any income or refunds generated from an activity, *i.e.*, participation fees, proceeds of sales, refunds of value added taxes (VAT), the expenditures for which have been wholly or partially reimbursed, shall be repaid by submitting a check payable to Commodity Credit Corporation or by offsetting the Cooperator's next reimbursement claim.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, 9996, Feb. 25, 2000]

## Subpart D—Contributions and Reimbursements

### § 1484.50 What cost share contributions are eligible?

(a) The Cooperator shall pay all costs necessary for the operation of the Cooperator's U.S. office.

(b) In calculating the amount of contributions that it will make, and the contributions it will receive from a U.S. industry or a State agency, a Cooperator program applicant may include the costs (or such prorated costs) listed under paragraph (c) of this section if:

(1) Expenditures will be made in furtherance of the Cooperator's overall foreign market development program;

(2) The contributor has not been or will not be reimbursed by any other source for such costs; and

(3) The contribution is made during the period covered by the project agreement.

(c) Subject to paragraph (b) of this section, eligible contributions are:

(1) Cash;

(2) Compensation paid to personnel;

(3) The cost of acquiring materials, supplies, or services;

(4) The cost of office space;

(5) A reasonable and justifiable proportion of general administrative costs and overhead;

(6) Payments for indemnity and fidelity bond expenses;

(7) The cost of business cards;

(8) The cost of seasonal greeting cards;

(9) Fees for office parking;

(10) The cost of subscriptions to publications;

(11) The cost of activities conducted overseas;

(12) Credit card fees;

(13) The cost of any independent evaluation or audit that is not required by FAS to ensure compliance with program requirements;

(14) The cost of giveaways, awards, prizes and gifts;

(15) The cost of product samples;

(16) Fees for participating in U.S. government activities;

(17) The cost of air and local travel in the United States related to a foreign market development effort;

(18) Transportation and shipping costs;

(19) The cost of displays and promotional materials;

(20) Advertising costs;

(21) Reasonable travel costs and expenses related to undertaking a foreign market development activity;

(22) Payment of employee's or contractor's share of personal taxes;

(23) The cost associated with trade shows, seminars, entertainment and STRE conducted in the United States;

(24) Product research that is undertaken to benefit an industry and has a specific export application; and

(25) Consumer promotions.

### § 1484.51 What are ineligible contributions?

(a) The following are not eligible contributions:

(1) Any portion of salary or compensation of an individual who is the target of a promotional activity;

(2) Any land costs other than allowable costs for office space;

(3) Depreciation;

(4) The cost of refreshments and related equipment provided to office staff;

(5) The cost of insuring articles owned by private individuals;

(6) The cost of any arrangement which has the effect of reducing the selling price of an agricultural commodity;

(7) The cost of product development or product modifications;

(8) Slotting fees or similar sales expenditures;

(9) Funds, services, or personnel provided by any U.S. government agency;

(10) Capital investments made by a third party, such as permanent structures, real estate, and the purchase of office equipment and furniture;

(11) The value of any services generated by a Cooperator or third party which involve no expenditure by the Cooperator or third party, e.g., free publicity;

(12) Membership fees in clubs and social organizations; and

(13) costs included as contributions for any other federally-assisted project or program.

(b) The Deputy Administrator shall determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section may be included by the Cooperator as an eligible contribution.

### § 1484.52 What are the guidelines for computing the value of non-cash contributions?

(a) *Computing the value of an individual's time.* If an individual's salary is known, allocate the individual's salary on the basis of time spent on foreign market development activities. If the individual's salary is unknown, claim up to the equivalent of a step 10, GS–15 for professional personnel and up to the current estimated industry rate at the person's level of employment for non-professional personnel.

(b) *Computing the value of indirect expenditures.* Allocate value on the basis of sound management and accounting

procedures when considering indirect expenditures, such as overhead and facilities, which are furnished by the industry.

### § 1484.53 What are the requirements for documenting and reporting contributions?

(a) Each claimed contribution must be documented by the Cooperator, showing the method of computing non-cash contributions, salaries, and travel expenses.

(b) Each Cooperator must keep records of the methods used to compute the value of non-cash contributions, and

(1) Copies of invoices or receipts for expenses paid by the U.S. industry and not reimbursed by the Cooperator for the joint activity; or

(2) If invoices are not available, an itemized statement from the U.S. industry as to what costs it incurred pursuant to the joint activity; or

(3) If neither of the foregoing is available, a statement from the U.S. industry as to what goods and services it provided; or

(4) If none of the foregoing are available, a memo to the files of the U.S. Cooperator's estimate of what contributions were made by the U.S. industry, item by item, and the method used to assign a value to each.

(c) Each Cooperator must report its contributions as described in § 1550.70 (a).

### § 1484.54 What expenditures may FAS reimburse under the Cooperator program?

(a) A Cooperator may seek reimbursement for an expenditure if:

(1) The expenditure is reasonable and has been made in furtherance of a market development activity; and

(2) The Cooperator has not been or will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, FAS will reimburse, in whole or in part, the cost of:

(1) Production and placement of advertising in print or electronic media or on billboards or posters;

(2) Production and distribution of banners, recipe cards, table tents, shelf talkers, and similar point of sale materials;

(3) Direct mail advertising;

(4) Food service promotions, product demonstrations to the trade, and distribution of promotional samples;

(5) Temporary displays and rental of space for temporary displays;

(6) Fees for participation in retail and trade exhibits and shows, and booth construction and transportation of related materials to such exhibits and shows;

(7) Trade seminars, including space rental, equipment rental, and duplication of seminar materials;

(8) Production and distribution of publications;

(9) Part-time contractors, such as interpreters, translators, and receptionists, to help with the implementation of promotional activities, such as trade shows, food service promotions, and trade seminars;

(10) Giveaways, awards, prizes, gifts, and other similar promotional materials, subject to the limitation that FAS will not reimburse more than $1.00 per item;

(11) Compensation and allowances for housing, educational tuition, and cost of living adjustments paid to U.S. citizen employees or U.S. citizen contractors stationed overseas, subject to the limitation that FAS shall not reimburse that portion of:

(i) The total of compensation and allowances that exceed 125 percent of the level of a GS–15, Step 10 salary for U.S. Government employees, and

(ii) Allowances that exceed the rate authorized for U.S. Embassy personnel;

(12) Foreign transfer, temporary lodging, and post hardship differential allowances for U.S. citizen employees;

(13) Approved salaries or compensation for non-U.S. citizens and non-U.S. contractors. Generally, FAS will not reimburse any portion of a non-U.S. citizen employee's compensation that exceeds the compensation prescribed for the most comparable position in the Foreign Service National (FSN) salary plan applicable to the country in which the employee works. However, if the local FSN salary plan is inappropriate, a Cooperator may request a higher level of reimbursement for a non-U.S. citizen in accordance with § 1550.20 (b)(8);

(14) A retroactive salary adjustment that conforms to a change in FSN salary plans, effective as of the date of such change;

(15) Accrued annual leave at such time when employment is terminated or when required by local law;

(16) Overtime paid to clerical staff;

(17) Fees for professional and consultant services;

(18) Air travel, plus passports, visas, and inoculations, subject to the limitation that FAS will not reimburse any portion of air travel in excess of the full fare economy rate or when the Cooperator fails to notify the Attaché/Counselor in the destination country in advance of the travel, unless the Deputy Administrator determines it was impractical to provide such notification;

(19) Per diem, subject to the limitation that FAS will not reimburse per diem in excess of the rates allowed under the U.S. Federal Travel Regulation (41 CFR Chapters 300 through 304);

(20) Automobile mileage at the local U.S. Embassy rate, or rental cars while in travel status;

(21) Other allowable expenditures while in travel status as authorized by the U.S. Federal Travel Regulation (41 CFR Chapters 300 through 304);

(22) An overseas office, including rent, utilities, communications originating overseas, office supplies, accident liability insurance premiums, and legal and accounting services;

(23) The purchase, lease, or repair of, or insurance premiums for, property that has an expected useful life of at least one year, such as furniture, equipment, machinery, removable fixtures, floor coverings, and computer hardware and software;

(24) Office decor, such as draperies or blinds;

(25) Premiums for health or accident insurance or other benefits for foreign national employees that the employer is required by law to pay;

(26) Accident liability insurance premiums for facilities used jointly with third party participants for Cooperator program activities, or such insurance premiums for travel of non-Cooperator personnel;

(27) Market research;

(28) Evaluations, if not required by FAS to ensure compliance with program requirements;

(29) Legal fees to obtain advice on the host country's labor laws;

(30) Employment agency fees;

(31) STRE, including breakfast, lunch, dinner, receptions, and refreshments at activities; miscellaneous courtesies such as checkroom fees, taxi fares, and tips; and decorations for a special promotional occasion;

(32) Educational travel of dependent children, visitation travel, rest and recuperation travel, home leave travel, and emergency visitation travel for U.S. overseas employees as allowed under the Foreign Affairs Manual;

(33) Evacuation payments (safe haven), and shipment and storage of household goods and motor vehicles;

(34) Demonstration projects;

(35) Purchase of trade and business periodicals containing material related to market development activities for use by overseas staffs;

(36) Training expenses in the U.S. for FSNs;

(37) Language training for U.S. citizen employees at the foreign post of assignment;

(38) Forward year financial obligations required by local law or custom; such as severance pay, attributable to employment of foreign nationals; or forfeiture of rent or deposits, attributable to the closure of an office;

(39) Fees for storage of necessary program materials;

(40) Shipment of samples or other program materials from the U.S. to foreign countries; and

(41) That portion of airtime for wireless phones that is devoted to program activities and monthly service fees prorated at the proportion of program-related airtime to total airtime.

### § 1484.55 What expenditures may not be reimbursed under the Cooperator program?

(a) FAS will not reimburse expenditures made prior to approval of a Cooperator's program, unreasonable expenditures, or any cost of:

(1) Expenses, fines, settlements, or claims resulting from suits, challenges,

or disputes emanating from employment terms, conditions, contract provisions, or related formalities;

(2) Product development, product modification, or product research;

(3) Product samples;

(4) Slotting fees or similar sales expenditures;

(5) The purchase, construction, or lease of space for permanent displays, *i.e.*, displays lasting beyond one marketing plan year;

(6) Office parking fees;

(7) Coupon redemption or price discounts;

(8) Refundable deposits or advances;

(9) Giveaways, awards, prizes, gifts, and other similar promotional materials in excess of $1.00 per item;

(10) Alcoholic beverages that are not an integral part of a promotional activity;

(11) The purchase, lease (except for use in authorized travel status), or repair of motor vehicles;

(12) Travel of applicants for employment interviews;

(13) Unused non-refundable airline tickets or associated penalty fees, except where travel is restricted by U.S. government action or advisory;

(14) Any arrangement which has the effect of reducing the selling price of an agricultural commodity;

(15) Goods and services and salaries of third party personnel;

(16) Membership fees in clubs and social organizations;

(17) Indemnity and fidelity bonds;

(18) Fees for participating in U.S. Government sponsored activities, other than trade fairs, shows, and exhibits;

(19) Business cards;

(20) Seasonal greeting cards;

(21) Subscriptions to non-trade related publications;

(22) Credit card fees;

(23) Refreshments, or related equipment, for office staff;

(24) Insurance on household goods and personal effects, including privately-owned automobiles, whether overseas or stored in the U.S., belonging to U.S. citizen employees;

(25) Home office domestic administrative expenses, including communication costs;

(26) Payment of U.S. or foreign employee's or contractor's share of personal taxes, except as legally required in a foreign country;

(27) Wireless phone equipment, equipment repair, insurance, and other related charges;

(28) STRE expenses incurred in the U.S;

(29) Entertainment, e.g., amusements, diversions, cover charges, personal gifts, or tickets to theatrical or sporting events;

(30) Functions (including receptions and meals at Cooperator staff conferences) at which target groups, such as members of the overseas trade, opinion leaders, foreign government officials, and other similar groups, are not present; or

(31) Promotions directed at consumers purchasing in their individual capacity.

(b) The Deputy Administrator may determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section will be reimbursed.

(c) FAS will reimburse for expenses incurred up to 30 calendar days beyond the conclusion of the marketing plan year.

### § 1484.56 How are Cooperators reimbursed?

(a) A format for reimbursement claims is available from the Director, Marketing Operations Staff, FAS, USDA. Claims for reimbursement shall contain at least the following information:

(1) Activity code;

(2) Country code;

(3) Cost category;

(4) Amount to be reimbursed or credited;

(5) If applicable, any reduction in the amount of reimbursement claimed to offset FAS demand for refund of amounts previously reimbursed, and reference to the relevant Compliance Report; and

(6) If applicable, any amount previously claimed that has not been reimbursed.

(b) All claims for reimbursement shall be submitted by the Cooperator's U.S. office to the Director, Marketing Operations Staff, FAS, USDA.

(c) FAS will not reimburse claims submitted later than 6 months after the end of a marketing plan year.

(d) If FAS overpays a reimbursement claim, the Cooperator shall repay FAS within 30 days the amount of the overpayment either by submitting a check payable to FAS or by offsetting its next reimbursement claim.

(e) If a Cooperator receives a reimbursement or offsets an advanced payment which is later disallowed, the Cooperator shall within 30 days of such disallowance repay FAS the amount owed either by submitting a check payable to FAS or by offsetting its next reimbursement claim.

(f) The Cooperator shall report any actions having a bearing on the propriety of any claims for reimbursement to the Attache/Counselor and its U.S. office shall report such actions in writing to the Division Director(s).

### § 1484.57 Will FAS make advance payments to a Cooperator?

(a) *Policy*. In general, FAS operates the Cooperator program on a reimbursable basis.

(b) *Exception*. Upon request, FAS may make two types of advance payments to a Cooperator. The first is a revolving fund operating advance provided by FAS only to Cooperators with foreign offices supported with project funds. The second is a special advance payment used to pay an impending large cost item. FAS will provide this type of advance expense payment in lieu of direct payments by FAS to vendors or other third parties. All Cooperators, with or without project fund-supported foreign offices, are eligible to request special advance payments. Normally, special advance payments received from FAS must be liquidated by the Cooperator within 90 days from the date of receipt. Prior to making an advance, FAS may require the participant to submit security in a form and amount acceptable to FAS to protect FAS' financial interests. FAS will not make any special advance payment to a Cooperator where a special advance is outstanding from a prior marketing plan year. Cooperators shall deposit and maintain advances in insured, interest-bearing accounts, unless such accounts are prohibited by law or custom of a host country.

(c) *Refunds due FAS*. A participant shall return any unexpended portion of an advance, plus any interest earned, either by submitting a check payable to FAS or by offsetting its next reimbursement claim. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

## Subpart E—Reporting, Evaluation, and Compliance

### § 1484.70 Must Cooperators report to FAS?

(a) *End-of-year contribution report*. Not later than January 31 of the year following the completion of the marketing plan year, a Cooperator shall submit two copies of a report which identifies contributions made by the Cooperator and the U.S. industry during that marketing plan year. A suggested format of a contribution report is available on the FAS home page (*http://www.fas.usda.gov/mos/programs/fnotice.html*) on the Internet or from the Director, Marketing Operations Staff, FAS, USDA.

(b) *Trip reports*. Not later than 45 days after completion of travel (other than local travel), a Cooperator shall submit a trip report. The report must include the name(s) of the traveler(s), purpose of travel, itinerary, names and affiliations of contacts, and a brief summary of findings, conclusions, recommendations, or specific accomplishments.

(c) *Research reports*. Not later than 6 months after the end of its marketing plan year, a Cooperator shall submit a report on any research conducted in accordance with its application.

(d) *Submission of reports*. A Cooperator shall submit the reports required by this section to the appropriate Division Director. Trip reports and research reports shall also be submitted to the appropriate Attache/Counselor(s). All reports shall be in English and include the Cooperator's agreement number, the countries and period covered, and the date of the report.

(e) *Additional reports*. FAS may require the submission of additional reports.

(f) *Independent audit reports.* A Cooperator shall provide to the FAS Compliance Review Staff, upon request, any audit reports by independent public accountants.

### § 1484.71 Are Cooperator documents subject to the provisions of the Freedom of Information Act?

(a) Documents submitted to FAS by Cooperators are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, 7 CFR part 1, Subpart A—Official Records, and, specifically, 7 CFR 1.11—Handling Information from a Private Business.

(b) If requested by a person located in the United States, a Cooperator shall provide to such person a copy of any document in its possession or control containing market information developed and produced under the terms of its agreement. The Cooperator may charge a fee not to exceed the costs for assembling, duplicating, and distributing the materials.

(c) The results of any research conducted by a Cooperator under an agreement shall be the property of the U.S. Government.

### § 1484.72 How is program effectiveness measured?

(a) The Government Performance and Results Act (GPRA) of 1993 (5 U.S.C. 306; 31 U.S.C. 1105, 1115–1119, 3515, 9703–9704) requires performance measurement of Federal programs, including the Cooperator program. Evaluation of the Cooperator program's effectiveness will depend on a clear statement by each Cooperator of the constraints and opportunities facing U.S. exports, goals to be met within a specified time, a schedule of measurable milestones for gauging success, a plan for achievement, and reports of activity results.

(b) Evaluation is an integral element of program planning and implementation, providing the basis for the strategic plan. The evaluation results guide the development and scope of a Cooperator's program, contribute to program accountability, and provide evidence of program effectiveness.

(c) A Cooperator shall conduct periodic evaluations of its program and activities and may contract with an independent evaluator to satisfy this requirement. FAS reserves the right to have direct input and control over design, scope, and methodology of any such evaluation, including direct contact with and provision of guidance to the independent evaluator.

(d) A Cooperator shall complete at least one program evaluation each year. Actual scope and timing of the program evaluation shall be determined by the Cooperator and the Division Director and specified in the Cooperator's application approval letter. A program evaluation shall contain:

(1) The name of the party conducting the evaluation;

(2) The activities covered by the evaluation;

(3) A concise statement of the constraint(s) and opportunities and the goals specified in the application;

(4) A description of the evaluation methodology;

(5) A description of additional export sales achieved, including the ratio of additional export sales in relation to Cooperator program funding received;

(6) A summary of the findings, including an analysis of the strengths and weaknesses of the program(s); and

(7) Recommendations for future programs.

(e) A Cooperator shall submit, via a cover letter to the Division Director, an executive summary which assesses the program evaluation's findings and recommendations and proposes changes in program strategy or design as a result of the evaluation.

### § 1484.73 Are Cooperators penalized for failing to make required contributions?

A Cooperator's contribution requirement is specified in the Cooperator program allocation letter. If a Cooperator fails to contribute the amount specified in its allocation approval letter, the Cooperator shall pay to Commodity Credit Corporation in U.S. dollars the difference between the amount it has contributed and the amount specified in the allocation approval letter. A Cooperator shall remit such payment by December 31 following the end of the marketing plan year.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, 9996, Feb. 25, 2000]

### § 1484.74 How is Cooperator program compliance monitored?

(a) The Compliance Review Staff (CRS), FAS, performs periodic on-site reviews of Cooperators to ensure compliance with this part.

(b) In order to verify that federal funds received by a Cooperator do not supplant private or U.S. industry funds or contributions pursuant to § 1550.20(a)(14), FAS will consider the Cooperator's overall marketing budget from year to year, variations in promotional strategies within a country or region, and new markets.

(c) The Director, CRS, will notify a Cooperator through a compliance report when it appears that Commodity Credit Corporation may be entitled to recover funds from that Cooperator. The compliance report will state the basis for this action.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, 9996, Feb. 25, 2000]

### § 1484.75 How does a Cooperator respond to a compliance report?

(a) A Cooperator shall, within 60 days of the date of the compliance report, submit a written response to the Director, CRS. This response shall include any money owed to Commodity Credit Corporation if the Cooperator does not wish to contest the compliance report. The Director, CRS, at the Director's discretion, may extend the period for response up to an additional 30 days. If the Cooperator does not respond to the compliance report within the required time period or, if after review of the Cooperator's response, the Director, CRS, determines that Commodity Credit Corporation may be entitled to recover funds from the Cooperator, the Director, CRS, will refer the compliance report to the Deputy Administrator.

(b) If, after review of the compliance report and response, the Deputy Administrator determines that the Cooperator owes money to FAS, the Deputy Administrator will so inform the Cooperator. The Deputy Administrator may initiate action to collect such amount pursuant to 7 CFR Part 1403, Debt Settlement Policies and Procedures. Determinations of the Deputy Administrator will be in writing and in sufficient detail to inform the Cooperator of the basis for the determination. The Cooperator has 30 days from the date of the Deputy Administrator's initial determination to submit any money owed to Commodity Credit Corporation or to request reconsideration.

[64 FR 52630, Sept. 30, 1999. Redesignated and amended at 65 FR 9995, 9996, Feb. 25, 2000]

### § 1484.76 Can a Cooperator appeal the determinations of the Deputy Administrator?

(a) The Cooperator may appeal the determinations of the Deputy Administrator to the Administrator. An appeal must be in writing and be submitted to the Office of the Administrator within 30 days following the date of the initial determination by the Deputy Administrator or the determination on reconsideration. The Cooperator may request a hearing.

(b) If the Cooperator submits its appeal and requests a hearing, the Administrator, or the Administrator's designee, will set a date and time, generally within 60 days. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the Cooperator bears the cost of a transcript; however, the Administrator may have a transcript prepared at FAS's expense.

(c) The Administrator will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after submission of the appeal, hearing, or receipt of any transcript, whichever is later. The determination of the Administrator will be the final determination of FAS. The Cooperator must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by the Administrator.

## PART 1485—COOPERATIVE AGREEMENTS FOR THE DEVELOPMENT OF FOREIGN MARKETS FOR AGRICULTURAL COMMODITIES

### Subpart A [Reserved]

### Subpart B—Market Access Program

Sec.

1485.10 General purpose and scope.

1485.11 Definitions.
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1485.21 Failure to make required contribution.
1485.22 Submissions.
1485.23 Miscellaneous provisions.
1485.24 Applicability date.
1485.25 Paperwork reduction requirement.

AUTHORITY: 7 U.S.C. 5623, 5662–5664 and sec. 1302, Pub. L. 103–66, 107 Stat. 330.

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EDITORIAL NOTE: Nomenclature changes to part 1485 appear at 61 FR 58780, Nov. 19, 1996.

## Subpart A [Reserved]

## Subpart B—Market Access Program

### § 1485.10 General purpose and scope.

(a) This subpart sets forth the policies underlying the Commodity Credit Corporation's (CCC) operation of the Market Access Program (MAP), and a subcomponent of that program, the Export Incentive Program/Market Access Program (EIP/MAP). It also establishes the general terms and conditions applicable to MAP and EIP/MAP agreements.

(b) Under the MAP, CCC enters into agreements with nonprofit trade organizations to share the costs of certain overseas marketing and promotion activities that are intended to develop, maintain or expand commercial export markets for U.S. agricultural commodities and products. MAP participants may receive assistance for either generic or brand promotion activities. EIP/MAP participants are U.S. commercial entities that receive assistance for brand promotion activities.

(c) The MAP and EIP/MAP generally operate on a reimbursement basis, and CCC may, at its option, provide such reimbursement either in cash or in CCC commodity certificates.

(d) CCC's policy is to ensure that benefits generated by MAP and EIP/MAP agreements are broadly available throughout the relevant agricultural sector and no one entity gains an undue advantage. The MAP and EIP/MAP are administered by personnel of the Foreign Agricultural Service.

### § 1485.11 Definitions.

For purposes of this subpart the following definitions apply:

*Activity*—a specific market development effort undertaken by a participant.

*Activity plan*—a document which details a participant's proposed activities and budget. (*Activity plan* is used in lieu of the term *Marketing plan* to avoid administrative confusion with plans submitted under the Cooperator Foreign Market Development Program.)

*Administrator*—the Administrator, FAS, USDA, or designee.

*Agricultural commodity*—an agricultural commodity, food, feed, fiber, wood, livestock or insect, and any product thereof; and fish harvested from a U.S. aquaculture farm, or harvested by a vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

*APAR*—activity plan amendment request.

*Attache/Counselor*—the FAS employee representing USDA interests in the foreign country in which promotional activities are conducted.

*Brand promotion*—an activity that involves the exclusive or predominant use of a single company name or logo(s) or brand name(s) of a single company.

*CCC*—the Commodity Credit Corporation.

*Contribution*—the cost-share expenditure made by a participant in support of an approved activity.

*Credit memo*—a notice that a vendor has decreased an amount owed for promotional expenditures at the time the notice is issued.

*Demonstration projects*—activities involving the erection or construction of a structure or facility or the installation of equipment.

*Deputy Administrator*—the Deputy Administrator, Commodity and Marketing Programs, FAS, USDA, or designee.

*Division Director*—the director of a commodity division, Commodity and Marketing Programs, FAS, USDA.

*EIP/MAP*—the Export Incentive Program/Market Access Program.

*EIP/MAP participant*—a U.S. commercial entity which has entered into an EIP/MAP agreement with CCC.

*Eligible commodity*—the agricultural commodity that is represented by an applicant.

*Expenditure*—either the transfer of funds, or payment via a credit memo in lieu of a transfer of funds.

*Exported commodity*—an agricultural commodity that is sold to buyers in, or is donated to, a foreign country.

*FAS*—Foreign Agricultural Service, USDA.

*Foreign third party*—a foreign entity that assists, in accordance with an approved activity plan, in promoting the export of a U.S. agricultural commodity.

*Generic promotion*—a promotion that is not a brand promotion.

*Market*—a country in which an activity is conducted.

*MAP*—the Market Access Program.

*MAP participant*—an entity which has entered into an MAP agreement with CCC.

*Participant*—a entity which has entered into an agreement with CCC.

*Promoted commodity*—an agricultural commodity whose sale is the intended result of a promotion activity.

*Sales team*—a group of individuals engaged in an approved activity intended to result in specific sales.

*Small-sized entity*—a U.S. commercial entity which meets the small business size standards published at 13 CFR part 121, Small Business Size Regulations.

*SRTG*—an association of State Departments of Agriculture referred to as State Regional Trade Group(s).

*STRE*—sales and trade relations expenditures.

*Supergrade*—a salary level designation that is applicable to certain non-U.S. employees who direct participants' overseas offices.

*Trade team*—a group of individuals engaged in an approved activity intended to promote the interests of an entire agricultural sector rather than to result in specific sales by any of its members.

*Unfair trade practice*—an act, policy, or practice of a foreign government that:

(1) Violates, is inconsistent with, or otherwise denies benefits to the United States under, any trade agreement to which the United States is a party; or

(2) Is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.

*U.S. commercial entity*—an agricultural cooperative, producer association authorized by 7 U.S.C. 291, or for-profit firm located and doing business in the United States, and engaged in the export or sale of an agricultural commodity.

*U.S. industry contribution*—the expenditure made by the U.S industry in support of an approved activity.

*USDA*—the United States Department of Agriculture.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 32644, June 25, 1996; 61 FR 58780, Nov. 19, 1996; 63 FR 29940, June 2, 1998; 63 FR 32041, June 11, 1998]

### § 1485.12 Participation eligibility.

(a) To participate in the MAP, an entity:

(1) Shall be:

(i) A nonprofit U.S agricultural trade organization;

(ii) A nonprofit state regional trade group;

(iii) A U.S. agricultural cooperative; or

(iv) A State agency; and

(2) Shall contribute:

(i) In the case of generic promotion, at least 10 percent of the value of resources provided by CCC for such generic promotion; or

(ii) In the case of brand promotion, at least 50 percent of the total cost of such brand promotions.

(b) To participate in the EIP/MAP, an entity:

(1) Shall be a U.S. commercial entity that either owns the brand(s) of the agricultural commodity to be promoted or has the exclusive rights to use such brand(s);

(2) Shall contribute at least 50 percent of the total cost of the brand promotion; and

(3) That is a for-profit firm, other than a cooperative or producer association authorized by 7 U.S.C. 291, shall be a small sized entity.

(c) CCC may require a contribution level greater than that specified in paragraphs (a) and (b) of this section. In requiring a higher contribution level, CCC will take into account such factors as past participant contributions, previous MAP funding levels, the length of time an entity participates in the program and the entity's ability to increase its contribution.

(d) CCC may require an EIP/MAP applicant to participate through an MAP participant.

(e) CCC will enter into MAP or EIP/MAP agreements only where the eligible agricultural commodity is comprised of at least 50 percent U.S. origin content by weight, exclusive of added water.

(f) CCC will not enter into an MAP or EIP/MAP agreement for the promotion of tobacco or tobacco products.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 58780, Nov. 19, 1996]

### § 1485.13 Application process and strategic plan.

(a) *General application requirements.* CCC will periodically publish a Notice in the FEDERAL REGISTER that it is accepting applications for participation in MAP and EIP/MAP. Applications shall be submitted in accordance with the terms and requirements specified in the Notice. An application shall contain basic information about the applicant and the proposed program, a program justification and a strategic plan.

(1) *Basic applicant and program information.* (i) All MAP and EIP/MAP applications shall contain:

(A) The name and address of the applicant;

(B) The name of the Chief Executive Officer;

(C) The name and telephone number of the applicant's primary contact person;

(D) The name(s) of the person(s) responsible for managing the program;

(E) Type of organization—see § 1485.12(a)(1);

(F) Tax exempt identification number, if applicable;

(G) Activity plan year (mm/dd/yy-mm/dd/yy);

(H) Dollar amount of CCC resources requested for generic activities;

(I) Dollar amount of CCC resources requested for brand activities;

(J) Percentage of CCC resources requested for brand activities that will be made available to small-sized entities;

(K) Total dollar amount of CCC resources requested;

(L) Percentage of CCC resources requested for general administrative costs and overhead; and

(M) Estimated cumulative carryover—i.e., the estimated amount of unexpended funds allocated to the applicant in any prior year;

(ii) Applications submitted by nonprofit entities shall also contain:

(A) A description of the organization;

(B) A description of the organization's membership and membership criteria;

(C) A list of affiliated organizations;

(D) A description of management and administrative capability;

(E) A description of prior export promotion experience;

(F) Value, in dollars, that the applicant will contribute;

(G) Applicant's contribution stated as a percent of 1(i)(K) above;

(H) Value, in dollar, of contributions from other sources;

(2) *Program justification.* (i) All MAP and EIP/MAP applications shall contain:

(A) A description of the eligible agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(B) A description of the exported agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(C) A description of the promoted agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(D) A description of the anticipated supply and demand situation for the exported agricultural commodity(s);

(E) The volume and value of the exported agricultural commodity(s) for the most recent 3-year period;

(F) If the proposal is for two or more years, an explanation why the proposal should be funded on a multiyear basis; and

(G) A certification and, if requested by the Deputy Administrator, a written explanation supporting the certification, that any funds received will supplement, but not supplant, any private or third party funds or other contributions to program activities. The justification shall indicate why the participant is unlikely to carry out the activities without Federal financial assistance. In determining whether federal funds received supplemented or supplanted private or third party funds or contributions, CCC will consider the participant's overall marketing budget from year to year, variations in promotional strategies within a country and new markets.

(ii) Applications submitted by a small-sized entity seeking funds under an EIP/MAP agreement shall contain a certification that it is a small business within the standards established by 13 CFR part 121. For purposes of determining size, a cooperative will be considered a single entity.

(iii) Applicants seeking funds for brand promotion shall contain the information required by §1485.16(g)(1) and (2) in order to justify a rate of reimbursement higher than specified therein.

(3) *Strategic plan*. (i) All MAP and EIP/MAP applications shall contain:

(A) A summary of proposed budgets by country and commodity aggregate code;

(B) A description of the world market situation for the exported agricultural commodity;

(C) A description of competition from other exporters, including U.S. firms, where applicable;

(D) A statement of goals and the applicant's plans for monitoring and evaluating performance towards achieving these goals.

(E) For each country, if applicable, five years of:

(*1*) historical U.S. export data;

(*2*) U.S. market share; and

(*3*) MAP funds received;

(F) For each country, three years of projected U.S. export data and U.S. market share;

(G) Country strategy, including constraint(s) impeding U.S. exports, strategy to overcome constraints, previous activities in the country, the projected impact of the proposed program on U.S. exports;

(H) A justification for any new overseas office;

(I) A description of any demonstration projects, if applicable (see §1485.13(d)(1) through (4));

(J) Data summarizing historical and projected exports, market share and MAP budgets for the world; and

(K) A description of overall program goals for the ensuing 3–5 years;

(ii) MAP applications for brand promotion assistance shall also contain:

(A) A description of how the brand promotion program will be publicized to U.S. and foreign commercial entities;

(B) The criteria that will be used to allocate funds to U.S. and foreign commercial entities; and

(C) A justification for conducting a brand promotion program with foreign commercial entities, if applicable.

(b) CCC may request any additional information which it deems necessary to evaluate an MAP or EIP/MAP application. In particular, CCC may require additional performance measurement, as required by the Government Performance and Results Act of 1993.

(c) *Eligible contributions*. (1) In calculating the amount of contributions that it will make, and the contributions it will receive from a U.S. industry, a foreign third party or a State agency, the MAP applicant may include the costs (or such prorated costs) listed under paragraph (c)(2) of this section if:

(i) Expenditures will be made in furtherance of an approved activity, and

(ii) The contributor has not been or will not be reimbursed by any other source for such costs.

(2) Subject to paragraph (c)(1) of this section, eligible contributions are:

(i) Cash;

(ii) Compensation paid to personnel;

(iii) The cost of acquiring materials, supplies or services;

(iv) The cost of office space;

(v) A reasonable and justifiable proportion of general administrative costs and overhead;

(vi) Payments for indemnity and fidelity bond expenses;

(vii) The cost of business cards;

(viii) The cost of seasonal greeting cards;

(ix) Fees for office parking;

(x) The cost of subscriptions to publications;

(xi) The cost of activities conducted overseas;

(xii) Credit card fees;

(xiii) The cost of any independent evaluation or audit that is not required by CCC to ensure compliance with program requirements;

(xiv) The cost of giveaways, awards, prizes and gifts;

(xv) The cost of product samples;

(xvi) Fees for participating in U.S. government activities;

(xvii) The cost of air and local travel in the United States;

(xviii) Payment of employee's or contractor's share of personal taxes; and

(xix) The cost associated with trade shows, seminars, entertainment and STRE conducted in the United States.

(3) The following are not eligible contributions:

(i) Any portion of salary or compensation of an individual who is the target of an approved promotional activity;

(ii) Any expenditure, including that portion of salary and time spent in promoting membership in the participant organization or in promoting the MAP among its members (sometimes referred to in the industry as "backsell");

(iii) Any land costs other than allowable costs for office space;

(iv) Depreciation;

(v) The cost of refreshments and related equipment provided to office staff;

(vi) The cost of insuring articles owned by private individuals;

(vii) The cost of any arrangement which has the effect of reducing the selling price of an agricultural commodity;

(viii) The cost of product development, product modifications, or product research;

(ix) Slotting fees or similar sales expenditures;

(x) Membership fees in clubs and social organizations; and

(xi) Any expenditure for an activity prior to CCC's approval of that activity or amendment.

(4) The Deputy Administrator shall determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section may be included by the participant as an eligible contribution.

(d) *Special rules governing demonstration projects funded with CCC resources.* CCC will consider proposals for demonstration projects provided:

(1) No more than one such demonstration project per constraint is undertaken within a market;

(2) The constraint to be addressed in the market is a lack of technical knowledge or expertise;

(3) The demonstration project is a practical and cost effective method of overcoming the constraint;

(4) A third party participates in such project through a written agreement which provides that title to the structure, facility or equipment may transfer to the third party and that the MAP participant may use the structure, facility or equipment for a period specified in the agreement for the purpose of removing the constraint.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 32644, June 25, 1996; 63 FR 29940, June 2, 1998]

### § 1485.14 Application approval and formation of agreements.

(a) *General.* CCC will, consistent with available resources, approve those applications which it considers to present the best opportunity for developing, maintaining or expanding export markets for U.S. agricultural commodities. The selection process, by its nature, involves the exercise of judgment. CCC's choice of participants and proposed promotion projects requires that it consider and weigh a number of factors that cannot be mathematically measured—i.e., market opportunity, market strategy and management capability.

(b) *Approval criteria.* In assessing the applications it receives and determining which it will approve, CCC considers the following criteria:

(1) The effectiveness of program management;

(2) Soundness of accounting procedures;

(3) The nature of the applicant organization, with greater weight given to those organizations with the broadest base of producer representation;

(4) Prior export promotion or direct export experience;

(5) Previous MAP funding;

(6) Adequacy of the applicant's strategic plan in the following categories:

(i) Description of market conditions;

(ii) Description of, and plan for addressing, market constraints;

(iii) Reasonable likelihood of plan success;

(iv) Export volume and value and market share goals in each country;

(v) Description of evaluation plan and suitability of the plan for performance measurement; and

(vi) Past program results and evaluations, if applicable.

(c) *Allocation factors.* After determining which applications to approve, CCC determines how it will allocate resources among participants based on the following factors, in addition to those in paragraph (b) of this section:

(1) Size of the budget request in relation to projected value of exports;

(2) Where applicable, size of the budget request in relation to actual value of exports in prior years;

(3) Where applicable, participant's past projections of exports compared with actual exports;

(4) Level of participant's, State's, and industry's contributions;

(5) Market share goals in target country(ies);

(6) The degree to which the product to be exported consists of U.S. grown agricultural commodities;

(7) The degree of value-added processing in the U.S.; and

(8) General administrative and overhead costs compared to direct promotional costs.

(9) In the case of a brand promotion program, the percentage of the budget that will be made available to small-sized entities as a means of providing priority assistance to such entities.

(d) *Approval decision.* (1) CCC will approve those applications which it determines best satisfy the criteria and factors specified above. In addition, CCC will only approve applications for EIP/MAP when there is sufficient U.S. industry need for a brand promotion and there is no eligible MAP participant interested in or capable of undertaking the brand promotion.

(2) CCC will not provide assistance to a single company for brand promotion in a single country for more than five years. This five year period shall not begin prior to the 1994 program or the participant's first activity plan year, whichever is later. In limited circumstances, the five year limitation may be waived if the Deputy Administrator determines that further assistance is necessary in order to meet the objectives of the program.

(e) *Formation of agreements.* CCC will notify each applicant in writing of the final disposition of its application. CCC will send a program agreement, allocation approval letter and a signature card to each approved applicant. The allocation approval letter will specify any special terms and conditions applicable to a participant's program, including the required level of participant contribution. An applicant that decides to accept the terms and conditions contained in the program agreement and allocation approval letter should so indicate by having its Chief Executive Officer sign the program agreement and by submitting the signed agreement to the Director, Marketing Operations Staff, FAS, USDA. Final agreement shall occur when the Administrator signs the agreement on behalf of CCC. The application, the program agreement, the allocation approval letter and these regulations shall establish the terms and conditions of an MAP or EIP/MAP agreement between CCC and the approved applicant.

(f) Signature cards. The participant shall designate at least two individuals in its organization to sign program agreements, reimbursement claims and advance requests. The participant shall submit the signature card signed by those designated individuals and by the

participant's Chief Executive Officer to the Director, Marketing Operations Staff, FAS, USDA, and shall immediately notify the Director of any changes in signatories and shall submit a revised signature card accordingly.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 32644, June 25, 1996; 63 FR 29940, June 2, 1998]

**§ 1485.15 Activity plan.**

(a) *General.* A participant shall develop a specific activity plan(s) based on its strategic plan and the allocation approval letter and shall submit an activity plan for each year in which it engages in program activities. An activity plan handbook, available from the Division Director, provides suggested formats and codes for activity plans and amendments.

(b) An activity plan shall contain:

(1) A written presentation of all proposed activities including:

(i) A short description of the relevant constraint;

(ii) A description of any changes in strategy from the strategic plan;

(iii) A budget for each proposed activity, identifying the source of funds;

(iv) Specific goals and benchmarks to be used to measure the effectiveness of each activity. This will assist CCC in carrying out its responsibilities under the Government Performance and Results Act of 1993 that requires performance measurement of Federal programs, including the MAP. Evaluation of MAP's effectiveness will depend on a clear statement by participants of goals, method of achievement, and results of activities at regular intervals. The overall goal of the MAP and of individual participants' activities is to achieve additional exports of U.S. agricultural products, that is, sales that would not have occurred in the absence of MAP funding.

(2) A staffing plan for any overseas office, including a listing of job titles, position descriptions, salary ranges and any request for approval of supergrade salaries; and

(3) An itemized administrative budget for any overseas office.

(c) Activity plans for small-sized entities operating through an SRTG shall contain a certification that it is a small-sized entity within the standards established by 13 CFR part 121.

(d) *Requests for approval of "supergrades".* (1) Ordinarily, CCC will not reimburse any portion of a non-U.S. citizen employees compensation that exceeds the highest salary level in the Foreign Service National (FSN) salary plan applicable to the country in which the employee works. However, a participant may seek a higher level of reimbursement for a non-U.S. citizen who will be employed as a country director or regional director by requesting that CCC approve that employee as a "supergrade".

(2) To request approval of a "supergrade", the participant shall include in its activity plan a detailed description of both the duties and responsibilities of the position, and of the qualifications and background of the employee concerned. The participant shall also justify why the highest FSN salary level is insufficient.

(3) Where a non-U.S. citizen will be employed as a country director, the MAP participant may request approval for a "Supergrade I" salary level, equivalent to a grade increase over the existing top grade of the FSN salary plan. The "supergrade" and its step increases are calculated as the percentage difference between the second highest and the highest grade in the FSN salary plan with that percentage applied to each of the steps in the top grade. Where the non-U.S. citizen will be employed as a regional director, with responsibility for activities and/or offices in more than one country, the MAP participant may request approval for a "Supergrade II" salary level which is calculated relative to a "Supergrade I" in the same way the latter is calculated relative to the highest grade in the FSN salary plan.

(e) *Submission of the activity plan.* A participant shall submit three copies of an activity plan to the Division Director and a copy of the relevant country section(s) to the Attaché/Counselor(s) concerned.

(f) *Activity plan approval.* CCC shall indicate in an activity plan approval letter which activities and budgets are approved or disapproved, and shall indicate any special terms and conditions that apply to the participant including any requirements with respect to contributions and program evaluations. A

participant may undertake promotional activities directly or through a foreign third party; however, the participant shall be responsible and accountable to CCC for all such promotional activities and related expenditures.

(g) *Activity plan changes.* (1) A participant may request changes to an activity plan by submitting one copy of an APAR to each of the Division Director and the Attaché/Counselor(s) concerned.

(2) An APAR for a new activity shall contain the information required in paragraph (b) of this section. All other APAR's shall contain the activity description, the proposed budget and a justification for transfer of funds, if applicable.

### § 1485.16 Reimbursement rules.

(a) A participant may seek reimbursement for an expenditure if:

(1) The expenditure was made in furtherance of an approved activity; and

(2) The participant has not been or will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, CCC will reimburse, in whole or in part, the cost of:

(1) Production and placement of advertising in print or electronic media or on billboards or posters;

(2) Production and distribution of banners, recipe cards, table tents, shelf talkers and other similar point of sale materials;

(3) Direct mail advertising;

(4) In-store and food service promotions, product demonstrations to the trade and to consumers, and distribution of promotional samples;

(5) Temporary displays and rental of space for temporary displays;

(6) Expenditures, other than travel expenditures, associated with retail, trade, and consumer exhibits and shows; seminars; and educational training; including participation fees, booth construction, transportation of related materials, rental of space and equipment, and duplication of related printed materials;

(7) International air travel, not to exceed the full fare economy rate, or other means of international transportation, and per diem, as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) for no more than two representatives of a single brand participant to exhibit their company's products at a foreign trade show.

(8) Publications;

(9) Part-time contractors such as demonstrators, interpreters, translators and receptionists to help with the implementation of promotional activities such as trade shows, in-store promotions, food service promotions, and trade seminars;

(10) Giveaways, awards, prizes, gifts and other similar promotional materials subject to the limitation that CCC will not reimburse more than $1.00 per item;

(11) The design and production of packaging, labeling or origin identification, to be used during the activity plan year in which the expenditure is made, if such packaging, labeling or origin identification are necessary to meet the importing requirements in a foreign country.

(c) Subject to paragraph (a) of this section, but for generic promotion activities only, CCC will also reimburse, in whole or in part, the cost of:

(1) Compensation and allowances for housing, educational tuition, and cost of living adjustments paid to a U.S. citizen employee or a U.S. citizen contractor stationed overseas subject to the limitation that CCC shall not reimburse that portion of:

(i) The total of compensation and allowances that exceed 125 percent of the level of a GS–15 Step 10 salary for U.S. Government employees, and

(ii) Allowances that exceed the rate authorized for U.S. Embassy personnel;

(2) Approved "supergrade" salaries for non-U.S. citizens and non-U.S. contractors;

(3) Compensation of a non-U.S. citizen staff employee or non-U.S. contractor subject to the following limitations:

(i) Where there is a local U.S. Embassy Foreign Service National (FSN) salary plan, CCC shall not reimburse any portion of such compensation that exceeds the compensation prescribed for the most comparable position in the FSN salary plan, or

(ii) Where an FSN salary plan does not exist, CCC will not reimburse any portion of such compensation that exceeds locally prevailing levels which the MAP participant shall document by a salary survey or other means.

(4) A retroactive salary adjustment that conforms to a change in FSN salary plans, effective as of the date of such change;

(5) Accrued annual leave at such time when employment is terminated or when required by local law;

(6) Overtime paid to clerical staff;

(7) Daily contractor fees subject to the limitation that CCC will not reimburse any portion of such fee that exceeds the daily gross salary of a GS–15, Step 10 for U.S. Government employees in effect on the date the fee is earned;

(8) International travel expenses plus passports, visas and inoculations subject to the limitation that CCC will not reimburse any portion of air travel in excess of the full fare economy rate or when the participant fails to notify the Attache/Counselor in the destination country in advance of the travel unless the Deputy Administrator determines it was impractical to provide such notification;

(9) Per diem subject to the limitation that CCC will not reimburse per diem in excess of the rates allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304);

(10) Automobile mileage at the local U.S. Embassy rate or rental cars while in travel status;

(11) Other allowable expenditures while in travel status as authorized by the U.S. Federal Travel Regulations (41 CFR parts 301 through 304);

(12) An overseas office, including rent, utilities, communications originating overseas, office supplies, accident liability insurance premiums and legal and accounting services;

(13) The purchase, lease, or repair of, or insurance premiums for, capital goods that have an expected useful life of at least one year such as furniture, equipment, machinery, removable fixtures, draperies, blinds, floor coverings, computer hardware and software;

(14) Premiums for health or accident insurance or other benefits for foreign national employees that the employer is required by law to pay;

(15) Accident liability insurance premiums for facilities used jointly with third party participants for MAP activities or for travel of non-MAP participant personnel;

(16) Market research;

(17) Evaluations, if not required by CCC to ensure compliance with program requirements;

(18) Legal fees to obtain advice on the host country's labor laws;

(19) Employment agency fees;

(20) STRE including breakfast, lunch, dinner, receptions and refreshments at approved activities; miscellaneous courtesies such as checkroom fees, taxi fares and tips; and decorations for a special promotional occasion;

(21) Educational travel of dependent children, visitation travel, rest and recuperation travel, home leave travel, emergency visitation travel for U.S. overseas employees allowed under the Foreign Affairs Manual, Foreign Affairs Manual, OIS/RA/PSG, Room B–264 Main State, Washington, D.C. 20520, Telephone: 202–736–4881, FAX: 202–736–7214.

(22) Evacuation payments (safe haven), shipment and storage of household goods and motor vehicles;

(23) Domestic administrative support expenses for the National Association of State Departments of Agriculture and the SRTGs;

(24) Generic commodity promotions (see § 1486.16(f));

(25) Travel expenditures associated with trade shows, seminars, and educational training conducted in the United States; and

(26) Demonstration projects.

(d) CCC will not reimburse any cost of:

(1) Forward year financial obligations, such as severance pay, attributable to employment of foreign nationals;

(2) Expenses, fines, settlements or claims resulting from suits, challenges or disputes emanating from employment terms, conditions, contract provisions and related formalities;

(3) The design and production of packaging, labeling or origin identification, except as described in paragraph (b)(11) of this section.

(4) Product development, product modification or product research;

(5) Product samples;

(6) Slotting fees or similar sales expenditures;

(7) The purchase, construction or lease of space for permanent displays, *i.e.*, displays lasting beyond one activity plan year;

(8) Rental, lease or purchase of warehouse space;

(9) Coupon redemption or price discounts;

(10) Refundable deposits or advances;

(11) Giveaways, awards, prizes, gifts and other similar promotional materials in excess of $1.00 per item;

(12) Alcoholic beverages that are not an integral part of an approved promotional activity;

(13) The purchase, lease (except for use in authorized travel status) or repair of motor vehicles;

(14) Travel of applicants for employment interviews;

(15) Unused non-refundable airline tickets or associated penalty fees except where travel is restricted by U.S. government action or advisory;

(16) Independent evaluation or audit, including activities of the subcontractor if CCC determines that such a review is needed in order to ensure program compliance;

(17) Any arrangement which has the effect of reducing the selling price of an agricultural commodity;

(18) Goods and services and salaries of personnel provided by U.S. industry or foreign third party;

(19) Membership fees in clubs and social organizations;

(20) Indemnity and fidelity bonds;

(21) Fees for participating in U.S. Government sponsored activities, other than trade fairs and exhibits;

(22) Business cards;

(23) Seasonal greeting cards;

(24) Office parking fees;

(25) Subscriptions to publications;

(26) Home office domestic administrative expenses, including communication costs;

(27) [Reserved]

(28) Payment of U.S. and foreign employees or contractors share of personal taxes, except as legally required in a foreign country, and;

(29) Any expenditure made for an activity prior to CCC's approval of that activity or amendment.

(e) The Deputy Administrator may determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section will be reimbursed.

(f) For a generic promotion activity involving the use of company names, logos or brand names, the MAP participant must ensure that all companies seeking to promote U.S. agricultural commodities have an equal opportunity to participate in the activity.

(g) For a brand promotion activity, CCC will reimburse at a rate equal to the percentage of U.S. origin content of the promoted agricultural commodity or at a rate of 50 percent, whichever is the lesser, except that CCC may reimburse for a higher rate if:

(1) There has been an affirmative action by the U.S. Trade Representative under Section 301 of the Trade Act of 1974 with respect to the unfair trade practice cited and there has been no final resolution of the case; and

(2) The participant shows, in comparison to the year such Section 301 case was initiated, that U.S. market share of the agricultural commodity concerned has decreased; and

(3) In such case, CCC shall determine the appropriate rate of reimbursement.

(h) CCC will reimburse for expenditures made after the conclusion of participant's activity plan year provided:

(1) The activity was approved prior to the end of the activity plan year;

(2) The activity was completed within 30 calendar days following the end of the activity plan year; and

(3) All expenditures were made for the activity within 6 months following the end of the activity plan year.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 3548, Feb. 1, 1996; 61 FR 24206, May 14, 1996; 61 FR 32644, June 25, 1996; 63 FR 29940, June 2, 1998; 63 FR 32041, June 11, 1998]

### § 1485.17 Reimbursement procedures.

(a) A format for reimbursement claims is available from the Division Director. Claims for reimbursement shall contain the following information:

(1) Activity type—brand or generic;

(2) Activity number;

(3) Commodity aggregate code;

(4) Country code;

(5) Cost category;

(6) Amount to be reimbursed;

(7) If applicable, any reduction in the amount of reimbursement claimed to offset CCC demand for refund of amounts previously reimbursed, and reference to the relevant Compliance Report; and

(8) If applicable, any amount previously claimed that has not been reimbursed.

(b) All claims for reimbursement shall be submitted by the participant's U.S. office to the Director, Marketing Operations Staff, FAS, USDA.

(c) In general, CCC will not reimburse a claim for less than $10,000 except that CCC will reimburse a final claim for a participant's activity plan year for a lesser amount.

(d) CCC will not reimburse claims submitted later than 6 months after the end of a participant's activity plan year.

(e) If CCC reimburses a claim with commodity certificates, CCC will issue commodity certificates with a face value equivalent to the amount of the claim which shall be in full accord and satisfaction of such claim.

(f) If CCC overpays a reimbursement claim, the participant shall repay CCC within 30 days the amount of the overpayment either by submitting a check payable to CCC or by offsetting its next reimbursement claim.

(g) If a participant receives a reimbursement or offsets an advanced payment which is later disallowed, the participant shall within 30 days of such disallowance repay CCC the amount owed either by submitting a check payable to CCC or by offsetting its next reimbursement claim.

(h) The participant shall report any actions having a bearing on the propriety of any claims for reimbursement to the Attache/Counselor and its U.S. office shall report such actions in writing to the Division Director(s).

### § 1485.18 Advances.

(a) *Policy*. In general, CCC operates MAP and EIP/MAP on a reimbursable basis. CCC will not advance funds to an EIP/MAP participant or to an MAP participant for brand promotion activities.

(b) *Exception*. Upon request, CCC may advance payments to an MAP participant for generic promotion activities. Prior to making an advance, CCC may require the participant to submit security in a form and amount acceptable to CCC to protect CCC's financial interests. Total payments advanced shall not exceed 40 percent of a participant's approved annual generic activity budget. However, CCC will not make any advance to an MAP participant where an advance is outstanding from a prior activity plan year.

(c) *Refunds due CCC*. A participant shall expend the advance on approved generic promotion activities within 90 calendar days after the date of disbursement by CCC. A participant shall return any unexpended portion of the advance, plus a prorated share of all proceeds generated (*i.e.*, premiums generated from certificate sales and interest earned), either by submitting a check payable to CCC or by offsetting its next reimbursement claim. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

### § 1485.19 Employment practices.

(a) An MAP participant shall enter into written contracts with all employees and shall ensure that all terms, conditions, and related formalities of such contracts conform to governing local law.

(b) An MAP participant shall, in its overseas office, conform its office hours, work week and holidays to local law and to the custom generally observed by U.S. commercial entities in the local business community.

(c) An MAP participant may pay salaries or fees in any currency (U.S. or foreign) if approved by the Attache/Counselor. However, participants are cautioned to consult local laws regarding currency restrictions.

### § 1485.20 Financial management, reports, evaluations and appeals.

(a) *Financial management*. (1) An MAP participant shall implement and maintain a financial management system that conforms to generally accepted accounting principles.

(2) An MAP participant shall institute internal controls and provide written guidance to commercial entities participating in its activities to ensure

their compliance with these provisions. Each participant shall maintain all original records and documents relating to program activities for five calendar years following the end of the applicable activity plan year and shall make such records and documents available upon request to authorized officials of the U.S. Government. An MAP participant shall also maintain all documents related to employment such as employment applications, contracts, position descriptions, leave records and salary changes, and all records pertaining to contractors.

(3) A participant shall maintain its records of expenditures and contributions in a manner that allows it to provide information by activity plan, country, activity number and cost category. Such records shall include:

(i) Receipts for all STRE (actual vendor invoices or restaurant checks, rather than credit card receipts);

(ii) Original receipts for any other program related expenditure in excess of $25.00;

(iii) The exchange rate used to calculate the dollar equivalent of expenditures made in a foreign currency and the basis for such calculation;

(iv) Copies of reimbursement claims;

(v) An itemized list of claims charged to each of the participant's CCC resources accounts;

(vi) Documentation with accompanying English translation supporting each reimbursement claim, including original evidence to support the financial transactions such as canceled checks, receipted paid bills, contracts or purchase orders, per diem calculations, travel vouchers, and credit memos; and

(vii) Documentation supporting contributions must include: the dates, purpose and location of the activity for which the cash or in-kind items were claimed as a contribution; who conducted the activity; the participating groups or individuals; and, the method of computing the claimed contributions. MAP participants must retain and make available for audit documentation related to claimed contributions.

(4) Upon request, a participant shall provide to CCC originals of documents supporting reimbursement claims.

(b) *Reports*. (1) End-of-Year Contribution Report. Not later than 6 months after the end of its activity plan year, a participant shall submit two copies of a report which identifies, by activity and cost category and in U.S. dollar equivalent, contributions made by the participant, the U.S. industry and foreign third parties during that activity plan year. A suggested format of a contribution report is available from the Division Director.

(2) *Trip reports*. Not later than 45 days after completion of travel (other than local travel), an MAP participant shall submit a trip report. The report must include the name(s) of the traveler(s), purpose of travel, itinerary, names and affiliations of contacts, and a brief summary of findings, conclusions, recommendations or specific accomplishments.

(3) *Research reports*. Not later than 6 months after the end of its activity plan year, an MAP participant shall submit a report on any research conducted in accordance with the activity plan.

(4) A participant shall submit the reports required by this subsection to the appropriate Division Director. Trip reports and research reports shall also be submitted to the Attache/Counselor concerned. All reports shall be in English and include the participant's agreement number, the countries covered, date of the report and the period covered in the report.

(5) CCC may require the submission of additional reports.

(6) A participant shall provide to the FAS Compliance Review Staff upon request any audit reports by independent public accountants.

(c) *Evaluation*—(1) *Policy*. (i) The Government Performance and Results Act (GPRA) of 1993 (5 U.S.C. 306; 31 U.S.C. 1105, 1115–1119, 3515, 9703–9704) requires performance measurement of Federal programs, including MAP. Evaluation of MAP's effectiveness will depend on a clear statement by participants of goals to be met within a specified time, schedule of measurable milestones for gauging success, plan for achievement, and results of activities at regular intervals. The overall goal of the MAP and of individual participants' activities is to achieve additional exports of

U.S. agricultural products, that is, sales that would not have occurred in the absence of MAP funding. A participant that can demonstrate additional sales compared to a representative base period, taking into account extenuating factors beyond the participant's control, will have met the overall objective of the GPRA and the need for evaluation.

(ii) Evaluation is an integral element of program planning and implementation, providing the basis for the strategic plan and activity plan. The evaluation results guide the development and scope of a participant's program, contributing to program accountability and providing evidence of program effectiveness.

(iii) An MAP participant shall conduct periodic evaluations of its program and activities and may contract with an independent evaluator to satisfy this requirement. CCC reserves the right to have direct input and control over design, scope and methodology of any such evaluation, including direct contact with and provision of guidance to the independent evaluator.

(2) *Types of evaluation.* (i) An activity evaluation is a review of an activity to determine whether such activity achieved the goals specified in the activity plan. Unless specifically exempted in the activity plan, all activity evaluations shall be completed within 90 days following the end of the MAP participant's activity plan year.

(ii) A brand promotion evaluation is a review of the U.S. and foreign commercial entities' export sales to determine whether the activity achieved the goals specified in the activity plan. These evaluations shall be completed within 90 days following the end of the participant's activity plan year.

(iii) A program evaluation is a review of the MAP participant's entire program or any appropriate portion of the program to determine the effectiveness of the participant's strategy in meeting specified goals. An MAP participant shall complete at least one program evaluation each year. Actual scope and timing of the program evaluation shall be determined by the MAP participant and the Division Director and specified in the MAP participant's activity plan approval letter.

(3) *Contents of program evaluation.* A program evaluation shall contain:

(i) The name of the party conducting the evaluation;

(ii) The activities covered by the evaluation (including the activity numbers);

(iii) A concise statement of the constraint(s) and the goals specified in the activity plan;

(iv) A description of the evaluation methodology;

(v) A description of additional export sales achieved, including the ratio of additional export sales in relation to MAP funding received;

(vi) A summary of the findings, including an analysis of the strengths and weaknesses of the program(s); and

(vii) Recommendations for future programs.

(4) An MAP participant shall submit via a cover letter to the Division Director, an executive summary which provides assessment of the program evaluation's findings and recommendations and proposed changes in program strategy or design as a result of the evaluation.

(5) If as a result of an evaluation or audit of activities of a participant under the program, CCC determines that further review is needed in order to ensure compliance with the requirements of the program, CCC may require the participant to contract for an independent audit of the program activities,

(d) *Appeals.* (1) The Director, Compliance Review Staff (Director, CRS) will notify a participant through a compliance report when it appears that CCC may be entitled to recover funds from that participant. The compliance report will state the basis for this action.

(2) A participant may, within 60 days of the date of the compliance report, submit a response to the Director, CRS. The Director, CRS, at the Director's discretion, may extend the period for response up to an additional 30 days. If the participant does not respond to the compliance report within the required time period or, if after review of the participant's response, the Director, CRS, determines that CCC may be entitled to recover funds from the participant, the Director, CRS, will

refer the compliance report to the Deputy Administrator.

(3) If after review of the compliance report and response, the Deputy Administrator determines that the participant owes any money to CCC he will so inform the participant and provide the basis for the decision. The Deputy Administrator may initiate action to collect such amount pursuant to 7 C.F.R. Part 1403, Debt Settlement Policies and Procedures. Determinations of the Deputy Administrator will be in writing and in sufficient detail to inform the participant of the basis for the determination. The participant may request reconsideration within 30 days of the date of the Deputy Administrator's initial determination.

(4) The Participant may appeal determinations of the Deputy Administrator to the Administrator. An appeal must be in writing and be submitted to the office of the Deputy Administrator within 30 days following the date of the initial determination by the Deputy Administrator or the determination on reconsideration. The participant may request a hearing.

(5) If the participant submits its appeal and requests a hearing, the Administrator, or the Administrator's designee, will set a date and time, generally within 60 days. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the participant bears the cost of a transcript; however, the Administrator may have a transcript prepared at CCC's expense.

(6) The Administrator will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after submission of the appeal, hearing or receipt of any transcript, whichever is later. The determination of the Administrator will be the final determination of CCC. The participant must exhaust all administrative remedies contained in this subsection before pursuing judicial review of a determination by the Administrator.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 32644, June 25, 1996; 63 FR 29941, June 2, 1998]

### § 1485.21 Failure to make required contribution.

An MAP participant's contribution requirement will be specified in the MAP allocation letter and the activity plan approval letter. The amount specified will be the amount of contribution to be furnished by the applicant and other sources as indicated in the participant's application. The MAP participant shall pay to CCC in dollars the difference between the amount actually contributed and the amount specified in the allocation approval letter. An MAP participant shall remit such payment within 90 days after the end of its activity plan year.

[63 FR 29941, June 2, 1998; 63 FR 32041, June 11, 1998]

### § 1485.22 Submissions.

The participant may make any submissions required by this regulation either by hand delivery to the Director, Marketing Operations Staff, FAS, USDA or by commercial service delivery or U.S. mail. If delivery occurs by commercial "next-day" mail service or U.S. regular mail, first class prepaid, the material shall be deemed submitted as of the date of the commercial service or U.S. registered mail receipt. For all other permissible methods of delivery, the material shall be deemed submitted as of the date received by the Director, Marketing Operations Staff, FAS, USDA.

### § 1485.23 Miscellaneous provisions.

(a) *Disclosure of program information.* (1) Documents submitted to CCC by participants are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, 7 CFR part 1, Subpart A—Official Records, and specifically 7 C.F.R. 1.11, Handling Information from a Private Business.

(2) If requested by a person located in the United States, a participant shall provide a copy of any document in its possession or control containing market information developed and produced under the terms of its agreement. The participant may charge a fee not to exceed the costs for assembling, duplicating and distributing the materials.

(3) The results of any research conducted by a participant under an agreement, shall be the property of the U.S. Government.

(b) *Ethical conduct.* (1) A participant shall conduct its business in accordance with the laws and regulations of the country in which an activity is carried out.

(2) Neither an MAP participant nor its affiliates shall make export sales of agricultural commodities and products covered under the terms of the agreement. Neither an MAP participant nor its affiliates shall charge a fee for facilitating an export sale. A participant may, however, collect check-off funds and membership fees that are required for membership in the participating organization. For the purposes of this paragraph, "affiliate" means any partnership, association, company, corporation, trust, or any other such party in which the participant has an investment other than in a mutual fund.

(3) An MAP participant shall not limit participation to members of its organization. The MAP participant shall publicize its program and make participation possible for commercial entities throughout the participant's industry or, in the case of SRTGs, throughout the corresponding region.

(4) A participant shall select U.S. agricultural industry representatives to participate in activities such as trade teams, sales teams, and trade fairs based on criteria that ensure participation on an equitable basis by a broad cross section of the U.S. industry. If requested, a participant shall submit such selection criteria to CCC for approval.

(5) All participants should endeavor to ensure fair and accurate fact-based advertising. Deceptive or misleading promotions may result in cancellation or termination of an agreement.

(6) The participant must report any actions or circumstances that have a bearing on the propriety of the program to the Attache/Counselor and its U.S. office shall report such actions in writing to the Division Director.

(c) *Contracting procedures.* (1) Neither the Commodity Credit Corporation (CCC) nor any other agency of the United States Government or any official or employee of the CCC or the United States Government has any obligation or responsibility with respect to participant contracts with third parties.

(2) A participant shall:

(i) Ensure that all expenditures for goods and services reimbursed, in excess of $25.00, by CCC are documented by a purchase order, invoice, or contract and that such documentation demonstrates competition in acquiring the goods or services;

(ii) Ensure that no employee or officer participates in the selection or award of a contract in which such employee or official, or the employee's or officer's family or partners has a financial interest;

(iii) Conduct all contracting in an openly competitive manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids and requests for proposals for procurement of any goods or services shall be excluded from competition for such procurement;

(iv) Base solicitations for professional and technical services on a clear and accurate description of the requirements for the services to be procured;

(v) Perform some form of price or cost analysis such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered prices.

(d) *Disposable capital goods.* (1) Capital goods purchased by the MAP participant and reimbursed by CCC that are unusable, unserviceable, or no longer needed for project purposes shall be disposed of in one of the following ways:

(i) The participant may exchange or sell the goods provided that it applies any exchange allowance, insurance proceeds or sales proceeds toward the purchase of other property needed in the project;

(ii) The participant may, with CCC approval, transfer the goods to other MAP participants and activities, or to a foreign third party; or

(iii) The participant may, upon Attaché/Counselor approval, donate the goods to a local charity, or convey the goods to the Attaché/Counselor, along

with an itemized inventory list and any documents of title.

(2) A participant shall maintain an inventory of all capital goods with a value of $100 acquired in furtherance of program activities. The inventory shall list and number each item and include the date of purchase or acquisition, cost of purchase, replacement value, serial number, make, model, and electrical requirements.

(3) The participant shall insure all capital goods acquired in furtherance of program activities and safeguard such goods against theft, damage and unauthorized use. The participant shall promptly report any loss, theft, or damage of property to the insurance company.

(e) *Contracts between MAP participants and brand participants.* Where CCC approves an application for brand promotion, the MAP participant shall enter into an agreement with each approved brand participant which shall:

(1) Specify a time period for such brand promotion, and require that all brand promotion expenditures be made within the MAP participant's approved activity plan period;

(2) Make no allowance for extension or renewal;

(3) Limit reimbursable expenditures to those made in countries and for activities approved in the activity plan;

(4) Specify the percentage of promotion expenditures that will be reimbursed, reimbursement procedures and documentation requirements;

(5) Include a written certification that the brand participant either owns the brand of the product it will promote or has exclusive rights to promote the brand in each of the countries in which promotion activities will occur;

(6) Require that all product labels, promotional material and advertising will identify the origin of the agricultural commodity as "Product of the U.S.", "Product of the U.S.A.", "Grown in the U.S.", "Grown in the U.S.A.", "Made in America" or other U.S. regional designation if approved in advance by CCC; that such origin identification will be conspicuously displayed, in a manner that is easily observed; and that such origin identification will conform, to the extent possible, to the U.S. standard of 1/6″ (.42 centimeters) in height based on the lower case letter "o". A participant may request an exemption from this requirement. All such requests shall be in writing and include justification satisfactory to the Deputy Administrator that this labelling requirement would hinder a participant's promotional efforts. The Deputy Administrator will determine, on a case by case basis, whether sufficient justification exists to grant an exemption from the labelling requirement;

(7) Specify documentation requirements for a U.S. brand applicant seeking priority consideration for assistance based on eligibility as a small-sized entity;

(8) Require that the U.S. brand participant submit to the MAP participant a statement certifying that any Federal funds received will supplement, but not supplant, any private or third party funds or other contributions to program activities; and

(9) The participant shall require the brand participant to maintain all original records and documents relating to program activities for five calendar years following the end of the applicable activity plan year and shall make such records and documents available upon request to authorized officials of the U.S. Government.

(f) EIP/MAP participants shall ensure that all product labels, promotional material and advertising will identify the origin of the agricultural commodity as "Product of the U.S.", "Product of the U.S.A.", "Grown in the U.S.", "Grown in the U.S.A.", "Made in America" or other U.S. regional designation if approved in advance by CCC; such origin identification is conspicuously displayed in a manner that is easily observed, and that, to the fullest extent possible, the origin identification conforms to the U.S. standard of 1/6″ (.42 centimeters) in height based on the lower case letter "o". An EIP/ MAP participant may request an exemption from this requirement. All such requests shall be in writing and include justification satisfactory to the Deputy Administrator that this labelling requirement would hinder a participant's promotional efforts. The Deputy Administrator will determine, on a case

by case basis, whether sufficient justification exists to grant an exemption from the labelling requirement;

(g) Travel shall conform to U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and air travel shall conform to the requirements of the "Fly America Act (49 U.S.C. 1517)." The MAP participant shall notify the Attaché/Counselor in the destination countries in writing in advance of any proposed travel.

(h) *Proceeds.* Any income or refunds generated from an activity, *i.e.*, participation fees, proceeds of sales, refunds of value added taxes (VAT), the expenditures for which have been wholly or partially reimbursed, shall be repaid by submitting a check payable to CCC or offsetting the participant's next reimbursement claim. However, where CCC reimburses a participant with CCC commodity certificates, such participant may retain any income generated by the sale of such certificates.

[60 FR 6363, Feb. 1, 1995, as amended at 61 FR 3548, Feb. 1, 1996; 61 FR 32644, June 25, 1996]

### § 1485.24 Applicability date.

This Subpart applies to activities that are approved in accordance with the participant's 1995 program and corresponding activity plan year.

### § 1485.25 Paperwork reduction requirements.

The paperwork and record keeping requirements imposed by this final rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980. OMB has assigned control number 05510027 for this information collection.

## PART 1486—EMERGING MARKETS PROGRAM

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AUTHORITY: 7 U.S.C. 5622 note.

SOURCE: 70 FR 255, Jan. 4, 2005, unless otherwise noted.

## Subpart A—General Information

### § 1486.100 What is the Emerging Markets Program?

(a) The principal purpose of the EMP is to assist U.S. entities in developing, maintaining, or expanding the exports of U.S. agricultural commodities and products by providing partial funding for technical assistance activities that promote U.S. agricultural exports to emerging markets, a consistent with U.S. foreign policy interests. The Program is intended primarily to support export market development efforts of the private sector, but the Program's resources may also be used to assist public agricultural organizations as well. Technical assistance may include activities such as feasibility studies, market research, sector assessments, orientation visits, specialized training, business workshops, and similar undertakings.

(b) The EMP may be used to support exports of U.S. agricultural commodities and products only through generic activities.

(c) Only initiatives that support the export of U.S. agricultural commodities and products are eligible for assistance from the program. The program's resources may not be used to support the export of another country's products to the United States, or to promote the development of a foreign economy as a primary objective.

(d) The program is administered by personnel of USDA's Foreign Agricultural Service.

### § 1486.101 What special definitions apply to this program?

For purposes of this subpart, the following definitions apply:

*Activities*—components of a project which, when implemented collectively, are intended to achieve a specific market development objective.

*Administrator*—the Administrator of FAS, or designee.

*Advisory Committee*—a group of representatives from the private sector appointed by the Secretary of Agriculture whose primary mission is to review proposals requesting funding under the EMP and make recommendations on projects and programs that can enhance exports through the use of program funds.

*Agreement*—a written assistance agreement under this part.

*Agricultural Commodity*—an agricultural commodity, food, feed, fiber, wood, livestock, or insect, and any product thereof; and fish harvested from a U.S. aquaculture farm or harvested by a vessel as defined in Title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

*Attache/Counselor*—the Foreign Agricultural Service employee representing United States Department of Agriculture interests in the foreign country in which promotional activities are conducted.

*CCC*—Commodity Credit Corporation.

*Compliance Review Staff*—the office within the Foreign Agricultural Service responsible for performing reviews of Recipients to ensure compliance under this part.

*Constraint*—a condition in a particular country or region which inhibits the development, expansion, or maintenance of exports of a specific U.S. agricultural commodity or product.

*Cost Share/Contribution*—the amount of funding (cash and in-kind) U.S. entities are willing to commit from their own resources in support of an approved project.

*Deputy Administrator*—the Deputy Administrator, Commodity and Marketing Programs, Foreign Agricultural Service, or designee.

*Emerging Market*—any country or regional grouping that is taking steps toward a market-oriented economy through the food, agriculture, or rural business sectors of the economy of the country; has the potential to provide a viable and significant market for United States agricultural commodities or products; a population greater than 1 million; and a per capita income level below the level for upper middle-income countries as determined by the World Bank.

*EMP*—Emerging Markets Program.

*FAS*—Foreign Agricultural Service.

*Generic Promotion*—an activity that does not involve or promote the exclusive or predominant use of an individual company name or logo or brand name.

*Project*—an approach or undertaking made up of one or more activities which, taken together, are intended to achieve a specific market development objective.

*Project Funds*—the funds made available to a Recipient by the Commodity Credit Corporation under an agreement, and authorized for expenditure in accordance with this part.

*Proposal*—an application for funding.

*Recipient*—a U.S. entity receiving financial assistance directly from the Commodity Credit Corporation or Foreign Agricultural Service to carry out a project.

*SRTG*—State Regional Trade Group.

*STRE*—sales and trade relations expenses including meals, receptions, refreshments, checkroom fees, tips, and dining decorations.

*UES*—Unified Export Strategy.

*USDA*—United States Department of Agriculture.

### § 1486.102 Is there a list of eligible emerging market countries?

The World Bank periodically redefines the income limits on upper middle-income economies. Consequently, an absolute list of "emerging market" countries has not been established. However, CCC will provide general guidance on country eligibility in each program announcement.

### § 1486.103 Are regional projects possible under the program?

Projects that focus on regions, such as the Caribbean Basin, rather than individual countries, are eligible for consideration provided such projects target qualifying emerging markets in the specified region. CCC may consider activities which target qualified emerging markets in a specific region, but are conducted in a non-emerging market because of its importance as a central location and ease of access to that region.

## Subpart B—Eligibility, Applications, and Funding

### § 1486.200 What entities are eligible to participate in the program?

To participate in the EMP, U.S. private or government entities must demonstrate a role or interest in the exports of U.S. agricultural commodities or products. Government organizations consist of federal, state, and local agencies. Private entities include nonprofit trade associations, universities, agricultural cooperatives, state regional trade groups, and profit-making entities and consulting businesses.

### § 1486.201 Under what conditions may research and consultant organizations, individuals, or any other for-profit entity apply to the program?

(a) Proposals from research and consulting entities will be considered for funding assistance only with evidence of substantial participation in and financial support by U.S. industry to a proposed project. Such support most credibly is provided in the form of actual monetary contributions to the cost of a project.

(b) For-profit entities shall not use program funds to conduct private business or to promote private self-interests. For-profit entities may not use program funds to supplement the costs of normal day-to-day operations or to promote their own products or services beyond specific uses approved in a given project.

### § 1486.202 Are there any ineligible entities?

Foreign organizations, whether government or private, may participate as

third parties in activities carried out by U.S. entities, but are not eligible for funding assistance from the program.

### § 1486.203 Which commodities/products are eligible for consideration under the program?

All U.S. agricultural commodities/products except tobacco are eligible for consideration. Agricultural product(s) should be comprised of at least 50 percent U.S. origin content by weight, exclusive of added water, to be eligible for funding. Projects which seek support for multiple commodities are also eligible.

### § 1486.204 Are multi-year proposals eligible for funding?

Proposals for projects exceeding 1 year in duration may be considered. If approved, funding for multi-year projects is normally provided 1 year at a time, with commitments beyond the first year subject to interim evaluations intended to assess the progress of the project toward meeting its intended objectives.

### § 1486.205 What types of funding are available under the program?

CCC has established three pools of funding within the EMP—the Central Fund, the Quick Response Marketing Fund, and the Technical Issues Resolution Fund. Each year CCC will inform the public of the process by which interested eligible entities may submit proposals for funding under the Central Fund. Because of the time sensitive nature of issues intended to be addressed, the Quick Response Marketing Fund and the Technical Issues Resolution Fund will be available continuously with no application deadline.

### § 1486.206 What is the Quick Response Marketing Fund?

(a) This fund was established to address priority constraints to market access that arise because of unforeseen events; market conditions in emerging markets are often less predictable than in more developed countries. It allows responsiveness to time-sensitive marketing problems or opportunities, such as a change in an import regime or the removal of a trade embargo; an unexpected or unusual change in the political or financial situation in a country; or a significant change in crop conditions—any of which may have an immediate impact on the access of particular commodities or products to specific markets.

(b) Proposals for the Quick Response Marketing Fund must identify specific market access issues that also face time constraints. Application content, evaluation, and reporting requirements are the same as for the Central Fund.

### § 1486.207 What is the Technical Issues Resolution Fund?

(a) This fund was established to address technical barriers to trade in emerging markets worldwide by providing technical assistance, training, and exchange of expertise. These include plant quarantine, animal health, food safety, and other technical barriers to U.S. exports based on unsound or incomplete scientific information.

(b) Funding priorities are principally those issues that are time sensitive and are strategic areas of longer term interest. Funding decisions are determined primarily through a review process that includes FAS and relevant regulatory agencies. The review is based upon the following criteria:

(1) The activity occurs in an eligible country or region of market priority;

(2) The trade constraint warrants intervention;

(3) The proposed activity is likely to achieve an impact in the short-or long-term;

(4) The Recipient is qualified to undertake the proposed activity;

(5) The budget requested is reasonable and includes leveraged resources;

(6) If applicable, a U.S. domestic constraint or trade issue can be resolved in support of a proposed activity; and

(7) The activity has support from USDA field offices.

(c) Because of the time sensitive nature of the issues intended to be addressed by these funds, proposals, whether private or government, may be submitted at any time during the year. Reviews of proposals are scheduled on a monthly basis. An expedited review may be requested but must be justified.

(d) Application content, evaluation, and reporting requirements are the same as for the Central Fund.

### § 1486.208 How does an entity apply to the program?

CCC will periodically announce that it is accepting proposals for participation in the EMP. All relevant information, including application deadlines (for the Central Fund) and proposal content, will be noted in the announcement, and proposals must be submitted in accordance with the terms and requirements specified in the announcement. CCC may request any additional information it deems necessary from any applicant in order to evaluate properly any proposal.

### § 1486.209 How are program applications evaluated and approved?

(a) *General*. Proposals received by the application deadline stated in the announcement for the Central Fund undergo a multi-phase review by FAS staff and the EMP Advisory Committee to determine qualifications, quality and appropriateness of projects, and reasonableness of project budgets.

(b) *Evaluation criteria*. FAS will consider a number of factors when reviewing proposals, including:

(1) The ability of the entity to provide an experienced U.S.-based staff with knowledge and expertise to ensure adequate development, supervision, and execution of the proposed project;

(2) The entity's willingness to contribute resources, including cash and goods and services of the U.S. industry, with greater weight given to cash contributions (for private sector proposals only);

(3) The conditions or constraints affecting the level of U.S. exports and market share for the agricultural commodity/product;

(4) The degree to which the proposed project is likely to contribute to the development, maintenance, or expansion of U.S. agricultural exports to emerging markets;

(5) Demonstration of how a proposed project will benefit a particular industry as a whole; and

(6) Past program results and evaluations, if applicable.

(7) The following priority technical assistance activities:

(i) Projects and activities which use technical assistance designed specifically to improve market access in emerging markets such as activities intended to mitigate the impact of sudden political events or economic and currency crises in order to maintain U.S. market share;

(ii) Marketing and distribution of value-added products, including new products or new uses. Examples include food service development, market research on potential for consumer-ready foods or new uses of a product, and export feasibility studies.

(iii) Studies of food distribution channels in emerging markets, including infrastructural impediments to U.S. exports; such studies may include cross-commodity activities which focus on problems which affect more than one industry, e.g., grain storage handling and inventory systems development;

(iv) Projects that specifically address various constraints to U.S. exports, including sanitary and phytosanitary issues and other non-tariff barriers;

(v) Assessments and follow-up activities designed to improve country-wide food and business systems, to reduce trade barriers, to increase prospects for U.S. trade and investment in emerging markets, or to determine the potential use for general export credit guarantees;

(vi) Projects that help foreign governments collect and use market information and develop free trade policies that benefit American exporters as well as the target country or countries; and

(vii) Short-term training in agriculture and agribusiness trade that will benefit U.S. exporters, including seminars and training at trade shows designed to expand the potential for U.S. agricultural exports by focusing on the trading system.

(c) *Approval decision*. CCC will approve those applications that it determines best satisfy the criteria and factors specified in paragraph (b) of this section. All decisions regarding the disposition of an application are final.

### § 1486.210 Are there any limits on the funding of proposals?

(a) The EMP is a relatively small program intended primarily to promote access to qualified emerging markets. Its funds are intended for focused

projects with specific activities, rather than expansive concept papers which contain only broad ideas. Large, overly expensive projects (e.g., in excess of approximately $500,000) are rarely appropriate for the program.

(b) CCC will not reimburse 100 percent of the cost of any project undertaken by the private sector. The program is intended to provide appropriate assistance to projects which also have a significant amount of financial contributions from other sources, especially U.S. private industry.

(c) Funding for continuing and substantially similar projects is generally limited to 3 years. After that time, the project is assumed to have proven its viability and, if necessary, should be continued by the Recipient with its own or with alternative sources of funding.

## Subpart C—Program Operations

### § 1486.300 How are applicants notified of decisions on their applications?

FAS will notify each applicant in writing of the final decision on its application. For approvals, letters will contain the notice of approval and any required qualifications or adjustments to the original proposal. For rejections, letters will explain reasons why the proposals were not approved for funding.

### § 1486.301 How is the working relationship established between CCC and the Recipient of program funding?

(a) FAS will send an approval letter followed by a project agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of EMP funding and cost-share contribution requirements. The applicant is authorized to begin implementation of the project as of the date of the approval letter, unless otherwise indicated.

(b) An applicant who accepts the terms and conditions contained in the agreement should so indicate by having the appropriate authorizing official sign the agreement and submit it to the Director, Marketing Operations Staff, FAS, USDA. The applicant may not be reimbursed for approved project expenses until the Recipient's authorizing official and CCC have signed the agreement.

### § 1486.302 Can changes be made to a project once it has been approved?

(a) Approved projects may be modified if circumstances change in such a way that they would likely affect the progress and ultimate success of a project. All requests for project modifications must be made in writing to FAS and must include:

(1) A justification as to why changes to the project as originally designed are needed;

(2) An explanation of the necessary adjustments in approach or strategy;

(3) A description of necessary changes in the project's time line(s); and

(4) Necessary changes to the project's budget (e.g., shifting of budgetary resources from one line item to another in order to accommodate the changes).

(b) Extensions of project time lines must be approved and made by FAS.

### § 1486.303 What specific contracting procedures must be adhered to?

(a) The Recipient has full and sole responsibility for the legal sufficiency of all contracts it may enter into with one or more third parties in order to carry out an approved project and shall assume financial liability for any costs or claims resulting from suits, challenges, or other disputes based on contracts entered into by the Recipient. Neither CCC nor any other agency of the United States Government or any official or employee of CCC or the United States Government has any obligation or responsibility with respect to Recipient contracts with third parties.

(b) Recipients are responsible for ensuring to the extent possible that the terms, conditions, and costs of contracts constitute the most economical and effective use of project funds.

(c) All fees for professional and consulting services paid to third parties in any part with project funds must be covered by written contracts.

(d) A Recipient shall:

(1) Ensure that all expenditures for goods and services in excess of $25 reimbursed by CCC are documented by a purchase order, invoice, or contract;

(2) Ensure that no employee or officer participates in the selection or award of a contract in which such employee or officer, or the employee's or officer's family or partners has a financial interest or gains a financial benefit;

(3) Conduct all contracting in an open manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids, or requests for proposals for procurement of any goods or services shall be excluded from competition for such procurement;

(4) Base each solicitation for professional or consulting services on a clear and accurate description of the requirements for the services to be procured;

(5) Perform some form of fee, price, or cost analysis, such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered fees or prices; and

(6) Document the decision-making process.

## Subpart D—Contributions and Reimbursements

### § 1486.400 What are the rules on cost sharing?

(a) The EMP is intended to complement, not supplant, the efforts of the U.S. private sector. Therefore, no private sector proposal will be considered without the element of cost-share from the participant and/or U.S. partners.

(b) There is no minimum or maximum amount of cost share. The degree of commitment to a proposed project represented by the amount and type of private funding are both used in determining which proposals will be approved. The type of cost share is also not specified, though some contributions are ineligible (§ 1486.402 below). Cost-share may be actual cash invested or professional time of staff assigned to the project. Proposals in which the private sector is willing to commit funds, rather than in-kind items such as staff resources, and those with higher amounts of cost-share, will be given priority consideration.

(c) Cost-sharing is not required for proposals from federal, state, or local government agencies. It is mandatory from all other eligible entities, even when they are party to a joint proposal with a government agency.

(d) Contributions from federal, state, or local government agencies or programs may not be counted toward the cost share requirement. Similarly, contributions from foreign (non-U.S.) organizations may not be counted toward the cost share requirement, but may be included in the total cost of the project.

(e) An activity that is initiated by FAS, and undertaken by an entity at the request of FAS, may be exempted from the contribution requirement. This determination is made at the discretion of FAS.

### § 1486.401 What cost share contributions are eligible?

(a) Eligible contributions are those expenses that:

(1) Have not been or will not be reimbursed by any other source outside of the Recipient or other participating U.S. entity;

(2) Are incurred during the period covered by the project agreement;

(3) Are directly related to activities necessary to implement an approved project; and

(4) Are not proscribed under § 1486.402.

(b) Contributions must be included in a project's line item budget.

### § 1486.402 What are ineligible contributions?

(a) The following are not eligible as contributions:

(1) Normal operating expenses and other costs not directly related to the project;

(2) Any portion of salary or compensation of an individual who is the focus of a promotional activity;

(3) Depreciation, e.g., office equipment;

(4) The cost of insuring articles owned by private individuals;

(5) The cost of product development or product modifications;

(6) Slotting fees or similar sales expenditures;

(7) Funds, services, capital goods, or personnel provided by any U.S. government agency;

(8) Capital investments made by a third party, such as permanent structures, real estate, and the purchase of office equipment and furniture;

(9) The value of any services generated by a third party which involve no expenditure by the Recipient or third party, e.g., free publicity;

(10) The cost of developing any application/proposal for EMP funding;

(11) Costs included as contributions for any other federally-assisted project or program;

(12) Membership fees in clubs and social or professional organizations; and

(13) Any expenditure made prior to approval of an EMP-funded project.

(b) The Deputy Administrator shall determine, at his or her discretion, whether any cost not expressly listed in this section may be included as an eligible contribution.

### § 1486.403 What expenditures may CCC reimburse under the program?

(a) A Recipient may seek reimbursement for an expenditure if:

(1) The expenditure is reasonable and is specified in the project budget in furtherance of an approved activity; and

(2) The Recipient has not been or will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, CCC will reimburse, in whole or in part, the cost of:

(1) Salaries and benefits of the Recipient's existing personnel or any other participating entity that are assigned to EMP-funded projects; however, reimbursement is limited to:

(i) The actual daily rate paid by the Recipient for the employee's salary or the daily rate of a General Schedule U.S. Government employee, GS–15/Step 10 in effect during the calendar year in which the project or activity is approved for funding, whichever is less;

(ii) The actual assigned time of the employee to the project; and

(iii) Benefits at a maximum rate of 30 percent of the existing salary of the employee, prorated to the time assigned to the project. In addition, reimbursement for an employee's time spent on an EMP-funded project must be in lieu of compensation from the Recipient or any other participating entity.

(2) Consulting fees for professional services; however, reimbursement for consulting fees is limited to the daily rate of a General Schedule U.S. Government employee, GS–15/Step 10 in effect during the calendar year in which the project or activity is approved for funding. Reimbursement is authorized only for actual days worked and is not authorized for travel and rest days. Benefits are not reimbursable.

(3) STRE, including breakfast, lunch, dinner, and refreshments when part of an approved overseas trade activity; miscellaneous courtesies such as checkroom fees, taxi fares, and tips; and representation expenses such as the costs of social events or receptions that are primarily attended by foreign officials, and which are held at foreign venues. Such expenses must conform to the American Embassy representational funding guidelines as the standard for judging the appropriateness of STRE event costs. STRE incurred in the United States is not authorized for reimbursement, but may be counted as a cost-share contribution to the project.

(4) Travel expenses, subject to the following:

(i) Air travel, limited to the full-fare economy class rate and must comply with the Fly America Act, 49 U.S.C. App. 1517. The CCC will not reimburse any portion of air travel in excess of the full fare economy rate or when the participant fails to notify the Counselor/Attache in the destination country in advance of the travel unless the Deputy Administrator determines it was impractical to provide such notification.

(ii) Per diem, limited to the allowable rate for each domestic or foreign locale (41 CFR Chapter 301). Expenses in excess of the authorized per diem rates may be allowed in special or unusual circumstances (41 CFR Chapter 301, subpart D), and must be approved in advance.

(iii) All other expenses while in travel status must conform to U.S. Federal Travel Regulations (41 CFR Chapters 301 and 304).

(5) Direct administrative costs.

(6) Indirect costs not identified as direct costs but which are necessary to the implementation of a project. Indirect costs must be specified to be eligible for reimbursement. Indirect costs incurred by private entities (other than those identified below) may be reimbursed up to a maximum of 10 percent of the EMP funded portion of the project budget, excluding indirect costs. Market development cooperators, state regional trade groups, for-profit entities, and government Recipients (excluding FAS) may not be reimbursed for indirect costs. Indirect costs are not reimbursable for any project funded under the Technical Issues Resolution Fund or the Quick Response Marketing Fund.

(7) Rental costs for equipment necessary to carry out approved projects. Equipment rentals must be returned by the Recipient to the supplier in accordance with the lease agreements, but in no case later than 90 calendar days from the completion date of the project.

(8) Procuring samples of specific commodities or agricultural products, which are appropriate and necessary to the success of a technical assistance activity.

### § 1486.404 What expenditures are not eligible for program funding?

(a) CCC will not reimburse expenditures made prior to approval of a Recipient's proposal, unreasonable expenditures, or any cost of:

(1) Branded product promotions—in-store, restaurant advertising, labeling, etc.;

(2) Administrative and operational expenses for trade shows;

(3) Advertising;

(4) Preparation and printing of magazines, brochures, flyers, posters, etc., except in connection with specific approved activities such as training;

(5) Design, development, and maintenance of Internet Web sites;

(6) Purchase and depreciation of equipment, e.g., office equipment or other fixed assets;

(7) Subsidizing or otherwise providing funds for graduate programs at colleges and/or universities (salaries or fees for individual students who are directly assigned to specific project activities appropriate to their backgrounds may be covered on a pro-rated basis);

(8) Subsidizing normal, day-to-day operating costs of an entity; exception: indirect costs incurred during implementation of an approved project;

(9) Honoraria for speakers;

(10) Costs of product research or new product development;

(11) Costs of developing technical assistance proposals submitted to the program;

(12) Refundable deposits or advances;

(13) STRE expenses within the United States;

(14) All costs related to the shipping, over land and sea, of commodity samples;

(15) Expenses, fees, fines, settlements, or claims resulting from suits, challenges, or disputes emanating from contractual terms, conditions, provisions, and related formalities;

(16) Legal fees, including fees and costs associated with trade disputes;

(17) Real estate costs other than allowable costs for office space whose use is assigned specifically to a project funded by the EMP; and

(18) Any expenditure that has been or will be reimbursed by any other source.

(b) The Deputy Administrator may determine whether any cost not expressly listed in this section will be reimbursed.

### § 1486.405 How are Recipients reimbursed for project expenditures?

(a) After implementation of an EMP project for which CCC has agreed to provide funding, Recipients may submit claims for reimbursement of the expenses incurred to the extent CCC has agreed to pay for such costs. Reimbursement for approved project expenses is limited to 85 percent of the amount specified in the project agreement. The Recipient may be reimbursed for the remaining 15 percent of the funds after the final performance report containing the information required by the agreement is submitted to and approved by FAS.

(b) A format for reimbursement claims is available from the Marketing Operations Staff, FAS, USDA.

(c) Final reimbursement claims must be made no later than 90 days after the completion date of the project, and are

subject to a complete final performance report acceptable to FAS.

(d) Any duplicate payment or overpayment made by CCC shall be returned by the Recipient promptly after discovery of the overpayment by the Recipient or within 30 days after notification by FAS, either by submitting a check made payable to the Commodity Credit Corporation and referencing the applicable project, or by offsetting as a credit on the next reimbursement claim. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

### § 1486.406 Will CCC make advance payments to Recipients?

(a) *Policy*. In general, CCC operates the EMP on a cost reimbursable basis.

(b) *Exception*. Upon request, CCC may make advance payments to a Recipient against an approved project budget. Up to 40 percent of the approved project budget may be provided as an advance, either at one time or in incremental payments. Advances should be limited to the minimum amounts needed and requested as close as is administratively feasible to the actual time of disbursement by the Recipient. Reimbursement claims will be used to offset advances. Recipients shall deposit and maintain advances in insured, interest-bearing accounts.

(c) *Refunds due CCC*. A Recipient shall expend all advances within 90 calendar days after the date of disbursement by CCC. A Recipient shall return all interest earned by advances plus any unexpended portion of the advance within 90 calendar days after the date of disbursement by CCC by submitting a check payable to CCC. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

## Subpart E—Reporting, Evaluation, and Compliance

### § 1486.500 What are the reporting requirements of the program?

(a) *Performance Reports*. (1) Recipients are required to submit regular progress reports in accordance with the project agreement. Quarterly progress reports are required for all projects with a duration of 1 year or longer. Projects of less than 1 year in duration generally require a mid-term report.

(2) Final performance reports must be submitted no later than 90 days after completion of the project, both electronically (preferably in PDF format) and in hard copy.

(3) Reporting requirements and formats for both quarterly progress reports and final performance reports are specified in the project agreement between CCC and the Recipient entity.

(4) All final performance reports will be made available to the public.

(b) *Financial Reports*. Final financial reports must be submitted no later than 90 days after completion of the project. Such reports must provide a final accounting of all project expenditures by cost category, and include the accounting of actual contributions made to the project by the Recipient and all other participating entity or entities.

### § 1486.501 What is the rule on notifying field offices of international travel?

The Recipient must advise the Agricultural Counselor(s) or Attache(s) in the country or countries of any planned visits by the Recipient or its consultants or other participants to such country or countries under terms of its agreement. Failure to notify the Counselor/Attache may result in disallowance of the travel expenditures.

### § 1486.502 How is project effectiveness measured?

Project evaluations may be carried out by FAS at its option with or without Recipients. FAS may also seek outside expertise to conduct or participate in evaluations.

### § 1486.503 How is program compliance monitored?

(a) The CRS, FAS, performs periodic on-site reviews of Recipients to ensure compliance with this part, applicable federal regulations, and the terms of the project agreements. Program funds spent inappropriately or on unapproved activities must be returned to CCC. The CRS will review contributions from Recipients for compliance with project budgets as approved and specified in the agreements.

(b) The Director, CRS, will notify a Recipient through a compliance report when, in the opinion of the Director, CRS, it appears that CCC is entitled to recover funds from that Recipient. The report will state the basis for this action.

### § 1486.504 How does a Recipient respond to a compliance report?

(a) A Recipient shall, within 60 days of the date of the compliance report, submit a written response to the Director, CRS. The Director, CRS, at his or her discretion, may extend the period for response up to an additional 30 days. The response shall include:

(1) Repayment of any funds determined to be due to CCC;

(2) Submission of documentation or evidence of any other required action; or

(3) A request for reconsideration of any finding and the supporting justification.

(b) If after review of the compliance report and response, the Director, CRS determines that the Recipient owes money to CCC, the Director, CRS, will so inform the Recipient and provide a detailed basis for the decision. The Recipient has 30 days from the date of the Director's, CRS, determination to submit any money owed to CCC or to request reconsideration.

(c) If the Recipient does not respond to the compliance report within the required time period, the Director, CRS, may initiate action to collect any amount owed to CCC pursuant to 7 CFR Part 1403, Debt Settlement Policies.

### § 1486.505 Can a Recipient appeal the determinations of the Director, CRS?

(a) A Recipient may appeal the determinations of the Director, CRS, to the Deputy Administrator, CMP. The request must be in writing and be submitted to the Office of the Deputy Administrator, CMP, within 30 days following the date of the original determination. The Recipient may request a hearing.

(b) If the Recipient submits its appeal and requests a hearing, the Deputy Administrator, or the Deputy Administrator's designee, will set a date and time, generally within 60 days. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the Recipient bears the cost of the transcript; however, the Deputy Administrator or designee may have a transcript prepared at FAS's expense.

(c) The Deputy Administrator or the Deputy Administrator's designee will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after submission of the appeal, hearing, or receipt of any transcript, whichever is later. The determination of the Deputy Administrator will be the final determination of FAS. The Recipient must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by the Deputy Administrator.

### § 1486.506 When will a project be reviewed?

Any project or activity funded under the program is subject to review or audit at any time during the course of implementation or after the completion of the project.

### § 1486.507 What is the effect of failing to make required contributions?

A Recipient's contribution requirement is specified in the project agreement. If a Recipient fails to contribute the total specified in the agreement, the difference between the amount contributed and the total must be repaid to the CCC in U.S. dollars. If a Recipient is reimbursed by CCC for less than the amount of funds approved in the agreement, then the final cost share shall equal, on a percentage basis, the original ratio of private contributions to the authorized EMP funding level.

### § 1486.508 How long must Recipients maintain original project records?

Each Recipient shall maintain all original records and documents relating to the project for 3 calendar years following the end of the project's completion. All documents and records related to the project, including records pertaining to contractors, shall be made available upon request.

### § 1486.509 Are Recipients allowed to charge fees for specific activities in approved projects?

Reasonable activity fees or registration fees, if identified as such in a project budget, may be charged for projects approved for program funding. Income or refunds generated from an activity, however, for which the expenditures have been wholly or partially reimbursed, shall be repaid by submitting a check payable to CCC or offsetting the Recipient's reimbursement claim. Any activity fees charged must be used to offset activity expenses. Such fees may not be used as profit or counted as cost-share. The intent to charge a fee must be part of the original proposal, along with an explanation of how such fees are to be used.

### § 1486.510 What is the policy regarding disclosure of program information?

(a) Documents submitted to CCC by Recipients are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, 7 CFR Part 1, Subpart A—Official Records, and specifically 7 CFR 1.11, Handling Information from a Private Business.

(b) Progress reports, final performance reports, and the results of any research or other activity conducted by a Recipient under an agreement, shall be the property of the U.S. Government.

### § 1486.511 What is the general policy regarding ethical conduct?

(a) The Recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent and any member of his or her immediate family, his or her partner, or an entity which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the Recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to sub-agreements. However, Recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Recipient.

(b) A Recipient shall conduct its business in accordance with the laws and regulations of the country in which an activity is carried out.

### § 1486.512 Has the Office of Management and Budget reviewed the paperwork and record keeping requirements contained in this part?

The paperwork and record keeping requirements imposed by this part have been submitted to the Office of Management and Budget (OMB) for review and under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has assigned control number 0551–0043 for this information collection.

## PART 1487—TECHNICAL ASSISTANCE FOR SPECIALTY CROPS

Sec.

1487.1 What special definitions apply to the TASC program?
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1487.7 How are agreements formalized?
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AUTHORITY: Sec. 3205 of Pub. L. 107–171.

SOURCE: 67 FR 57327, Sept. 10, 2002, unless otherwise noted.

### § 1487.1 What special definitions apply to the TASC program?

For purposes of this part, the following definitions apply:

*CCC*—Commodity Credit Corporation.

*Eligible Organization*—Any U.S. organization, including, but not limited to, U.S. government agencies, State government agencies, non-profit trade associations, universities, agricultural cooperatives, and private companies.

*FAS*—Foreign Agricultural Service, United States Department of Agriculture.

*Participant*—An entity which has entered into a TASC agreement with the CCC.

*Specialty crop*—all cultivated plants, or the products thereof, produced in the United States, except wheat, feed grains, oilseeds, cotton, rice, peanuts, sugar, and tobacco.

*TASC*—Technical Assistance for Specialty Crops.

*United States*—the fifty states, the District of Columbia, and Puerto Rico.

[67 FR 57327, Sept. 10, 2002, as amended at 68 FR 42564, July 18, 2003]

### § 1487.2 What is the TASC program?

Under the TASC program, CCC, an agency and instrumentality of the United States within the Department of Agriculture, provides funds to eligible organizations, on a grant basis, to implement activities that are intended to address a sanitary, phytosanitary, or related technical barrier that prohibit or threaten the export of U.S. specialty crops that are currently available on a commercial basis. The TASC program is intended to benefit the represented industry rather than a specific company or brand. This program is administered by FAS.

### § 1487.3 What activities are eligible?

(a) *General.* In order to be eligible for funding under the TASC program, activities must address sanitary, phytosanitary, or technical barriers to export of specialty crops. Examples of expenses that CCC may agree to cover under the TASC program include, but are not limited to: initial pre-clearance programs, export protocol and work plan support, seminars and workshops, study tours, field surveys, development of pest lists, pest and disease research, database development, reasonable logistical and administrative support, and travel and per diem expenses.

(b) *Location of activities.* Eligible projects may take place in the United States or abroad.

### § 1487.4 Are there any limits on the scope of proposals?

(a) *Funding cap.* Proposals which request more than $500,000 of CCC funding in a given year will not be considered.

(b) *Length of activities.* Funding will not be provided for projects that have received TASC funding for 5 years. The 5 years do not need to be consecutive.

(c) *Target countries.* Proposals may target all eligible export markets, including single countries or reasonable regional groupings of countries.

(d) *Multiple proposals.* Applicants may submit multiple proposals, but no participant may have more than five approved projects underway at any given time.

[74 FR 22090, May 12, 2009]

### § 1487.5 What is the process for submitting proposals?

(a) *General.* Periodically the CCC will inform the public of the process by which interested eligible organizations may submit proposals for TASC program funding. This announcement will, among other things, include information on any deadlines for submitting proposals and the address of the office to which the proposals should be sent. The CCC also may announce the availability of a Quick Response Fund within the TASC program. Proposals submitted under any form of quick response process may be submitted at any time during the year but must meet the basic requirements of the program and any specific requirements of that particular process. Organizations interested in participating in the TASC program may submit their proposals electronically or in paper copy. Although no specific format is required, a sample format for proposals is available from the address provided in this rule.

(b) *Contents of proposals.* TASC proposals must contain complete information about the proposed projects, including, at a minimum, the following:

(1) Organizational information, including:

(i) Organization's name, address, Chief Executive Officer (or designee), and Federal Tax Identification Number (TIN);

(ii) Type of organization;

(iii) Name, telephone number, fax number, and e-mail address of the primary contact person;

(iv) A description of the organization and its membership; and

(v) A description of the organization's experience in technical assistance projects, including activities involved and project results.

(2) Project information, including:

(i) A brief project title;

(ii) The amount of funding requested and a justification for why federal funding is needed;

(iii) Beginning and ending dates for the proposed project;

(iv) A market assessment, including a brief description of the specific export barrier to be addressed by the project;

(v) The goals of the project, and the expected benefits to the represented industry;

(vi) A description of the activities planned to address the export barrier;

(vii) An itemized list of all estimated costs associated with the project for which reimbursement will be sought; and

(viii) Information indicating all financial and in-kind support to the proposed project, and the resources to be contributed by each entity that will contribute to the project's implementation. This may include the organization that submitted the proposal, private industry entities, host governments, foreign third parties, CCC, FAS, or other Federal agencies. Support may include cash, goods, and services. Although highly encouraged, financial support from the participant is not required.

(3) Export information, including:

(i) Performance measures for three years, beginning with the year that the project would begin, which will be used to measure the effectiveness of the project;

(ii) A benchmark performance measure for the year prior to the year that the project would begin; and

(iii) The viability of long-term sales to this market.

[67 FR 57327, Sept. 10, 2002, as amended at 68 FR 44564, July 18, 2003]

### § 1487.6 What are the criteria for evaluating proposals?

(a) *Evaluation criteria.* FAS will use the following criteria in evaluating proposals:

(1) The nature of the specific export barrier and the extent to which the proposal is likely to successfully remove, resolve, or mitigate that barrier;

(2) The potential trade impact of the proposed project on market retention, market access, and market expansion, including the potential for expanding commercial sales in the targeted market;

(3) The completeness and viability of the proposal;

(4) The ability of the organization to provide an experienced staff with the requisite technical and trade experience to execute the proposal;

(5) The extent to which the proposal is targeted to a market in which the United States is generally competitive;

(6) The cost of the project and the amount of other resources dedicated to the project, including cash and goods and services of the U.S. industry and foreign third parties;

(7) The degree to which time is essential to addressing specific export barriers;

(8) In cases where the CCC receives multiple proposals from different applicants which address essentially the same barrier, the nature of the applicant organization will be taken into consideration, with a greater weight given to those organizations with the broadest base of producer representation.

(b) *Evaluation process.* FAS will review all proposals for eligibility and completeness and will evaluate each proposal against the factors described in paragraph (a) of this section. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal, and submit the proposals and funding recommendations to appropriate officials within FAS for decision. FAS may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. government experts in evaluating the merits of a proposal.

[67 FR 57327, Sept. 10, 2002, as amended at 68 FR 42564, July 18, 2003; 74 FR 22090, May 12, 2009]

### § 1487.7 How are agreements formalized?

Following the approval of a proposal, the CCC will enter into a written agreement with the organization that submitted the proposal. This program agreement will incorporate the proposal as approved by the FAS, include a maximum dollar amount that may be reimbursed (the funding level), and identify terms and conditions under which the CCC will reimburse certain costs of the project. Program agreements also will outline any specific responsibilities of the participant, including, but not limited to, the timely and effective implementation of program activities and the submission of a written report(s), on no less than an annual basis, which evaluates the TASC project using the performance measures presented in the approved proposal.

[68 FR 42564, July 18, 2003]

### § 1487.8 How are payments made?

(a) *Reimbursement.* (1) Following the implementation of a project for which the CCC has agreed to provide funding, a participant may submit claims for reimbursement of eligible expenses to the extent that the CCC has agreed to pay such expenses. Any changes to approved activities must be approved in writing by the FAS before any reimbursable expenses associated with the change can be incurred. A participant will be reimbursed after the CCC reviews the claim and determines that it is complete.

(2) All claims for reimbursement must be received no later than 90 calendar days following the expiration or termination date of the program agreement. For program agreements which extend beyond twelve months, all claims for reimbursement must be received no later than 90 calendar days following the next anniversary of the effective date of the agreement.

(3) Participants shall maintain complete records of all program expenditures, identified by TASC agreement number, program year, country or region, activity number and cost category. Such records shall be accompanied by original documentation which supports the expenditure and shall be made available to the FAS upon request.

(4) Participants shall maintain all records and documents relating to TASC projects, including the original documentation which supports reimbursement claims, for a period of 3 calendar years following the expiration or termination date of the program agreement. Such records and documents will be subject to verification by FAS and shall be made available upon request to authorized officials of the U.S. Government. FAS may deny a claim for reimbursement if the claim is not supported by acceptable documentation.

(5) In the event that a reimbursement claim is overpaid or is disallowed after payment already has been made, the participant shall return the overpayment amount or the disallowed amount to the CCC within 30 days after realizing the overpayment or receiving notification of the overpayment or disallowed amount.

(b) *Advances.* Participants may request advances of funds, not to exceed 85 percent of the funding approved in any given program year. All advanced funds must be either fully expended or the balance returned by check made payable to the CCC no later than the 90th calendar day following the date of disbursement of the advance to the participant. Upon the expenditure of advance funds, participants must submit reimbursement claims to offset the advance charged to them.

(c) *Interest.* Participants shall deposit and maintain advanced funds in insured, interest-bearing accounts. Interest earned on outstanding advances must be returned by check made payable to the CCC at the time the advance is either fully expended or itself returned.

[68 FR 42564, July 18, 2003, as amended at 74 FR 22090, May 12, 2009]

## PART 1488—FINANCING OF SALES OF AGRICULTURAL COMMODITIES

### Subpart A—Financing of Export Sales of Agricultural Commodities from Private Stocks Under CCC Export Credit Sales Program (GSM–5)

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AUTHORITY: Sec. 5(f), 62 Stat. 1072 (15 U.S.C. 714c) and sec. 4(a), 80 Stat. 1538, as amended by sec. 101, 92 Stat. 1685 (7 U.S.C. 1707a(a)).

## Subpart A—Financing of Export Sales of Agricultural Commodities From Private Stocks Under CCC Export Credit Sales Program (GSM–5)

SOURCE: 42 FR 10999, Feb. 25, 1977, unless otherwise noted.

GENERAL

### § 1488.1 General statement.

(a) Except as otherwise provided in this paragraph (a), the regulations and the supplements thereto contained in this subpart A supersede the regulations and supplements revised April 1975, and set forth the terms and conditions governing the CCC Export Credit Sales Program (GSM–5). The maximum financing period shall be three years. The regulations and supplements as revised in April 1971 and April 1975, shall remain in effect for all transactions under financing approvals issued thereunder.

(b) Subject to the terms and conditions set forth in this subpart A, CCC will purchase for cash, after delivery, the exporter's account receivable arising from the export sale.

(c) The provisions of Pub. L. 83–664 are not applicable to shipments under this program.

(d) The regulations contained in this subpart A may be supplemented by such additional terms and conditions, applicable to specified agricultural commodities, and, to the extent that they may be in conflict or inconsistent with any other provisions of this subpart A, such additional terms and conditions shall prevail.

### § 1488.2 Definition of terms.

As used in this subpart A and in the forms and documents related thereto, the following terms shall have the meanings assigned to them in this section:

(a) *Account receivable* means the contractual obligation of the foreign importer to the exporter for the port value of the commodity delivered for which the exporter is extending credit to the importer. The account receivable shall be evidenced by documents, in form and substance satisfactory to CCC, establishing the contractual obligation between the U.S. exporter and the foreign importer. The account receivable shall provide for (1) payment of principal and interest in U.S. dollars in the United States, (2) interest in accordance with § 1488.14, and (3) acceleration of payment thereunder in accordance with these regulations.

(b) *Agency or branch bank* means an agency or branch of a foreign bank, supervised by New York State banking authorities or the banking authorities of any other State providing similar supervision, and approved by the Controller, CCC.

(c) *Assistant Sales Manager* means the Assistant Sales Manager, Commercial

Export Programs, Office of the General Sales Manager.

(d) *Bank obligation* means an obligation, acceptable to CCC, of a U.S. bank, a foreign bank, an agency or branch bank, to pay to CCC in U.S. dollars the amount of the account receivable, plus interest in accordance with §1488.14. The bank obligation shall be in the form of an irrevocable letter of credit issued by a U.S. bank or a branch bank, or confirmed or advised by a U.S. bank or any agency or branch bank in accordance with §1488.12. The bank obligation shall provide for payment under the terms and conditions of the financing agreement and shall be payable not later than the date of expiration of the financing period or of the bank obligation, whichever occurs first, if payment is not received from other sources.

(e) *CCC* means the Commodity Credit Corporation, U.S. Department of Agriculture.

(f) *Carrying charges* means storage, insurance, and interest charges involved in the cost of storing the commodity before delivery as provided for in the sales contract, and other incidental costs as may be approved by the Assistant Sales Manager.

(g) *Commercial risk* means risk of loss due to any cause other than specified as noncommercial risk in paragraph (u) of this section.

(h) *Date of delivery* means the onboard date of the ocean bill of lading, or the date of an airway bill, or, if exported by rail or truck, the date of entry shown on an authenticated landing certificate or similar document issued by an official of the government of the importing country. If delivery is before export, the date of delivery means (1) the date(s) of the warehouse receipt(s), or other evidence acceptable to CCC, covering the commodity in a warehouse acceptable to CCC, or (2) the onboard carrier (truck, rail car or lash or seabee barge) date of a through bill of lading covering commodities in a container or a lash or seabee barge at a U.S. inland or coastal point.

(i) *Date of sale* means the earliest date the exporter has knowledge that a contractual obligation exists with the foreign buyer under which a firm dollar and cent price has been established or a mechanism to establish the price has been agreed upon.

(j) *Delivery* means the delivery required by the export sale contract to transfer to the importer full or conditional title to the agricultural commodity. Delivery before export may be (1) in a warehouse in the United States acceptable to CCC by issuance or transfer of the warehouse receipt to the importer, or (2) f.a.s. or f.o.b. U.S. inland or coastal loading point, if the commodity is loaded in a container on a truck or rail car, or in a lash or seabee barge for shipment to a point of export under a through bill of lading. Delivery at point of export shall be f.a.s. or f.o.b. export carrier at U.S. ports, at U.S. airports, at U.S. border points of exit or, if transshipped through Canada, at ports on the Great Lakes or the St. Lawrence River.

(k) *Eligible commodities* means agricultural commodities, including eligible cotton, produced in the United States and designated as eligible for export under CCC's Export Credit Sales Program in a USDA announcement. Commodities which have been purchased from CCC are eligible for export as private stocks. Exports of commodities pursuant to any CCC barter contract, Pub. L. 480 or AID agreement, or direct loan by the Export-Import Bank are not eligible for financing under this program. Commodities delivered prior to CCC receiving the sale registration request in accordance with §1488.4 are not eligible for financing under this program unless such financing is determined by the Vice President, CCC, or the Assistant Sales Manager, to be in the interest of CCC.

(l) *Eligible cotton* means Upland and Extra Long staple cotton grown in the United States: *Provided, however*, That reginned or repacked cotton, as defined in regulations of the U.S. Department of Agriculture under the U.S. Cotton Standards Act (7 CFR 28.40), by-products of cotton such as cotton mill waste, motes, and linters, and any cotton that contains any by-products of cotton are not eligible for export financing hereunder. CCC's determination as to the eligibility of cotton shall be final.

(m) *Eligible destination* means the country which is named in the financing agreement and which meets the licensing requirements of the U.S. Department of Commerce.

(n) *Eligible exporter* or *exporter* means a person (1) who is engaged in the business of buying or selling commodities and for this purpose maintains a bona fide business office in the United States, its territories or possessions, and has someone on whom service of judicial process may be had within the United States, (2) who is financially responsible, and (3) who is not suspended or debarred from contracting with or participating in any program financed by CCC on the date of issuance of the financing approval.

(o) *OGSM* means the Office of the General Sales Manager, U.S. Department of Agriculture.

(p) *Financing agreement* means the exporter's request for a sale registration as approved by the Assistant Sales Manager, including the terms and conditions of the regulations in effect on the date of approval.

(q) *Financing period* means the number of months over which repayment is to be made. Such period shall start on the date of delivery or the weighted average delivery date of the commodities to be exported under the financing agreement, and shall expire on the expiration of the bank obligation or the specified period over which repayment is to be made, whichever occurs first.

(r) *Foreign bank* means a bank which is not a U.S. bank or an agency or branch bank, and includes a foreign branch of a U.S. bank.

(s) *Foreign importer* or *importer* means the foreign buyer who purchases the commodities to be exported under a financing agreement and executes the documents evidencing the account receivable assigned to CCC.

(t) *GSM–5* means the regulations contained in this subpart A, and supplements thereto, setting forth the terms and conditions governing the CCC Export Credit Sales Program.

(u) *Noncommercial risk* means risk of loss due to (1) inability of the foreign bank through no fault of its own to convert foreign currency to dollars, or (2) non-delivery into the eligible destination of the commodity covered by a financing agreement through no fault of the foreign bank or importer or exporter because of the cancellation by the government of the eligible destination of previously issued valid authority to import such shipment into the eligible destination or because of the imposition of any law or of any order, decree, or regulation having the force of law, which prevents the import of such shipment into the eligible destination, or (3) inability of the foreign bank to make payment due to war, hostilities, civil war, rebellion, revolution, insurrection, civil commotion, or other like disturbance occurring in the eligible destination, expropriation, or confiscation, or other like action by the government of the eligible destination country, or (4) failure of the foreign bank to make payment for any reason if it is an instrumentality of or is wholly owned by the foreign government.

(v) *Port value* means the net amount of the exporter's sales price of the commodity to be exported under the financing agreement, (1) basis f.a.s. or f.o.b. export carrier at U.S. ports, at U.S. border points of exit, at U.S. airports if shipped by air, or, if transshipped through Canada at ports on the Great Lakes, or on the St. Lawrence River, or (2) basis U.S. warehouse for commodities delivered to such warehouse before export, or (3) basis f.a.s. or f.o.b. U.S. inland or coastal loading point for commodities delivered before export under through bill of lading. The port value shall not include ocean freight for a c. & f. sale or ocean freight and marine and war risk insurance for a c.i.f. sale but may include carrying charges as provided for in the sales contract. The net amount of the exporter's sales price means the exporter's contract price for the commodities, on the basis stated above, less any payments made to the exporter and less any discounts, credits, or allowances by the exporter.

(w) *Sale* means a contract to sell on credit U.S. agricultural commodities to be financed under GSM–5.

(x) *United States* means the 50 States, the District of Columbia, and Puerto Rico.

(y) *U.S. bank* means a bank organized under the laws of the United States, a State, or the District of Columbia.

(z) *USDA announcement* means an announcement published monthly by the U.S. Department of Agriculture (USDA), and which includes the list of eligible commodities and interest rates under GSM–5.

(aa) *Vice President, CCC* means the Vice President who is the General Sales Manager, Office of the General Sales Manager.

[42 FR 10999. Feb. 25, 1977, as amended at 42 FR 30833, June 17, 1977; Amdt. 5, 43 FR 25992, June 16, 1978]

FINANCING EXPORT SALES

### § 1488.3 General.

When considering the extension of CCC credit for the purpose of financing agricultural commodities, CCC will take into account the extent to which CCC credit financing will:

(a) Permit U.S. exporters to meet competition from other countries.

(b) Prevent a decline in U.S. commercial export sales.

(c) Substitute commercial dollar sales for sales made pursuant to Pub. L. 480 or other concessional programs.

(d) Result in a new use of the agricultural commodity in the importing country.

(e) Permit expanded consumption of agricultural commodities in the importing country and thereby increase total commercial sales of agricultural commodities to the importing country.

### § 1488.4 Submission of requests for sale registrations.

(a) An eligible exporter shall submit a request for a sale registration for financing to the office specified in § 1488.22.

(b) Requests for sale registrations shall be in writing. If such a request is made by telephone, it must be confirmed by letter or wire.

(c) The total amount requested to be registered under a sale shall not exceed the sale contract value, including the upward tolerance, if any.

(d) Requests for sale registration shall incorporate by reference all terms and conditions of GSM–5. The following information shall also be included in the exporter's request for a sale registration:

(1) The name, class, grade, or quality, as applicable, and quantity of the commodity to be exported.

(2) The country of destination.

(3) The port value of the commodity to be exported and the sale contract tolerance, if applicable.

(4) The date of sale and exporter's sale number.

(5) The date of delivery or the period for delivery and the month in which application for payment will be submitted.

(6) The financing period.

(7) Whether the bank obligation assuring payment of the account receivable will be issued by a U.S. bank, branch bank, or foreign bank. If it will be issued by a foreign bank, its name and address, and the name of the confirming U.S. bank, branch bank, or agency bank (if approved as provided in § 1488.12b), and the percentage of confirmation.

(8) The name and address of the foreign importer.

(9) If delivery of the commodity to be exported is before export in a warehouse, the name and address of the warehouse to which delivery is to be made.

(10) If the commodity will be sold through an intervening purchaser, the name and address of the intervening purchaser, and a statement that the sale of the commodity is or will be conditioned on its resale by the intervening purchaser and that the commodity will be shipped directly to the foreign importer in the destination country specified in paragraph (d)(2) of this section pursuant to a contract in which the foreign importer agrees to pay the U.S. exporter the amount to be financed in accordance with the terms of GSM–5 financing agreement.

(11) Any additional information as determined by CCC.

[42 FR 10999, Feb. 25, 1977, as amended by Amdt. 5, 43 FR 25992, June 16, 1978]

### § 1488.5 Acceptance of sale registrations.

(a) Upon receiving a request for a sale registration complying with the applicable provisions of this subpart,

the Assistant Sales Manager may approve the registration of the sale. If approved, the exporter will be notified in writing of the financing agreement number which will constitute notice that the sale is registered and eligible for financing.

(b) [Reserved]

(c) CCC reserves the right to reject any and all requests for sale registration.

(d) The registration of a sale shall create a financing agreement between the exporter and CCC which shall consist of the exporter's request for a sale registration, CCC's acceptance of the sale registration, the applicable terms and conditions of this subpart, including amendments and supplemental announcements hereunder which are in effect on the date of approval.

(e) The financing agreement may contain such terms and conditions, not inconsistent with GSM–5, as are deemed necessary in the interest of CCC.

(f) An exporter shall promptly notify the Assistant Sales Manager when he is unable to fulfill his obligations under any sale registered with CCC.

[42 FR 10999, Feb. 25, 1977, as amended by Amdt. 6, 43 FR 29933, July 12, 1978]

### § 1488.6 Amendments to financing agreement.

The financing agreement may be amended provided such amendment is in conformity with GSM–5 at the time of amendment and is determined to be in the interest of CCC. Amendments may include extension of the period for delivery or the period for export, and change in the interest rate. After the commodity has been delivered, CCC will consider requests to increase the amount of the sale registration value for any quantity within the tolerance in the sales contract and for carrying charges provided such requests relate to the same sale as originally registered with CCC.

### § 1488.7 Expiration of period(s) for delivery and/or export.

(a) Unless delivery by the exporter to the importer is made within such period as may be provided in the financing agreement or any amendment thereof, or under paragraph (b) of this section, the financing agreement will no longer be valid.

(b) If the Assistant Sales Manager determines that delay in delivery was due solely to causes without the fault or negligence of the exporter, the period for delivery may be extended by CCC by the period of such delay.

(c) If delivery is made before export under the terms of the financing agreement, failure to export within the period specified therefor in the financing agreement shall constitute a breach of the financing agreement. In such case, if full payment under the bank obligation or account receivable has not been received, the account receivable and the bank obligation shall, at the option of the Assistant Sales Manager, become immediately due and payable, and liquidated damages shall be payable in accordance with § 1488.11.

DOCUMENTS REQUIRED FOR FINANCING

### § 1488.8 Documents required after delivery.

(a) CCC will purchase an exporter's account receivable only if the Treasurer, Commodity Credit Corporation, United States Department of Agriculture, Washington, DC 20250, receives the documents specified in paragraphs (b) through (e) of this section and any documentation and certifications required by any supplements to these regulations within forty-five days, or any extension thereof by the Treasurer or Assistant Treasurer, CCC, after date of delivery of commodities exported or to be exported under the financing agreement.

(b) The exporter shall submit a "Combined Application for Disbursement, Assignment of Account Receivable and Certification" which shall include:

(1) A written application for disbursement, showing the financing agreement number and the port value of the commodity delivered.

(2) An assignment of the account receivable arising from the export sale, in form and substance acceptable to CCC.

(3) The exporter's certification (i) that he has entered into a contract to sell an eligible commodity; (ii) of the

date of sale, the grade, quality, quantity, agreed upon price for the commodity and payment terms and interest in accordance with the financing agreement; (iii) that he has in his files documents evidencing the export sale contract and the obligation of the importer to him for the financed portion of the export sale and will retain and furnish them to CCC on demand until 3 years after the end of the financing period; (iv) that agricultural commodities of the grade, quality, and quantity called for in the exporter's sale as registered with CCC have been delivered to the foreign importer; and (v) that he knows of no defenses to the account receivable assigned to CCC.

(c) A copy of the sales invoice to the foreign importer, or, if the commodity has been sold through an intervening purchaser, a copy of the exporter's sales invoice to the intervening purchaser and of the intervening purchaser's sales invoice to the foreign importer.

(d) A copy of the document evidencing export provided for in § 1488.9 and, if the consignee is other than the foreign importer named in the financing agreement, such additional information as CCC may request to show that export was made in accordance with the instructions of, or the export sale contract with, the foreign importer. If delivery is before export in a warehouse acceptable to CCC, the warehouse receipt or other documents acceptable to CCC evidencing delivery of the commodity to the importer or his agent. If delivery is before export in a container or a lash or seabee barge at a U.S. inland or coastal point, for export shipment under a through bill of lading, one copy of the through bill of lading with an onboard (truck, rail car, or lash or seabee barge) endorsement, dated and signed or initialed on behalf of the export carrier. The through bill of lading must be certified by the exporter as being a true copy and must show the quantity, the date, and place of loading the commodity on a truck, or rail car, or lash or seabee barge, the name of the originating carrier, the destination of the commodity, and the name of both the exporter and the importer.

(e) A bank obligation or obligations in accordance with § 1488.7(c), § 1488.10, § 1488.12 and paragraph (i) of this section, naming CCC as beneficiary, in form and substance acceptable to CCC, covering the amount of the application for disbursement, citing the financing agreement number; and providing for the payment of interest in accordance with § 1488.14.

(f) On receipt of the documents described in paragraphs (b) through (e) of this section and any documentation and certifications required by any supplements to these regulations, the Treasurer, CCC will pay promptly to the exporter the amount of the account receivable or the dollar amount of sales registered in accordance with § 1488.5, whichever is the lesser.

(g) If an acceptable application for disbursement and the supporting documents described in paragraphs (b) through (e) of this section have not been received by CCC within 45 days from the date of the delivery, or any extension thereof by the Treasurer or Assistant Treasurer, CCC, the financing agreement shall be void.

(h) [Reserved]

(i) If for any reason a draft drawn under a foreign bank obligation is dishonored or if the issuing bank is insolvent, in bankruptcy, in receivership, or in liquidation, or has made an assignment for the benefit of creditors, or for any other reason discontinues or suspends payments to depositors or creditors, or otherwise ceases to operate on an unrestricted basis, any balance due on the account receivable assured by the obligation issued by such bank shall, at the option of CCC, become immediately due and payable. CCC may permit the substitution of another acceptable foreign bank obligation covering such balance due if confirmed in accordance with § 1488.12.

[42 FR 10999, Feb. 25, 1977, as amended at 42 FR 27569, May 31, 1977; Amdt. 5, 43 FR 25992, June 16, 1978]

### § 1488.9 Evidence of export.

(a) If the commodity is exported by rail or truck, the exporter shall furnish to the Treasurer, CCC, one copy of the bill of lading covering the commodity exported, certified by the exporter as

being a true copy, and an authenticated landing certificate or similar document issued by an official of the government of the country to which the commodity is exported, showing the quantity, the gross landed weight of the commodity, the place and date of entry, and the name and address of both the exporter and the importer.

(b) If the commodity is exported by ocean carrier, the exporter shall furnish to the Treasurer, CCC, one non-negotiable copy or photo copy or other type of copy of either (1) an on-board ocean bill of lading or (2) an ocean bill of lading with an onboard endorsement, dated and signed or initialed on behalf of the carrier. The bill of lading must be certified by the exporter as being a true copy and must show the quantity, the date and place of loading the commodity, the name of the vessel, the destination of the commodity and the name and address of both the exporter and the importer.

(c) If the commodity is exported by aircraft, the exporter shall furnish to the Treasurer, CCC, one non-negotiable copy of an airway bill, dated and signed or initialed on behalf of the carrier. The airway bill must be certified by the exporter as being a true copy and must show the date and place of loading the commodity, the name of the airline, the destination of the commodity, and the name and address of both the exporter and the importer.

(d) If the exporter is unable to supply documentary evidence of export as specified in this section, he shall submit such other documentary evidence as may be acceptable to CCC.

(e) For commodities transshipped through Canada via the Great Lakes or the St. Lawrence River, the exporter shall certify that the commodity transshipped was produced in the United States.

### § 1488.9a Evidence of export for commodities delivered before export.

For commodities delivered before export under a financing agreement for which the financial period is 12 months or less, the exporter shall furnish a certification to the Treasurer, CCC, within 60 days from the date of delivery or such extension of time as may be granted by the Treasurer or Assistant Treasurer, CCC, certifying that the commodities have been exported. The certification must include the name of the ocean carrier, the date the commodities were loaded aboard the ocean carrier and the financing agreement number.

[Amdt. 5, 43 FR 25992, June 16, 1978]

DOCUMENTS REQUIRED AFTER FINANCING

### § 1488.10 Evidence of entry into country of destination.

(a) Commodities exported under a financing agreement must enter the destination country specified in the financing agreement.

(b) For a financing agreement under which the financing period is in excess of 12 months, within 90 days, or such extension of time as may be granted in writing by the Assistant Sales Manager, following shipment from the United States of any agricultural commodity exported under the financing agreement, the exporter shall furnish to the office specified in § 1488.22, documentary evidence verifying entry of the commodity into the country of destination specified in the financing agreement. The documentary evidence must:

(1) Identify the agricultural commodity (or permit identification through supplementary documents also furnished) as that exported under the financing agreement,

(2) State the quantity and date of entry of the commodity into the destination country, and

(3) Be signed by (i) a customs official of the destination country, or (ii) the importer, or (iii) a representative of an independent superintending or controlling firm.

(c) When the commodity enters the country of destination in bond, a statement by the importer will be acceptable which:

(1) Identifies the commodity as that exported under the financing agreement,

(2) States the quantity of the commodity entered under bond and date of entry into the destination country, and

(3) Certifies that the commodity will be withdrawn from bonded storage at a later date for consumption in the destination country.

(d) If the evidence of entry is in other than the English language, the exporter shall also provide an English translation thereof.

(e) Failure to furnish, within the time specified, evidence of entry of the commodity into the country of destination shall constitute prima facie evidence of failure to enter or to cause the entry of the commodity into such country as required. In such case, the financing agreement may be terminated by the Assistant Sales Manager, and if full payment under the bank obligation or account receivable has not yet been received, the bank obligation and the account receivable shall at the option of CCC, become due and payable and liquidated damages shall be payable in accordance with §1488.11. The remedy herein provided shall not be exclusive of other rights available to the Federal government if the commodity enters a country other than that specified in the financing agreement.

DELIVERY REQUIREMENTS

**§1488.11 Liquidated damages.**

Failure of the exporter to export or cause to be exported, within the period provided therefor, any agricultural commodity financed, when delivery is made before export under the terms of the financing agreement, or failure of the exporter to enter or cause the entry of, such commodity into the country of destination, shall constitute a breach of the financing agreement which will result in serious and substantial damage to CCC and to its program. Since it will be difficult, if not impossible, to prove the exact amount of such damage, the exporter shall pay to CCC promptly on demand, as reasonable compensation and not as a penalty, liquidated damages in lieu of probable actual damages, as follows:

(a) For each day of delay in exportation after the final date for exportation, when delivery is made before export under the terms of the financing agreement, .15 percent of the amount financed under the financing agreement for the commodity not exported; (b) for failure to export or cause exportation, when delivery is made before export under the terms of the financing agreement, 5 percent of the amount financed under the financing agreement for the commodity not exported; (c) for failure, after exportation, to enter or cause the entry of the commodity into the country of destination, at the rate of 5 percent a year of the amount financed under the financing agreement for such commodity from the start of the financing period until payment to CCC of the amount financed; *Provided however,* That the aggregate of all amounts assessed under this §1488.11 with respect to the same commodity shall not exceed 5 percent of the amount financed for such commodity. Liquidated damages shall not be assessed: Under paragraph (a) of this section if the Assistant Sales manager determines that the delay was due to such causes as acts of God or government or public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather; under paragraph (b) of this section if the Assistant Sales Manager determines that failure to export was due to loss, damage, destruction or deterioration of the commodity or act of God or government or public enemy; and under paragraph (c) of this section if the Assistant Sales Manager determines that failure to enter or cause the entry of the commodity into the country of destination was due to loss, damage, destruction or deterioration of the commodity or act of God or government or public enemy.

BANK OBLIGATIONS AND REPAYMENT

**§1488.12 Coverage of bank obligations.**

(a) U.S. banks and branch banks shall be liable without regard to risk (1) for payment of bank obligations issued by them or (2) for payment of bank obligations confirmed by them without regard to risk if a requirement for such confirmation is included in the financing agreement or (3) as provided in paragraphs (c) and (d) of this section.

(b) An obligation issued by a foreign bank must be confirmed and advised, as provided in paragraphs (a), (c), (d), (e), and (f) of this section, by a U.S. bank or a branch bank, or may be confirmed by an agency bank when determined by the President or Vice President, CCC after consultation with the

Controller, CCC, to be in the interest of CCC.

(c) A U.S. bank must confirm the full amount of an obligation issued by its foreign branch. CCC will hold the U.S. bank liable for payment without regard to risks.

(d) If a branch bank confirms an obligation issued by its home office, or by another branch of its home office, it must confirm the full amount thereof. CCC will hold the branch bank liable for payment without regard to risks.

(e) If CCC accepts an agency bank confirmation of a foreign bank obligation, it must be for the full amount thereof without regard to risks and will be subject to such terms and conditions as may be contained in the financing agreement. CCC will not accept an agency bank confirmation of an obligation issued by its home office, or by a branch of its home office.

(f) Except as provided in paragraphs (a), (c), and (d) of this section, if a U.S. bank or a branch bank confirms an obligation issued by a foreign bank, it must confirm at least 10 percent pro rata and must advise the remainder of the foreign bank obligation. The percentage of confirmation shall be the same for both the account receivable and the interest portions of the obligation. For the confirmed amount, except as provided in paragraph (a)(2) of this section, CCC will hold the U.S. bank or branch bank liable for commercial risks but not for non-commercial risks. For the advised amount, CCC will not hold the U.S. bank or branch bank liable for commercial or non-commercial risks. CCC will hold the foreign bank liable without regard to risks for all amounts not recovered from the U.S. or branch bank.

(g) Under special circumstances, on application in writing, the Vice President, CCC, may reduce or waive requirements for 10 percent confirmation by a U.S. or branch bank, but a bank will not be relieved of any obligation it undertakes.

(h) Any bank obligation which provides for a bank acceptance of a time draft by CCC (banker's acceptance) shall not be acceptable to CCC.

(i) CCC will consent to cancellation or reduction of a bank obligation to the extent of any payment it receives from other sources or amounts otherwise payable under such bank obligation.

(j) Collection of accounts receivable purchased under GSM–5 will be effected through the issuance by CCC of sight drafts against the bank obligations, but this method of collection shall not be exclusive of any other collection procedures or rights available to CCC.

[42 FR 10999, Feb. 25, 1977, as amended at 42 FR 27569, May 31, 1977; 42 FR 30833, June 17, 1977; 43 FR 45551, Oct. 3, 1978; 44 FR 51187, Aug. 31, 1979]

### § 1488.13 CCC drafts.

CCC will draw one draft for each payment due under bank obligations. If any portion of a CCC draft is dishonored, the U.S. bank or branch bank shall return the dishonored draft together with its statement of the reason for nonpayment. If a draft which is drawn under a partially confirmed bank obligation is dishonored, CCC will replace the draft with separate drafts for the confirmed and unconfirmed portions at the request of the confirming bank. Such replacement shall not alter the confirming bank's obligation for timely payment to CCC of the confirmed portion of the credit. For confirmed amounts, except as provided in § 1488.12(a), (c) and (d), a U.S. or branch bank may request refund from CCC of the amount paid if it certifies to CCC that it is unable to recover funds from the foreign bank due to a stipulated non-commercial risk which existed on the date payment was made to CCC under the draft. If CCC finds that inability to recover funds was due to such a non-commercial risk, the refund shall be promptly made together with interest at the Federal Reserve Bank of New York discount rate from and including the date payment was originally made to CCC but not include the date of refund by CCC. For unconfirmed amounts, remittance to CCC shall be considered final, and the U.S. bank or branch bank shall not thereafter have recourse to CCC.

[42 FR 10999, Feb. 25, 1977, as amended at 42 FR 27569, May 21, 1977; 42 FR 30833, June 17, 1977]

**§ 1488.14 Interest charges.**

The account receivable assigned to CCC and the related bank obligation(s) shall bear interest as specified in this section. Rates of interest applicable to financing agreements shall be published in USDA announcement. The interest rate applicable to that portion of an account receivable for which payment is assured by a bank obligation issued or confirmed for all risks according to § 1488.12(a)(ii) or pro rata confirmed by a U.S. bank shall be lower than the interest rate applicable for the remainder of the account receivable. The interest rate applicable to that portion of an account receivable the payment of which is assured by a bank obligation issued or pro rata confirmed by a branch bank shall, when determined by the President or Vice President, CCC after consultation with the Controller, CCC, to be in the interest of CCC, be lower than the interest rate applicable for the remainder of the account receivable. The interest rates applicable to accounts receivable the payment of which is assured by an agency bank confirmation may, when determined by the President or Vice President, CCC, after consultation with the Controller, CCC, to be in the interest of CCC, be lower than the interest rate applicable for the remainder of the account receivable. The interest rate applicable will be the rate in effect on the date CCC receives the sale registration request under § 1488.4. Interest shall accrue on the account receivable from the date of delivery or the weighted average delivery date of the agricultural commodities delivered under the financing agreement to the date of payment, or to the date of expiration of the financing period, or to the date of expiration of the bank obligation, whichever occurs first, and shall be payable as specified in the financing agreement. Thereafter, interest shall accrue on any unpaid part of both the principal and interest due as of such expiration date.

[42 FR 10999, Feb. 25, 1977, as amended at 42 FR 27569, May 31, 1977]

**§ 1488.15 Advance payment.**

If, before expiration of the financing period, the exporter or the U.S. bank or the agency or branch bank accepts payment from or on behalf of the foreign importer of any part of the account receivable, it shall be remitted promptly to CCC. Such prepayment shall be applied first to interest on the unpaid balance of the account receivable to the date CCC receives such prepayment and then to the principal.

**§ 1488.16 Liability for payment.**

If delivery is made within the coverage of the bank obligation(s) submitted in accordance with § 1488.8, CCC will look to the obligating bank or banks and the foreign importer, rather than to the exporter or intervening purchaser, for payment of all amounts due at maturity of the account receivable and of the bank obligation(s), but the exporter and the intervening purchaser shall remain liable for any loss arising from breach of any contractual obligation, certification or warranty made by them pursuant to the financing agreement, and the exporter shall remain liable for any amounts not covered by the bank obligation which are owing to CCC, and any remittance or refund required by § 1488.15 and § 1488.18, together with interest thereon at the rate specified in the documents evidencing the account receivable, as well as for any liquidated damages provided for in § 1488.11. The liability of the bank and the importer under their respective obligations shall be several.

MISCELLANEOUS PROVISIONS

**§ 1488.17 Assignment.**

The exporter shall not assign any claim or rights or any amounts payable under the financing agreement, in whole or in part, without written approval of the Vice President, CCC, or the Controller, CCC.

**§ 1488.18 Covenant against contingent fees.**

The exporter warrants that no person or selling agency has been employed or retained to solicit or secure the financing agreement on an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the exporter for the

purpose of securing business. For breach or violation of this warranty, CCC shall have the right, without limitation on any other rights it may have, to annul the financing agreement without liability to CCC. Should the financing agreement be annulled, CCC will promptly consent to the reduction or cancellation or related bank obligations except for amounts outstanding under a financing agreement. Such amounts shall, on demand, be refunded to CCC by the exporter.

### § 1488.19 [Reserved]

### § 1488.20 Officials not to benefit.

No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the financing agreement or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the financing agreement if made with a corporation for its general benefit.

### § 1488.21 Exporter's records and accounts.

CCC shall have access to and the right to examine any directly pertinent books, documents, papers and records of the exporter involving transactions related to the financed export credit sale until the expiration of three years after the end of the financing period.

### § 1488.22 Communications.

(a) Unless otherwise provided, written requests, notifications, or communications by the applicant pertaining to the financing agreement shall be addressed to the Assistant Sales Manager, Commercial Export Programs, Office of the General Sales Manager, U.S. Department of Agriculture, Washington, DC 20250.

(b) [Reserved]

### § 1488.23 OMB Control Numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in these regulations (7 CFR part 1488) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0551–0021.

[Amdt. 8, 50 FR 13967, Apr. 9, 1985]

# PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM

## Subpart A—General Provisions

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AUTHORITY: 16 U.S.C. 3838h–3838i.

SOURCE: 74 FR 2818, Jan. 16, 2009, unless otherwise noted.

## Subpart A—General Provisions

### § 1491.1 Applicability.

(a) The regulations in this part set forth requirements, policies, and procedures, for implementation of the Farm and Ranch Lands Protection Program (FRPP) as administered by the Natural Resources Conservation Service (NRCS). FRPP cooperative agreements shall be administered under the regulations in effect at the time the cooperative agreement is signed.

(b) The NRCS Chief may implement FRPP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

### § 1491.2 Administration.

(a) The regulations in this part shall be administered under the general supervision and direction of the NRCS Chief.

(b) NRCS shall—

(1) Provide overall program management and implementation leadership for FRPP;

(2) Develop, maintain, and ensure that policies, guidelines, and procedures are carried out to meet program goals and objectives;

(3) Ensure that the FRPP share of the cost of an easement or other deed restrictions in eligible land shall not exceed 50 percent of the appraised fair market value of the conservation easement;

(4) Determine eligibility of the land, the landowner, and the entity;

(5) Ensure a conservation plan is developed in accordance with 7 CFR part 12;

(6) Make funding decisions and determine allocations of program funds;

(7) Coordinate with the Office of the General Counsel (OGC) to ensure the legal sufficiency of the cooperative agreement and the easement deed or other legal instrument;

(8) Sign and monitor cooperative agreements for the CCC with the selected entity;

(9) Monitor and ensure conservation plan compliance with highly erodible land and wetland provisions in accordance with 7 CFR part 12; and

(10) Provide leadership for establishing, implementing, and overseeing administrative processes for easements, easement payments, and administrative and financial performance reporting.

(c) NRCS shall enter into cooperative agreements with eligible entities to assist NRCS with implementation of this part.

**§ 1491.3 Definitions.**

The following definitions will apply to this part and all documents issued in accordance with this part, unless specified otherwise:

*Agricultural uses* are defined by the State's farm or ranch land protection program or equivalent, or where no program exists, agricultural uses should be defined by the State agricultural use tax assessment program. (If NRCS finds that a State definition of agriculture is so broad that an included use could lead to the degradation of soils and agriculture productivity, NRCS reserves the right to impose greater deed restrictions on the property than allowable under that State definition of agriculture in order to protect agricultural use and related conservation values.)

*Certified entity* means an eligible entity that NRCS has determined to meet the requirements of §1491.4(d) of this part.

*Chief* means the Chief of NRCS, USDA.

*Commodity Credit Corporation (CCC)* is a Government-owned and operated entity that was created to stabilize, support, and protect farm income and prices. CCC is managed by a Board of Directors, subject to the general supervision and direction of the Secretary of Agriculture, who is an ex-officio director and chairperson of the Board. CCC provides the funding for FRPP, and NRCS administers FRPP on its behalf.

*Conservation Easement* means a voluntary, legally recorded restriction, in the form of a deed, on the use of property, in order to protect resources such as agricultural lands, historic structures, open space, and wildlife habitat.

*Conservation Plan* is the document that—

(1) Applies to highly erodible cropland;

(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules;

(3) Is approved by the local soil conservation district in consultation with the local committees established under Section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 5909h(b)(5)) and the Secretary, or by the Secretary.

*Cooperative agreement* means the document that specifies the obligations and rights of NRCS and eligible entities participating in the program.

*Dedicated fund* means an account held by an eligible entity sufficiently capitalized for the purpose of covering expenses associated with the management, monitoring, and enforcement of conservation easements and where such account cannot be used for other purposes.

*Eligible entity* means federally recognized Indian Tribes, State, unit of local

government, or a non-governmental organization, which has a farmland protection program that purchases agricultural conservation easements for the purpose of protecting agriculture use and related conservation values by limiting conversion to non-agricultural uses of the land.

*Fair market value* means the value of a conservation easement as ascertained through standard real property appraisal methods, as established in § 1491.4(g).

*Farm and ranch land of statewide importance* means, in addition to prime and unique farmland, land that is of statewide importance for the production of food, feed, fiber, forage, biofuels, and oil seed crops. Criteria for defining and delineating this land are to be determined by the appropriate State agency or agencies. Generally, additional farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, additional farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law in accordance with 7 CFR part 657.

*Farm and ranch land of local importance* means farm or ranch land used to produce food, feed, fiber, forage, biofuels, and oilseed crops, that are not identified as having national or statewide importance. Where appropriate, these lands are to be identified by the local agency or agencies concerned. Farmlands of local importance may include tracts of land that have been designated for agriculture by local ordinance.

*Farm or Ranch Succession Plan* means a general plan to address the continuation of some type of agricultural business on the conserved land; the farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers and ranchers.

*Field Office Technical Guide (FOTG)* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. The FOTG contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Forest land* means a land cover or use category that is at least 10 percent stocked by single-stemmed woody species of any size that will be at least 13 feet tall at maturity. Also included is land bearing evidence of natural regeneration of tree cover (cutover forest or abandoned farmland) that is not currently developed for non-forest use. Ten percent stocked, when viewed from a vertical direction, equates to an aerial canopy cover of leaves and branches of 25 percent or greater.

*Forest management plan* means a site-specific plan that is prepared by a professional resource manager, in consultation with the participant, and is approved by the State Conservationist. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a); another practice plan approved by the State Forester; or another plan determined appropriate by the State Conservationist. The plan complies with applicable Federal, State, Tribal, and local laws, regulations and permit requirements.

*Historical and archaeological resources* mean resources that are:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*),

(2) Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA),

(3) Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101(b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA), or

(4) Included in the SHPO or THPO inventory with written justification as to why it meets National Register of Historic Places criteria.

*Imminent harm* means easement violations or threatened violations that, as determined by the Chief, would likely cause immediate and significant degradation to the conservation values; for example, those violations that would adversely impact agriculture use, productivity, and related conservation values or result in the erosion of topsoil beyond acceptable levels as established by NRCS.

*Indian Tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450(b)(e)).

*Land Evaluation and Site Assessment System (LESA)* means the land evaluation system approved by the NRCS State Conservationist used to rank land for farm and ranch land protection purposes, based on soil potential for agriculture, as well as social and economic factors, such as location, access to markets, and adjacent land use. (For additional information see the Farmland Protection Policy Act rule at 7 CFR part 658.)

*Landowner* means a person, legal entity, or Indian tribe having legal ownership of land and those who may be buying eligible land under a purchase agreement. The term, "landowner" may include all forms of collective ownership including joint tenants, tenants-in-common, and life tenants. State governments, local governments, and non-governmental organizations that qualify as eligible entities are not eligible as landowners, unless otherwise determined by the Chief.

*Natural Resources Conservation Service (NRCS)* means an agency of the United States Department of Agriculture.

*Non-governmental organization* means any organization that:

(1) Is organized for, and at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986;

(2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code; and

(3) Is described—

(i) In section 509(a)(1) and (2) of that Code; or

(ii) Is described in section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

*Other interests in land* include any right in real property other than easements that are recognized by State law. FRPP funds shall only be used to purchase other interests in land with prior approval from the Chief.

*Other productive soils* means farm and ranch land soils, in addition to prime farmland soils that include unique farmland and farm and ranch land of statewide and local importance.

*Pending offer* means a written bid, contract, or option extended to a landowner by an eligible entity to acquire a conservation easement before the legal title to these rights has been conveyed for the purpose of limiting non-agricultural uses of the land.

*Prime farmland* means land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by the Secretary.

*Purchase price* means the appraised fair market value of the easement minus the landowner donation.

*Right of enforcement* means a vested right set forth in the conservation easement deed, equal in scope to the right of inspection and enforcement granted to the grantee, that the Chief, on behalf of the United States, may exercise under specific circumstances in order to enforce the terms of the conservation easement when not enforced by the holder of the easement.

*Secretary* means the Secretary of the United States Department of Agriculture.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861 and 7 CFR part 610, subpart C.

*State Conservationist* means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Island Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

*Unique farmland* means land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR part 657 and 7 CFR part 658.

[74 FR 2818, Jan. 16, 2009, as amended at 74 FR 31581, July 2, 2009]

### § 1491.4 Program requirements.

(a) Under FRPP, the Chief, on behalf of CCC, shall provide funding for the purchase of conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity for the purpose of protecting the agricultural use and related conservation values of the land by limiting nonagricultural uses of the land. Eligible entities submit applications to NRCS State Offices to partner with NRCS to acquire conservation easements on farm and ranch land. NRCS enters into cooperative agreements with selected entities and provides funds for up to 50 percent of the fair market value of the easement. In return, the entity agrees to acquire, hold, manage, and enforce the easement. A Federal right of enforcement must also be included in each FRPP funded easement deed for the protection of the Federal investment.

(b) The term of all easements or other interests in land shall be in perpetuity unless prohibited by State law. In States that limit the term of the easement or other interest in land, the term of the easement or other interest in land must be the maximum allowed by State law.

(c) To be eligible to receive FRPP funding, an entity must meet the definition of "eligible entity" as listed in § 1491.3. In addition, eligible entities interested in receiving FRPP funds must demonstrate:

(1) A commitment to long-term conservation of agricultural lands;

(2) A capability to acquire, manage, and enforce easements;

(3) Sufficient number of staff dedicated to monitoring and easement stewardship; and

(4) The availability of funds.

(d) To be eligible as a "certified entity," an entity must be qualified to be an "eligible entity" and have demonstrated, as determined by the Chief:

(1) The ability to complete acquisition of easements in a timely fashion;

(2) The ability to monitor easements on a regular basis;

(3) The ability to enforce the provisions of easement deeds;

(4) Experience enrolling parcels in the Farm and Ranch Lands Protection Program (FRPP) or the Farmland Protection Program (FPP);

(5) For non-governmental organizations, the existence of a dedicated fund for the purposes of easement management, monitoring, and enforcement where such fund is sufficiently capitalized in accordance with NRCS standards. The dedicated fund must be dedicated to the purposes of managing, monitoring, and enforcing each easement held by the eligible entity; and

(6) Other certification criteria, including having a plan for administering easements enrolled under this part, as determined by the Chief.

(e) Review and Revocation of Certification.

(1) The Chief shall conduct a review of certified entities every three years to ensure that the certified entities are meeting the certification criteria established in § 1491.4(d).

(2) If the Chief finds that the certified entity no longer meets the criteria in § 1491.4(d), the Chief may:

(i) Allow the certified entity a specified period of time, at a minimum 180 days, in which to take such actions as may be necessary to meet the criteria; and

(ii) Revoke the certification of the entity, if after the specified period of time, the certified entity does not meet the criteria established in § 1491.4(d).

(f) Eligible land:

(1) Must be privately owned land on a farm or ranch and contain at least 50 percent prime, unique, Statewide, or locally important farmland, unless otherwise determined by the State Conservationist; contain historical or archaeological resources; or furthers a State or local policy consistent with the purposes of the program; and is subject to a pending offer by an eligible entity;

(2) Must be cropland, rangeland, grassland, pasture land, or forest land that contributes to the economic viability of an agricultural operation or serves as a buffer to protect an agricultural operation from development;

(3) May include land that is incidental to the cropland, rangeland, grassland, pasture land, or forest land if the incidental land is determined by the Secretary to be necessary for the efficient administration of a conservation easement;

(4) May include parts of or entire farms or ranches;

(5) Must not include forest land of greater than two-thirds of the easement area. Forest land that exceeds the greater of 10 acres or 10 percent of the easement area shall have a forest management plan before closing;

(6) Unless otherwise determined by the Chief, NRCS shall not provide FRPP funds for the purchase of an easement or other interest in land on land owned in fee title by an agency of the United States, a State or local government, or by an entity whose purpose is to protect agricultural use and related conservation values, including those listed in the statute under eligible land, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use;

(7) Must be owned by landowners who certify that they do not exceed the adjusted gross income limitation eligibility requirements set forth in part 1400 of this title;

(8) Must possess suitable on-site and off-site conditions which will allow the easement to be effective in achieving the purposes of the program. Suitability conditions may include, but are not limited to, hazardous substances on or in the vicinity of the parcel, land use surrounding the parcel that is not compatible with agriculture, and highway or utility corridors that are planned to pass through or immediately adjacent to the parcel; and

(9) May be land on which gas, oil, earth, or other mineral rights exploration has been leased or is owned by someone other than the applicant may be offered for participation in the program. However, if an applicant submits an offer for an easement project, USDA will assess the potential impact that the third party rights may have upon achieving the program purposes. USDA reserves the right to deny funding for any application where there are exceptions to clear title on any property.

(g) Prior to FRPP fund disbursement, the value of the conservation easement must be appraised. Appraisals must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser. The appraisal must conform to the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions, as selected by the entity. State Conservationists will provide the guidelines through which NRCS will review appraisals for quality control purposes.

(h) The landowner shall be responsible for complying with the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985, as amended, and 7 CFR part 12.

[74 FR 2818, Jan. 16, 2009, as amended at 74 FR 31581, July 2, 2009]

### § 1491.5 Application procedures.

(a) An entity shall submit an application to the State Conservationist in the State where parcels are located in order to determine if the entity is eligible to participate in FRPP.

(b) The Chief shall determine whether an eligible entity is a certified entity based on the criteria set forth in §1491.4(d); information provided by the entity's application; and data in the national FRPP database.

(c) The State Conservationist shall notify each entity if it has been determined eligible, certified, or ineligible.

(d) Entities with cooperative agreements entered into after the effective date of this part will not have to resubmit an annual application for the duration of the cooperative agreement. Entities may reapply for eligibility when their cooperative agreements expire.

(e) Throughout the fiscal year, eligible entities may submit to the appropriate NRCS State Conservationist applications for parcels, in that State, with supporting information to be scored, ranked, and considered for funding.

(f) At the end of each fiscal year, the lists of pending, unfunded parcels shall be cancelled unless the entity requests that specific parcels be considered for funding in the next fiscal year. Entities must submit a new list of parcels each fiscal year in order to be considered for funding unless they request that parcels from the previous fiscal year be considered.

### §1491.6 Ranking considerations and proposal selection.

(a) Before the State Conservationist can score and rank the parcels for funding, the eligibility of the landowner and the land must be assessed.

(b) The State Conservationist shall use National and State criteria to score and rank parcels. The national ranking criteria will be established by the Chief and the State criteria will be determined by the State Conservationist, with advice from the State Technical Committee. The national criteria shall comprise at least half of the ranking system score.

(c) When funds are available, the State Conservationist shall announce the date on which ranking of parcels shall occur. A State Conservationist may announce more than one date of ranking in a fiscal year.

(d) All parcels submitted throughout the fiscal year shall be scored. All parcels will be ranked together in accordance with the national and state ranking criteria before parcels are selected for funding.

(e) The parcels selected for funding shall be listed on the agreements of the entities that submitted the parcels and the agreements shall be signed by the State Conservationist and the eligible entity. Funds for each fiscal year's parcels shall be obligated with a new signature each year on an amendment to the agreement. Parcels funded on each fiscal year's amendment shall have a separate deadline for closing and requesting reimbursement.

(f) The national ranking criteria are:

(1) Percent of prime, unique, and important farmland in the parcel to be protected;

(2) Percent of cropland, pastureland, grassland, and rangeland in the parcel to be protected;

(3) Ratio of the total acres of land in the parcel to be protected to average farm size in the county according to the most recent USDA Census of Agriculture;

(4) Decrease in the percentage of acreage of farm and ranch land in the county in which the parcel is located between the last two USDA Censuses of Agriculture;

(5) Percent population growth in the county as documented by the United States Census;

(6) Population density (population per square mile) as documented by the most recent United States Census;

(7) Proximity of the parcel to other protected land, such as military installations land owned in fee title by the United States or a State or local government, or by an entity whose purpose is to protect agricultural use and related conservation values, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use;

(8) Proximity of the parcel to other agricultural operations and infrastructure; and

(9) Other additional criteria as determined by the Chief.

(g) State or local criteria, as determined by the State Conservationist, with advice of the State Technical Committee, may include:

(1) The location of a parcel in an area zoned for agricultural use;

(2) The performance of an entity experience in managing and enforcing easements. Performance must be measured by the closing efficiency or percentage of monitoring that is reported. Years of an entity's existence shall not be used as a ranking factor;

(3) Multifunctional benefits of farm and ranch land protection including social, economic, historical and archaeological, and environmental benefits;

(4) Geographic regions where the enrollment of particular lands may help achieve National, State, and regional conservation goals and objectives, or enhance existing government or private conservation projects;

(5) Diversity of natural resources to be protected;

(6) Score in the Land Evaluation and Site Assessment (LESA) system. This score serves as a measure of agricultural viability (access to markets and infrastructure);

(7) Existence of a farm or ranch succession plan or similar plan established to encourage farm viability for future generations; and

(8) Landowner willingness to allow public access for recreational purposes.

(h) State ranking criteria will be developed on a State-by-State basis. The State Conservationist will make available a full listing of applicable National and State ranking criteria.

## Subpart B—Cooperative Agreements and Conservation Easement Deeds

### § 1491.20 Cooperative agreements.

(a) NRCS, on behalf of CCC, shall enter into a cooperative agreement with those entities selected for funding. Once a proposal is selected by the State Conservationist, the entity must work with the State Conservationist to finalize and sign the cooperative agreement, incorporating all necessary FRPP requirements. The cooperative agreement must address:

(1) The interests in land to be acquired, including the United States' right of enforcement as well as the form and other terms and conditions of the easement deed;

(2) The management and enforcement of the rights on lands acquired with FRPP funds;

(3) The responsibilities of NRCS;

(4) The responsibilities of the eligible entity on lands acquired with FRPP funds;

(5) The allowance of parcel substitution upon mutual agreement of the parties; and

(6) Other requirements deemed necessary by NRCS to meet the purposes of this part or protect the interests of the United States.

(b) The term of cooperative agreements shall be a minimum of five years for certified entities and three years for other eligible entities.

(c) The cooperative agreement shall also include an attachment listing the parcels accepted by the State Conservationist. This list shall include landowners' names and addresses, acreage, the estimated fair market value, the estimated Federal contribution, and other relevant information. An example of a cooperative agreement shall be made available by the State Conservationist.

### § 1491.21 Funding.

(a) Subject to the statutory limits, the State Conservationist, in coordination with the cooperating entity, shall determine the NRCS share of the cost of purchasing a conservation easement or other interest in the land.

(b) NRCS may provide up to 50 percent of the appraised fair market value of the conservation easement, as determined in §1491.4(g). An entity shall share in the cost of purchasing a conservation easement in accordance with the limitations of this part.

(c) A landowner may make donations toward the acquisition of the conservation easement.

(d) The entity must provide a minimum of 25 percent of the purchase price of the conservation easement.

(e) FRPP funds may not be used for expenditures such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other related administrative and transaction costs incurred by the entity.

(f) If the State Conservationist determines that the purchase of two or more

conservation easements are comparable in achieving FRPP goals, the State Conservationist shall not assign a higher priority to any one of these conservation easements solely on the basis of lesser cost to FRPP.

(g) Environmental Services Credits.

(1) NRCS asserts no direct or indirect interest in environmental credits that may result from or be associated with an FRPP easement.

(2) NRCS retains the authority to ensure that the requirements for FRPP-funded easements are met and maintained consistent with this part.

(3) If activities required under an environmental credit agreement may affect land covered under a FRPP easement, landowners are encouraged to request a compatibility assessment from the eligible entity prior to entering into such agreements.

### § 1491.22 Conservation easement deeds.

(a) Under FRPP, a landowner grants an easement to an eligible entity with which NRCS has entered into an FRPP cooperative agreement. The easement shall require that the easement area be maintained in accordance with FRPP goals and objectives for the term of the easement.

(b) Pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement. In such cases where State law limits the term of a conservation easement, the easement term shall be for the maximum allowed under state law.

(c) The entity may use its own terms and conditions in the conservation easement deed, but a conservation easement deed template used by the eligible entity shall be submitted to the NRCS National Headquarters within 30 days of the signing of the cooperative agreement. The conservation easement deed templates must be reviewed and approved by the NRCS National Headquarters in advance of use. NRCS reserves the right to require additional specific language or to remove language in the conservation easement deed to protect the interests of the United States. The Chief may exercise the option to promulgate standard minimum conservation deed requirements as a condition for receiving FRPP funds.

(d) The conveyance document must include a "right of enforcement" clause. NRCS shall specify the terms for the "right of enforcement" clause to read as set forth in the FRPP cooperative agreement. This right is a vested property right and cannot be condemned by State or local government.

(e) As a condition for participation, a conservation plan shall be developed by NRCS in consultation with the landowner and implemented according to the NRCS Field Office Technical Guide. NRCS may work through the local conservation district in the development of the conservation plan. The conservation plan will be developed and managed in accordance with the Food Security Act of 1985, as amended, 7 CFR part 12 or subsequent regulations, and other requirements as determined by the State Conservationist. To ensure compliance with this conservation plan, the easement shall grant to the United States, through NRCS, its successors or assigns, a right of access to the easement area.

(f) The cooperating entity shall acquire, hold, manage and enforce the easement. The cooperating entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities.

(g) Prior to easement closing, NRCS must sign an acceptance of the conservation easement, concurring with the terms of the conservation easement and accepting its interest in the conservation easement deed.

(h) All conservation easement deeds acquired with FRPP funds must be recorded. Proof of recordation shall be provided to NRCS by the cooperating entity.

(i) Impervious surfaces shall not exceed two percent of the FRPP easement area, excluding NRCS-approved conservation practices. The NRCS State Conservationist may waive the two percent impervious surface limitation on a parcel by parcel basis, provided that no more than ten percent of the easement area is covered by impervious surfaces. Before waiving the two percent limitation, the State Conservationist must consider, at a minimum:

population density; the ratio of open prime other important farmland versus impervious surfaces on the easement area; the impact to water quality concerns in the area; the type of agricultural operation; and parcel size. All FRPP easements must include language limiting the amount of impervious surfaces within the easement area.

(j) The conservation easement deed must include an indemnification clause requiring the landowner (grantor) to indemnify and hold harmless the United States from any liability arising from or related to the property enrolled in FRPP.

(k) The conservation easement deed must include an amendment clause requiring that any changes to the easement deed after its recordation must be consistent with the purposes of the conservation easement and this part.

[74 FR 2818, Jan. 16, 2009, as amended at 74 FR 31581, July 2, 2009]

## Subpart C—General Administration

### § 1491.30 Violations and remedies.

(a) In the event of a violation of the terms of the easement, the eligible entity shall notify the landowner. The landowner may be given reasonable notice and, where appropriate, an opportunity to voluntarily correct the violation in accordance with the terms of the conservation easement.

(b) In the event that the entity fails to enforce any of the terms of the conservation easement, as determined in the sole discretion of the Chief, the Chief and his or her successors or assigns may exercise the United States' rights to enforce the terms of the conservation easement through any and all authorities available under Federal or State law.

(c) Notwithstanding paragraph (a) of this section, NRCS, upon notification to the landowner, reserves the right to enter upon the easement area at any time to monitor conservation plan implementation or remedy deficiencies or easement violations, as it relates to the conservation plan. The entry may be made at the discretion of NRCS when the actions are deemed necessary to protect highly erodible soils and wetland resources. The landowner will be liable for any costs incurred by the NRCS as a result of the landowner's negligence or failure to comply with the easement requirements as it relates to conservation plan violations.

(d) The United States shall be entitled to recover any and all administrative and legal costs from the participating entity, including attorney's fees or expenses, associated with any enforcement or remedial action as it relates to the enforcement of the FRPP easement.

(e) In instances where an easement is terminated or extinguished, NRCS shall collect CCC's share of the conservation easement based on the appraised fair market value of the conservation easement at the time the easement is extinguished or terminated. CCC's share shall be in proportion to its percentage of original investment.

(f) In the event NRCS determines it must exercise its rights identified under a conservation easement or other interest in land, NRCS shall provide written notice by certified mail to the grantee at the grantee's last known address. The notice will set forth the nature of the noncompliance by the grantee and a 60-day period to cure. If the grantee fails to cure within the 60-day period, NRCS shall take the action specified under the notice. NRCS reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation values or other interest in land it seeks to protect.

[74 FR 2818, Jan. 16, 2009, as amended at 74 FR 31581, July 2, 2009]

### § 1491.31 Appeals.

(a) A person or eligible entity which has submitted an FRPP proposal and is therefore participating in FRPP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

(b) Before a person or eligible entity may seek judicial review of any administrative action taken under this part,

the person or eligible entity must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for the purposes of judicial review, no decision shall be a final Agency action except a decision of the Chief of the NRCS under these provisions.

(c) Enforcement action undertaken by the NRCS in furtherance of its vested property rights are under the jurisdiction of the Federal District Court and not subject to review under administrative appeal regulations.

**§ 1491.32 Scheme or device.**

(a) If it is determined by the NRCS that a cooperating entity has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such a cooperating entity during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS on behalf of CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or entity of payments for easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

## PART 1492 [RESERVED]

## PART 1493—CCC EXPORT CREDIT GUARANTEE PROGRAMS

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AUTHORITY: 7 U.S.C. 5602, 5622, 5661, 5662, 5663, 5664, 5676; 15 U.S.C. 714b(d), 714c(f).

SOURCE: 59 FR 52876, Oct. 19, 1994, unless otherwise noted.

## Subpart A—Restrictions and Criteria for Export Credit Guarantee Programs

### § 1493.1 General statement.

This subpart sets forth the restrictions which apply to the use of credit guarantees under the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM–102) and the Intermediate Credit Guarantee Program (GSM–103) and the criteria considered by CCC in determining the annual allocations of credit guarantees to be made available with respect to each participating country. This subpart also sets forth the criteria considered by CCC in the review and approval of proposed allocation levels for GSM–102 and/or GSM–103 credit guarantees which may be made available in connection with export sales of specific U.S. agricultural commodities to these countries. These restrictions and criteria are interrelated and will be applied and considered together in the process of determining which sales opportunities under GSM–102 or GSM–103 will best meet the purposes of the programs.

### § 1493.2 Purposes of programs.

CCC may use export credit guarantees:

(a) To increase exports of U.S. agricultural commodities;

(b) To compete against foreign agricultural exports;

(c) To assist countries, particularly developing countries, in meeting their food and fiber needs; and

(d) For such other purposes as the Secretary of Agriculture determines appropriate, consistent with the provisions of § 1493.6.

### § 1493.3 Restrictions on programs and cargo preference statement.

(a) *Restrictions on use of credit guarantees.* (1) Export credit guarantees authorized under these regulations shall not be used for foreign aid, foreign policy, or debt rescheduling purposes.

(2) CCC shall not make credit guarantees available in connection with sales of agricultural commodities to any country that the Secretary determines cannot adequately service the debt associated with such sales.

(b) *Cargo preference laws.* The provisions of the cargo preference laws shall not apply to export sales with respect to which credit is guaranteed under these programs.

### § 1493.4 Criteria for country allocations.

The criteria considered by CCC in reviewing proposals for country allocations under the GSM–102 or GSM–103 programs, will include, but not be limited to, the following:

(a) Potential benefits that the extension of export credit guarantees would provide for the development, expansion or maintenance of the market for particular U.S. agricultural commodities in the importing country;

(b) Financial and economic ability of the importing country to adequately service CCC guaranteed debt;

(c) Financial status of participating banks in the importing country as it would affect their ability to adequately service CCC guaranteed debt;

(d) Political stability of the importing country as it would affect its ability to adequately service CCC guaranteed debt; and

(e) Current status of debt either owed by the importing country to CCC or to lenders protected by CCC's guarantees.

### § 1493.5 Criteria for agricultural commodity allocations.

The criteria considered by CCC in reviewing proposals for specific U.S. commodity allocations within a specific country allocation will include, but not be limited to, the following:

(a) Potential benefits that the extension of export credit guarantees would provide for the development, expansion or maintenance of the market in the importing country for the particular U.S. agricultural commodity under consideration;

(b) The best use to be made of the export credit guarantees in assisting the importing country in meeting its particular needs for food and fiber, as may be determined through consultations with private buyers and/or representatives of the government of the importing country;

(c) Evaluation, in terms of program purposes, of the relative benefits of providing payment guarantee coverage

for sales of the U.S. agricultural commodity under consideration compared to providing coverage for sales of other U.S. agricultural commodities; and

(d) Evaluation of the near and long term potential for sales on a cash basis of the U.S. commodity under consideration.

### § 1493.6 Additional required determinations for GSM–103.

Notwithstanding any other provision under this part, CCC shall not guarantee under the GSM–103 program the repayment of credit made available to finance an export sale unless the Secretary of Agriculture determines that such sale will:

(a) Develop, expand or maintain the importing country as a foreign market, on a long-term basis, for the commercial sale and export of U.S. agricultural commodities, without displacing normal commercial sales;

(b) Improve the capability of the importing country to purchase or use, on a long-term basis, U.S. agricultural commodities; or

(c) Otherwise promote the export of U.S. agricultural commodities.

## Subpart B—CCC Export Credit Guarantee Program (GSM–102) and CCC Intermediate Export Credit Guarantee Program (GSM–103) Operations

### § 1493.10 General statement.

(a) *Overview.* (1) This subpart contains the regulations governing the operations of the Export Credit Guarantee Program (GSM–102) and the Intermediate Credit Guarantee Program (GSM–103). The GSM–102 and GSM–103 programs of the Commodity Credit Corporation (CCC) were developed to expand U.S. agricultural exports by making available export credit guarantees to encourage U.S. private sector financing of foreign purchases of U.S. agricultural commodities on credit terms. Under GSM–102, credit guarantees are issued for terms of up to three years. Under GSM–103, credit guarantees are issued for terms of from three to ten years.

(2) The programs operate in cases where credit is necessary to increase or maintain U.S. exports to a foreign market and where private U.S. financial institutions would be unwilling to provide financing without CCC's guarantee. The programs are operated in a manner intended not to interfere with markets for cash sales. The programs are targeted toward those countries where the guarantees are necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments. In providing this credit guarantee facility, CCC seeks to expand market opportunities for U.S. agricultural exporters and assist long-term market development for U.S. agricultural commodities.

(3) The credit facility created by these programs is the CCC payment guarantee. The payment guarantee is an agreement by CCC to pay the exporter, or the U.S. financial institution that may take assignment of the exporter's right to proceeds, specified amounts of principal and interest due from, but not paid by, the foreign bank issuing an irrevocable letter of credit in connection with the export sale to which CCC's guarantee coverage pertains. By approving an exporter's application for a payment guarantee, CCC encourages private sector, rather than governmental, financing and incurs a substantial portion of the risk of default by the foreign bank. CCC assumes this risk, in order to be able to operate the programs for the purposes specified in § 1493.2.

(b) *Credit facility mechanism.* Typically, in export sales of U.S. agricultural commodities, payment by the importer is made under an irrevocable letter of credit. For the purpose of the GSM–102 and GSM–103 programs, CCC will consider applications for payment guarantees only in connection with export sales of U.S. agricultural commodities where the payment for the agricultural commodities will be made in one of the two following ways:

(1) An irrevocable foreign bank letter of credit, issued in favor of the exporter, specifically stating the deferred payment terms under which the foreign bank is obligated to make payments in U.S. dollars as such payments become due; or

(2) An irrevocable foreign bank letter of credit, issued in favor of the exporter, that is supported by a related obligation specifically stating the deferred payment terms under which the foreign bank is obligated to make payment to the exporter, or the exporter's assignee, in U.S. dollars as such payments become due. The exporter may assign the right to proceeds under the letter of credit or related obligation to a U.S. bank or other financial institution so that the exporter may realize the proceeds of the sale prior to the deferred payment date(s) as set forth in the irrevocable foreign bank letter of credit or its related obligation. The GSM–102 and GSM–103 programs are designed to protect the exporter or the exporter's assignee against those losses specified in the payment guarantee resulting from defaults, whether for commercial or noncommercial reasons, by the foreign bank obligated under the letter of credit or related obligation.

(c) *Program administration.* The GSM–102 and GSM–103 programs will be administered pursuant to this part and any Program Announcements and Notices to Participants issued by CCC pursuant to, and not inconsistent with, this part. These programs are under the general administrative responsibility of the General Sales Manager (GSM), Foreign Agricultural Service (FAS/USDA). The review and payment of claims for loss will be administered by the Office of the Controller, CCC. Information regarding specific points of contact for the public, including names, addresses, and telephone and facsimile numbers of particular USDA or CCC offices, will be announced by a public press release (see §1493.20(c), "Contacts P/R").

(d) *Country allocations and program announcements.* From time to time, CCC will issue a Program Announcement to announce a GSM–102 and/or GSM–103 program allocation for a specific country. The Program Announcement for a country allocation will designate specific allocations for U.S. agricultural commodities or products thereof. Exporters may negotiate export sales to buyers in that country for one of the commodities specified in the Program Announcement and seek payment guarantee coverage within the dollar amounts of specified coverage for that commodity. The Program Announcement will contain a requirement that the exporter's sales contract contain a shipping deadline within the applicable program year. The final date for a contractual shipping deadline will be stated in the Program Announcement. Program Announcements may also contain a specified "undesignated" or "unallocated" dollar amount for the purpose that if dollar amounts specified for a specific commodity for a country become fully used, an additional allocation from the "unallocated" or "undesignated" portion of the total country allocation may then be designated for a specific commodity. Program Announcements that include an "allocated" or "undesignated" dollar amount will contain further information on the "unallocated" or "undesignated" portion of the country allocation.

### §1493.20 Definition of terms.

Terms set forth in this part, in CCC Program Announcements and Notices to Participants, and in any CCC-originated documents pertaining to the GSM–102 and GSM–103 programs will have the following meanings:

(a) *Assignee.* A financial institution in the United States which, for adequate consideration given, has obtained the legal rights to receive the payment of proceeds under the payment guarantee.

(b) *CCC.* The Commodity Credit Corporation, an agency and instrumentality of the United States within the Department of Agriculture, authorized pursuant to the Commodity Credit Corporation Charter Act of 1948 (15 U.S.C. 714 *et seq.*), and subject to the general supervision and direction of the Secretary of Agriculture.

(c) *Contacts P/R.* A notice issued by FAS/USDA by public press release which contains specific names, addresses, and telephone and facsimile numbers of contacts within FAS/USDA and CCC for use by persons interested in obtaining information concerning the operations of the GSM–102 or GSM–103

program. The Contacts P/R also contains details about where to submit information required to qualify for program participation, to apply for payment guarantees, to request amendments of payment guarantees, to submit evidence of export reports, and to give notices of default and file claims for loss.

(d) *Date of export.* One of the following dates, depending upon the method of shipment: the on-board date of an ocean bill of lading or the on-board ocean carrier date of an intermodal bill of lading; the on-board date of an airway bill; or, if exported by rail or truck, the date of entry shown on an entry certificate or similar document issued and signed by an official of the Government of the importing country.

(e) *Date of sale.* The earliest date on which a contractual obligation exists between the exporter, or an intervening purchaser, if applicable, and the importer under which a firm dollar-and-cent price for the sale of agricultural commodities to the importer has been established or a mechanism to establish such price has been agreed upon.

(f) *Discounts and allowances.* Any consideration provided directly or indirectly, by or on behalf of the exporter or an intervening purchaser, to the importer in connection with a sale of an agricultural commodity, above and beyond the commodity's value, stated on the appropriate FOB, FAS, CFR or CIF basis. Discounts and allowances include, but are not limited to, the provision of additional goods, services or benefits; the promise to provide additional goods, services or benefits in the future; financial rebates; the assumption of any financial or contractual obligations; the whole or partial release of the importer from any financial or contractual obligations; or settlements made in favor of the importer for quality or weight.

(g) *Eligible interest.* The maximum amount of interest, based on the interest rate indicated in CCC's payment guarantee or any amendments to such payment guarantee, which CCC agrees to pay the exporter or the exporter's assignee in the event that CCC pays a claim for loss. The maximum interest rate stated in the payment guarantee, when determined or adjusted by CCC, will not exceed the average investment rate of the most recent Treasury 52-week bill auction in effect at that time.

(h) *Exported value.* (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, the value, FAS or FOB basis, U.S. point of export, of the export sale, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, is measured by the CFR or CIF value of the agricultural commodity less the cost of ocean freight, as determined at the time of application and, in the case of CIF sales, less the cost of marine and war risk insurance, as determined at the time of application, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis, and where the commodity is sold on a CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo) which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the exported value.

(i) *Exporter.* A seller of U.S. agricultural commodities or products thereof that has qualified in accordance with the provisions of § 1493.30.

(j) *FAS/USDA.* The Foreign Agricultural Service, U.S. Department of Agriculture.

(k) *Foreign bank letter of credit.* An irrevocable commercial letter of credit,

subject to the current revision of the Uniform Customs and Practices for Documentary Credits (International Chamber of Commerce Publication No. 500, or latest revision), providing for payment in U.S. dollars against stipulated documents and issued in favor of the exporter by a CCC-approved foreign banking institution.

(l) *GSM*. The General Sales Manager, FAS/USDA, acting in his capacity as Vice President, CCC, or his designee.

(m) *GSM–102*. A CCC program, also referred to as the "Export Credit Guarantee Program," under which payment guarantees are approved for a credit period not exceeding 3 years from the date(s) of export or from the date interest begins to accrue, whichever is earlier.

(n) *GSM–103*. A CCC program, also referred to as the "Intermediate Export Credit Guarantee Program," under which payment guarantees are approved for a credit period no less than 3 years but not exceeding 10 years from the date(s) of export or from the date interest begins to accrue, whichever is earlier.

(o) *Guaranteed value*. The maximum amount, exclusive of interest, that CCC agrees to pay the exporter or assignee under CCC's payment guarantee, as indicated on the face of the payment guarantee.

(p) *Importer*. A foreign buyer that enters into a contract with an exporter, or with an intervening purchaser, for an export sale of agricultural commodities to be shipped from the U.S. to the foreign buyer.

(q) *Incoterms*. The following customary terms, as defined by the International Chamber of Commerce, Incoterms (current revision):

(1) Free Alongside Ship (FAS),

(2) Free on Board (FOB),

(3) Cost and Freight (CFR, or alternatively, C&F, C and F, or CNF), and

(4) Cost Insurance and Freight (CIF).

(r) *Intervening purchaser*. A party that agrees to purchase U.S. agricultural commodities from an exporter and sell the same agricultural commodities to an importer.

(s) *Late interest*. Interest, in addition to the interest due under the payment guarantee, which CCC agrees to pay in connection with a claim for loss, accruing during the period beginning on the first day after receipt of a claim which CCC has determined to be in good order and ending on the day on which payment is made on such claim for loss.

(t) *Payment guarantee*. An agreement under which CCC, in consideration of a fee paid, and in reliance upon the statements and declarations of the exporter, subject to the terms set forth in the written guarantee, this subpart, and any applicable Program Announcements or Notices to Participants, agrees to pay the exporter or the exporter's assignee in the event of a default by a foreign bank on its payment obligation under the foreign bank letter of credit issued in connection with a guaranteed sale or under the foreign bank's related obligation.

(u) *Notice to participants*. A notice issued by CCC by public press release which serves one or more of the following functions: to remind participants of the requirements of the program; to clarify the program requirements contained in these regulations in a manner which is not inconsistent with the regulations; to instruct exporters to provide additional information in applications for payment guarantees under specific country and/or commodity allocations; and to supplement the provisions of a payment guarantee, in a manner not inconsistent with these regulations, before the exporter's application for such payment guarantee is approved.

(v) *Port value*. (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, U.S. point of export, the value, FAS or FOB basis, U.S. point of export, of the export sale, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, including the upward tolerance, if any, as provided by the export sales contract, is measured by the CFR or CIF value of the agricultural commodity less the value of ocean freight and, in the case of CIF sales,

less the value of marine and war risk insurance, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis and where the commodity was sold on CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo), which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the port value.

(w) *Program announcement.* An announcement issued by CCC which provides information on specific country and commodity allocations and may identify eligible agricultural commodities and countries, length of credit periods which may be covered, specify dollar limitations for CCC exposure in particular countries, and include other information and requirements.

(x) *Related obligation.* A contractual commitment by the foreign bank issuing the letter of credit in connection with an export sale to make payment(s) on principal amount(s), plus any contractual interest, in U.S. dollars, to a financial institution in the United States on deferred payment terms consistent with those permitted under CCC's credit guarantee programs. The U.S. financial institution is entitled to such payments because it has financed the obligation arising under such letter of credit.

(y) *United States or U.S.* All of the 50 states, the District of Columbia, and the territories and possessions of the United States.

(z) *U.S. agricultural commodity.* (1) An agricultural commodity or product entirely produced in the United States; or

(2) A product of an agricultural commodity—

(i) 90 percent or more of the agricultural components of which by weight, excluding packaging and added water, is entirely produced in the United States; and

(ii) That the Secretary determines to be a high value agricultural product. For purposes of this definition, fish entirely produced in the United States include fish harvested by a documented fishing vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

(aa) *USDA.* United States Department of Agriculture.

[59 FR 52876, Oct. 19, 1994, as amended at 62 FR 24561, May 6, 1997]

### § 1493.30 Information required for program participation.

Before CCC will accept an application for a payment guarantee under either the GSM–102 program or the GSM–103 program, the applicant must qualify for participation in these programs. Based upon the information submitted by the applicant and other publicly available sources, CCC will determine whether the applicant is eligible for participation in the programs.

(a) *Submission of documentation.* In order to qualify for participation in the GSM–102 and GSM–103 programs, an applicant must submit to CCC, at the address specified in the Contacts P/R, the following information:

(1) The address of the applicant's headquarters office and the name and address of an agent in the U.S. for the service of process;

(2) The legal form of doing business of the applicant, e.g., sole proprietorship, partnership, corporation, etc.

(3) The place of incorporation of the applicant, if the applicant is a corporation;

(4) The name and U.S. address of the office(s) of the applicant, and statement indicating whether the applicant is a U.S. domestic corporation, a foreign corporation or another foreign entity. If the applicant has multiple offices, the address included in the information should be that which is pertinent to the particular GSM–102 or

GSM–103 export sale contemplated by the applicant;

(5) A certified statement describing the applicant's participation, if any, during the past three years in U.S. Government programs, contracts or agreements; and

(6) A certification that: "I certify, to the best of my knowledge and belief, that neither [name of applicant] nor any of its principals has been debarred, suspended, or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency. ["Principals," for the purpose of this certification, means officers; directors; owners of five percent or more of stock; partners; and persons having primary management or supervisory responsibility within a business entity (e.g., general manager, plant manager, head of a subsidiary division, or business segment, and similar positions).] I further agree that, should any such debarment, suspension, or notice of proposed debarment occur in the future, [name of applicant] will immediately notify CCC."

(b) *Previous qualification*. Any exporter that has previously qualified under this section may submit applications for GSM–102 or GSM–103 payment guarantees. Each application must include the statement required by §1493.40(a)(18) incorporating the certifications of §1493.50, including the certification in §1493.50(e) that the information previously provided pursuant to paragraph (a) of this section has not changed. If the exporter is unable to provide such certification, such exporter must update the information required by paragraph (a) of this section which has changed and certify that the remainder of the information previously provided has not changed.

(c) *Additional submissions*. CCC will promptly notify applicants that have submitted information required by this section whether they have qualified to participate in the program. Any applicant failing to qualify will be given an opportunity to provide additional information for consideration by CCC.

(d) *Ineligibility for program participation*. An applicant may be ineligible to participate in the GSM–102 or GSM–103 programs if:

(1) Such applicant is currently debarred, suspended, or proposed for debarment from contracting with or participating in any program administered by a U.S. Government agency; or

(2) Such applicant is controlled or can be controlled, in whole or in part, by any individuals or entities currently debarred, suspended or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency.

### §1493.40 Application for payment guarantee.

(a) A firm export sale must exist before an exporter may submit an application for a payment guarantee. An application for a payment guarantee may be submitted in writing or may be made by telephone, but, if made by telephone, it must be confirmed in writing to the office specified in the Contacts P/R. An application must identify the name and address of the exporter and include the following information:

(1) Name of the destination country.

(2) Name and address of the importer.

(3) Name and address of the intervening purchaser, if any, and a statement that the commodity will be shipped directly to the importer in the destination country.

(4) Date of sale.

(5) Exporter's sale number.

(6) Delivery period as agreed between the exporter and the importer.

(7) A full description of the commodity (including packaging, if any).

(8) Mean quantity, contract loading tolerance and, if necessary, a request for CCC to reserve coverage up to the maximum quantity permitted by the contract loading tolerance.

(9) Unit sales price of the commodity, or a mechanism to establish the price, as agreed between the exporter and the importer. If the commodity was sold on the basis of CFR or CIF, the actual (if known at the time of application) or estimated value of freight and, in the case of sales made on a CIF basis, the actual (if known at the time of application) or estimated value of marine and war risk insurance, must be specified.

(10) Description and value of discounts and allowances, if any.

(11) Port value (includes upward loading tolerance, if any).

(12) Guaranteed value.

(13) Guarantee fee.

(14) Name and location of the foreign bank issuing the letter of credit.

(15) The term length for the credit being extended and the intervals between principal payments for each shipment to be made under the export sale.

(16) A statement indicating whether any portion of the export sale for which the exporter is applying for a payment guarantee is also being used as the basis for an application for participation in any of the following CCC or USDA export programs: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program. The number of the Agreement assigned by USDA under one of these programs should be included, as applicable.

(17) Other information as specified in Notices to Participants, as applicable.

(18) The exporter's statement, "All Section 1493.50 Certifications Are Being Made In This Application" which, when included in the application by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.50.

(b) An application for a payment guarantee may be approved as submitted, approved with modifications agreed to by the exporter, or rejected by the GSM. In the event that the application is approved, the GSM will cause a payment guarantee to be issued in favor of the exporter. Such payment guarantee will become effective at the time specified in § 1493.60(b). If, based upon a price review, the unit sales price of the commodity does not fall within the prevailing commercial market level ranges, as determined by CCC, the application will not be approved.

### § 1493.50 Certification requirements for obtaining payment guarantee.

By providing the statement in § 1493.40(a)(18), the exporter is certifying that the information provided in the application is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to applications that do not include this statement. The exporter, in submitting an application for a payment guarantee and providing the statement set forth in § 1493.40(a)(18), certifies that:

(a) The agricultural commodity or product to be exported under the payment guarantee is a U.S. agricultural commodity as defined by § 1493.20(z).

(b) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law;

(c) If the agricultural commodity is vegetable oil or a vegetable oil product, that none of the agricultural commodity or product has been or will be used as a basis for a claim of a refund, as drawback, pursuant to section 313 of the Tariff Act of 1930, 19 U.S.C. 1313, of any duty, tax or fee imposed under Federal law on an imported commodity or product;

(d) No person or selling agency has been employed or retained to solicit or secure the payment guarantee, and that there is no agreement or understanding for a commission, percentage, brokerage, or contingent fee, except in the case of bona fide employees or bona fide established commercial or selling agencies maintained by the exporter for the purpose of securing business; and

(e) The information provided pursuant to § 1493.30 has not changed, the exporter still meets all of the qualification requirements of § 1493.30, and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements. If the exporter breaches or violates these certifications with respect to a GSM–102 or GSM–103 payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter.

[59 FR 52876, Oct. 19, 1994, as amended at 62 FR 24561, May 6, 1997]

**§ 1493.60 Payment guarantee.**

(a) *CCC's obligation.* The payment guarantee will provide that CCC agrees to pay the exporter or the exporter's assignee an amount not to exceed the guaranteed value, plus eligible interest, in the event that the foreign bank fails to pay under the foreign bank letter of credit or the related obligation. Payment by CCC will be in U.S. dollars.

(b) *Period of guarantee coverage.* The payment guarantee will apply to the period beginning either on the date(s) of export(s) or on the date when interest begins to accrue, whichever is earlier, and will continue during the credit term specified in the payment guarantee or amendments thereto. However, the payment guarantee becomes effective on the date(s) of export(s) of the agricultural commodities or products thereof specified in the exporter's application for a payment guarantee.

(c) *Terms of the CCC payment guarantee.* The terms of CCC's coverage will be set forth in the payment guarantee, as approved by CCC, and will include the provisions of this subpart, which may be supplemented by any Program Announcements and/or Notices to Participants in effect at the time the payment guarantee is approved by CCC.

(d) *Final date to export.* The final date to export shown on the payment guarantee will be one month, as determined by CCC, after the contractual deadline for shipping.

(e) *Reserve coverage for loading tolerances.* The exporter may apply for a payment guarantee and, if coverage is available, pay the guarantee fee, based at least on, the amount of the lower loading tolerance of the export sales contract; however, the exporter may also request that CCC reserve additional guarantee coverage to accommodate up to the amount of the upward loading tolerance specified in the export sales contract. If such additional guarantee coverage is available at the time of application and CCC determines to make such reservation, it will so indicate to the exporter. In the event that the exporter ships a quantity greater than the amount on which the guarantee fee was paid (*i.e.*, lower loading tolerance), it may obtain the additional coverage from CCC, up to the amount of the upward loading tolerance, by filing for an amendment to the payment guarantee, and by paying the additional amount of fee applicable. If such amendment to the payment guarantee is not filed with CCC by the exporter within 30 days after the date of the last export against the sales contract, CCC may determine not to reserve the coverage originally set aside for the exporter.

(f) *Ineligible exports.* Commodities with a date of export prior to the date of receipt by CCC of the exporter's telephonic or written application for a payment guarantee, or with a date of export made after the final date for export shown on the payment guarantee or any amendments thereof, are ineligible for GSM–102 or GSM–103 guarantee coverage, except where it is determined by the GSM to be in the best interests of CCC to provide guarantee coverage on such commodities.

(g) *Foreign agricultural component.* CCC may approve payment guarantees under this subpart only in connection with sales of United States agricultural commodities as defined in § 1493.20(z). CCC may not provide guarantee coverage under this subpart on credit extended for the value of any foreign agricultural component.

(h) *Additional requirements.* The payment guarantee may contain such additional terms, conditions, and limitations as deemed necessary or desirable by the GSM. Such additional terms, conditions or qualifications, as stated in the payment guarantee are binding on the exporter or the exporter's assignee.

(i) *Amendments.* A request for an amendment of a payment guarantee may be submitted only by the exporter (with the concurrence of the assignee, if any). CCC will consider such a request only if the amendment sought is consistent with this subpart and any applicable Program Announcements and Notices to Participants. Amendments may include, but will not be limited to, a change in the credit period and an extension of time to export. Any amendment to the payment guarantee, particularly those that result in an increase in CCC's liability under the payment guarantee, may result in an

increase in the guarantee fee. (Technical corrections or corrections of a clerical error which may be submitted by the exporter or the exporter's assignee are not viewed as amendments.)

**§ 1493.70 Guarantee rates and fees.**

(a) *Guarantee fee rates.* The payment guarantee fee rates will be based upon the length of the payment terms provided for in the export sale contract, the degree of risk that CCC assumes, as determined by CCC, and any other factors which CCC determines appropriate for consideration. A current schedule of the guarantee fee rates charged by CCC under GSM–102 and GSM–103 will be available upon request from the FAS/USDA office specified in the Contacts P/R.

(b) *Calculation of fee.* The guarantee fee will be computed by multiplying the guaranteed value by the guarantee fee rate.

(c) *Payment of fee.* The exporter shall remit, with his written application, the full amount of the guarantee fee. Applications will not be approved until the guarantee fee has been received by CCC. The exporter's check for the guarantee fee shall be made payable to CCC and mailed or delivered by courier to the office specified in the Contacts P/R.

(d) *Refunds of fee.* Guarantee fees paid in connection with approved applications will ordinarily not be refundable. CCC's approval of the application will be final and refund of the guarantee fee will not be made after approval unless the GSM determines that such refund will be in the best interest of CCC. If the application for a payment guarantee is not approved or is approved only for a part of the guarantee coverage requested, a full or pro rata refund of the fee remittance will be made.

**§ 1493.80 Evidence of export.**

(a) *Report of export.* The exporter is required to provide CCC an evidence of export report for each shipment made under the payment guarantee. This report must include the following:

(1) Payment guarantee number

(2) Date of export

(3) Exporter's sale number

(4) Exported value

(5) Quantity

(6) A full description of the commodity exported

(7) Unit sales price received for the commodity exported and the basis (e.g., FOB, CFR, CIF). Where the unit sales price at export differs from the unit sales price indicated in the exporter's application for a payment guarantee, the exporter is also required to submit a statement explaining the reason for the difference.

(8) Description and value of discounts and allowances, if any.

(9) Number of the Agreement assigned by USDA under another program if any portion of the export sale was also approved for participation in the following CCC or USDA export programs: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program.

(10) The exporter's statement, "All § 1493.90 Certifications Are Being Made In This Evidence Of Export" which, when included in the evidence of export by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.90.

(b) *Time limit for submission of evidence of export.* The exporter must provide a written report to the office specified in the Contacts P/R within 60 calendar days if the export was by rail or truck; or 30 calendar days if the export was by any other carrier. The time period for filing a report of export will commence upon each date of export of the commodity covered under a payment guarantee. If the evidence of export report is not received by CCC within the time period for filing, the payment guarantee will become null and void only if and only to the extent that failure to make timely filing resulted, or would be likely to result, in:

(1) Significant financial harm to CCC;

(2) The undermining of an essential regulatory purpose of the program;

(3) Obstruction of the fair administration of the program; or

(4) A threat to the integrity of the program. The time limit for submission of an evidence of export report may be extended if such extension is determined by the GSM to be in the best interests of CCC.

(c) *Export sales reporting.* Exporters may have a mandatory reporting responsibility under Section 602 of the Agricultural Trade Act of 1978 (7 U.S.C. 5712), as amended by Section 1531 of the Food, Agriculture, Conservation, and Trade Act of 1990 for exports of wheat and wheat flour, feed grains, oilseeds, cotton, and other agricultural commodities and products thereof.

**§ 1493.90 Certification requirements for the evidence of export.**

By providing the statement contained in § 1493.80(a)(10), the exporter is certifying that the information provided in the evidence of export report is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to reports that do not include this statement. If the exporter breaches or violates these certifications with respect to a GSM–102 or GSM–103 payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter. The exporter, in submitting the evidence of export and providing the statement set forth in § 1493.80(a)(10), certifies that:

(a) The agricultural commodity or product exported under the payment guarantee is a U.S. agricultural commodity as defined by § 1493.20(z).

(b) Agricultural commodities of the grade, quality and quantity called for in the exporter's sales contract with the importer have been exported to the country specified in the payment guarantee;

(c) A letter of credit has been opened in favor of the exporter by the foreign bank shown in the payment guarantee to cover the port value of the commodity exported;

(d) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law; and

(e) The information provided pursuant to § 1493.30 has not changed, the exporter still meets all of the qualification requirements of § 1493.30 and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements.

[59 FR 52876, Oct. 19, 1994, as amended at 62 FR 24561, May 6, 1997]

**§ 1493.100 Proof of entry.**

(a) *Diversion.* The diversion of commodities covered by a GSM–102 or GSM–103 payment guarantee to a country other than that shown on the payment guarantee is prohibited, unless expressly authorized by the GSM.

(b) *Records of proof of entry.* Exporters must obtain and maintain records of an official or customary commercial nature and grant authorized USDA officials access to such documents or records as may be necessary to demonstrate the arrival of the agricultural commodities exported in connection with the GSM–102 or GSM–103 programs in the country that was the intended country of destination of such commodities. Records demonstrating proof of entry must be in English or be accompanied by a certified or other translation acceptable to CCC. Records acceptable to meet this requirement include an original certification of entry signed by a duly authorized customs or port official of the importing country, by the importer, by an agent or representative of the vessel or shipline which delivered the agricultural commodity to the importing country, or by a private surveyor in the importing country, or other documentation deemed acceptable by the GSM showing:

(1) That the agricultural commodity entered the importing country;

(2) The identification of the export carrier;

(3) The quantity of the agricultural commodity;

(4) The kind, type, grade and/or class of the agricultural commodity; and

(5) The date(s) and place(s) of unloading of the agricultural commodity in the importing country. [Records of proof of entry need not be submitted with a claim for loss, except as may be provided in § 1493.110(b)(4)(ii).]

**§ 1493.110 Notice of default and claims for loss.**

(a) *Notice of default.* If the foreign bank issuing the letter of credit fails to make payment pursuant to the terms of the foreign bank letter of credit or related obligation, the exporter or the exporter's assignee must submit a notice of default to CCC as soon as possible, but not later than 10 calendar days after the date that payment was due from the foreign bank (the due date). A notice of default must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. If the exporter or the exporter's assignee fails to promptly notify CCC of defaults in accordance with this paragraph, CCC may make the payment guarantee null and void with respect to any payment(s) applicable to such default. This time limit may be extended only under extraordinary circumstances and if such extension is determined by the Controller, CCC, to be in the best interests of CCC. The notice of default must include:

(1) Payment guarantee number;

(2) Name of the country;

(3) Name of the defaulting bank;

(4) Due date;

(5) Total amount of the defaulted payment due, indicating separately the amounts for principal and interest;

(6) Date of foreign bank's refusal to pay, if applicable; and

(7) Reason for foreign bank's refusal to pay, if known.

(b) *Filing a claim for loss.* A claim for a loss by the exporter or the exporter's assignee will not be paid if it is made later than six months from the due date of the defaulted payment. A claim for loss must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. The claim for loss must include the following information and documents:

(1) Payment guarantee number;

(2) A certification that the scheduled payment has not been received;

(3) A certification of the amount of accrued interest in default, the date interest began to accrue, and the interest rate on the foreign bank obligation applicable to the claim;

(4) A copy of each of the following documents, with a cover document containing a signed certification by the exporter or the exporter's assignee that each page of each document is a true and correct copy:

(i)(A) The foreign bank letter of credit securing the export sale; and

(B) If applicable, the document(s) evidencing the related obligation owed by the foreign bank to the assignee financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter. Such related obligation must be demonstrated in one of the following ways:

(*1*) The related obligation, including a specific promise to pay on deferred payment terms, may be contained in the letter of credit as a special instruction from the issuing bank directly to the U.S. financial institution to refinance the amounts paid by the U.S. financial institution for obligations financed according to the tenor of the letter of credit; or

(*2*) The related obligation may be memorialized in a separate document(s) specifically identified and referred to in the letter of credit as the agreement under which the foreign bank is obliged to repay the U.S. financial institution on deferred payment terms; or

(*3*) The letter of credit payment obligations may be specifically identified in a separate document(s) setting forth the related obligation, or in a duly executed amendment thereto, as having been financed by the U.S. financial institution pursuant to, and subject to repayment in accordance with the terms of, such related obligation; or

(*4*) The related obligation may be memorialized in the form of a promissory note executed by the foreign bank issuing the letter of credit in favor of the U.S. financial institution submitting the claim;

(ii) Depending upon the method of shipment, the negotiable ocean carrier or intermodal bill(s) of lading signed by the shipping company with the onboard ocean carrier date for each shipment, the airway bill, or, if shipped by rail or truck, the entry certificate or similar document signed by an official of the importing country;

(iii)(A) The exporter's invoice showing, as applicable, the FAS, FOB, CFR or CIF values; or

(B) If there was an intervening purchaser, both the exporter's invoice to

the intervening purchaser and the intervening purchaser's invoice to the importer;

(iv) An instrument, in form and substance satisfactory to CCC, subrogating to CCC the respective rights of the exporter and the exporter's assignee, if applicable, to the amount of payment in default under the applicable export sale. The instrument must reference the applicable foreign bank letter of credit and the related obligation, if applicable; and

(v) A copy of the report(s) of export previously submitted by the exporter to CCC pursuant to § 1493.80(a).

(c) *Subsequent claims for defaults on installments*. If the initial claim is found in good order, the exporter or an exporter's assignee need only provide all of the required claims documents with the initial claim relating to a covered transaction. For subsequent claims relating to failure of the foreign bank to make scheduled installments on the same export shipment, the exporter or the exporter's assignee need only submit to CCC a notice of such failure containing the information stated in paragraph (b)(1), (2), and (3) of this section; an instrument of subrogation as per paragraph (b)(4)(iv) of this section, and including the date the original claim was filed with CCC.

**§ 1493.120 Payment for loss.**

(a) *Determination of CCC's liability*. Upon receipt in good order of the information and documents required under § 1493.110, CCC will determine whether or not a loss has occurred for which CCC is liable under the applicable payment guarantee, this subpart and any applicable supplemental Program Announcements and Notices to Participants. If CCC determines that it is liable to the exporter and/or the exporter's assignee, CCC will pay the exporter or the exporter's assignee in accordance with paragraphs (b) and (c) of this section.

(b) *Amount of CCC's liability*. CCC's maximum liability for any claims for loss submitted with respect to any payment guarantee, not including any late interest payments due in accordance with paragraph (c) of this section, will be limited to the lesser of:

(1) The guaranteed value as stated in the payment guarantee, plus eligible interest; or

(2) The guaranteed percentage (as indicated in the payment guarantee) of the exported value indicated in the evidence of export, plus eligible interest.

(c) *Late interest payment*. If a claim is not paid within one day of receipt of a claim which CCC has determined to be in good order, late interest will accrue in favor of the exporter or the exporter's assignee beginning with the first day after the day of receipt of a claim found by CCC to be in good order and continuing until and including the date that payment is made by CCC. Late interest will be paid on the guaranteed amount, as determined by paragraphs (b)(1) and (2) of this section, and will be calculated based on the average investment rate of the most recent Treasury 91-day bill auction as announced by the Department of Treasury as of the due date.

(d) *Accelerated payments*. CCC will pay claims only for losses on amounts not paid as scheduled. CCC will not pay claims for amounts due under an accelerated payment clause in the export sales contract, the foreign bank's letter of credit, or any obligation owed by the foreign bank to the assignee U.S. financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter, unless it is determined to be in the best interests of CCC by the Controller, CCC. Notwithstanding the foregoing, CCC at its option may declare the entire amount of the unpaid balance, plus accrued interest, in default and make payment to the exporter or the exporter's assignee in addition to such other claimed amount as may be due from CCC.

(e) *Action against the assignee*. Notwithstanding any other provision in this subpart to the contrary, with regard to commodities covered by a payment guarantee, CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge, provided that:

(1) The exporter complies with the reporting requirements under § 1493.80

and §1493.90, excluding post-export adjustments (*i.e.*, corrections to evidence of export reports); and

(2) The exporter or the exporter's assignee furnishes the statements and documents specified in §1493.110.

**§1493.130 Recovery of losses.**

(a) *Notification*. Upon payment of loss to the exporter or the exporter's assignee, CCC will notify the foreign bank of CCC's rights under the subrogation agreement to recover all moneys in default.

(b) *Receipt of monies*. (1) In the event that monies for a defaulted payment are recovered by the exporter or the exporter's assignee from the importer, the foreign bank, or any other source whatsoever, such monies shall be immediately paid to the Treasurer, CCC. If such monies are not received by CCC within 15 business days from the date of recovery by the exporter or the exporter's assignee, the exporter or the exporter's assignee will owe to CCC interest from the date of recovery to the date of receipt by CCC. This interest will be calculated based on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and will accrue from such date to the date of payment by the exporter or the exporter's assignee to CCC. Such interest will be charged only on CCC's share of the recovery.

(2) If CCC recovers monies that should be applied to a payment guarantee for which a claim has been paid by CCC, CCC will pay the holder of the payment guarantee its pro rata share immediately, provided that the required information necessary for determining pro rata distribution has been furnished. If payment is not made by CCC within 15 business days from the date of recovery or 15 business days from receiving the required information for determining pro rata distribution, whichever is later, CCC will pay interest calculated on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and such interest will accrue from such date to the date of payment by CCC. The interest will apply only to the portion of the recovery payable to the holder of the payment guarantee.

(c) *Allocation of recoveries*. Recoveries made by CCC from the importer or the foreign bank, and recoveries received by CCC from the exporter, the exporter's assignee, or any other source whatsoever, will be allocated by CCC to the exporter or the exporter's assignee and to CCC on a pro rata basis determined by their respective interests in such recoveries. The respective interest of each party will be determined on a pro rata basis, based on the combined amount of principal and interest in default. Once CCC has paid out a particular claim under a GSM–102 or GSM–103 payment guarantee, CCC prorates any collections it receives and shares these collections proportionately with the holder of the guarantee until both CCC and the holder of the guarantee have been reimbursed in full. Appendix A to §1493.130—Illustration of Pro Rata Allocation of Recoveries—provides an example of the methodology used by CCC in applying this paragraph (c).

(d) *Liabilities to CCC*. Notwithstanding any other terms of the payment guarantee, the exporter may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter has engaged in fraud, or has been or is in material breach of any contractual obligation, certification or warranty made by the exporter for the purpose of obtaining the payment guarantee or for fulfilling obligations under GSM–102 or GSM–103. Further, the exporter's assignee may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter's assignee has engaged in fraud or otherwise violated program requirements.

(e) *Good faith*. The violation by an exporter of the certifications in §1493.50(b) and §1493.90(d) or the failure of an exporter to comply with the provisions of §1493.100 or §1493.140(e) will not affect the validity of any payment guarantee with respect to an assignee which had no knowledge of such violation or failure to comply at the time such exporter applied for the payment

guarantee or at the time of assignment of the payment guarantee.

(f) *Cooperation in recoveries.* Upon payment by CCC of a claim to the exporter or the exporter's assignee, the exporter or the exporter's assignee will cooperate with CCC to effect recoveries from the foreign bank and/or the importer.

APPENDIX A TO § 1493.130—ILLUSTRATION OF PRO RATA ALLOCATION OF RECOVERIES

The following example illustrates CCC's policy, as set forth in § 1493.130(c), regarding pro rata sharing of recoveries made for claims filed under the GSM–102 and GSM–103 programs. A typical case might be as follows:

1. The U.S. bank enters into a $300,000 three-year credit arrangement with the foreign bank calling for equal annual payments of principal and annual payments of interest at a rate of 10 percent per annum and a penalty interest rate of 12 percent per annum on overdue amounts until the overdue amount is paid.

2. The foreign bank fails to make the final principal payment of $100,000 and an interest payment of $10,000, both due on January 31.

3. On February 10, the U.S. bank files a claim in good order with CCC.

4. CCC's guarantee states that CCC's maximum liability is limited to 98 percent of the principal amount due ($98,000) and interest at a rate of 8 percent per annum (basis 365 days) on 98 percent of the principal ($7,840).

5. CCC pays the claim on February 22.

6. The latest bond equivalent rate of the 52-week Treasury bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment (January 31) is 9 percent. The latest investment rate of the 91-day Treasury Bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment by CCC (February 11) is 7 percent.

COMPUTATION OF OBLIGATIONS

Using the above case, CCC's payment to the holder of the payment guarantee would be computed as follows:

1. CCC's Obligation under the Payment Guarantee:

| | | |
|---|---|---|
| (a) ..... | Principal coverage—(98% × $100,000). | $98,000.00 |
| (b) ..... | Interest coverage—(8% × $98,000). | $7,840.00 |
| ..... | | $105,840.00 |
| (c) ..... | Late interest due from CCC (7% per annum for 11 days × $105,840). | $223.28 |
| (d) ..... | Amount paid by CCC on February 22. | $106,063.28 |

2. Foreign Bank's Obligation under the Letter of Credit or the Related Obligation:

| | | |
|---|---|---|
| (a) ..... | Principal due January 31. | $100,000.00 |
| ..... | Interest due January 31 (10% × $100,000). | $10,000.00 |
| ..... | Amount owed by foreign bank as of January 31. | $110,000.00 |
| (b) ..... | Penalty interest due (12% per annum for 22 days × $100,000). | $795.62 |
| (c) ..... | Amount owed by foreign bank as of February 22. | $110,795.62 |

3. Amount of Foreign Bank's Obligation Not Covered by CCC's Payment Guarantee: $4,668.55

COMPUTATION OF PRO RATA SHARING IN RECOVERY OF LOSSES

In establishing each party's respective interest in any recovery of losses, the total amount due under the foreign bank obligation would be determined as of the date the claim is paid by CCC (February 22). Using the above example in which the amount owed by the foreign bank is $110,000, CCC would be entitled to 95.75 percent ($106,063.07 divided by $110,765.62) and the holder of the payment guarantee would be entitled to 4.21 percent ($4,668.55 divided by $110,795.62) of any recoveries of losses after settlement of the claim. Since in this example, the losses were recovered after the claim has been paid by CCC, § 1493.130(b) would apply.

## § 1493.140 Miscellaneous provisions.

(a) *Assignment.* (1) The exporter may assign the proceeds which are, or may become, payable by CCC under a payment guarantee or the right to such proceeds only to a financial institution in the U.S. The assignment must cover all amounts payable under the payment guarantee not already paid, may not be made to more than one party, and may not, unless approved in advance by CCC, be:

(i) Made to one party acting for two or more parties or

(ii) Subject to further assignment.

(2) An original and two copies of the written notice of assignment signed by the parties thereto must be filed by the assignee with the Treasurer, CCC, at

the address specified in the Contacts P/R.

(3) Receipt of the notice of assignment will ordinarily be acknowledged to the exporter and its assignee in writing by an officer of CCC. In cases where a financial institution is determined to be ineligible to receive an assignment, in accordance with paragraph (b) of this section, CCC will provide notice thereof, to the financial institution and to the exporter issued the payment guarantee, in lieu of an acknowledgment of assignment.

(4) The name and address of the assignee must be included on the written notice of assignment.

(b) *Ineligibility of financial institutions to receive an assignment*. A financial institution will be ineligible to receive an assignment of proceeds which may become payable under a payment guarantee if, at the time of assignment, such financial institution:

(1) Is not in sound financial condition, as determined by the Treasurer of CCC; or

(2) Is the financial institution issuing the letter of credit or branch, agency, or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(c) *Ineligibility of financial institutions to receive proceeds*. A financial institution will be ineligible to receive proceeds payable under a payment guarantee approved by CCC if such financial institution:

(1) At the time of assignment of a payment guarantee, is not in sound financial condition, as determined by the Treasurer of CCC;

(2) Is the financial institution issuing the letter of credit or a branch, agency, or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(d) *Alternative satisfaction of payment guarantees*. CCC may, with the agreement of the exporter (or if the right to proceeds payable under the payment guarantee has been assigned, with the agreement of the exporter's assignee), establish procedures, terms and/or conditions for the satisfaction of CCC's obligations under a payment guarantee other than those provided for in this subpart if CCC determines that those alternative procedures, terms, and/or conditions are appropriate in rescheduling the debts arising out of any transaction covered by the payment guarantee and would not result in CCC paying more than the amount of CCC's obligation.

(e) *Maintenance of records and access to premises*. (1) For a period of five years after the date of expiration of the coverage of a payment guarantee, the exporter or the exporter's assignee, as applicable, must maintain and make available all records pertaining to sales and deliveries of and extension of credit for agricultural commodities exported in connection with a GSM–102 or GSM–103 payment guarantee, including those records generated and maintained by agents, intervening purchasers, and related companies involved in special arrangements with the exporter. The Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, must be given full and complete access to the premises of the exporter or the exporter's assignee, as applicable, during regular business hours from the effective date of the payment guarantee until the expiration of such five-year period to inspect, examine, audit, and make copies of the exporter's, exporter's assignee's, agent's, intervening purchaser's or related company's books, records and accounts concerning transactions relating to the payment guarantee, including, but not limited to, financial records and accounts pertaining to sales, inventory, processing, and administrative and incidental costs, both normal and unforeseen. During such period, the exporter or the exporter's assignee may be required to make available to the Secretary of Agriculture or the Comptroller General of the United States, through their authorized representatives, records that pertain to transactions conducted outside the program, if, in the opinion of the GSM, such records would pertain

directly to the review of transactions undertaken by the exporter in connection with the payment guarantee.

(2) The exporter must maintain the proof of entry required by §1493.100(b), and must provide access to such documentation if requested by the Secretary of Agriculture or his authorized representative for the five-year period specified in paragraph (e)(1) of this section.

(f) *Responsibility of program participants.* It is the responsibility of all program participants to review, and fully acquaint themselves with, all regulations, Program Announcements, and Notices to Participants relating to the GSM–102 or GSM–103 program, as applicable. Applicants for payment guarantees under these programs are hereby on notice that they will be bound by any terms contained in applicable Program Announcements or Notices to Participants issued prior to the date of approval of a payment guarantee.

(g) *Submission of documents by principal officers.* All required submissions, including certifications, applications, reports, or requests (*i.e.*, requests for amendments), by exporters or exporters' assignees under this subpart must be signed by a principal or officer of the exporter or exporter's assignee or their authorized designee(s). In cases where the designee is acting on behalf of the principal or the officer, the signature must be accompanied by: wording indicating the delegation of authority or, in the alternative, by a certified copy of the delegation of authority; and the name and title of the authorized person or officer. Further, the exporter or exporter's assignee must ensure that all information/reports required under these regulations are submitted within the required time limits. If requested in writing, CCC will acknowledge receipt of a submission by the exporter or the exporter's assignee. If acknowledgment of receipt is requested, the exporter or exporter's assignee must submit an extra copy of each document and a stamped self-addressed envelope for return by U.S. mail. If courier services are desired for the return receipt, the exporter or exporter's assignee must also submit a self-addressed courier service order which includes the recipient's billing code for such service.

(h) *Officials not to benefit.* No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the payment guarantee or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the payment guarantee if made with a corporation for its general benefit.

(i) *OMB control number assigned pursuant to the Paperwork Reduction Act.* The information collection requirements contained in this part (7 CFR part 1493) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0551–0004.

## Subpart C—CCC Facility Guarantee Program (FGP) Operations

SOURCE: 62 FR 42656, Aug. 8, 1997, unless otherwise noted.

### §1493.200 General statement.

This subpart governs the Commodity Credit Corporation's (CCC) Facility Guarantee Program (FGP). CCC will issue facility payment guarantees for project applications meeting the terms and conditions of the Facility Guarantee Program (FGP) and where private sector financing is otherwise not available. This subpart describes the criteria and procedures for applying for a facility payment guarantee, and contains the general terms and conditions of such a guarantee. These general terms and conditions may be supplemented by special terms and conditions specified in program announcements or notices to participants published prior to the issuance of a facility payment guarantee and, if so, will be incorporated by reference on the face of the facility payment guarantee issued by CCC.

### §1493.210 Definition of terms.

Terms set forth in this subpart will have the following meaning:

*Assignee.* A financial institution in the United States which, for adequate

consideration given, has obtained the legal rights to receive payment under the facility payment guarantee.

*CCC*. The Commodity Credit Corporation, an agency and instrumentality of the United States within the U.S. Department of Agriculture, authorized pursuant to the Commodity Credit Corporation Charter Act of 1948, *as amended*, 15 U.S.C. 714 *et seq.*, and subject to the general supervision and direction of the Secretary of Agriculture.

*Contacts P/R*. A notice issued by Foreign Agricultural Service, U.S. Department of Agriculture (FAS/USDA) by public press release which contains specific names, addresses, and telephone and facsimile numbers of contacts within FAS/USDA and CCC. The Contacts P/R also contains details about where to submit information required to qualify for program participation, to apply for payment guarantees, to request amendments of facility payment guarantees, to submit evidence of export reports, and to give notices of default and file claims for loss.

*Contract value*. The total negotiated dollar amount for the export sale of goods and services to emerging markets.

*Date of export for goods*. The on-board date of an ocean bill of lading or an airway bill, the on-board ocean carrier date of an intermodal bill of lading; or, if exported by rail or truck, the date of entry shown on an entry certificate or similar document issued and signed by an official of the government of the importing country.

*Date of export for services*. The date interest begins to accrue on credit extended to cover payment for services, except for freight and marine insurance where the date of export is the same date as for the goods exported.

*Discounts and allowances*. Any consideration provided directly or indirectly, by or on behalf of an exporter, to an importer in connection with a sale of goods or services, in excess of the value of such goods or services. Discounts or allowances include, but are not limited to, the provision of additional goods, services or benefits; the promise to provide additional goods, services or benefits in the future; financial rebates; the assumption of any financial or contractual obligation; or the whole or partial release of the importer from any financial or contractual obligation.

*Facility*. An opportunity or project that improves the handling, marketing, processing, storage, or distribution of imported agricultural commodities or products.

*GSM*. The General Sales Manager, Foreign Agricultural Service, U.S. Department of Agriculture, acting in his capacity as Vice President, CCC; or his designee.

*U.S. goods*. Goods that are assembled, processed or manufactured in, and exported from, the United States including goods which contain imported raw materials or imported components.

*U.S. services*. Services performed by citizens or legal residents of the United States, including those temporarily residing outside the United States.

### § 1493.220 Exporter eligibility.

An exporter may apply for a facility payment guarantee if such exporter:

(a) Is a citizen or legal resident of the United States or is a business organized under the laws of any state of the United States or the District of Columbia;

(b) Has an established place of business in the United States;

(c) Has a registered agent for service of process in the United States; and

(d) Is not suspended or debarred, or owned or controlled by a person who is suspended or debarred, from contracting with, or participating in programs administered by, a U.S. Government agency.

### § 1493.230 Eligible transactions.

(a) *Program announcements*. From time to time CCC will issue program announcements indicating the availability of facility payment guarantees in connection with sales of goods or services to emerging markets. The announcements will specify the emerging markets, the maximum amount, in U.S. dollars, of guarantee exposure that CCC will undertake, and may specify special terms or conditions that will be applicable.

(b) *Sale requirements*. CCC will issue facility payment guarantees only in connection with projects that CCC determines will benefit primarily exports of U.S. agricultural commodities and

products, and only where there is a firm contract for the sale of goods or services for the establishment or improvement of an agriculture-related facility. The contract may be contingent, however, on the issuance of a CCC facility payment guarantee.

(c) *Initial payment requirement.* The contract for sale of goods or services between the exporter and the importer shall oblige the importer to make an initial payment(s) to the exporter of at least 15 percent of the net contract value in §1493.260(b)(1). Such initial payment(s) shall be in U.S. dollars or instruments having a definite value in U.S. dollars, and shall be made prior to the export of the goods or services.

(d) *Required method of payment.* CCC will issue a facility payment guarantee only in connection with a sale in which payment will be made under either:

(1) An irrevocable foreign bank letter of credit specifically stating the deferred payment terms under which the foreign bank is obligated to make payments in U.S. dollars as payments become due; or

(2) An irrevocable foreign bank letter of credit supported by a related obligation specifically stating the deferred payment terms under which the foreign bank is obligated to make payment in U.S. dollars as such payments become due.

(e) *Form of letter of credit.* The foreign bank letter of credit referred to in paragraph (d) of this section shall be an irrevocable commercial letter of credit, subject to the revision of the International Chamber of Commerce Uniform Customs and Practices for Documentary Credits©; in effect when the letter of credit is issued, providing for payment in U.S. dollars against stipulated documents and issued in favor of the exporter by a CCC-approved foreign banking institution.

(f) *Form of related obligation.* The related obligation referred to in paragraph (d) of this section shall be in one of the following forms:

(1) A letter of credit including a specific promise to pay on deferred payment terms as a special instruction from the issuing bank directly to the U.S. financial institution to refinance the amounts paid by the U.S. financial institution for obligations financed according to the tenor of the letter of credit;

(2) A separate document specifically identified and referred to in the letter of credit as the agreement under which the foreign bank is obligated to repay the U.S. financial institution on deferred payment terms;

(3) A separate document setting forth the related obligation, or in a duly executed amendment thereto, as having been financed by a U.S. financial institution pursuant to, and subject to, repayment in accordance with the terms of such related obligation; or

(4) A promissory note executed by a foreign bank issuing the letter of credit in favor of the financial institution.

### §1493.240 Initial application and letter of preliminary commitment.

(a) *Initial application.* An exporter may apply for a facility payment guarantee by submitting the following information:

(1) A cover sheet with the title: "Application for a Facility Payment Guarantee—Preliminary Commitment";

(2) The program announcement number;

(3) The emerging market;

(4) The name, contact person, address, and telephone number and, if applicable, facsimile number and E-mail address of:

(i) The exporter;

(ii) The exporter's registered agent for service of process in the United States;

(iii) The exporter's assignee, if applicable;

(iv) The importer;

(v) The end-user of the goods or services if other than the importer;

(vi) The foreign bank expected to issue the letter of credit or related obligation; and

(vii) The financial institution in the United States expected to provide financing;

(5) A statement on letterhead from a:

(i) Foreign bank indicating an interest in guaranteeing payment, in U.S. dollars, for goods or services to be exported under the facility payment guarantee at least equal to the net contract value listed in paragraph (a)(14) of this section, less the initial payment

requirement listed in paragraph (a)(15) of this section; and

(ii) Financial institution in the U.S. indicating an interest in financing the export sales of goods or services under the facility payment guarantee for an amount at least equal to the net contract value listed in paragraph (a)(14) of this section less the initial payment requirement listed in paragraph (a)(15) of this section. The financial institution must state that such financing would not otherwise be available without an FGP payment guarantee;

(6) The period for which credit is being extended to finance the sale of goods or services covered by the facility payment guarantee;

(7) The exporter's sales number pertinent to this application and a description of the status of the intended sale;

(8) A description (e.g., a process flow diagram) of the agriculture-related facility that will use the goods or services to be covered by the facility payment guarantee and an explanation of how these goods and services will be used to improve handling, marketing, processing, storage, or distribution of agricultural commodities or products;

(9) A brief description of each good or service to be covered by the facility payment guarantee including, where applicable, brand name, model number, Standard Industrial Classification (SIC) or the North American Industry Classification System (NAICS) code, and contract specifications;

(10) The final date for export of goods or services. If applicable, include construction start date, milestones (e.g., installation), and contractual deadline for completion of project;

(11) The contract value for the sale of goods or services and the basis of sale for goods to be exported (e.g., FOB, CFR, CIF);

(12) The description and value of the goods or cost of services listed in paragraph (a)(11) of this section that are not U.S. goods or services;

(13) Identification and cost of, and justification for, those services listed in paragraph (a)(12) of this section for which the exporter requests CCC to provide coverage;

(14) The net contract value in § 1493.260(b)(1) obtained by subtracting paragraph (a)(12) of this section from paragraph (a)(11) of this section, and adding paragraph (a)(13) of this section;

(15) The amount to be paid in accordance with the initial payment requirement (§ 1493.230(c));

(16) The description and dollar amount of discounts and allowances provided in connection with the sale of goods or services covered by the facility payment guarantee;

(17) The facility base value in § 1493.260(b)(2) obtained by subtracting paragraphs (a)(15) and (a)(16) of this section from paragraph (a)(14) of this section;

(18) The maximum guaranteed value under the facility payment guarantee determined by multiplying the facility base value listed in paragraph (a)(17) of this section by the guarantee rate of coverage announced by CCC in § 1493.260(b)(3);

(19) A map or other description of the facility's location and distance from major population centers of neighboring countries;

(20) For all principal agricultural commodities or products (inputs) to be handled, marketed, processed, stored, or distributed, by the proposed project after completion, provide:

(i) A list or table identifying such principal inputs;

(ii) The likely countries of origin for each input;

(iii) Estimated annual quantities, in metric tons, of each input listed in paragraph (a)(20)(i) of this section to be used by the project for five years from the final date of export or until the expiration of the facility payment guarantee, whichever comes first; and

(iv) An analysis, including price, cost, and other assumptions (the reasons why U.S. agricultural commodities or products will be more competitive inputs than commodities or products from other sources, and whether the projected use of U.S. agricultural commodities or products depends on the availability of U.S. export bonus or credit guarantee programs), of which inputs listed in paragraph (a)(20)(i) of this section will represent increased imports of U.S. agricultural commodities or products:

(A) To a greater degree than imports of agricultural commodities or products from other countries;

(B) To or at levels significantly above those expected in the absence of the project; and

(C) For a period of five years from the final date of export or until expiration of the facility payment guarantee, whichever comes first.

(21) If applicable, a list of agricultural outputs or final products of the proposed project and:

(i) Projected annual quantities (for five years or until the expiration of the facility payment guarantee, whichever comes first), in metric tons, of each output to be marketed;

(A) Within the emerging market; and

(B) In any other country;

(ii) Quantities, by country of origin, of products imported into the emerging market during the past year which would compete with such outputs; and

(iii) An analysis of whether products of the project will significantly displace U.S. exports of similar agricultural commodities or products in any market;

(22) If applicable, a description of any arrangements or understandings with other U.S. or foreign government agencies, or with financial institutions or entities, private or public, providing financing to the exporter in connection with this export sale, and copies of any documents relating to such arrangements;

(23) A description of the exporter's experience selling goods or providing services similar to those for which the exporter seeks to obtain facility payment guarantee coverage;

(24) A statement of how this project may encourage privatization of the agricultural sector, or benefit private farms or cooperatives, in the emerging market. Include in the statement the share of private sector ownership of the project;

(25) The exporter's signature.

(b) *Application fee.* The exporter shall pay the application fee specified in the program announcement at the time the application is submitted. An application will not be considered without payment of the specified fee. The application fee is nonrefundable.

(c) *Letter of preliminary commitment.* CCC will determine whether, in its judgment, the project in connection with which the exporter seeks a facility payment guarantee is likely to increase exports of U.S. agricultural commodities or products to an emerging market; and whether the project is likely to benefit primarily U.S. agricultural commodities or products as opposed to commodities or products originating in other countries. If necessary, CCC may seek additional information from an applicant prior to making its determination. If CCC determines that an application meets these standards and appears to represent, in CCC's judgment, the best use of available resources, CCC will respond to the applicant with a letter of preliminary commitment indicating CCC's interest in issuing a facility payment guarantee conditioned on its approval of the exporter's final application.

### § 1493.250 Final application and issuance of a facility payment guarantee.

(a) *Final application.* An exporter who has received a letter of preliminary commitment may, within six months of the date of such letter, submit a final application to CCC for a facility payment guarantee which shall include the following information:

(1) A cover sheet with the title: "Application for a Facility Payment Guarantee—Final Commitment."

(2) A letterhead statement from the importer's bank or other documentation confirming the importer has the financial ability to comply with the initial payment requirement in § 1493.230(c);

(3) Written evidence of a firm sale signed by the exporter and the importer, specifying at minimum, the following information: Goods or services to be exported, quantities of such items, delivery terms (e.g., FOB, CFR, CIF), delivery period(s), contract value, payment terms, and date of sale. A sales contract may be contingent upon obtaining a facility payment guarantee;

(4) A description of any changes in the information submitted in the preliminary application; and

(5) The exporter's signature;

(b) *Additional information.* CCC shall have the right to request the exporter to furnish any other information and

documentation it deems pertinent to the evaluation of the exporter's final application for a final commitment. CCC may request from the exporter an independent engineering study or economic feasibility study relating to the project.

(c) *Final commitment letter.* After making a favorable determination on the exporter's submissions, CCC will issue a final commitment letter indicating the applicable exposure fee rate and stating that CCC is prepared to issue a facility payment guarantee upon receiving full payment of the exposure fee within an allotted time. The letter will also indicate the key terms and coverage of the guarantee to be issued. CCC will also inform exporters in writing when it denies their request for a facility payment guarantee.

(d) *Exposure fee.* The exposure fee is calculated by multiplying the requested guaranteed value (up to the maximum established by CCC's final commitment letter) by the exposure fee rate. Once the facility payment guarantee is issued to the exporter, CCC will ordinarily not refund the exposure fee. If CCC does not issue a facility payment guarantee, or issues a guarantee for only part of the coverage requested, CCC will make a full or *pro rata* refund of the exposure fee, as appropriate.

(e) *Issuance of the facility payment guarantee.* Upon receipt of the exposure fee, CCC will issue a facility payment guarantee.

### § 1493.260 Facility payment guarantee.

(a) *CCC's maximum obligation.* CCC will agree to pay the exporter or the exporter's assignee an amount not to exceed the guaranteed value stipulated on the face of the facility payment guarantee, plus eligible interest, in the event that the foreign bank fails to pay under the foreign bank letter of credit or related obligation. The exact amount of CCC's liability in the event of default will be determined in accordance with § 1493.310(b).

(b) *Calculation of maximum guarantee coverage.* CCC will determine the maximum amount of its obligation under a facility payment guarantee by calculating a:

(1) Net contract value equal to the contract value minus:

(i) The value of goods that are not U.S. goods; and

(ii) The cost of services that are not U.S. services (except those services the exporter requests CCC to determine are vital to the success of the project and approved to be included in the net contract value);

(2) Facility base value equal to net contract value minus:

(i) The amount to be paid in accordance with the initial payment requirement in § 1493.230(c); and

(ii) The amount of discounts and allowances; and

(3) Maximum guaranteed value equal to:

(i) A principal amount determined by multiplying the facility base value (as determined in § 1493.260(b)(2)) by the guaranteed percentage specified in the program announcement; and

(ii) Interest on such principal amount at the rate specified in the applicable program announcement, not to exceed the investment rate of the most recent Treasury 52-week bill auction in effect at that time.

(c) *Value and cost.* For the purposes of this section:

(1) *Value* means declared customs value of the goods; or, in the absence of specific information regarding declared customs value, the fair market wholesale value of the imported goods in the United States at the time they were acquired by the participant; and

(2) *Cost* means actual amount paid by the exporter for the services in an arms-length transaction; or in the absence of an arms-length transaction, the fair market value of the services at the time the services were provided.

(d) *U.S. content test.* (1) CCC will issue a guarantee only if the following items collectively represent less than 50 percent of the net contract value in § 1493.260(b)(1):

(i) The value of imported components (except for raw materials) that are assembled, processed, or manufactured into U.S. goods included in the net contract value;

(ii) The cost of services that are not U.S. services (including freight on foreign flag carriers and transportation insurance registered with foreign

agents) that, at the request of the exporter, CCC determines are vital to the success of the project and approves their inclusion in the net contract value;

(2) For purpose of this subsection, minor or cosmetic procedures (e.g., affixing labels, cleaning, painting, polishing) do not qualify as assembling, processing or manufacturing;

(3) For purpose of this subsection, local services which involve costs for hotels, meals, transportation, and other similar services incurred in the emerging market are not U.S. services.

(e) *Period of guarantee coverage.* The payment guarantee will apply to the period beginning on the date(s) of export(s) and will continue during the credit term specified in the facility payment guarantee. For goods, the period of coverage will also apply from the date on which interest begins to accrue, if earlier than the date of export. The final payments of principal and interest by the foreign bank must come due within the period of guarantee coverage.

(f) *Terms of the CCC facility payment guarantee.* The terms of CCC's coverage will be set forth in the facility payment guarantee and will include the provisions of this subpart, which may be supplemented by any program announcement(s) or notice(s) to participants in effect at the time the facility payment guarantee is approved by CCC.

(g) *Final date to export.* The final date to export will be stated in the facility payment guarantee.

(h) *Ineligible exports.* Goods or services with a date of export prior to the date CCC issues the facility payment guarantee are ineligible for coverage unless approved by the GSM.

(i) *Additional requirements.* The facility payment guarantee may contain such additional terms, conditions, and limitations as are deemed necessary or desirable by the GSM. Such additional terms, conditions or qualifications, as stated in the facility payment guarantee, are binding on the exporter or the exporter's assignee.

(j) *Amendments.* Exporters must notify CCC of any amendments concerning contracts covered by a facility payment guarantee. CCC will determine if the contract amendments will require amendments to the facility payment guarantee. Amending the facility payment guarantee may result in an increase to the exposure fee. Requests made by the exporter to amend the facility payment guarantee so as to change the guaranteed value must have the concurrence of the assignee when an assignment has been made.

(k) *Effective date.* The facility payment guarantee shall become effective on the date of export of the goods or services.

APPENDIX TO § 1493.260—ILLUSTRATION OF FGP COVERAGE OF IMPORTED RAW MATERIALS, COMPONENTS, AND SERVICES THAT ARE NOT U.S. SERVICES

The following example illustrates CCC's regulations and policy options with regard to issuing a payment guarantee for a project which includes imported raw materials, imported components, and services that are not U.S. services:

1. Ten grain trucks and one truck scale are to be exported from the U.S. to an emerging market. The trucks will provide the ability to purchase larger quantities of grain from the U.S. The contract value totals $2,025,000, cost, insurance and freight (CIF) basis.

2. The fenders, hoods and doors of the trucks have been manufactured and assembled in the U.S. and contain some imported raw materials (sheet metal).

3. Imported components consist of starters and alternators, with a U.S. customs valuation of $149,000. These items are installed into the trucks in the U.S.

4. The truck scale was imported from Canada into the U.S. with a U.S. customs valuation of $20,000.

5. A U.S. citizen, will travel on a foreign airline carrier to the emerging market (airfare is $1,000) to instruct mechanics in repair and maintenance of the trucks. He will be paid a salary for this service and, in addition, will be reimbursed separately for local costs in the emerging market (e.g., hotel, meals, transportation) which are estimated to be $5,000.

6. The trucks are to be shipped on foreign flag vessels, and the marine insurance is to be placed with a foreign agent. The combined cost of these services that are not U.S. services for which the exporter seeks coverage is estimated to be $500,000.

CCC'S APPROVAL OF SERVICES THAT ARE NOT U.S. SERVICES

CCC agrees to include in the net contract value the foreign flag freight and marine insurance ($500,000) and the airfare ($1,000) of the U.S. instructor (§ 1493.260(b)(1)).

CALCULATION OF NET CONTRACT VALUE

CCC will calculate the net contract value by subtracting from the contract value ($2,025,000) the U.S. customs value of the truck scale ($20,000) in accordance with §1493.260(b)(1)(I) and the local costs to be incurred by the U.S. instructor ($5,000) in accordance with §1493.260(b)(1)(ii) to equal $2,000,000.

CCC'S DETERMINATION OF U.S. CONTENT ELIGIBILITY

The imported components and services that are not U.S. services approved for coverage total $650,000 (*i.e.*, $149,000 for starters and alternators, $1,000 for airfare, $500,000 for freight and insurance; or 32.5 percent of the net contract value of $2,000,000 (§1493.260(b)(1)). Since this is less than 50 percent of the net contract value the transaction meets the U.S. content test (§1493.260(d)).

### § 1493.270 Certifications.

(a) *Exporter's signature.* The exporter's signature on documentation submitted to CCC under this subpart, is the exporter's certification that:

(1) There have not been and are no arrangements for any payments in violation of the Foreign Corrupt Practices Act of 1977, as amended, or other U.S. Laws;

(2) All information submitted to CCC is true and correct; and

(3) The exporter is in compliance with this subpart.

(b) *False certification.* False certifications under this subpart may result in the termination of the facility payment guarantee, suspension or debarment, or civil or criminal action.

### § 1493.280 Evidence of export report.

(a) *Report of export.* The exporter is required to provide CCC an evidence of export report for each shipment of goods or provision of services covered under the facility payment guarantee. Each report must be numbered in chronological order and contain the following information in the order prescribed below:

(1) The facility payment guarantee number;

(2) The date goods or services were exported or provided;

(3) The exporter's sale number, bill of lading numbers, or identification of other documents that may be submitted to establish the contract value of the goods or services exported or provided;

(4) The net contract value of the exported goods or services as determined in accordance with §1493.260(b)(1);

(5) The amount paid in accordance with the initial payment requirement (§1493.230 (c));

(6) A description and dollar value of discounts and allowances, if any;

(7) The exported value of the shipment which is the net contract value of the goods or services exported in paragraph (a)(4) of this section minus:

(i) The initial payment requirement listed in paragraph (a)(5) of this section; and

(ii) The dollar amount of any discounts and allowances listed in paragraph (a)(6) of this section;

(8) The name of the carrier and, if applicable, the name of the vessel;

(9) The final payment schedule showing the payment due dates and amounts of principal, and payment due dates for interest accrual. If the payment schedule is unknown, the exporter must indicate in writing that: "The payment schedule will be provided in an amendment to the evidence of export report when the payment schedule has been determined;"

(10) Written statements that:

(i) The goods exported or services provided were included in the final application for a final commitment as approved by CCC for coverage under the facility payment guarantee and this subpart;

(ii) The specifications and quantity of goods or services exported conform to the information contained in the exporter's application documents for a facility payment guarantee, or if different, that CCC has approved of such changes;

(iii) A letter of credit has been opened in favor of the exporter by the foreign bank shown on the facility payment guarantee to cover the dollar amount of the sale of goods or services exported less the amount paid in accordance with the initial payment requirement and less discounts and allowances; and

(11) The exporter's signature.

(b) *Final report of export.* The final evidence of export report submitted

under a facility payment guarantee must contain:

(1) A written statement that exports under the facility payment guarantee have been completed;

(2) The information requested in § 1493.280(a) for the shipment(s) included in the final report; and

(3) The combined total of all dollar amounts reported under § 1493.280 (a) and (b) for all reports.

(c) *Time limit for submission of evidence of export report*. Unless extended by CCC for good cause, the exporter must submit to CCC an evidence of export report:

(1) Within 60 days of the date goods are exported by rail or truck;

(2) Within 30 days of the date goods are exported by any other carrier; or

(3) Within 30 days of the date of export of services.

(d) *Late reports*. If the evidence of export report is not received by CCC within the time period for filing, the facility payment guarantee will become null and void only if and only to the extent that failure to make timely filing resulted, or would likely result, in:

(1) Significant financial harm to CCC;

(2) The undermining of an essential regulatory purpose of the FGP;

(3) The obstruction of the fair administration of the FGP; or

(4) A threat to the integrity of the FGP.

### § 1493.290 Proof of entry.

(a) *Diversion*. The diversion of goods covered by a facility payment guarantee to a country other than that shown on the facility payment guarantee is prohibited, unless expressly authorized by the GSM.

(b) *Records of proof of entry*. Exporters must obtain and maintain records of an official or customary commercial nature and grant authorized USDA officials access to such documents or records as may be necessary to demonstrate the arrival of the goods authorized by the facility payment guarantee. Records demonstrating proof of entry must be in English or be accompanied by a certified or other translation acceptable to CCC. Records acceptable to meet this requirement include:

(1) For goods: An original certificate, signed by a duly authorized customs or port official of the emerging market, by the importer, by an agent or representative of the vessel or ship line which delivered the goods to the emerging market, or by a private surveyor in the emerging market, or other documentation deemed acceptable by CCC:

(i) Showing that the goods entered the emerging market;

(ii) Identifying the export carrier;

(iii) Describing the goods; and

(iv) Indicating date and place the goods were unloaded in the emerging market.

(2) [Reserved]

### § 1493.300 Notice of default and claims for loss.

(a) *Notice of default*. If the foreign bank issuing the letter of credit fails to make payment pursuant to the terms of the foreign bank letter of credit or related obligation, the exporter or the exporter's assignee must submit a notice of default to CCC as soon as possible, but not later than ten days after the date that payment was due from the foreign bank (the due date). A notice of default must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. If the exporter or the exporter's assignee fails to promptly notify CCC of defaults in accordance with this paragraph, CCC may make the facility payment guarantee null and void with respect to any payment(s) applicable to such default. This time limit may be extended only under extraordinary circumstances and if approved by the Controller, CCC. The notice of default must include:

(1) Facility payment guarantee number;

(2) Name of the emerging market;

(3) Name of the defaulting bank;

(4) Payment due date;

(5) Total amount of the defaulted payment due, indicating separately the amounts for principal and interest;

(6) Date of foreign bank's refusal to pay, if applicable; and

(7) Reason for the foreign bank's refusal to pay, if known.

(b) *Filing a claim for loss.* A claim for a loss by the exporter or the exporter's assignee will not be paid if it is made later than six months from the due date of the defaulted payment. A claim for loss must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. The claim for loss must include the following information and documents:

(1) Facility payment guarantee number;

(2) A certification that the scheduled payment has not been received;

(3) A certification of the amount of accrued interest in default, the date interest began to accrue and the interest rate on the foreign bank obligation applicable to the claim; and

(4) A copy of each of the following documents, with a cover document containing a signed certification by the exporter or the exporter's assignee that each page of each document is a true and correct copy:

(i)(A) The foreign bank's letter of credit securing the export sale, and;

(B) If applicable, the document(s) evidencing the related obligation owed by the foreign bank to the assignee financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter.

(ii) Depending upon the method of shipment, the negotiable ocean carrier or intermodal bill(s) of lading signed by the shipping company with the onboard ocean carrier date for each shipment, the airway bill; or, if shipped by rail or truck, the entry certificate or similar document signed by an official of the emerging market;

(iii) The exporter's sales invoice(s) showing the value and basis of sale (e.g., FOB, CFR, or CIF) or, if services are billed separately, documents that the exporter or its assignee relied upon in extending the credit to the issuing foreign bank;

(iv) An instrument, in form and substance satisfactory to CCC, subrogating to CCC the respective rights of the exporter and the exporter's assignee, if applicable, to the amount of payment in default. The instrument must reference the applicable foreign bank letter of credit and the related obligation, if applicable; and

(v) A copy of the evidence of export report(s) previously submitted by the exporter to CCC pursuant to § 1493.280.

(c) *Subsequent claims for defaults on installments.* The exporter or an exporter's assignee need only provide one claim which meets full documentation requirements relating to a covered transaction. For subsequent claims relating to such failures of the foreign bank to make scheduled installments on the same export, the exporter or the exporter's assignee need only submit to CCC a notice of such failure containing the information stated in paragraphs (b) (1), (2), and (3) of this section; an instrument of subrogation as per paragraph (b)(4)(iv) of this section, and the date the original claim was filed with CCC.

**§ 1493.310 Payment for loss.**

(a) *Determination of CCC's liability.* Upon receipt in good order of the information and documents required under § 1493.300, CCC will determine whether or not a loss has occurred for which CCC is liable under the facility payment guarantee, this subpart, program announcement(s) and notice(s) to participants. If CCC determines that it is liable to the exporter or the exporter's assignee, CCC will pay the exporter or the exporter's assignee in accordance with paragraphs (b) and (c) of this section.

(b) *Amount of CCC's liability.* CCC's maximum liability for any claims for loss submitted with respect to any facility payment guarantee, not including any late interest payments due in accordance with paragraph (c) of this section, will be limited to the lesser of:

(1) The guaranteed value as stated in the facility payment guarantee, plus eligible interest; or

(2) The guaranteed percentage (as indicated in the facility payment guarantee) of the exported value indicated in the evidence of export report (§ 1493.280(a)(7)), plus eligible interest.

(c) *Late interest payment.* If a claim is not paid within one day of receipt of a claim which CCC has determined to be in good order, late interest will accrue in favor of the exporter or the exporter's assignee beginning with the first day after the claim was found by CCC to be in good order and continuing

until and including the date that payment is made by CCC. Late interest will be paid on the guaranteed amount, as determined by paragraphs (b)(1) and (2) of this section, and will be calculated based on the latest average investment rate of the most recent Treasury 91-day bill auction as announced by the Department of Treasury as of the due date.

(d) *Accelerated payments*. CCC will pay claims only for losses on amounts not paid as scheduled. CCC will not pay claims for amounts due under an accelerated payment clause in the export sales contract, the foreign bank's letter of credit, or any obligation owed by the foreign bank to the assignee U.S. financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter, unless it is determined to be in the best interest of CCC by the Controller, CCC. Notwithstanding the foregoing, CCC at its option may declare the entire amount of the unpaid balance, plus accrued interest, in default and make payment to the exporter or the exporter's assignee in addition to such other claimed amount as may be due from CCC.

(e) *Action against the assignee*. Notwithstanding any other provision in this subpart to the contrary, with regard to the value of goods or services covered by a facility payment guarantee, CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission or statement by the exporter of which the assignee has no knowledge, provided that:

(1) The exporter complies with the reporting requirements under § 1493.270 and § 1493.280 excluding post-export adjustments (*i.e.*, corrections of evidence of export reports); and

(2) The exporter or the exporter's assignee furnishes the statements and documents specified in § 1493.300.

**§ 1493.320 Recovery of losses.**

(a) *Notification*. Upon payment of loss to the exporter or the exporter's assignee, CCC will notify the foreign bank of CCC's rights under the subrogation agreement to recover all monies in default.

(b) *Receipt of monies*. (1) In the event that monies for a defaulted payment are recovered by the exporter or the exporter's assignee from the importer, the foreign bank or any other source whatsoever, such monies shall be immediately paid to the Treasurer, CCC. If such monies are not received by CCC within 15 days from the date of recovery by the exporter or the exporter's assignee, the exporter or the exporter's assignee will owe to CCC interest from the date of recovery to the date of receipt by CCC. This interest will be calculated based on the latest average investment rate of the most recent Treasury 91-day auction, as announced by the Department of Treasury, in effect on the date of recovery and will accrue from such date to the date of payment by the exporter or the exporter's assignee to CCC. Such interest will be charged only on CCC's share of the recovery.

(2) If CCC recovers monies that should be applied to a facility payment guarantee for which a claim has been paid by CCC, CCC will pay the holder of the facility payment guarantee its pro rata share immediately, provided that the required information necessary for determining pro rata distribution has been furnished. If payment is not made by CCC within 15 days from the date of recovery or 15 days from receiving the required information for determining pro rata distribution, whichever is later, CCC will pay interest calculated on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and will accrue from such date to the date of payment by CCC. The interest will apply only to the portion of the recovery payable to the holder of the facility payment guarantee.

(c) *Allocation of recoveries*. Recoveries made by CCC from the importer or the foreign bank, and recoveries received by CCC from the exporter, the exporter's assignee or any other source whatsoever, will be allocated by CCC to the exporter or the exporter's assignee and to CCC on a pro rata basis determined by their respective interests in such recoveries. The respective interest of each party will be determined on a pro rata basis, based on the combined

amount of principal and interest in default. Once CCC has paid out a particular claim under a facility payment guarantee, CCC prorates any collections it receives and shares these collections proportionately with the holder of the guarantee until both CCC and the holder of the guarantee have been reimbursed in full. Appendix to § 1493.320 provides an example of the methodology used by CCC in applying this paragraph (c).

(d) *Liabilities to CCC*. Notwithstanding any other terms of the facility payment guarantee, the exporter may be liable to CCC for any amounts paid by CCC under the facility payment guarantee when and if it is determined by CCC that the exporter engaged in fraud, or has been or is in breach of any contractual obligation, certification or warranty made by the exporter for the purpose of obtaining the facility payment guarantee or for fulfilling obligations under the FGP. Further, the exporter's assignee may be liable to CCC for any amounts paid by CCC under the facility payment guarantee when and if it is determined by CCC that the exporter's assignee engaged in fraud or otherwise violated program requirements.

(e) *Good faith*. The violation by an exporter of the certifications in § 1493.270 or the failure of an exporter to comply with the provisions of § 1493.290 or § 1493.330(e) will not affect the validity of any facility payment guarantee with respect to an assignee which had no knowledge of such violation or failure to comply at the time such exporter applied for the facility payment guarantee or at the time of assignment of the facility payment guarantee.

(f) *Cooperation in recoveries*. Upon payment by CCC of a claim to the exporter or the exporter's assignee, the exporter or the exporter's assignee will cooperate with CCC to effect recoveries from the foreign bank or the importer.

## APPENDIX TO § 1493.320—ILLUSTRATION OF PRO RATA ALLOCATION OF RECOVERIES

The following example illustrates CCC's policy, as set forth in § 1493.320, regarding pro rata sharing of recoveries made for claims filed under the FGP. For the purpose of this example only, even though CCC interest coverage is on a floating rate basis, a constant rate of interest is assumed. A typical case might be as follows:

1. The U.S. bank enters into a $300,000 three-year credit arrangement for the export sale of goods and services with the foreign bank calling for equal semi-annual payments of principal and semi-annual payment of interest at a rate of 10 percent per annum and a penalty interest rate of 12 percent per annum on overdue amounts until the overdue amount is paid.

2. Exported value reported to CCC equals $300,000.

3. The foreign bank fails to make the final principal payment of $50,000 and an interest payment of $2,493.15, both due on January 31.

4. On February 10, the U.S. bank files a notice of default and claim in good order with CCC.

5. CCC's guarantee states that CCC's maximum liability is limited to 95 percent of the principal amount due ($47,500) and interest at a rate of 8 percent per annum (basis 365 days) on 95 percent of the principal ($1,894.80).

6. CCC pays the claim on February 22.

7. The latest investment rate of the 91-day Treasury Bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment by CCC (February 11) is 7 percent.

### COMPUTATION OF OBLIGATIONS

Using the above case, CCC's payment to the holder of the facility payment guarantee would be computed as follows:

| | |
|---|---|
| 1. CCC's Obligation under the Facility Payment Guarantee: | |
| (a) Principal coverage—(95% × $50,000) | $47,500.00 |
| (b) Interest coverage—(8% × $47,500 × 182/365) | 1,894.80 |
| Total | 49,394.80 |
| (c) Late interest due from CCC (7% per annum for 11 days × $49,394.80) | 104.20 |
| (d) Amount paid by CCC on February 22 | 49,499.00 |
| 2. Foreign Bank's Obligation under the Letter of Credit or the Related Obligation: | |
| (a) Principal due January 31 | 50,000.00 |
| Interest due January 31 (10% × $ 50,000 × 182/365) | 2,493.15 |
| Amount owed by foreign bank as of January 31 | 52,493.15 |
| (b) Penalty interest due (12% per annum for 22 days × $ 50,000) | 361.64 |
| (c) Amount owed by foreign bank as of February 22 | 52,854.79 |

3. Amount of Foreign Bank's Obligation Not Covered by CCC's Payment Guarantee: ..... 3,355.79

COMPUTATION OF PRO RATA SHARING IN RECOVERY OF LOSSES

In establishing each party's respective interest in any recovery of losses, the total amount due under the foreign bank obligation would be determined as of the date the claim is paid by CCC (February 22). Using the above example in which the amount owed by the foreign bank is $52,854.79, CCC would be entitled to 93.65 percent ($49,499.00 divided by $52,854.79) and the holder of the facility payment guarantee would be entitled to 6.35 percent ($3,355.79 divided by $52,854.79) of any recoveries of losses after settlement of the claim. Since in this example, the losses were recovered after the claim had been paid by CCC, §1493.320(b) would apply.

**§ 1493.330 Miscellaneous provisions.**

(a) *Assignment.* (1) The exporter may assign the proceeds which are, or may become, payable by CCC under a facility payment guarantee or the right to such proceeds only to a financial institution in the U.S. The assignment must cover all amounts payable under the facility payment guarantee not already paid, may not be made to more than one party, and may not, unless approved in advance by CCC, be subject to further assignment. Any assignment may be made to one party as agent or trustee for two or more parties participating in the assignment.

(2) An original and two copies of the written notice of assignment signed by the parties thereto must be filed by the assignee with the Treasurer, CCC, at the address specified in the Contacts P/R.

(3) Receipt of the notice of assignment will ordinarily be acknowledged to the exporter and its assignee in writing by an officer of CCC. In cases where a financial institution is determined to be ineligible to receive an assignment, in accordance with paragraph (b) of this section, CCC will provide notice thereof to such financial institution and to the exporter issued the facility payment guarantee in lieu of an acknowledgment of assignment.

(4) The name and address of the assignee must be included on the written notice of assignment.

(b) *Ineligibility of financial institutions to receive an assignment.* A financial institution will be ineligible to receive an assignment of proceeds which may become payable under a facility payment guarantee if, at the time of assignment, such financial institution:

(1) Is not in sound financial condition, as determined by the Treasurer of CCC; or

(2) Is the financial institution issuing the letter of credit or a branch, agency or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(c) *Ineligibility of financial institutions to receive proceeds.* A financial institution will be ineligible to receive proceeds payable under a facility payment guarantee approved by CCC if such financial institution:

(1) At the time of assignment of a facility payment guarantee, is not in sound financial condition, as determined by the Treasurer of CCC;

(2) Is the financial institution issuing the letter of credit or a branch, agency, or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(d) *Alternative satisfaction of facility payment guarantees.* CCC may, with the agreement of the exporter (or if the right to proceeds payable under the facility payment guarantee has been assigned, with the agreement of the exporter's assignee), establish procedures, terms or conditions for the satisfaction of CCC's obligations under a facility payment guarantee other than those provided for in this subpart if CCC determines that those alternative procedures, terms or conditions are appropriate in rescheduling the debts arising out of any transaction covered by the facility payment guarantee and would not result in CCC paying more than the amount of CCC's obligation.

(e) *Maintenance of records and access to premises.* (1) For a period of five years after the date of expiration of the coverage of a facility payment guarantee, the exporter or the exporter's assignee,

as applicable, must maintain and make available all records pertaining to sales and deliveries of and extension of credit for goods or services exported in connection with a facility payment guarantee, including those records generated and maintained by agents, and related companies involved in special arrangements with the exporter. The Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, must be given full and complete access to the premises of the exporter or the exporter's assignee, as applicable, during regular business hours from the effective date of the facility payment guarantee until the expiration of such five-year period to inspect, examine, audit, and make copies of the exporter's, exporter's assignee's, or a related company's books, records, and accounts concerning transactions relating to the facility payment guarantee, including, but not limited to, financial records and accounts pertaining to sales, inventory, manufacturing, processing, and administrative and incidental costs, both normal and unforeseen.

(2) The exporter must maintain the proof of entry required by §1493.290(b), and must provide access to such document if requested by the Secretary of Agriculture or his authorized representative for the five-year period specified in paragraph (e)(1) of this section.

(f) *Responsibility of program participants.* It is the responsibility of all program participants to review, and fully acquaint themselves with, this subpart, program announcement(s), and notice(s) to participants relating to the FGP, as applicable. Applicants for facility payment guarantees under this program are hereby on notice that they will be bound by any terms contained in applicable program announcement(s) or notice(s) to participants issued prior to the date of approval of a facility payment guarantee.

(g) *Submission of documents by principal officers.* All required submissions, including certifications, applications, reports, or requests (*i.e.*, requests for amendments), by exporters or exporters' assignees under this subpart must be signed by a principal or officer of the exporter or exporter's assignee or their authorized designee(s). In cases where the designee is acting on behalf of the principal or the officer, the signature must be accompanied by:

(1) Wording indicating the delegation of authority or, in the alternative, by a certified copy of the delegation of authority; and

(2) The name and title of the authorized person or officer. Further, the exporter or exporter's assignee must ensure that all information/reports required under this subpart are submitted within the required time limits. If requested in writing, CCC will acknowledge receipt of a submission by the exporter or the exporter's assignee. If acknowledgment of receipt is requested, the exporter or exporter's assignee must submit an extra copy of each document and a stamped self-addressed envelope for return by U.S. mail. If courier services are desired for the return receipt, the exporter or exporter's assignee must also submit a self-addressed courier service order which includes the recipient's billing code for such service.

(h) *Officials not to benefit.* No member of or delegate to Congress, or resident Commissioner, shall be admitted to any share or part of the facility payment guarantee or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the facility payment guarantee if made with a corporation for its general benefit.

(i) *Deadlines.* (1) Where a deadline is fixed in terms of days, it means business days and excludes Saturdays, Sundays and federal holidays.

(2) Where a deadline is fixed in terms of months, the deadline falls on the same day of the month as the day triggering the deadline period, or if there is no same day, the last day of the month; and

(3) Where a deadline would otherwise fall on a Saturday, Sunday or federal holiday, the deadline shall be the next business day.

## Subpart D—CCC Supplier Credit Guarantee Program Operations

SOURCE: 61 FR 33831, July 1, 1996, unless otherwise noted.

**§ 1493.400 General statement.**

(a) *Overview.* (1) This subpart contains the regulations governing the operations of the Supplier Credit Guarantee Program (SCGP). The restrictions and criteria set forth at subpart A for the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM–102) and the Intermediate Credit Guarantee Program (GSM–103) will apply to this subpart. The SCGP was developed to expand U.S. agricultural exports by making available payment guarantees to encourage U.S. exporters to extend financing on credit terms of not more than 180 days to importers of U.S. agricultural commodities.

(2) The SCGP operates in cases where credit is necessary to increase or maintain U.S. exports to a foreign market and where private U.S. exporters would be unwilling to provide financing without CCC's guarantee. The program is operated in a manner intended not to interfere with markets for cash sales. The program is targeted toward those countries where the guarantees are necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments. In providing this credit guarantee facility, CCC seeks to expand market opportunities for U.S. agricultural exporters and assist long-term market development for U.S. agricultural commodities.

(3) The credit facility created by this program is the SCGP payment guarantee (payment guarantee). The payment guarantee is an agreement by CCC to pay the exporter, or the U.S. financial institution that may take assignment of the exporter's right to proceeds, specified amounts of principal and, where applicable, interest due from, but not paid by, the importer incurring the obligation in connection with the export sale to which CCC's guarantee coverage pertains. By approving an exporter's application for a payment guarantee, CCC encourages private sector, rather than government, financing and incurs a substantial portion of the risk of default by the importer. CCC assumes this risk, in order to be able to operate the program for the purposes specified in § 1493.2.

(b) *Credit facility mechanism.* (1) For the purpose of the SCGP, CCC will consider applications for payment guarantees only in connection with export sales of U.S. agricultural commodities where the payment for the agricultural commodities will be made under an unconditional and irrevocable importer obligation to a U.S. exporter payable in U.S. dollars, as defined in § 1493.410(n).

(2) The exporter may assign the right to proceeds under the importer obligation to a U.S. bank or other financial institution so that the exporter may realize the proceeds of the sale prior to the deferred payment date(s) as set forth in the importer obligation.

(3) The SCGP payment guarantee is designed to protect the exporter or the exporter's assignee against those losses specified in the payment guarantee resulting from defaults, whether for commercial or noncommercial reasons, by the importer under the importer's obligation.

(c) *Program administration.* The SCGP will be administered pursuant to subpart A and this subpart and any Program Announcements and Notices to Participants issued by CCC pursuant to, and not inconsistent with, this subpart. This program is under the general administrative responsibility of the General Sales Manager (GSM), Foreign Agricultural Service (FAS/USDA). The review and payment of claims for loss will be administered by the Office of the Controller, CCC. Information regarding specific points of contact for the public, including names, addresses, and telephone and facsimile numbers of particular USDA or CCC offices, will be announced by a public press release (see § 1493.410(c), "Contacts P/R").

(d) *Country allocations and program announcements.* From time to time, CCC will issue a Program Announcement to announce a SCGP allocation for a specific country. The Program Announcement for a country allocation will designate specific allocations for U.S. agricultural commodities or products thereof, will indicate the form of promissory note required by CCC, and will provide other pertinent information. Exporters may negotiate export sales to importers in that country for one of the commodities specified in the

Program Announcement and seek payment guarantee coverage within the dollar amounts of specified coverage for that commodity. The Program Announcement will contain a requirement that the exporter's sales contract contain a shipping deadline within the applicable program year. The final date for a contractual shipping deadline will be stated in the Program Announcement. Program Announcements may also contain a specified "undesignated" or "unallocated" dollar amount for the purpose that if dollar amounts specified for a specific commodity for a country become fully used, an additional allocation from the "unallocated" or "undesignated" portion of the total country allocation may then be designated for a specific commodity. Program Announcements that include an "unallocated" or "undesignated" dollar amount will contain further information on the "unallocated" or "undesignated" portion of the country allocation.

**§ 1493.410 Definition of terms.**

Terms set forth in this subpart and in CCC Program Announcements, Notices to Participants, and any other CCC-originated documents pertaining to the SCGP will have the following meanings:

(a) *Assignee*. A financial institution in the United States which, for adequate consideration given, has obtained the legal rights to receive the payment of proceeds under the payment guarantee.

(b) *CCC*. The Commodity Credit Corporation, an agency and instrumentality of the United States within the Department of Agriculture, authorized pursuant to the Commodity Credit Corporation Charter Act of 1948 (15 U.S.C. 714 *et seq.*), and subject to the general supervision and direction of the Secretary of Agriculture.

(c) *Contacts P/R*. A notice issued by FAS/USDA by public press release which contains specific names, addresses, and telephone and facsimile numbers of contacts within FAS/USDA and CCC for use by persons interested in obtaining information concerning the operations of the SCGP. The Contacts P/R also contains details about where to submit information required to qualify for program participation, to apply for payment guarantees, to request amendments of payment guarantees, to submit evidence of export reports, and to give notices of default and file claims for loss.

(d) *Date of export*. One of the following dates, depending upon the method of shipment: the on-board date of an ocean bill of lading or the on-board ocean carrier date of an intermodal bill of lading; the on-board date of an airway bill; or, if exported by rail or truck, the date of entry shown on an entry certificate or similar document issued and signed by an official of the Government of the importing country.

(e) *Date of sale*. The earliest date on which a contractual obligation exists between the exporter, or an intervening purchaser, if applicable, and the importer under which a firm dollar-and-cent price for the sale of agricultural commodities to the importer has been established or a mechanism to establish such price has been agreed upon.

(f) *Discounts and allowances*. Any consideration provided directly or indirectly, by or on behalf of the exporter, or an intervening purchaser, to the importer in connection with a sale of an agricultural commodity, above and beyond the commodity's value, stated on the appropriate FOB, FAS, CFR or CIF basis. Discounts and allowances include, but are not limited to, the provision of additional goods, services or benefits; the promise to provide additional goods, services or benefits in the future; financial rebates; the assumption of any financial or contractual obligations; the whole or partial release of the importer from any financial or contractual obligations; or settlements made in favor of the importer for quality or weight.

(g) *Eligible interest*. The maximum amount of interest, based on the interest rate indicated in CCC's payment guarantee or any amendments to such payment guarantee, which CCC agrees to pay the exporter or the exporter's assignee in the event that CCC pays a claim for loss. The maximum interest rate stated in the payment guarantee, when determined or adjusted by CCC, will not exceed the average investment rate of the most recent Treasury 52-

week bill auction in effect at that time.

(h) *Exported value.* (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, the value, FAS or FOB basis, U.S. point of export, of the export sale, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, is measured by the CFR or CIF value of the agricultural commodity less the cost of ocean freight, as determined at the time of application and, in the case of CIF sales, less the cost of marine and war risk insurance, as determined at the time of application, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis, and where the commodity is sold on a CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo) which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the exported value.

(i) *Exporter.* A seller of U.S. agricultural commodities or products thereof that has qualified in accordance with the provisions of § 1493.420.

(j) *FAS/USDA.* The Foreign Agricultural Service, U.S. Department of Agriculture.

(k) *GSM.* The General Sales Manager, FAS/USDA, acting in his capacity as Vice President, CCC, or his designee.

(l) *Guaranteed value.* The maximum amount, exclusive of interest, that CCC agrees to pay the exporter or assignee under CCC's payment guarantee, as indicated on the face of the payment guarantee.

(m) *Importer.* A foreign buyer that enters into a contract with an exporter, or with an intervening purchaser, for an export sale of agricultural commodities to be shipped from the U.S. to the foreign buyer.

(n) *Importer obligation.* A promissory note or notes that conform(s) with the requirements for such note(s) specified in the applicable country or regional Program Announcement(s).

(o) *Incoterms.* The following customary terms, as defined by the International Chamber of Commerce, Incoterms© current revision):

(1) Free Alongside Ship (FAS);

(2) Free on Board (FOB);

(3) Cost and Freight (CFR, or alternatively, C&F, C and F, or CNF); and

(4) Cost Insurance and Freight (CIF).

(p) *Intervening purchaser.* A party that agrees to purchase U.S. agricultural commodities from an exporter and sell the same agricultural commodities to an importer.

(q) *Late interest.* Interest, in addition to the interest due under the payment guarantee, which CCC agrees to pay in connection with a claim for loss, accruing during the period beginning on the first day after receipt of a claim which CCC has determined to be in good order and ending on the day on which payment is made on such claim for loss.

(r) *Notice to participants.* A notice issued by CCC by public press release which serves one or more of the following functions: to remind participants of the requirements of the program; to clarify the program requirements contained in these regulations in a manner which is not inconsistent with the regulations; to instruct exporters to provide additional information in applications for payment guarantees under specific country and/or commodity allocations; and to supplement the provisions of a payment guarantee, in a manner not inconsistent with these regulations, before the exporter's application for such payment guarantee is approved.

(s) *Payment guarantee.* An agreement under which CCC, in consideration of a

fee paid, and in reliance upon the statements and declarations of the exporter, subject to the terms set forth in the written guarantee (including the required form of promissory note), this subpart, and any applicable Program Announcements or Notices to Participants, agrees to pay the exporter or the exporter's assignee in the event of a default by an importer under the importer obligation.

(t) *Port value.* (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, U.S. point of export, the value, FAS or FOB basis, U.S. point of export, of the export sale, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, including the upward tolerance, if any, as provided by the export sales contract, is measured by the CFR or CIF value of the agricultural commodity less the value of ocean freight and, in the case of CIF sales, less the value of marine and war risk insurance, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis and where the commodity was sold on CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo), which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the port value.

(u) *Program announcement.* An announcement issued by CCC which provides information on specific country and commodity allocations and may identify eligible agricultural commodities and countries, length of credit periods which may be covered, specify dollar limitations for CCC exposure in particular countries, the form of promissory note required for a particular country or region, and include other information and requirements.

(v) *SCGP.* The Supplier Credit Guarantee Program described by this subpart.

(w) *United States or U.S.* All of the 50 states, the District of Columbia, and the territories and possessions of the United States.

(x) *U.S. agricultural commodity.* (1) An agricultural commodity or product entirely produced in the United States; or

(2) A product of an agricultural commodity—

(i) 90 percent or more of the agricultural components of which by weight, excluding packaging and added water, is entirely produced in the United States; and

(ii) That the Secretary determines to be a high value agricultural product. For purposes of this definition, fish entirely produced in the United States include fish harvested by a documented fishing vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

(y) *USDA.* United States Department of Agriculture.

[61 FR 33831, July 1, 1996, as amended at 62 FR 24561, May 6 1997]

### § 1493.420 Information required for program participation.

Before CCC will accept an application for a payment guarantee under the SCGP, the applicant must qualify for participation in this program. Based upon the information submitted by the applicant and other publicly available sources, CCC will determine whether the applicant is eligible for participation in the program.

(a) *Submission of documentation.* In order to qualify for participation in the SCGP, an applicant must submit to

CCC, at the address specified in the Contacts P/R, the following information:

(1) The address of the applicant's headquarters office and the name and address of an agent in the U.S. for the service of process;

(2) The legal form of doing business of the applicant, e.g., sole proprietorship, partnership, corporation, etc.;

(3) The place of incorporation of the applicant, if the applicant is a corporation;

(4) The name and U.S. address of the office(s) of the applicant, and statement indicating whether the applicant is a U.S. domestic corporation, a foreign corporation or another foreign entity. If the applicant has multiple offices, the address included in the information should be that which is pertinent to the particular export sale contemplated by the applicant under this subpart;

(5) A certified statement describing the applicant's participation, if any, during the past three years in U.S. Government programs, contracts or agreements; and

(6) A certification that: "I certify, to the best of my knowledge and belief, that neither [name of applicant] nor any of its principals has been debarred, suspended, or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency. ["Principals," for the purpose of this certification, means officers; directors; owners of five percent or more of stock; partners; and persons having primary management or supervisory responsibility within a business entity (e.g., general manager, plant manager, head of a subsidiary division, or business segment, and similar positions).] I further agree that, should any such debarment, suspension, or notice of proposed debarment occur in the future, [name of applicant] will immediately notify CCC."

(b) *Previous qualification.* Any exporter that is qualified under subpart B, §1493.30 is qualified under this section to submit applications for a SCGP payment guarantee, and the information provided by the exporter pursuant to §1493.30 will be deemed to also have been provided under this section. Each application must include the statement required by §1493.430(a)(17) incorporating the certifications of §1493.440, including the certification in §1493.440(e) that the information previously provided pursuant to §1493.420 has not changed. If the exporter is unable to provide such certification, such exporter must update the information required by paragraph (a) of this section which has changed and certify that the remainder of the information previously provided has not changed.

(c) *Additional submissions.* CCC will promptly notify applicants that have submitted information required by this section whether they have qualified to participate in the program. Any applicant failing to qualify will be given an opportunity to provide additional information for consideration by CCC.

(d) *Ineligibility for program participation.* An applicant may be ineligible to participate in the SCGP if:

(1) Such applicant is currently debarred, suspended, or proposed for debarment from contracting with or participating in any program administered by a U.S. Government agency; or

(2) Such applicant is controlled or can be controlled, in whole or in part, by any individuals or entities currently debarred, suspended or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency.

### §1493.430 Application for a payment guarantee.

(a) A firm export sale must exist before an exporter may submit an application for a payment guarantee. An application for a payment guarantee may be submitted in writing or may be made by telephone, but, if made by telephone, it must be confirmed in writing to the office specified in the Contacts P/R. An application must identify the name and address of the exporter and include the following information:

(1) Name of the destination country;

(2) Name and address of the importer;

(3) Name and address of the intervening purchaser, if any, and a statement that the commodity will be shipped directly to the importer in the destination country;

(4) Date of sale;

(5) Exporter's sale number;

(6) Delivery period as agreed between the exporter and the importer;

(7) A full description of the commodity (including packaging, if any);

(8) Mean quantity, contract loading tolerance and, if the exporter chooses, a request for CCC to reserve coverage up to the maximum quantity permitted by the contract loading tolerance;

(9) Unit sales price of the commodity, or a mechanism to establish the price, as agreed between the exporter and the importer. If the commodity was sold on the basis of CFR or CIF, the actual (if known at the time of application) or estimated value of freight and, in the case of sales made on a CIF basis, the actual (if known at the time of application) or estimated value of marine and war risk insurance, must be specified;

(10) Description and value of discounts and allowances, if any;

(11) Port value (includes upward loading tolerance, if any);

(12) Guaranteed value;

(13) Guarantee fee;

(14) The term length for the credit being extended and the intervals between principal payments for each shipment to be made under the export sale;

(15) A statement indicating whether any portion of the export sale for which the exporter is applying for a payment guarantee is also being used as the basis for an application for participation in any of the following CCC or USDA export programs: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program. The number of the Agreement assigned by USDA under one of these programs should be included, as applicable;

(16) Other information as requested by CCC or specified in Program Announcements and Notices to Participants, as applicable; and

(17) The exporter's statement, "ALL SECTION 1493.440 CERTIFICATIONS ARE BEING MADE IN THIS APPLICATION" which, when included in the application by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.440.

(b) An application for a payment guarantee may be approved as submitted, approved with modifications agreed to by the exporter, or rejected by the GSM. In the event that the application is approved, the GSM will cause a payment guarantee to be issued in favor of the exporter. Such payment guarantee will become effective at the time specified in § 1493.450(b). If, based upon a price review, the unit sales price of the commodity does not fall within the prevailing commercial market level ranges, as determined by CCC, the application will not be approved.

(c) Ineligible exporter. An exporter will be ineligible to obtain a payment guarantee if such exporter:

(1) Directly or indirectly owns or controls the importer;

(2) Is directly or indirectly owned or controlled by the importer; or

(3) Is directly or indirectly owned or controlled by a person(s) or entity(ies) which also owns or controls the importer.

### § 1493.440 Certification requirements for payment guarantee.

By providing the statement in § 1493.430(a)(17), the exporter is certifying that the information provided in the application is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to applications that do not include this statement. The exporter, in submitting an application for a payment guarantee and providing the statement set forth in § 1493.430(a)(17), certifies that:

(a) The agricultural commodity or product to be exported under the payment guarantee is a U.S. agricultural commodity as defined by § 1493.410(x).

(b) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law;

(c) If the agricultural commodity is vegetable oil or a vegetable oil product, that none of the agricultural commodity or product has been or will be used as a basis for a claim of a refund, as drawback, pursuant to section 313 of

the Tariff Act of 1930, 19 U.S.C. 1313, of any duty, tax or fee imposed under Federal law on an imported commodity or product;

(d) No person or selling agency has been employed or retained to solicit or secure the payment guarantee, and that there is no agreement or understanding for a commission, percentage, brokerage, or contingent fee, except in the case of bona fide employees or bona fide established commercial or selling agencies maintained by the exporter for the purpose of securing business; and

(e) The information provided pursuant to § 1493.420 has not changed, the exporter still meets all of the qualification requirements of § 1493.420, and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements. If the exporter breaches or violates these certifications with respect to a SCGP payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter.

[61 FR 33831, July 1, 1996, as amended at 62 FR 24561, May 6, 1997]

### § 1493.450 Payment guarantee.

(a) *CCC's obligation*. The payment guarantee will provide that CCC agrees to pay the exporter or the exporter's assignee an amount not to exceed the guaranteed value, plus eligible interest, in the event that the importer fails to pay under the importer obligation. unless CCC determines with respect to the particular transaction and claim that the guaranteed portion of the port value exceeded the prevailing U.S. market value for the same, or same type of agricultural commodity or product. In making this determination, CCC will adjust the prevailing U.S. market value for estimated freight and/or insurance costs if the export sale was made on a CFR or CIF basis. Payment by CCC will be in U.S. dollars.

(b) *Period of guarantee coverage*. The payment guarantee will apply to a credit period not exceeding 180 days beginning either on the date(s) of export(s) or from the date when interest begins to accrue whichever is earlier, and will continue during the credit term specified in the payment guarantee or amendments thereto. However, the payment guarantee becomes effective on the date(s) of export(s) of the agricultural commodities or products thereof specified in the exporter's application for a payment guarantee.

(c) *Terms of the CCC payment guarantee*. The terms of CCC's coverage will be set forth in the payment guarantee, as approved by CCC, and will include the provisions of this subpart, which may be supplemented by any Program Announcements and/or Notices to Participants in effect at the time the payment guarantee is approved by CCC.

(d) *Final date to export*. The final date to export shown on the payment guarantee will be one month, as determined by CCC, after the contractual deadline for shipping.

(e) *Reserve coverage for loading tolerances*. The exporter may apply for a payment guarantee and, if coverage is available, pay the guarantee fee, based at least on, the amount of the lower loading tolerance of the export sales contract; however, the exporter may also request that CCC reserve additional guarantee coverage to accommodate up to the amount of the upward loading tolerance specified in the export sales contract. If such additional guarantee coverage is available at the time of application and CCC determines to make such reservation, it will so indicate to the exporter. In the event that the exporter ships a quantity greater than the amount on which the guarantee fee was paid (*i.e.*, lower loading tolerance), it may obtain the additional coverage from CCC, up to the amount of the upward loading tolerance, by filing for an amendment to the payment guarantee, and by paying the additional amount of fee applicable. If such amendment to the payment guarantee is not filed with CCC by the exporter within 30 days after the date of the last export against the sales contract, CCC may determine not to reserve the coverage originally set aside for the exporter.

(f) *Ineligible exports*. Commodities with a date of export prior to the date

of receipt by CCC of the exporter's telephonic or written application for a payment guarantee, or with a date of export made after the final date for export shown on the payment guarantee or any amendments thereof, are ineligible for guarantee coverage under this subpart, except where it is determined by the GSM to be in the best interests of CCC to provide guarantee coverage on such commodities.

(g) *Foreign agricultural component.* CCC may approve payment guarantees under this subpart only in connection with sales of United States agricultural commodities as defined in § 1493.410(x). CCC may not provide guarantee coverage under this subpart on credit extended for the value of any foreign agricultural component.

(h) *Additional requirements.* The payment guarantee may contain such additional terms, conditions, and limitations as deemed necessary or desirable by the GSM. Such additional terms, conditions or qualifications, as stated in the payment guarantee are binding on the exporter or the exporter's assignee.

(i) *Amendments.* A request for an amendment of a payment guarantee may be submitted only by the exporter (with the concurrence of the assignee, if any). CCC will consider such a request only if the amendment sought is consistent with this subpart and any applicable Program Announcements and Notices to Participants. Amendments may include, but will not be limited to, a change in the credit period and an extension of time to export. Any amendment to the payment guarantee, particularly those that result in an increase in CCC's liability under the payment guarantee, may result in an increase in the guarantee fee. (Technical corrections or corrections of a clerical error which may be submitted by the exporter or the exporter's assignee are not viewed as amendments.)

### § 1493.460 Guarantee rates and fees.

(a) *Guarantee fee rates.* The current payment guarantee fee rate(s) will be available by Program Announcement.

(b) *Calculation of fee.* The guarantee fee will be computed by multiplying the guaranteed value by the guarantee fee rate.

(c) *Payment of fee.* The exporter shall remit, with his written application, the full amount of the guarantee fee. Applications will not be approved until the guarantee fee has been received by CCC. The exporter's check for the guarantee fee shall be made payable to CCC and mailed or delivered by courier to the office specified in the Contacts P/R.

(d) *Refunds of fee.* Guarantee fees paid in connection with approved applications will ordinarily not be refundable. CCC's approval of the application will be final and refund of the guarantee fee will not be made after approval unless the GSM determines that such refund will be in the best interest of CCC. If the application for a payment guarantee is not approved or is approved only for a part of the guarantee coverage requested, a full or pro rata refund of the fee remittance will be made.

### § 1493.470 Evidence of export.

(a) *Report of export.* The exporter is required to provide CCC an evidence of export report for each shipment made under the payment guarantee. This report must include the following:

(1) Payment guarantee number;

(2) Date of export;

(3) Exporter's sale number;

(4) Exported value;

(5) Quantity;

(6) A full description of the commodity exported;

(7) Unit sales price received for the commodity exported and the basis (e.g., FOB, CFR, CIF). Where the unit sales price at export differs from the unit sales price indicated in the exporter's application for a payment guarantee, the exporter is also required to submit a statement explaining the reason for the difference;

(8) Description and value of discounts and allowances, if any;

(9) Number of the Agreement assigned by USDA under any other program if any portion of the export sale was also approved for participation in any of the following CCC or USDA export program: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program; and

(10) The exporter's statement, "ALL SECTION 1493.480 CERTIFICATIONS ARE BEING MADE IN THIS EVIDENCE OF EXPORT" which, when included in the evidence of export by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.480.

(b) *Time limit for submission of evidence of export*. The exporter must provide a written report to the office specified in the Contacts P/R within 60 calendar days if the export was by rail or truck; or 30 calendar days if the export was by any other carrier. The time period for filing a report of export will commence upon each date of export of the commodity covered under a payment guarantee. If the evidence of export report is not received by CCC within the time period for filing, the payment guarantee will become null and void only if and only to the extent that failure to make timely filing resulted, or would be likely to result, in:

(1) Significant financial harm to CCC;

(2) The undermining of an essential regulatory purpose of the program;

(3) Obstruction of the fair administration of the program; or

(4) A threat to the integrity of the program. The time limit for submission of an evidence of export report may be extended if such extension is determined by the GSM to be in the best interests of CCC.

(c) *Export sales reporting*. Exporters may have a mandatory reporting responsibility under section 602 of the Agricultural Trade Act of 1978, as amended (7 U.S.C. 5712) for exports of wheat and wheat flour, feed grains, oilseeds, cotton, and other agricultural commodities and products thereof.

### § 1493.480 Certification requirements for the evidence of export.

By providing the statement contained in § 1493.470(a)(10), the exporter is certifying that the information provided in the evidence of export report is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to reports that do not include this statement. If the exporter breaches or violates these certifications with respect to a SCGP payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter. The exporter, in submitting the evidence of export and providing the statement set forth in § 1493.470(a)(10), certifies that:

(a) The agricultural commodity or product exported under the payment guarantee is a U.S. agricultural commodity as defined by § 1493.410(x).

(b) Agricultural commodities of the grade, quality and quantity called for in the exporter's sales contract with the importer have been exported to the country specified in the payment guarantee;

(c) There is an importer obligation as defined in § 1493.410(n) to cover the exported value of the commodity exported;

(d) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law; and

(e) The information provided pursuant to § 1493.420 has not changed, the exporter still meets all of the qualification requirements of § 1493.420 and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements.

[61 FR 33831, July 1, 1996, as amended at 62 FR 24561, May 6, 1997]

### § 1493.490 Proof of entry.

(a) *Diversion*. The diversion of commodities covered by a SCGP payment guarantee to a country other than that shown on the payment guarantee is prohibited, unless expressly authorized by the GSM.

(b) *Records of proof of entry*. Exporters must obtain and maintain records of an official or customary commercial nature and grant authorized USDA officials access to such documents or records as may be necessary to demonstrate the arrival of the agricultural commodities exported in connection

with the SCGP in the country that was the intended country of destination of such commodities. Records demonstrating proof of entry must be in English or be accompanied by a certified or other translation acceptable to CCC. Records acceptable to meet this requirement include an original certification of entry signed by a duly authorized customs or port official of the importing country, by the importer, by an agent or representative of the vessel or shipline which delivered the agricultural commodity to the importing country, or by a private surveyor in the importing country, or other documentation deemed acceptable by the GSM showing:

(1) That the agricultural commodity entered the importing country;

(2) The identification of the export carrier;

(3) The quantity of the agricultural commodity;

(4) The kind, type, grade and/or class of the agricultural commodity; and

(5) The date(s) and place(s) of unloading of the agricultural commodity in the importing country. (Records of proof of entry need not be submitted with a claim for loss, except as may be provided in § 1493.500(b)(4)(ii).)

### § 1493.500 Notice of default and claims for loss.

(a) *Notice of default.* If the importer fails to make payment pursuant to the terms of the importer obligation, the exporter or the exporter's assignee must submit a notice of default to CCC as soon as possible, but not later than 10 calendar days after the date that payment was due from the importer (the due date). A notice of default must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. If the exporter or the exporter's assignee fails to promptly notify CCC of defaults in accordance with this paragraph, CCC may make the payment guarantee null and void with respect to any payment(s) applicable to such default. This time limit may be extended only under extraordinary circumstances and if such extension is determined by the Controller, CCC, to be in the best interests of CCC. The notice of default must include:

(1) Payment guarantee number;

(2) Name of the country;

(3) Name of the defaulting importer;

(4) Due date;

(5) Total amount of the defaulted payment due, indicating separately the amounts for principal and interest;

(6) Date of importer's refusal to pay, if applicable; and

(7) Reason for importer's refusal to pay, if known.

(b) *Filing a claim for loss.* A claim for a loss by the exporter or the exporter's assignee will not be paid if it is made later than six months from the due date of the defaulted payment. A claim for loss must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. The claim for loss must include the following information and documents:

(1) Payment guarantee number;

(2) A certification that the scheduled payment has not been received;

(3) A certification of the amount of accrued interest in default, the date interest began to accrue, and the interest rate on the importer obligation applicable to the claim;

(4) A copy of each of the following documents, with a cover document containing a signed certification by the exporter or the exporter's assignee that each page of each document is a true and correct copy:

(i) The importer obligation;

(ii) Depending upon the method of shipment, the negotiable ocean carrier or intermodal bill(s) of lading signed by the shipping company with the onboard ocean carrier date for each shipment, the airway bill, or, if shipped by rail or truck, the entry certificate or similar document signed by an official of the importing country;

(iii)(A) The exporter's invoice showing, as applicable, the FAS, FOB, CFR or CIF values; or

(B) If there was an intervening purchaser, both the exporter's invoice to the intervening purchaser and the intervening purchaser's invoice to the importer;

(iv) An instrument, in form and substance satisfactory to CCC, subrogating to CCC the respective rights of the exporter and the exporter's assignee, if applicable, to the amount of

payment in default under the applicable export sale. The instrument must reference the applicable importer obligation; and

(v) A copy of the report(s) of export previously submitted by the exporter to CCC pursuant to § 1493.470(a).

(c) *Subsequent claims for defaults on installments*. If the initial claim is found in good order, the exporter or an exporter's assignee need only provide all of the required claims documents with the initial claim relating to a covered transaction. For subsequent claims relating to failure of the importer to make scheduled installments on the same export shipment, the exporter or the exporter's assignee need only submit to CCC a notice of such failure containing the information stated in paragraph (b) (1), (2), and (3) of this section; an instrument of subrogation as per paragraph (b)(4)(iv) of this section, and including the date the original claim was filed with CCC.

**§ 1493.510 Payment for loss.**

(a) *Determination of CCC's liability*. Upon receipt in good order of the information and documents required under § 1493.500, CCC will determine whether or not a loss has occurred for which CCC is liable under the applicable payment guarantee, this subpart and any applicable supplemental Program Announcements and Notices to Participants. If CCC determines that it is liable to the exporter and/or the exporter's assignee, CCC will pay the exporter or the exporter's assignee in accordance with paragraphs (b) and (c) of this section.

(b) *Amount of CCC's liability*. Subject to a determination by CCC with respect to prevailing U.S. market value pursuant to § 1493.450(a) of this part, CCC's maximum liability for any claims for loss submitted with respect to any payment guarantee, not including any late interest payments due in accordance with paragraph (c) of this section, will be limited to the lesser of:

(1) The guaranteed value as stated in the payment guarantee, plus eligible interest; or

(2) The guaranteed percentage (as indicated in the payment guarantee) of the exported value indicated in the evidence of export, plus eligible interest.

(c) *Late interest payment*. If a claim is not paid within one day of receipt of a claim which CCC has determined to be in good order, late interest will accrue in favor of the exporter or the exporter's assignee beginning with the first day after the day of receipt of a claim found by CCC to be in good order and continuing until and including the date that payment is made by CCC. Late interest will be paid on the guaranteed amount, as determined by paragraphs (b)(1) and (2) of this section, and will be calculated based on the average investment rate of the most recent Treasury 91-day bill auction as announced by the Department of Treasury as of the due date.

(d) *Accelerated payments*. CCC will pay claims only for losses on amounts not paid as scheduled. CCC will not pay claims for amounts due under an accelerated payment clause in the export sales contract or the importer obligation unless it is determined to be in the best interests of CCC by the Controller, CCC. Notwithstanding the foregoing, CCC at its option may declare the entire amount of the unpaid balance, plus accrued interest, in default and make payment to the exporter or the exporter's assignee in addition to such other claimed amount as may be due from CCC.

(e) *Action against the assignee*. Notwithstanding any other provision in this subpart to the contrary, with regard to commodities covered by a payment guarantee, CCC will not, except pursuant to a determination under § 1493.450(a) of this part, hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge, provided that:

(1) The exporter complies with the reporting requirements under §§ 1493.470 and 1493.480, excluding post-export adjustments (*i.e.*, corrections to evidence of export reports); and

(2) The exporter or the exporter's assignee furnishes the statements and documents specified in § 1493.500.

**§ 1493.520 Recovery of losses.**

(a) *Notification.* Upon payment of loss to the exporter or the exporter's assignee, CCC will notify the importer of CCC's rights under the subrogation agreement to recover all moneys in default.

(b) *Receipt of monies.* (1) In the event that monies for a defaulted payment are recovered by the exporter or the exporter's assignee from the importer or any other source whatsoever, such monies shall be immediately paid to the Treasurer, CCC. If such monies are not received by CCC within 15 business days from the date of recovery by the exporter or the exporter's assignee, the exporter or the exporter's assignee will owe to CCC interest from the date of recovery to the date of receipt by CCC. This interest will be calculated based on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and will accrue from such date to the date of payment by the exporter or the exporter's assignee to CCC. Such interest will be charged only on CCC's share of the recovery.

(2) If CCC recovers monies that should be applied to a payment guarantee for which a claim has been paid by CCC, CCC will pay the holder of the payment guarantee its pro rata share immediately, provided that the required information necessary for determining pro rata distribution has been furnished. If payment is not made by CCC within 15 business days from the date of recovery or 15 business days from receiving the required information for determining pro rata distribution, whichever is later, CCC will pay interest calculated on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and such interest will accrue from such date to the date of payment by CCC. The interest will apply only to the portion of the recovery payable to the holder of the payment guarantee.

(c) *Allocation of recoveries.* Recoveries made by CCC from the importer, and recoveries received by CCC from the exporter, the exporter's assignee, or any other source whatsoever, will be allocated by CCC to the exporter or the exporter's assignee and to CCC on a pro rata basis determined by their respective interests in such recoveries. The respective interest of each party will be determined on a pro rata basis, based on the combined amount of principal and interest in default. Once CCC has paid out a particular claim under a payment guarantee, CCC pro rates any collections it receives and shares these collections proportionately with the holder of the guarantee until both CCC and the holder of the guarantee have been reimbursed in full. Appendix A to § 1493.520—Illustration of Pro Rata Allocation of Recoveries—provides an example of the methodology used by CCC in applying this paragraph (c).

(d) *Liabilities to CCC.* Notwithstanding any other terms of the payment guarantee, the exporter may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter has engaged in fraud, or has been or is in material breach of any contractual obligation, certification or warranty made by the exporter for the purpose of obtaining the payment guarantee or for fulfilling obligations under SCGP. Further, the exporter's assignee may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter's assignee has engaged in fraud or otherwise violated program requirements.

(e) *Good faith.* The violation by an exporter of the certifications in §§ 1493.440(b) and 1493.480(d) or the failure of an exporter to comply with the provisions of §§ 1493.490 or 1493.530(e) will not affect the validity of any payment guarantee with respect to an assignee which had no knowledge of such violation or failure to comply at the time such exporter applied for the payment guarantee or at the time of assignment of the payment guarantee.

(f) *Cooperation in recoveries.* Upon payment by CCC of a claim to the exporter or the exporter's assignee, the exporter or the exporter's assignee will cooperate with CCC to effect recoveries from the importer.

APPENDIX A TO § 1493.520—ILLUSTRATION OF PRO RATA ALLOCATION OF RECOVERIES

The following example illustrates CCC's policy, as set forth in § 1493.520(c), regarding pro rata sharing of recoveries made for claims filed under the SCGP. A typical case might be as follows:

1. The U.S. exporter enters into a $200,000, 180 day credit arrangement with the importer calling for two equal payments of principal and two equal payments of interest at a rate of 10 percent per annum and a penalty interest rate of 12 percent per annum (basis 360 days) on overdue amounts until the overdue amount is paid. (Basis for interest calculation may be 360 or 365 days.)

2. The importer fails to make the final principal payment of $100,000 and an interest payment of $2,500.00 (10% per annum for 90 days on $100,000), both due on January 31.

3. On February 10, the U.S. exporter files a claim in good order with CCC.

4. CCC's guarantee states that CCC's maximum liability is limited to 60 percent of the principal amount due ($60,000) and interest at a rate of 8 percent per annum (basis 365 days) on 60 percent of the principal outstanding ($1,183.56) (8% per annum for 90 days on $60,000). (CCC's basis for interest calculation is 365 days.)

5. CCC pays the claim on February 22.

6. The average investment rate of the most recent 91-day Treasury Bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment by CCC (January 31) is 7 percent. (CCC's late interest rate.)

COMPUTATION OF OBLIGATIONS

Using the above case, CCC's payment to the holder of the payment guarantee would be computed as follows:

| | |
|---|---|
| 1. CCC's Obligation under the Payment Guarantee: | |
| (a) Principal coverage—(60% $100,000) | $60,000.00 |
| (b) Interest coverage—(8% per annum for 90 days on $60,000, basis 365 days) | 1,183.56 |
| | $61,183.56 |
| (c) Late interest due from CCC (7% per annum for 11 days on $61,183.56, basis 365 days) | 129.07 |
| (d) Amount paid by CCC on February 22 | $61,312.63 |
| 2. Importer's obligation under the importer obligation: | |
| (a) Principal due January 31 | $100,000.00 |
| Interest due January 31 (10% per annum for 90 days on $100,000, basis 360 days) | 2,500.00 |
| Amount owed by importer as of January 31 | $102,500.00 |
| (b) Penalty interest due (12% per annum for 22 days on $102,500.00, basis 360 days) | 751.67 |
| (c) Amount owed by importer as of February 22 | $103,251.67 |
| 3. Amount of importer's obligation not covered by CCC's payment guarantee: $41,939.04 ($103,251.67–$61,312.63).. | |

COMPUTATION OF PRO RATA SHARING IN RECOVERY OF LOSSES

In establishing each party's respective interest in any recovery of losses, the total amount due under the importer obligation would be determined as of the date the claim is paid by CCC (February 22). Using the above example in which the amount owed by the importer is $103,251.67, CCC would be entitled to 59.38 percent ($61,312.63 divided by $103,251.67) and the holder of the payment guarantee would be entitled to 40.62 percent ($41,939.04 divided by $103,251.67) of any recoveries of losses after settlement of the claim. Since in this example, the losses were recovered after the claim has been paid by CCC, § 1493.520(b) would apply.

## § 1493.530 Miscellaneous provisions.

(a) *Assignment.* (1) The exporter may assign the proceeds which are, or may become, payable by CCC under a payment guarantee or the right to such proceeds only to a financial institution in the U.S. The assignment must cover all amounts payable under the payment guarantee not already paid, may not be made to more than one party, and may not, unless approved in advance by CCC, be:

(i) Made to one party acting for two or more parties; or

(ii) Subject to further assignment.

(2) An original and two copies of the written notice of assignment signed by the parties thereto must be filed by the assignee with the Treasurer, CCC, at the address specified in the Contacts P/R.

(3) Receipt of the notice of assignment will ordinarily be acknowledged to the exporter and its assignee in writing by an officer of CCC. In cases where a financial institution is determined to be ineligible to receive an assignment, in accordance with paragraph (b) of this section, CCC will provide notice thereof, to the financial institution and to the exporter issued the payment guarantee, in lieu of an acknowledgment of assignment.

(4) The name and address of the assignee must be included on the written notice of assignment.

(b) *Ineligibility of financial institutions to receive an assignment.* A financial institution will be ineligible to receive an assignment of proceeds which may become payable under a payment guarantee if, at the time of assignment, such financial institution:

(1) Is not in sound financial condition, as determined by the Treasurer of CCC;

(2) Owns or controls the entity issuing the importer obligation; or

(3) Is owned or controlled by an entity that owns or controls the entity issuing the importer obligation.

(c) *Ineligibility of financial institutions to receive proceeds.* A financial institution will be ineligible to receive proceeds payable under a payment guarantee approved by CCC if such financial institution:

(1) At the time of assignment of a payment guarantee, is not in sound financial condition, as determined by the Treasurer of CCC;

(2) Owns or controls the entity issuing the importer obligation; or

(3) Is owned or controlled by an entity that owns or controls the entity issuing the importer obligation.

(d) *Alternative satisfaction of payment guarantees.* CCC may, with the agreement of the exporter (or if the right to proceeds payable under the payment guarantee has been assigned, with the agreement of the exporter's assignee), establish procedures, terms and/or conditions for the satisfaction of CCC's obligations under a payment guarantee other than those provided for in this subpart if CCC determines that those alternative procedures, terms, and/or conditions are appropriate in rescheduling the debts arising out of any transaction covered by the payment guarantee and would not result in CCC paying more than the amount of CCC's obligation.

(e) *Maintenance of records and access to premises.* (1) For a period of five years after the date of expiration of the coverage of a payment guarantee, the exporter or the exporter's assignee, as applicable, must maintain and make available all records pertaining to sales and deliveries of and extension of credit for agricultural commodities exported in connection with a payment guarantee, including those records generated and maintained by agents, intervening purchasers, and related companies involved in special arrangements with the exporter. The Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, must be given full and complete access to the premises of the exporter or the exporter's assignee, as applicable, during regular business hours from the effective date of the payment guarantee until the expiration of such five-year period to inspect, examine, audit, and make copies of the exporter's, exporter's assignee's, agent's, intervening purchaser's, or related company's books, records and accounts concerning transactions relating to the payment guarantee, including, but not limited to, financial records and accounts pertaining to sales, inventory, processing, and administrative and incidental costs, both normal and unforeseen. During such period, the exporter or the exporter's assignee may be required to make available to the Secretary of Agriculture or the Comptroller General of the United States, through their authorized representatives, records that pertain to transactions conducted outside the program, if, in the opinion of the GSM, such records would pertain directly to the review of transactions undertaken by the exporter in connection with the payment guarantee.

(2) The exporter must maintain the proof of entry required by §1493.490(b), and must provide access to such documentation if requested by the Secretary of Agriculture or his authorized representative for the five-year period specified in paragraph (e)(1) of this section.

(f) *Responsibility of program participants.* It is the responsibility of all program participants to review, and fully acquaint themselves with, all regulations, Program Announcements, and Notices to Participants issued pursuant to this subpart. Applicants for payment guarantees are hereby on notice that they will be bound by any terms contained in applicable Program Announcements or Notices to Participants issued prior to the date of approval of a payment guarantee.

(g) *Submission of documents by principal officers.* All required submissions, including certifications, applications, reports, or requests (*i.e.*, requests for amendments), by exporters or exporters' assignees under this subpart must be signed by a principal or officer of the exporter or exporter's assignee or their authorized designee(s). In cases where the designee is acting on behalf of the principal or the officer, the signature must be accompanied by: Wording indicating the delegation of authority or, in the alternative, by a certified copy of the delegation of authority; and the name and title of the authorized person or officer. Further, the exporter or exporter's assignee must ensure that all information/reports required under these regulations are submitted within the required time limits. If requested in writing, CCC will acknowledge receipt of a submission by the exporter or the exporter's assignee. If acknowledgment of receipt is requested, the exporter or exporter's assignee must submit an extra copy of each document and a stamped self-addressed envelope for return by U.S. mail. If courier services are desired for the return receipt, the exporter or exporter's assignee must also submit a self-addressed courier service order which includes the recipient's billing code for such service.

(h) *Officials not to benefit.* No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the payment guarantee or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the payment guarantee if made with a corporation for its general benefit.

(i) *OMB control number assigned pursuant to the Paperwork Reduction Act.* The information requirements contained in this part (7 CFR part 1493, subpart D) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0551–0037.

# PART 1494—EXPORT BONUS PROGRAMS

## Subpart A—Export Enhancement Program Criteria

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1494.1200 Program operations.
1494.1201 Paperwork Reduction Act.

SOURCE: 56 FR 25011, June 3, 1991, unless otherwise noted.

## Subpart A—Export Enhancement Program Criteria

AUTHORITY: 7 U.S.C. 5663.

SOURCE: 56 FR 26324, June 7, 1991, unless otherwise noted.

### § 1494.10 General statement.

This subpart sets forth the criteria to be considered in evaluating and approving proposals for initiatives to facilitate export sales under the Commodity

Credit Corporation's (CCC) Export Enhancement Program (EEP). These criteria are interrelated and will be considered together in order to select eligible commodities and eligible countries for EEP initiatives which will best meet the program's objectives. The objectives of the program are to discourage unfair trade practices by other countries, to increase U.S. agricultural commodity exports, and to encourage other countries exporting agricultural commodities to undertake serious negotiations on agricultural trade problems. Under the EEP, bonuses are made available by CCC to enable exporters to meet prevailing world prices for targeted commodities in targeted destinations. In the operation of the EEP, CCC will make reasonable efforts to avoid the displacement of usual marketings of U.S. agricultural commodities.

### § 1494.20 Criteria.

The criteria considered by CCC in reviewing proposals for initiatives will include, but not be limited to, the following:

(a) The expected contribution of proposed initiatives in furthering trade policy negotiations and, in particular, in furthering the U.S. trade policy negotiating strategy of countering competitors' subsidies and other unfair trade practices by displacing such countries' subsidized exports in targeted countries;

(b) The contribution which initiatives will make toward realizing U.S. agricultural export goals and, in particular, in developing, expanding, or maintaining markets for U.S. agricultural commodities;

(c) The effect that sales facilitated by initiatives would have on non-subsidizing exporters of agricultural products; and

(d) The subsidy requirements of proposed initiatives compared to the expected benefits.

## Subpart B—Export Enhancement Program Operations

AUTHORITY: 15 U.S.C. 714c; 7 U.S.C. 5602, 5651, 5661, 5662, 5676.

### § 1494.101 General statement.

This subpart contains the regulations governing the operation of the Export Enhancement Program (EEP) of the Commodity Credit Corporation (CCC). CCC will, from time to time, announce, through public press release, initiatives to facilitate the export of U.S. agricultural commodities to targeted markets. The public press release, which will contain the name of a person for interested parties to contact, will be followed by the issuance of an Invitation for Offers (Invitation). Invitations will be issued pursuant to this subpart by the General Sales Manager (GSM) and will specify the eligible country(ies) (the targeted market), the unit of measure, the eligible commodity, the maximum quantity of the eligible commodity eligible for a CCC bonus, the quality specifications of the eligible commodity (including possible restrictions on type, kind, grade and/or class or other quality specifications), the eligible buyer(s), the method and rate for determining liquidated damages and performance security requirements, and any other terms and conditions peculiar to that Invitation. Invitations may be one of the following two types: Those inviting exporters which have a sales contract with an eligible buyer to submit a competitive offer for a CCC Bonus; and those inviting exporters which have a sales contract with an eligible buyer to apply for an Announced CCC Bonus. After an interested person has qualified to submit an offer for an eligible commodity, the eligible exporter may submit an offer to CCC in response to an Invitation. Such offer must contain the information required by this subpart and any additional information required by the applicable Invitation. The exporter's offer will include either the Announced CCC Bonus, if applicable, or an amount in dollars and cents for a bonus deemed necessary by the exporter to make a commercial sale of the eligible commodity for export to the eligible country competitive with export sales of the commodity by other exporting countries to buyers in the eligible country. If the exporter has furnished the required performance security and the offer is acceptable to CCC, then CCC will notify the exporter that its

offer has been accepted. CCC and the exporter will enter into an Agreement in which CCC will agree to pay the bonus to the exporter in return for the exporter's submission of proof that the eligible commodity has been exported from the United States and entered into the eligible country, in accordance with the terms and conditions of the Agreement.

**§ 1494.201 Definitions of terms.**

Terms used in this subpart, Invitations issued pursuant to this subpart, and any documents pertaining to the EEP shall have the following meaning, unless otherwise specified in such Invitations or documents:

(a) *Agreement or EEP Agreement*—The Agreement entered into between CCC and the exporter consisting of:

(1) The terms and conditions of this subpart;

(2) The terms and conditions of the applicable Invitation;

(3) The exporter's offer;

(4) CCC's acceptance of the exporter's offer; and

(5) The public press release for the Announced CCC Bonus in effect at the time of the offer, if applicable.

(b) *Announced CCC bonus*—A CCC bonus announced by CCC by public press release in connection with an Invitation which specifies that the CCC bonus amount will be pre-determined and announced by CCC.

(c) *FSA*—The Farm Service Agency, U.S. Department of Agriculture.

(d) *Bonus value*—The CCC bonus multiplied by the quantity of the eligible commodity exported pursuant to an Agreement, provided that the eligible commodity enters into the eligible country. (The bonus value is paid to the exporter in CCC certificates or other form of payment.)

(e) *Business day*—Days during which employees of the U.S. Department of Agriculture in Washington, DC or in Kansas City, Missouri, as applicable depending upon the office to which a submission is to be made, are on official duty during normal business hours.

(f) *CCC*—The Commodity Credit Corporation, U.S. Department of Agriculture.

(g) *CCC bonus*—A dollar and cents amount, established through CCC's acceptance of the exporter's offer for such bonus amount, to be paid to the exporter for each unit of the eligible commodity exported pursuant to an Agreement, provided that the eligible commodity enters into the eligible country.

(h) *CCC Certificate*—The CCC Commodity Certificate or Certificates issued by CCC that may be transferred or exchanged for a CCC-owned commodity pursuant to CCC's regulations on Commodity Certificates, In Kind Payments, and Other Forms of Payment, currently codified at 7 CFR part 1470.

(i) *CCC Operations Division (CCCOD)*—The CCC Operations Division, FAS, U.S. Department of Agriculture.

(j) *Date of entry*—Either the date on the certificate of entry specified in § 1494.401(f)(2) indicating that the eligible commodity entered the eligible country on that date or the date that an entry document was issued by a customs port authority or other government official, whichever is later.

(k) *Date of export*—One of the following dates, depending upon the method of shipment:

(1) The on-board date shown on the export carrier's bill of lading, when the eligible commodity is shipped from the U.S. without being transshipped through a Canadian port;

(2) The on-board date at the Canadian port shown on the export carrier's bill of lading, when the eligible commodity is shipped from a Canadian transshipment port on the St. Lawrence River, provided its identity had been preserved until shipped from Canada;

(3) The on-board date shown on the export carrier's through bill of lading, when the eligible commodity is loaded to a lash barge for shipment from the U.S.; or

(4) The date of entry shown on an authenticated landing certificate or similar document issued by an official of the government of the eligible country, when the eligible commodity is shipped by rail or truck from the U.S.

(l) *Date of sale*—The earliest date the exporter has knowledge that a sales contract, as defined in paragraph (bb) of this section, exists with an eligible buyer.

(m) *Director*—The Director, Kansas City Commodity Office, FSA, U.S. Department of Agriculture, or the Director's designee.

(n) *Eligible Buyer*—Unless otherwise specified in the Invitation, a buyer, located in the eligible country, that has entered, or will enter, into a sales contract with an exporter. (The applicable Invitation may limit the eligible buyer to one or more particular buyers in an eligible country.)

(o) *Eligible country*—The country or countries, as specified in an Invitation, which will be the only country or countries into which an exported eligible commodity must ultimately be entered in order for the exporter to earn a bonus from CCC under that Invitation.

(p) *Eligible commodity*—The U.S. agricultural commodity specified as eligible for export under the applicable Invitation, which is of the kind, type, grade and/or class of commodity specified in the applicable Invitation. (If the eligible commodity is grain, it must meet the definition applicable for that grain under the U.S. Grain Standards Act and the regulations issued thereunder.)

(q) *Eligible exporter*. A person that has been notified by CCC that such person is qualified to submit offers in response to Invitations.

(r) *Export or exported*—The shipment of the eligible commodity from the United States or from the Canadian transshipment port, as permitted by this subpart, destined for the eligible country.

(s) *Exporter*—An eligible exporter that enters into an Agreement with CCC under this subpart.

(t) *Export carrier*—The carrier on which the eligible commodity is shipped under the Agreement to the eligible country or to a port in a nearby country, if transshipments other than through Canada are allowed by the applicable Invitation. ("Export carrier" may mean an ocean vessel and, on Canadian transshipments, will mean the ocean vessel loaded at the Canadian transshipment port; or, on overland shipments, a railcar or truck; or a container or lash barge loaded with the eligible commodity for which a through on-board bill of lading is issued for shipment to the eligible country, provided that the loaded container or lash barge is subsequently lifted aboard an ocean vessel.)

(u) *FAS*—The Foreign Agricultural Service, U.S. Department of Agriculture.

(v) *GSM*—The General Sales Manager, FAS, U.S. Department of Agriculture, acting in the capacity of Vice President, CCC, or the GSM's designee.

(w) *Invitation*—The Invitation for Offers issued by CCC pursuant to this subpart, generally specifying the eligible country, the eligible commodity, the maximum quantity of the eligible commodity eligible for a CCC bonus, the quality specifications of the eligible commodity, the eligible buyer(s), the method and rate for determining liquidated damages and performance security requirements, allowances for transshipments, and any other terms and conditions particular to that Invitation. (If the Invitation contains terms or conditions that are inconsistent with this subpart, the terms and conditions of the Invitation will prevail for the purposes of Agreements entered into pursuant to such Invitation.)

(x) *Notice to exporters—EEP Contacts*—A notice issued by FAS by public press release which contains specific addresses; telephone, facsimile and telex numbers; and contacts within FAS and FSA to obtain further information concerning qualification as an eligible exporter, the submission of offers in response to Invitations, amendments to Agreements, requests for bonus payments, the submission of export and entry documentation, and other matters related to the EEP.

(y) *Official Inspection Certificate*—A valid official export inspection or other quality analysis certificate, as specified in the applicable Invitation.

(z) *Official weight certificate*—A valid official export weight or other quantity certificate, as specified in the applicable Invitation.

(aa) *Person*—An individual, partnership, corporation, association or other legal entity.

(bb) *Sales contract*—The sales contract entered into between an eligible exporter and an eligible buyer which sets forth the terms and conditions of a sale of the eligible commodity from the

eligible exporter to the buyer. (Written evidence of sale may be in the form of a signed sales contract, an offer and acceptance between parties, or other documentary evidence of sale. The written evidence of sale for the purposes of the EEP must, at a minimum, document the following information: the eligible commodity, quantity, quality specifications, delivery terms (FOB, C&F, etc.) to the eligible country, delivery period, unit price, payment terms, date of sale, and evidence of agreement between buyer and seller. A sales contract with an intervening purchaser or an affiliate or subsidiary of the eligible exporter is not an eligible sales contract for the purpose of this subpart.)

(cc) *Transshipment*—The entry of the eligible commodity into a country other than the eligible country which occurs prior to the subsequent entry of the eligible commodity into the eligible country.

(dd) *Time*—All references to time shall refer to local time in Washington, DC.

(ee) *Unit of measure*—The unit of measure for the eligible commodity, as specified in the applicable Invitation.

(ff) *United States or U.S.*—All of the 50 States, the District of Columbia, and the territories and possessions of the United States.

(gg) *U.S. agricultural commodity*. (1) An agricultural commodity or product entirely produced in the United States; or

(2) A product of an agricultural commodity—

(i) 90 percent or more of the agricultural components of which by weight, excluding packaging and added water, is entirely produced in the United States; and

(ii) That the Secretary determines to be a high value agricultural product. For purposes of this definition, fish entirely produced in the United States include fish harvested by a documented fishing vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

[56 FR 25011, June 3, 1991, as amended at 60 FR 21039, May 1, 1995; 62 FR 24561, May 6, 1997]

**§ 1494.301 Information required for program participation.**

Before CCC will consider an offer from an interested person, such person must qualify for participation in the program. Based upon information submitted by the interested person and available from public sources, CCC will determine whether the interested person is eligible for participation in the program.

(a) *Submission of documentation*. An interested person that wishes to qualify as an eligible exporter must furnish the following information or documentation to CCC at the address referenced in the Notice to Exporters—EEP Contacts:

(1) The address of the interested person's office and the name and address of an agent in the U.S. for the service of process;

(2) The legal form of doing business of the interested person, e.g., sole proprietorship, partnership, corporation, etc.;

(3) The place of incorporation of the interested person, if the interested person is a corporation;

(4) The name and address of an office(s) of the interested person within the U.S., if the interested person is a foreign corporation or other foreign entity; and

(5) A certified statement describing the interested person's participation, if any, during the past three years in U.S. Government programs, contracts or agreements.

(6) The following certification: "I certify, to the best of my knowledge and belief, that neither [name of interested person] nor any of its principals has been debarred, suspended, or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency. ["Principals," for the purpose of this certification, means officers; directors; owners of five percent or more of stock; partners; and persons having primary management or supervisory responsibility within a business entity (e.g., general manager, plant manager, head of a subsidiary division or business segment, and similar positions).] I further agree that, should any such debarment, suspension, or notice of proposed debarment occur in the future, [name of

interested person] will immediately notify CCC."

(b) *Necessity to qualify*. An interested person may not submit an offer, and CCC will not consider any such offer, until CCC has notified the interested person that such person has qualified as an eligible exporter.

(c) *Additional submissions*. CCC will promptly notify interested persons that have submitted information required by this section whether they have qualified to have their offers considered. Any person failing to qualify will be notified of the basis of CCC's decision and will be given an opportunity to provide additional information for consideration by CCC.

(d) *Previous performance*. CCC may request additional information with respect to the interested person's performance under any U.S. Government programs or in connection with any contracts or agreements with the U.S. Government during the past three years.

(e) *Ineligibility for program participation*. A person may be ineligible to participate in the EEP if such person:

(1) Is currently debarred, suspended or proposed for debarment from contracting with or participating in any program administered by a U.S. Government agency; or

(2) Is controlled or can be controlled, in whole or in part, by any individuals or entities currently debarred, suspended or proposed for debarment from contracting with or participating in programs administered by a U.S. Government agency.

(f) *Duty to update information provided to CCC*. An eligible exporter is under a continuing obligation to inform CCC of any changes in the information or documentation submitted to CCC pursuant to paragraph (a) of this section and to provide current and accurate information to CCC.

(g) *Payment of bonus to exporters without proven EEP participation*. An eligible exporter that has not yet demonstrated its ability to participate successfully in the EEP will be eligible to receive a bonus payment(s) only after the eligible commodity specified in an EEP Agreement has entered into the eligible country. Such an exporter must furnish performance security under "Option B" of the applicable Invitation and follow the procedure specified in §1494.701(d) to request the payment of the bonus. An eligible exporter may demonstrate its ability to participate successfully in the EEP by entering or causing to be entered into the eligible country at least 95% of the quantity of the eligible commodity specified in any one EEP Agreement. CCC will consider that an exporter has proven its ability to participate successfully in the EEP as of the date on which CCC pays to the exporter a bonus for entry of a quantity that brings the total entered quantity for any one EEP Agreement to at least 95%. For all EEP Agreements that such exporter enters into with CCC subsequent to that date, the exporter may furnish performance security under "Option A" of the applicable Invitation and will be eligible to receive bonus payments in accordance with §1494.701(c).

[56 FR 25011, June 3, 1991, as amended at 60 FR 21039, May 1, 1995]

### §1494.401 Performance security.

(a) *Requirement to establish performance security*. Prior to the submission of an offer to CCC in response to an Invitation, an eligible exporter must establish performance security, in a form which is acceptable to CCC, in order to guarantee the eligible exporter's faithful performance of the Agreement. If CCC enters into an Agreement with the eligible exporter, this performance security must remain in effect until its cancellation or reduction is authorized by CCC pursuant to paragraph (f) of this section. An offer made by an eligible exporter will not be considered if proof of the establishment of the performance security is not made available to CCC by 3 p.m. on the date for which the offer is submitted for consideration.

(b) *Form of performance security*. The performance security must be acceptable to CCC and may be an irrevocable standby letter of credit, a bond, or a certified or cashier's check. If a standby letter of credit is furnished as performance security, the opening bank may be a U.S. bank or a foreign bank. If the standby letter of credit is opened by a foreign bank, it must be 100 percent confirmed by a U.S. bank. If a

bond is furnished as performance security, the surety(ies) must be among those appearing on the list of approved sureties maintained by the U.S. Department of the Treasury. If a cashier's or certified check is furnished as performance security, the bank issuing the cashier's or certified check must be a U.S. bank.

(c) *Amount of performance security.* The amount of the performance security to be furnished to CCC in response to a particular Invitation will depend upon whether the eligible exporter intends to select "Option A" or "Option B" for the timing of the bonus payment. If the eligible exporter furnishes performance security under "Option A" of the applicable Invitation, the eligible exporter may request payment of the bonus after export of the eligible commodity but before entry of the commodity into the eligible country. If the eligible exporter furnishes performance security under "Option B" of the applicable Invitation, the eligible exporter may request payment of the bonus only after the exported eligible commodity has entered into the eligible country. The applicable Invitation will specify the exact amount of performance security for the eligible commodity required under either "Option A" or "Option B" and the method and rate for determining liquidated damages. After the exporter and CCC enter into an Agreement, the exporter may request CCC to change the performance security option for an entire Agreement from "Option B" to "Option A" and, if CCC agrees to this change, the exporter will increase the performance security amount to the level required by the applicable Invitation for "Option A".

(d) *Additional security.* The exporter shall promptly furnish such additional security as CCC may determine is necessary to protect CCC under an Agreement if the surety(ies) or obligating bank:

(1) Becomes unacceptable to the U.S. Government or CCC; and/or

(2) Fails to furnish reports on its financial condition as required by the U.S. Government or CCC.

(e) *Right to funds under the performance security.* If CCC enters into an Agreement with an exporter under the EEP, CCC will have the right to funds from the performance security established by the exporter for such Agreement to recover:

(1) The amount of any bonus paid to the exporter under the Agreement if the exporter fails to perform in accordance with such Agreement;

(2) Any funds owed by the exporter to CCC related to the specific EEP Agreement for which the performance security was established, including those for liquidated damages, discounts for late performance, overpayments made by CCC, storage charges, or other damages or charges as determined by CCC; and/or

(3) Any amounts or funds that could be owed by the exporter to CCC in accordance with subparagraphs (e) (1) and (2) of this section for unfulfilled obligations under the Agreement if the performance security should expire prior to the exporter's fulfillment of these obligations. Should the exporter fulfill these obligations, in accordance with the Agreement, after CCC has drawn upon the performance security, CCC will return the funds drawn to the exporter or other appropriate party, as determined by CCC. CCC may return the performance security if it determines that the exporter is not liable for any damages incurred by CCC as a result of the exporter's failure to fulfill its obligations under the Agreement and that the exporter will not retain any bonus payment which was not earned.

(f) *Cancellation or reduction of performance security.* (1) CCC will agree, upon request by the exporter, to a cancellation of the performance security established for an Agreement when CCC determines, on the basis of evidence provided by the exporter or other evidence available to CCC, that:

(i) The exporter has fully performed under the Agreement;

(ii) The exporter has fully compensated CCC for all costs incurred or damages suffered by CCC, unless CCC has determined to hold the exporter harmless for such damages pursuant to § 1494.801(d) as a result of the exporter's nonperformance of the Agreement; or

(iii) It is no longer in the best interest of the EEP to require the exporter to maintain the performance security, and the exporter submits to CCC a

written statement agreeing that all other terms and conditions of the Agreement will remain unchanged pending final resolution of the exporter's liabilities to CCC.

(2) To support a request for the cancellation of performance security furnished in connection with an Agreement, the exporter must provide to CCC evidence of the export of the eligible commodity as provided by §1494.701(c), and the entry of the eligible commodity into the eligible country or countries. The entry certification must be in English or accompanied by a certified or other translation acceptable to CCC. To show entry of the eligible commodity into the eligible country, the exporter must furnish to CCC an original certification signed by a duly authorized customs or port official of the eligible country, by the eligible buyer, by an agent or representative of the vessel or shipline which delivered the eligible commodity to the eligible country, or by a private surveyor in the target country or other documentation deemed acceptable by the GSM showing:

(i) That the eligible commodity entered the eligible country;

(ii) The identification of the export carrier;

(iii) The quantity of the eligible commodity unloaded;

(iv) The kind, type, grade and/or class of the eligible commodity; and

(v) The date(s) and place(s) of unloading of the eligible commodity in the eligible country.

(3) If the exporter makes multiple shipments against a sales contract with an eligible buyer, CCC may agree to a proportional reduction in the amount of the required performance security when the exporter has furnished evidence that the exporter has performed under the Agreement with respect to a particular shipment.

(4) Upon the payment of liquidated damages by an exporter to CCC under a specific Agreement or the determination by CCC, pursuant to §1494.801(d), to hold the exporter harmless for the payment of liquidated damages owed to CCC under a specific Agreement, CCC will allow the exporter to cancel or reassign that portion of the performance security opened for such specific Agreement that would relate to the value of the liquidated damages.

**§ 1494.501 Submission of offers to CCC.**

(a) *Consideration of offers.* Unless otherwise specified in the Invitation, CCC will consider offers on a daily basis from the date of issuance of the Invitation until such time that CCC announces that offers will no longer be accepted under the Invitation, the total quantity of the eligible commodity announced in the Invitation has been awarded, or the Invitation has expired as indicated by the expiration date shown in the Invitation.

(1) Prior to the submission of an offer to CCC, the eligible exporter must have entered into a sales contract, as defined in §1494.201(bb), with an eligible buyer for the export sale and the delivery of the eligible commodity to the eligible country.

(2) The date of sale of the eligible exporter's sales contract with an eligible buyer must be after the issuance date of the applicable Invitation.

(3) The sales contract between the eligible exporter and an eligible buyer may be conditioned upon the eligible exporter's entering into an Agreement with CCC under the EEP for the payment of a bonus.

(4) CCC will not be responsible to any person for any loss caused by the failure of the eligible exporter to obtain a CCC bonus.

(5) The eligible exporter must promptly notify CCC in writing of any amendment to the sales contract with an eligible buyer.

(b) *Submission of offers.* Eligible exporters must submit offers, or modifications or withdrawals thereof, to the address, telephone, telex or facsimile numbers specified in the Notice to Exporters—Contacts for EEP. Telephonic offers must be confirmed in writing immediately thereafter by telex or facsimile. If a telephonic offer is not confirmed in writing by 9 a.m. on the next business day, the offer will not be considered. The date and time affixed to submissions will be as determined by CCC.

(c) *Content of offers.* Offers to CCC for a CCC bonus under the EEP must contain the information shown below in the same numerical order as shown

below. CCC reserves the right to reject any offer that so materially departs from this prescribed format that its consideration would hinder the offer review process. The applicable Invitation may require the submission of further information necessary for the consideration of an offer.

(1) The use of the numerical designation assigned to the applicable Invitation, which shall signify that the offer is submitted subject to all the terms and conditions of this subpart and the Invitation in response to which the offer is being submitted for consideration by CCC.

(2) The date and time for which the offer is submitted for consideration. The time shall be stated as "after 3 p.m." For example, the information required by paragraphs (c)(1) and (c)(2) of this section could be stated as follows: "Invitation No. GSM–500–1, Revision No. X, For Consideration After 3 p.m. on August 1, 1991."

(3) The full business name and address of the eligible exporter making the offer.

(4) The name and title of the individual signing the offer.

(5) The telephone number and telex or facsimile number of the eligible exporter submitting the offer.

(6) The CCC bonus in dollar and cents requested by the eligible exporter for each unit of measure of the eligible commodity to be exported to the eligible country. The offer shall contain only one CCC bonus. In offers submitted in response to an Invitation in which CCC has announced the bonus amount, the eligible exporter shall state the dollar and cents amount of the Announced CCC Bonus.

(7) The quantity, on a net weight basis, (less any dockage, if applicable) of the eligible commodity for which the eligible exporter wishes to receive a CCC bonus pursuant to an EEP Agreement. This quantity shall be exclusive of tolerances and expressed in the unit of measure specified in the applicable Invitation. This quantity may be less than the sales contract quantity.

(8) The U.S. coast of export. The Invitation may require the eligible exporter to indicate: The coasts of export if more than one coast of export is allowed for an offer; the Canadian port if the eligible commodity is to be transshipped through a Canadian port on the St. Lawrence River; or the U.S. city and state from which the shipments will cross the border into the eligible country if the eligible commodity is to be shipped by rail or truck.

(9) The quality of the eligible commodity to be exported to the eligible buyer, if required by the applicable Invitation, including any additional quality specifications not found in the Invitation but included in the tender specifications by the eligible buyer or the sales contract with the eligible buyer. The Invitation may limit an offer to one or more quality designations for the eligible commodity.

(10) The names of the eligible buyer and the eligible country. Unless otherwise provided for in the applicable Invitation, an offer shall contain only one eligible buyer and one eligible country. The Invitation may also provide that the eligible buyer need not necessarily be located in the eligible country.

(11) The date of sale of the sales contract with the eligible buyer.

(12) The number assigned by the eligible exporter to the sales contract.

(13) The quantity of the eligible commodity specified in the sales contract, expressed in the unit of measure specified in the applicable Invitation.

(14) The sales contract loading tolerance, if any, expressed in a percentage.

(15) The sales contract unit price, delivery terms (e.g., FOB, C&F, etc.); the nature of any arrangements or understandings of the eligible exporter and any other person that would affect the sales contract, including but not limited to arrangements or understandings concerning commissions, rebates, and other payments if applicable; credit payment terms (e.g., GSM–102, GSM–103, or other credit arrangements); and, if required by the applicable Invitation, the discharge port. The possible credit payment terms referenced in an offer are for CCC's information only and are not to be construed as a contingency for consideration or acceptance. The eligible exporter is fully responsible for the arrangement of such payment terms independently from the EEP offer and

CCC bears no responsibility if such credit payment terms cannot be secured.

(16) The delivery period specified in the sales contract expressed on the basis of either shipment from the United States or the Canadian transshipment port or arrival in the eligible country. If an arrival period is shown, the offer must also indicate an anticipated shipment period. If a multiple month delivery schedule is agreed upon in the sales contract the offer must specify the quantity of the eligible commodity to be delivered each month or at other specified intervals.

(17) Any options which may be exercised by the eligible buyer under the sales contract. If the offer is accepted by CCC, the exporter must immediately inform CCC if any such options are exercised by the buyer.

(18) The name and address of the sales agent, if any, for the sales contract.

(19) The designation of bonus payment under "Option A" or "Option B," as described in §1494.401(c).

(20) The words "ALL ITEM 20 CERTIFICATIONS ARE BEING MADE IN THIS OFFER" which, when included in the offer by the eligible exporter, will indicate that the eligible exporter is certifying that:

(i) The information furnished to CCC with respect to the sales contract is correct;

(ii) The date of sale with an eligible buyer was after the issuance date of the applicable Invitation;

(iii) The sale does not replace any sale made to the eligible buyer by the eligible exporter, or any affiliate or subsidiary of the eligible exporter, prior to the issuance date of the applicable Invitation;

(iv) There are no other arrangements or understandings between the eligible exporter and any other person that would alter the information provided under paragraph (c) of this section;

(v) There were and will be no corrupt payments or extra sales services, or other items extraneous to the export sale provided in connection with the export sale, and the transaction complied with applicable U.S. law;

(vi) The CCC bonus requested in the offer has been arrived at independently, without any consultation, communication, or agreement with any other eligible exporter or competitor relating to:

(A) The amount of the CCC bonus;

(B) The intention to submit an offer; or

(C) The methods or factors used to calculate the CCC bonus requested;

(vii) The CCC bonus requested in the offer has not been and will not knowingly be disclosed by the eligible exporter, directly or indirectly, to any other eligible exporter or competitor before the time the offer is to be considered by CCC, unless otherwise required by law;

(viii) No attempt has been made, or will be made, by the eligible exporter to induce any other concern to submit, or not to submit, an offer for the purpose of restricting competition;

(ix) The signatory of the offer:

(A) Is the person in the eligible exporter's organization responsible for determining the CCC bonus being requested and has not participated and will not participate in any action contrary to subparagraphs (c)(20) (vi), (vii), and (viii) of this section; or

(B) Has been authorized in writing to act as agent for the eligible exporter for the purposes of paragraphs (b) and (c) of this section and certifies that the eligible exporter named in the offer and the signatory have not participated and will not participate in any action contrary to subparagraphs (c)(20) (vi), (vii), and (viii) of this section;

(x) If the eligible commodity is vegetable oil or a vegetable oil product, that none of the eligible commodity has been or will be used as the basis of a claim of a refund, as drawback, pursuant to Section 313 of the Tariff Act of 1930 (19 U.S.C. 1313) of any duty, tax or fee imposed under Federal law on an imported commodity or product;

(xi) The agricultural commodity or product to be exported under an EEP Agreement is a U.S. agricultural commodity as defined by §1494.201(gg).

(xii) The eligible exporter is providing the assurances required by §§15.4 and 15b.5 of this title (7 CFR part 15 relates to various non-discrimination provisions);

(xiii) The eligible exporter still meets all of the qualification and program eligibility requirements of §1494.301 and will immediately notify CCC if there is a change of circumstances which should cause it to fail to meet such requirements; and

(xiv) The eligible exporter is providing any other certification required by the applicable Invitation.

Any eligible exporter which is unable to make the certifications specified in this subparagraph (c)(20) must provide a written statement to that effect to CCC and may include any explanation or any additional information for the consideration of CCC. CCC will reject an offer if the eligible exporter states that it is unable to provide the required certifications, unless CCC determines that acceptance of the offer would be in the best interests of the EEP.

(d) *Conditional offers*. Any qualification or condition in, or added to, the offer and not expressly authorized by this subpart or the applicable Invitation may make such offer ineligible for consideration by CCC.

(e) *CCC's right to additional information*. CCC may require the individual who signed the offer to provide documentary evidence of such individual's authority to execute an Agreement with CCC on behalf of the eligible exporter making the offer. CCC may require the eligible exporter to submit any other information which CCC deems necessary for consideration of the eligible exporter's offer. The exporter must furnish a copy of the sales contract to CCC upon request.

(f) *Considerations in making an offer*. In making an offer, the eligible exporter should take into consideration that the exchange of CCC Certificates which may be issued as a bonus will be governed by the terms and conditions stated on the certificates and by any applicable regulations or procedures issued by or on behalf of CCC.

[56 FR 25011, June 3, 1991, as amended at 62 FR 24561, May 6, 1997]

### §1494.601 Acceptance of offers by CCC.

(a) *Establishment of acceptable sales prices and CCC bonuses*. For each Invitation, CCC will establish sales prices for the eligible commodity and CCC bonus amounts which would be acceptable to CCC in terms of furthering the objectives of the EEP.

(1) In establishing acceptable sales prices for the eligible commodity, CCC will consider available relevant market data.

(2) In determining acceptable CCC bonus amounts, CCC may take into consideration factors such as, but not limited to, the following: The prevailing domestic market price of the eligible commodity; the price of the same agricultural commodity exported by other exporting countries to the eligible country; ocean freight rates for the export of the eligible commodity from the U.S. and other exporting countries to the eligible country; the particular preferences or purchasing practices of buyers in the eligible country which would customarily affect the acceptability of the eligible commodity relative to that of competing exports of the same agricultural commodity to the eligible country from other exporting countries; and the cost effectiveness of the payment of a CCC bonus amount in view of CCC's obligation to maximize the use of resources available for the operation of the EEP.

(3) The acceptable sales prices and bonus amounts will be modified by CCC as necessary to take advantage of updated information that becomes available to CCC.

(b) *Acceptance of offers for a CCC bonus on a competitive basis*. An offer from an eligible exporter for a CCC bonus on a competitive bonus that meets all of the requirements of this subpart will first be reviewed to determine if the offer contains an acceptable sales price. If the sales price contained in the offer is found to be acceptable, then the CCC bonus contained in the offer will be reviewed to determine if the CCC bonus requested is found to be acceptable. Offers with acceptable sales prices and acceptable CCC bonuses will be accepted under each Invitation beginning with the offer having the lowest CCC bonus amount, subject to the limitations in paragraphs (f) and (h) of this section.

(c) *Acceptance of offers for an announced CCC bonus*. Offers from eligible exporters for an Announced CCC Bonus

that meet all of the requirements of this subpart and which contain an acceptable sales price will be accepted under each Invitation on a first-come, first-served basis according to the time of receipt of the offer, as determined by CCC, subject to the limitations in paragraphs (f) and (h) of this section.

(d) *Notification of acceptance of offers.* CCC will notify an eligible exporter by telephone of the acceptance or rejection of its offer as soon as possible after review of the exporter's offer by CCC but not later than 10 a.m. of the next business day after the date the offer was submitted for consideration. If an offer is rejected, CCC will notify the eligible exporter of the basis for the rejection. Acceptance of offers will be confirmed in writing. The date of the telephonic notification of acceptance by CCC of the eligible exporter's offer will be the effective date of the exporter's Agreement with CCC.

(e) *Announcement of acceptance of offers.* CCC will generally announce the acceptance of offers by public press release as soon as possible after the notification to the exporter. The announcement will generally include the eligible commodity, the eligible country, the exporter, the delivery period, the CCC bonus, and, if applicable, the class of the eligible commodity.

(f) *Limitation on acceptance of offers.* The total quantity of the eligible commodity, exclusive of tolerances, to be exported under all offers that are accepted by CCC pursuant to a particular Invitation will not be greater than the total quantity of the eligible commodity stated in such Invitation. CCC may refuse to accept further offers under an applicable Invitation if the quantity of the eligible commodity, exclusive of tolerances, already accepted totals the quantity, exclusive of tolerances, that is being tendered for by the eligible buyer, even though such quantity may be less than the total quantity available under that Invitation.

(g) *Rejection of offers.* Any offer or part of an offer submitted for consideration that is not accepted by CCC by 10 a.m. of the next business day after the date for which the offer was submitted for consideration will be deemed to have been rejected.

(h) *CCC's right of rejection.* Notwithstanding any other provisions of this subpart, CCC reserves the right to reject any or all offers submitted for consideration on a particular day, including those offers that have acceptable sales prices and CCC bonus amounts.

**§ 1494.701 Payment of bonus.**

(a) *Forms of bonus.* The bonus may be paid to the exporter in CCC Certificates or in any other form specified in the applicable Invitation which CCC determines to be appropriate.

(b) *Quantity on which bonus is paid.* The quantity of the eligible commodity exported from the U.S. which is eligible for the payment of a CCC bonus is the net weight (less any dockage, if applicable) or count which is established by the Official Inspection Certificate, the Official Weight Certificate or the export bill of lading, whichever is less. If the exporter has furnished performance security under "Option A" of the applicable Invitation and wishes the bonus to be paid prior to the entry of the eligible commodity into the eligible country, this quantity will be used in calculating the bonus value for the purposes of making payment to the exporter. If the exporter is not paid the bonus until the commodity enters into the eligible country, then this quantity will also be used in calculating the bonus value for the purposes of making payment to the exporter, unless in the determination of CCC, there is evidence to suggest that there was destruction, diversion or loss of the eligible commodity prior to entry into the eligible country. The payment of a bonus value to an exporter does not indicate that the bonus has been earned by the exporter under the Agreement; pursuant to § 1494.801(a)(3), the bonus is not earned by the exporter until the eligible commodity enters into the eligible country in accordance with the Agreement and the exporter submits proof of such entry to CCC.

(c) *Request for bonus payment under "Option A."* If the exporter has furnished performance security under "Option A" of the applicable Invitation and wishes the bonus to be paid after export of the eligible commodity, the exporter must, within 30 calendar days after the date of export of the eligible

commodity, furnish to the Director, at the address referenced in the Notice to Exporters—Contacts for EEP, a written request for payment of the bonus. All documents submitted to support such a request must be acceptable to the Director.

(1) To support each bonus payment request, the exporter must furnish to the Director the following:

(i) The original or an original copy of the on-board bill of lading issued for the export carrier and signed by an agent of the export carrier. The bill of lading must show:

(A) The identification of the export carrier;

(B) The date and place of issuance;

(C) The quantity of the eligible commodity;

(D) An on-board date; and

(E) That the eligible commodity is destined for the eligible country.

(ii) The original or an original copy of the Official Weight Certificate, as required in the applicable Invitation. The certificate must show:

(A) The identification of the export carrier, if known at the time of issuance;

(B) The date and place of issuance; and

(C) The weight or count of the eligible commodity.

(iii) The original or an original copy of the Official Inspection Certificate, as required in the applicable Invitation. The certificate must show:

(A) The identification of the export carrier, if known at the time of issuance;

(B) The date and place of issuance;

(C) The quantity of the eligible commodity to which the certificate relates; and

(D) The quality description of the eligible commodity.

(iv) If the documents submitted under paragraphs (c)(1)(ii) and (iii) of this section do not specify the export carrier, the exporter must also submit a signed certification that the commodity represented by the Official Inspection and/or the Official Weight certificates is the identical eligible commodity represented on the export bill of lading.

(2) If the export of the eligible commodity was by lash barge, the exporter must furnish, in addition to the documents required by paragraph (c)(1) of this section, a statement from the vessel's agent showing that the lash barge was loaded to the lash vessel named in the on-board lash bill of lading and that the eligible commodity is destined for the eligible country.

(3) If the export of the eligible commodity was from a Canadian transshipment port on the St. Lawrence River, the exporter must furnish to the Director the following, in addition to the documents required by paragraph (c)(1) of this section:

(i) Documentary evidence covering the movement of the eligible commodity from the United States to the export carrier described in the on-board bill of lading issued at the Canadian transshipment port and showing the information provided in paragraphs (c)(1) and, if applicable, (c)(2) of this section; and

(ii) A certification that the eligible commodity exported is the identical eligible commodity that was shipped from the United States.

(4) If the export of the eligible commodity was by railcar or truck, the exporter must furnish to the Director the following, in addition to the documents required by paragraphs (c)(1)(ii) and (iii) of this section:

(i) The authenticated landing certificate or similar document issued by the government of the eligible country; and

(ii) The original or an original copy of the bill of lading issued at the point of loading the railcar or truck. The bill of lading must show:

(A) The identification of the export carrier;

(B) The date and place of issuance;

(C) The quantity of the eligible commodity;

(D) The date that the railcar or truck was loaded; and

(E) That the eligible commodity is destined for the eligible country.

(d) *Request for bonus payment under "Option B."* If the exporter has furnished performance security under "Option B" of the applicable Invitation and wishes the bonus to be paid after the entry of the exported eligible commodity into the eligible country, the exporter must, within 60 calendar days

after the date of entry of the eligible commodity into the eligible country, furnish to the Director at the address referenced in the Notice to Exporters—Contracts for EEP, a written request for payment of the bonus. To support each request, the exporter must furnish to the Director, in a form acceptable to the Director, the documents specified in paragraph (c) of this section, as applicable, along with the certification of entry specified in § 1494.401(f)(2).

(e) *Time frame for payment of a bonus.* CCC will endeavor to pay the bonus to the exporter within 10 business days after CCC determines that the documents supporting the bonus request are acceptable.

(f) *Certificate amount.* If CCC decides to pay the bonus in the form of a CCC Certificate(s), the dollar value of the certificate(s) issued to the exporter will be determined by multiplying the CCC bonus specified in the Agreement by the net quantity of the eligible commodity on which the bonus is to be paid, as specified in paragraph (b) of this section, less any dockage if applicable.

(g) *Late requests for bonus payment.* If CCC decides to pay the bonus in the form of a CCC Certificate(s) and the exporter fails to request issuance of the certificate(s) within 30 calendar days after the date of export of the eligible commodity, if the exporter has chosen performance security "Option A," or within 60 days after the entry of the eligible commodity into the eligible country, if the exporter has chosen performance security "Option B", CCC may, upon issuing the certificate(s), discount the certificate(s) in an amount determined appropriate by CCC to compensate it for costs which may be incurred by CCC as a result of the exporter's delay.

### § 1494.801 Enforcement and termination of agreements with CCC.

(a) *Performance in accordance with an Agreement with CCC.* (1) An exporter which enters into an Agreement with CCC must ensure that the eligible commodity is exported from the U.S. and enters the eligible country in accordance with the terms and conditions of the Agreement.

(2) The diversion of the eligible commodity to a country other than the eligible country is prohibited. Transshipments of the eligible commodity are permitted only if specifically allowed in the applicable Invitation or for shipment through a Canadian transshipment port on the St. Lawrence River if the eligible commodity had been shipped from the United States via the Great Lakes coastal range and its identity had been preserved until shipped from Canada.

(3) Regardless of whether or not a bonus has been paid by CCC to the exporter pursuant to § 1494.701, the bonus is not earned by the exporter until the eligible commodity enters into the eligible country in accordance with the Agreement. In order to retain a bonus or request payment of a bonus, depending upon the option chosen for furnishing performance security, and to request cancellation of the performance security, the exporter must provide evidence to CCC, as specified in § 1494.401(f)(2), that the eligible commodity entered into the eligible country. If, on the basis of evidence available to it, CCC determines that there was destruction, diversion or loss of the eligible commodity prior to entry into the eligible country, CCC will not release the amount of performance security corresponding to the amount of eligible commodity for which insufficient evidence of entry into the eligible country was presented to CCC until:

(i) CCC recovers from the exporter the amount of the bonus corresponding to such amount of the eligible commodity, if the exporter has already been paid the bonus under performance security "Option A"; and

(ii) The requirements of either § 1494.401(f)(1)(ii) or § 1494.401(f)(1)(iii) have been met.

(4) The failure of an exporter to perform in full and to fulfill all of its obligations under the Agreement will constitute a breach of the Agreement. An exporter which breaches the Agreement may be required to forfeit its right to receive or retain part or all of the bonus authorized or paid under the Agreement and may also be liable to CCC for damages. Examples of an exporter's failure to perform under the

Agreement include, but are not limited to, the following:

(i) The exporter does not ship all of the required amount of the eligible commodity in accordance with the delivery period stated in the Agreement;

(ii) The exporter exports an amount of the eligible commodity that is inconsistent with the quality specifications in the Agreement;

(iii) The exporter is unable to provide a certification that all of the eligible commodity exported pursuant to the Agreement was entered into the eligible country;

(iv) The eligible commodity is transshipped through any country, other than Canada, unless specifically allowed in the applicable Invitation; or

(v) The eligible commodity is transshipped through Canada without having its identity preserved.

(5) If the eligible commodity is to be delivered to the eligible buyer in multiple shipments, CCC may decide to consider the shipments separately in determining whether the exporter has failed to perform under the Agreement.

(b) *Return of bonus.* An exporter that fails to fulfill all of its obligations under the Agreement shall be in default. If an exporter that has already been paid the bonus value defaults, CCC shall have the right to recover the bonus value paid for the quantity of the eligible commodity with respect to which the exporter failed to perform under the Agreement.

(1) If CCC has paid this bonus value in the form of a CCC Certificate(s), the exporter shall pay to CCC the higher of:

(i) The dollar value of the CCC Certificate(s);

(ii) The dollar amount received for the CCC Certificate(s) if the CCC Certificate(s) was transferred to another party; or

(iii) The dollar amount of the proceeds from the sale of the CCC-owned commodities exchanged for the CCC Certificate(s) if the commodities were sold to another party.

(2) If CCC has paid this bonus value in some other form, as specified in the applicable Invitation, the exporter shall pay to CCC the dollar and cents amount or equivalent of the bonus value paid to the exporter.

(c) *Liability for liquidated damages.* The exporter's failure to perform under the Agreement will cause serious and substantial losses to CCC, such as damages to the EEP and CCC's domestic price support program, storage charges, and administrative and other costs incurred. If the exporter breaches the Agreement, the exporter will be liable to pay to CCC as liquidated damages an amount obtained by applying the method or rate for determining damages specified in the applicable Invitation to the quantity of the eligible commodity with respect to which the exporter failed to perform under such Agreement. In submitting an offer in response to an Invitation issued under this subpart, the exporter agrees that such liquidated damages are reasonable estimates of the probable actual damages which may be incurred by CCC.

(d) *Decision to hold the exporter harmless for liquidated damages.* CCC will hold an exporter harmless for the payment of liquidated damages if:

(1) The exporter's failure to perform under the Agreement was due to causes solely without the exporter's fault or negligence and the exporter had taken the necessary action to enable it to export the required quantity of the eligible commodity and enter it into the eligible country; or

(2) The eligible commodity was lost or destroyed after it had been placed aboard the export carrier.

In making the decision whether to hold an exporter harmless pursuant to this paragraph, CCC may consider any information available to CCC, including any information provided to it by the exporter.

(e) *Fraud, scheme or device.* Notwithstanding any other provision of law, CCC may take action to recover any bonus paid or to hold the exporter liable for the payment of damages caused to CCC if the exporter engages in fraud with respect to the EEP, or adopts or participates in adopting a scheme or device which is designed to evade this subpart or which has the effect of evading this subpart. Such acts shall include, but are not limited to:

(1) Concealing information which is required by this subpart; or

(2) Submitting information which is known by the exporter to be false or erroneous.

(f) *CCC's right to recover amounts due CCC by exporters.* If the exporter breaches its obligations under the Agreement and becomes liable to CCC for repayment of the bonus value or for liquidated or other damages, CCC reserves the right to recover such amounts due CCC by making a claim against the performance security furnished to CCC, as described under §1494.401, or by taking any other measures available to CCC as a result of this subpart or any laws or regulations, including debt settlement regulations, applicable to CCC.

(g) *Shipping tolerances.* If the exporter exports and enters into the eligible country, in accordance with the requirements of the Agreement, a quantity of the eligible commodity which is less than the quantity specified in §1494.501(c)(7) but not less than such quantity minus 5 percent, the exporter shall not be required to pay liquidated damages for failure to perform under the Agreement for the quantity which failed to be exported and entered into the eligible country. If an exporter exports and enters into the eligible country, in accordance with the requirements of the Agreement, a quantity of the eligible commodity which is greater than the quantity specified in §1494.501(c)(7), the exporter may request payment of the bonus value based upon the actual quantity, on a net weight basis, exported and entered into the eligible country, but not greater than the quantity specified in §1494.501(c)(7), plus 5 percent.

(h) *Termination of agreements.* (1) CCC may, by written notice to the exporter, terminate an Agreement, in whole or in part, as a result of:

(i) the failure of the exporter to carry out any provisions of the Agreement;

(ii) the failure of the exporter to maintain a business office in the U.S.;

(iii) the failure of the exporter to maintain an agent in the U.S. for service of process; or

(iv) the suspension or debarment of the exporter from participation in CCC or other U.S. Government programs.

If an Agreement is terminated by CCC pursuant to this subparagraph, CCC will not compensate the exporter for any costs incurred by the exporter. The exporter will be liable to CCC for any funds owed to CCC for the repayment of any bonus already paid and may be liable to CCC for liquidated or other damages suffered by CCC. If CCC intends to hold the exporter liable for liquidated damages, and it has not already so notified the exporter prior to the termination of the Agreement, CCC will generally do so at the time that it notifies the exporter of the termination of the Agreement.

(2) CCC may, by written notice to the exporter, terminate an Agreement, in whole or in part, if CCC determines it to be in the best interest of CCC. If an agreement is so terminated, the exporter will be compensated for reasonable losses, as determined by CCC, resulting from such termination. These losses will not include lost profits and will not exceed the bonus value under the Agreement.

(i) *Amendment of agreements.* (1) CCC will have the authority to amend an Agreement, either before or after such Agreement has been breached by the exporter, if the exporter requests that the Agreement be amended and CCC determines that such amendment would serve the best interests of the EEP. The exporter may be required to submit documentary evidence to CCC to demonstrate that it is making progress toward fulfilling the Agreement before CCC will consider amending the Agreement. All requests for amendments submitted by exporters, and all amendments made by CCC to an Agreement, under this subpart shall be in writing.

(2) Prior to amending an Agreement with the exporter, CCC will consider whether the amendment to the Agreement should include a reduction in the CCC bonus or a modification of the sales price. If CCC determines that the CCC bonus and the sales price are still acceptable, it may amend the Agreement to incorporate the exporter's requested change, while maintaining the current CCC bonus and sales price, provided that the amendment would otherwise serve the best interests of the EEP. If CCC determines that the CCC bonus and/or the sales price are no longer acceptable, due to changes in market or other conditions, it will so

inform the exporter. If the exporter still requests that the Agreement be amended, CCC and the exporter will enter into discussions in an attempt to arrive at a new CCC bonus and/or sales price which would be acceptable to CCC. If these discussions are successful, then CCC may amend the Agreement to incorporate the exporter's requested change as well as the new CCC bonus and/or sales price, provided that the amendment would otherwise serve the best interests of the EEP. If these discussions are unsuccessful, then the Agreement will not be amended and the exporter will be considered to be in breach of the Agreement if it fails to perform under the terms of the Agreement.

(j) *Amendments to sales contracts.* In the event of an amendment to the sales contract between the exporter and the eligible buyer or a change in the delivery schedule, CCC will determine whether the amendment or change would constitute a breach of the Agreement. If CCC determines that the amendment or change would constitute a breach of the Agreement, CCC may terminate the Agreement. In the alternative, if CCC determines that a continuation of the Agreement would serve the best interests of the EEP, and if the exporter requests an amendment, CCC may amend the Agreement to take into account the amendment to the sales contract or change in delivery schedule. An amendment to an Agreement will be in accordance with paragraph (i)(1) of this section. CCC will promptly advise the exporter of its determination in writing by letter, facsimile, or telex.

### § 1494.901 Dispute resolution and appeals.

(a) *Dispute resolution.* (1) The Director of the CCC Operations Division (Director, CCCOD) and the exporter will attempt to resolve any disputes, including any adverse determinations made by CCC, arising under the EEP, this subpart, the applicable Invitation, or the Agreement.

(2) The exporter may seek reconsideration of a determination by the Director, CCCOD relating to the Agreement by submitting a letter requesting reconsideration to the Director, CCCOD, within 30 days of the date of the determination. For the purposes of this section, the date of a determination will be the date of the letter or other means of notification to the exporter of the determination. The exporter may include with the letter requesting reconsideration any additional information which it wishes the Director, CCCOD, to consider in reviewing its request. The Director, CCCOD, will respond to the request for reconsideration within 30 days of the date on which the request or the final documentary evidence submitted by the exporter is received by him, whichever is later, unless the GSM extends the time permitted for response. If the exporter fails to request reconsideration of a determination by the Director, CCCOD, that the exporter owes any funds to CCC under the Agreement, then such funds will become a debt of the exporter to CCC at the expiration of the 30-day period for submitting such a request.

(3) If the exporter requested a reconsideration of a determination by the Director, CCCOD, pursuant to subparagraph (a)(2) of this section, and the Director, CCCOD, upheld the original determination, then the exporter may appeal the determination to the GSM in accordance with the procedures set forth in paragraph (b) of this section. If the exporter fails to appeal the determination to the GSM, then any funds owed to CCC will become a debt of the exporter to CCC at the expiration of the 30-day period for submitting an appeal to the GSM.

(b) *Appeal procedures.* (1) An exporter which has exhausted the procedures set forth in paragraph (a) of this section may appeal to the GSM a determination of the Director, CCCOD, relating to the Agreement between the exporter and CCC. An appeal to the GSM must be in writing and filed with the office of the GSM no later than 30 days following the date of the final determination by the Director, CCCOD. In this appeal to the GSM, the exporter shall be entitled to an administrative hearing before the GSM, if the exporter indicates in its appeal letter that it desires such a hearing.

(2) If the exporter does not desire an administrative hearing, the exporter

may submit any additional written information or documentation which it desires the GSM to consider in acting upon its appeal. This information or documentation may be submitted to the GSM up until the time that a decision is made by the GSM. The GSM will base the determination upon information contained in the administrative record. The GSM will endeavor to make a decision on an appeal not involving a hearing within 60 days of the date on which the GSM receives the appeal or the date that final documentary evidence is submitted by the exporter to the GSM, whichever is later.

(3) If the exporter has indicated that it desires an administrative hearing, the GSM will set a date and time for the hearing which is mutually convenient for the GSM and the exporter. This date will ordinarily be within 60 days of the date on which the GSM receives the request for hearing. The hearing will be an informal procedure. The exporter and/or its counsel may present any administrative or documentary evidence to the GSM which it desires to have the GSM consider in making a determination. A transcript of the hearing will not ordinarily be prepared unless the exporter bears the costs involved in preparing the transcript, although the GSM may arrange to have a transcript prepared at the expense of the Government if it is determined to be appropriate. The exporter may provide additional written information to the GSM up until the time that the GSM makes a determination. The GSM will base the determination upon the information contained in the administrative record and will endeavor to make a decision within 60 days of the date of the hearing or the date of receipt of the transcript, if one is to be prepared, whichever is later.

(4) The decision of the GSM will be the final determination of CCC and the exporter will be entitled to no further administrative appellate rights.

(5) If the GSM upholds a determination of the Director, CCCOD, that the exporter owes any funds to CCC under the Agreement, then such funds will become a debt of the exporter to CCC.

(c) *Failure to comply with determination*. If, for any reason, the exporter has failed to pay funds to CCC which have been determined to be owed to CCC under the Agreement and the exporter has exhausted its rights under this section or has failed to exercise such rights, then CCC will have the right to withdraw funds from the performance security established by the exporter or to take any other measures available to CCC as result of this subpart or any laws or regulations, including debt settlement regulations, applicable to CCC.

(d) *Exporter's obligation to perform*. The exporter will continue to have an obligation to perform under the Agreement pending the conclusion of all procedures under this section.

### § 1494.1001 Miscellaneous provisions.

(a) *Assignments*. The exporter may not assign the Agreement or any rights thereunder, including the right to receive a bonus under the Agreement.

(b) *Maintenance of records and access to premises*. (1) For a period of five years after CCC agrees to the cancellation of an exporter's performance security for an Agreement, the exporter must maintain accurate records showing sales and deliveries of the eligible commodity exported in connection with the Agreement. The Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, will have full and complete access to the premises of the exporter during regular business hours from the effective date of the Agreement until the expiration of such five-year period to inspect, examine, audit and make copies of the exporter's books, records and accounts concerning transactions relating to the Agreement, including, but not limited to, financial records and accounts pertaining to sales, inventory, processing, and administrative and incidental costs, both normal and unforeseen. From the effective date of the Agreement and until the expiration of such five-year period, the exporter may be required to make available to the Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, records that pertain to transactions conducted outside the program, if, in the opinion of the GSM, such records would pertain directly to the

review of transactions undertaken by the exporter in connection with the performance of an EEP Agreement.

(2) The exporter must maintain the certification of entry specified in §1494.401(f)(2), and must provide access to such document if requested by the Secretary of Agriculture or an authorized representative, for the five-year period specified in subparagraph (b)(1) of this section.

(c) *Arrival verification reviews.* CCC will review, on an annual basis, a sufficient number of exports made in connection with EEP Agreements to ensure that the eligible commodity which was exported pursuant to each such Agreement arrived in the eligible country specified in the Agreement.

(d) *Signatory on certifications.* Any certification required from a person pursuant to this subpart or an Invitation must be signed by the person, if an individual, or by a partner or officer of the person, if the person is a partnership or a corporation, respectively.

(e) *Officials not to benefit.* No member of or Delegate to Congress, or Resident Commissioner, will participate or share in any of the benefits of any Agreement entered into pursuant to the EEP, but this provision may not be construed to extend to an Agreement made by CCC with a corporation for its general benefit.

(f) *Paperwork Reduction Act.* The information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control number 0551–0028.

(g) *Waiver of irregularities.* CCC reserves the right to waive any informality or minor irregularity with respect to any aspect of the operation of the EEP or any Agreement executed thereunder in order to best accomplish the purposes of the program.

## Subpart C—Dairy Export Incentive Program Criteria

AUTHORITY: 7 U.S.C. 5663.

SOURCE: 56 FR 26324, June 7, 1991, unless otherwise noted.

### §1494.1100 General statement.

This subpart sets forth the criteria to be considered in evaluating and approving proposals for initiatives to facilitate export sales under the Commodity Credit Corporation's (CCC) Dairy Export Incentive Program (DEIP). These criteria are interrelated and will be considered together in order to select eligible commodities and eligible countries for DEIP initiatives which will best meet the program's objectives. The objectives of the program are to increase U.S. agricultural commodity exports and to encourage other countries exporting agricultural commodities to undertake serious negotiations on agricultural trade problems. Under the DEIP, bonuses are made available by CCC to enable exporters to meet prevailing world prices for targeted dairy products in targeted destinations. In the operation of the DEIP, CCC will make reasonable efforts to avoid the displacement of commercial export sales of U.S. dairy products and to ensure that sales facilitated by the DEIP are in addition to, and not in place of, any export sales of dairy products that the exporter would have otherwise made in the absence of the program.

### §1494.1101 Criteria.

The criteria considered in evaluating and approving proposals for the DEIP are those set forth in §1494.20 of this part.

## Subpart D—Dairy Export Incentive Program Operations

AUTHORITY: 15 U.S.C. 713a–14, 714c.

SOURCE: 57 FR 45263, Oct. 1, 1992, unless otherwise noted.

### §1494.1200 Program operations.

This subpart contains the regulations governing the operation of the Dairy Export Incentive Program (DEIP) of the Commodity Credit Corporation (CCC). Under the DEIP, CCC facilitates the export of U.S. dairy products by paying bonuses to exporters which export U.S. dairy products to targeted markets in accordance with the terms and conditions of an Agreement entered into between the exporter and

CCC. Except as otherwise provided in this subpart, the program operations provisions of subpart B of this part, relating to the Export Enhancement Program, will also apply to the DEIP. Any terms or conditions applicable to a particular Invitation for Offers (Invitation) under the DEIP, beyond those terms or conditions set forth in this subpart or subpart B of this part, will be specifically provided for in such Invitation.

### § 1494.1201 Paperwork Reduction Act.

The information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control No. 0551–0029.

## PART 1495 [RESERVED]

## PART 1499—FOOD FOR PROGRESS PROGRAM

Sec.

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AUTHORITY: 7 U.S.C. 1736o; and 15 U.S.C. 714b and 714c.

SOURCE: 74 FR 13066, Mar. 26, 2009, unless otherwise noted.

### § 1499.1 General statement.

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Commodity Credit Corporation (CCC) to participants in the Food for Progress Program (FFPr). Under FFPr, participants use the donated commodities or proceeds from the sale of such commodities to implement activities in a foreign country pursuant to an agreement with CCC. The Foreign Agricultural Service (FAS) of the Department of Agriculture (USDA) administers FFPr on behalf of CCC.

(b) In addition to the provisions of this part, other regulations of general application issued by USDA, including the regulations set forth in Chapter 30 of this title, are applicable to the FFPr. All provisions of the CCC Charter Act (15 U.S.C. 714 et seq.) and any other statutory provisions that are generally applicable to CCC are applicable to FFPr and the regulations set forth in this part.

(c) This part shall not apply to a donation by CCC to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under FFPr.

### § 1499.2 Definitions.

The following definitions are applicable to this part:

*Activity* means a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* means a legally binding agreement entered into between CCC and a participant to implement activities under FFPr.

*CCC* means the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*CCC-provided funds* means U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and handling of the donated commodities, expenses involved in the administration and monitoring of the activities under the agreement, and technical assistance related to the monetization of donated commodities.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*Donated commodities* means the commodities donated by CCC to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service acting on behalf of CCC.

*FFPr* means the Food for Progress Program.

*Force majeure* is a common clause in contracts, exempting the parties for non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and other sources.

*Participant* means an entity with which CCC has entered into an agreement.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a participant for the purpose of implementing in the targeted country activities described in a FFPr agreement and that is accountable to such participant for the use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Targeted country* means the country in which activities are implemented under an agreement.

### § 1499.3 Eligibility determination.

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

(1) Organizational experience in implementing and managing awards, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;

(2) Experience working in the proposed targeted country;

(3) An adequate financial framework to implement the activities the entity proposes to carry out under FFPr. In order to determine whether the entity is financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a FFPr agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1599 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

### § 1499.4 Application process.

(a) An entity seeking to enter into an agreement with CCC shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under FFPr in the proposed targeted country. An application shall contain the items specified in paragraph (b) of this section and shall be submitted electronically to FAS at the address set forth at *http://www.fas.usda.gov*. An entity that has not yet met the eligibility requirements in § 1499.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1499.3.

(b) An applicant shall include the following items in its application:

(1) A completed Form SF–424, which is a standard application for Federal assistance;

(2) An introduction that contains the elements specified in paragraph (c) of this section; and

(3) A plan of operation that contains the elements specified in paragraph (d) of this section.

(c) The introduction shall include:

(1) An explanation of the need for the food aid in the targeted country and how the applicant's proposed activities would address that need;

(2) Information regarding the applicant's ability to become registered and operate in the targeted country;

(3) Information about the applicant's past food aid projects; and

(4) A budget that details the amount of any sale proceeds, income, and CCC-provided funds that the applicant proposes to use to fund:

(i) Administrative costs;

(ii) Inland transportation, storage and handling costs; and

(iii) Activity costs.

(d) A plan of operation shall include:

(1) The name of the targeted country where the proposed activities would be implemented;

(2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefor, and the proposed delivery schedule;

(3) If monetization or barter is proposed:

(i) The quantity of the requested commodities that would be sold or bartered;

(ii) The amount of sale proceeds anticipated;

(iii) The amount of income expected to be generated;

(iv) The anticipated monetization completion date;

(v) The goods or services to be generated from the barter of the requested commodities; and

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, and any other required items set forth on the FAS Web site at *http://www.fas.usda.gov*.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution or barter of the requested commodities or funded by sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities requested and of any sale proceeds and income expected to be generated to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-CCC sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which FFPr will strengthen or increase the capabilities of such entities to further economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's progress towards achieving the objectives of the proposed activities;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of any port, transportation, storage, and warehouse facilities that would be used with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste, and, in cases where the applicant proposes to distribute some or all of the requested commodities, a description of how they would be transported from the receiving port to the point at which distribution would be made to the beneficiaries;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the applicant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at *http://www.fas.usda.gov*.

**§ 1499.5 Agreements.**

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of CCC and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or CCC-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated, except as approved by FAS.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and CCC-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or CCC-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that the participant is aware of, and has the capacity to complete, all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using CCC-provided funds to acquire goods and services, either directly or indirectly through another party, from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by CCC of the agreement, in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for as long as such donated commodities are controlled by the participant.

(g) CCC may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) CCC may provide donated commodities and CCC-provided funds under a multiyear agreement contingent upon the availability of commodities and funds.

**§ 1499.6 Payments.**

(a) If the participant arranges for transportation in accordance with § 1499.7(b)(2), and the participant seeks payment directly, the participant shall, as specified in the agreement, either submit to FAS, or maintain on file and make available to FAS, the following documents:

(1) A signed copy of the completed Form CCC–512;

(2) The original, or a true copy of, each on-board bill of lading indicating

the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and,

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes, a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of the liner booking note or charter party covering ocean transportation of the cargo;

(6) In the case of charter shipments, a signed notice of arrival at the first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs other than at load port, and other expenses approved by CCC, indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with §1499.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in §1499.6(a) in order to receive payment from CCC.

(c) In no case will CCC reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing the donated commodities from the designated port or point of entry, the participant will be reimbursed in the manner set forth in the agreement.

(e) If the agreement authorizes the payment of CCC-provided funds, CCC will pay these funds to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of CCC-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance if:

(i) It is received earlier than 60 days after the date of a previous advance made in connection with the same agreement; or

(ii) Any required reports, as specified in §1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by CCC. The account shall be interest-bearing, unless the exceptions in §3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to CCC any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS accounting for all funds advanced and all interest earned.

(3) The participant shall return to CCC any funds that are advanced by CCC if such funds have not been obligated as of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to CCC in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment according to the purchase contract with CCC.

### §1499.7 Transportation of goods.

(a) Shipments of donated commodities are subject to the requirements of

46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by CCC under FFPr will be acquired under a specific agreement in the manner determined by FAS. Such transportation will be acquired by:

(1) CCC in accordance with the Federal Acquisition Regulations (FAR), USDA's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR), and directives issued by the Director, Office of Procurement and Property Management, USDA; or

(2) The participant, with reimbursement by CCC, in the manner specified in the agreement.

(c) A participant that acquires transportation in accordance with paragraph (b)(2) of this section may only use the services of a freight forwarder that is licensed by the FMC and that would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(1) Is not engaged in, and will not engage in, supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under any FFPr agreement to which the participant is a party; and

(2) Is not affiliated with the participant and has not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) A participant that is responsible for transportation under paragraph (b)(2) of this section shall declare in the transportation contract the point at which the ocean carrier will take custody of commodities to be transported.

### § 1499.8 Entry and handling of commodities.

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities from the designated point and time where title to the commodities passes to the participant by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and,

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the reprocessed product;

(iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and,

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered.

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

(i) Banners, posters or other media informing the public of the name and source of the donated commodities; and

(ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(d) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

### § 1499.9 Damage to or loss of commodities.

(a) FAS will be responsible for the donated commodities prior to the transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer as specified in the agreement.

(b) A participant shall inform FAS, in the manner and within the time period set forth in the agreement, of any damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of CCC with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant. The agreement will specify whether the participant is responsible for obtaining a survey in the event that the donated commodities are damaged or lost following the transfer of title to the commodities to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor, CCC will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

(i) The participant was required by the agreement to pay for the survey;

(ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or

(iii) The survey was not conducted contemporaneously with the discharge of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, and the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to:

(i) Observe the discharge of the cargo;

(ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales are not used, state the reason therefor and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the

seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the participant has title to the donated commodities, and the value of any damaged donated commodities is in excess of $1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The value of damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

(1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or

(2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

(i) Sale for the most appropriate use, *i.e.*, animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;

(ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or

(iii) Destruction of the commodities if they are unfit for any use, in such manner as to prevent their use for any purpose.

(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e)(1) of this section and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e)(1) of this section, including the quantities, values, and dispositions of commodities determined to be unfit.

### § 1499.10 Claims for damage to or loss of commodities.

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be $20,000 or greater, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be less than $20,000, the participant will be responsible for providing detailed information about the damage or loss in the next report required to be filed under § 1499.13(c)(1) or (2) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities, less any funds generated if such commodities

are sold in accordance with § 1499.9(e)(1).

(e) If FAS determines that a participant is not exercising due diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

### § 1499.11 Use of commodities and sale proceeds.

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity or affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1499.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines that this requirement would constitute an undue burden.

(f) A participant may use sale proceeds or income to purchase real or personal property only if local law permits the participant to retain title to such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(g) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. As provided for in the agreement, the participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

### § 1499.12 Subrecipients.

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant

shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or CCC-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or CCC-provided cash funds that are not used in accordance with the subagreement or are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient, FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or CCC-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and that performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter XXX of this title.

### § 1499.13 Recordkeeping and reporting requirements.

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and, in the case of bartered commodities, covering the services and goods derived from the barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the sale proceeds and income have been disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(4) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of two years after the agreement has been closed out.

(5) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an annual financial audit with respect to a particular agreement, and

CCC provides funds for this purpose, the participant shall arrange for such audit and submit it to FAS, in the manner specified in the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

(i) Is financially and legally separate from the participant's organization;

(ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;

(iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;

(iv) Uses local consultants, as appropriate, to conduct portions of the evaluation; and,

(v) Provides a detailed outline of the evaluation, major tasks, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (e)(1) of this section is a condition for the participant to retain any funds provided by CCC to carry out the evaluations.

(f) A participant shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The agreement will specify the acceptable forms and time requirements for submission.

### § 1499.14 Noncompliance with an agreement.

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, or CCC-provided funds are lost due to an action or omission of the participant.

### § 1499.15 Suspension, termination, and closeout of agreements.

(a) An agreement may be suspended or terminated by CCC if it determines that:

(1) The continuation of the assistance provided under the agreement is no longer necessary or desirable; or

(2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title.

(c) An agreement will be considered completed when CCC and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The procedures in sections §§ 3019.71 through 3019.73 of this title will apply to the closeout of a completed agreement.

### § 1499.16 Appeals.

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

### § 1499.17 Paperwork Reduction Act.

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Number 0551–0035.

# CHAPTER XV—FOREIGN AGRICULTURAL SERVICE, DEPARTMENT OF AGRICULTURE


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# PART 1520—AVAILABILITY OF INFORMATION TO THE PUBLIC

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AUTHORITY: 5 U.S.C. 552

SOURCE: 67 FR 45895, July 11, 2002, unless otherwise noted.

### § 1520.1 General statement.

This part is issued in accordance with the regulations of the Secretary of Agriculture 7 CFR, part 1—Administrative Regulations, Subpart A—Official Records, §1.3, Agency Implementing Regulations, for the Freedom of Information Act (5 U.S.C. 552). The Secretary's Regulations, as implemented by the regulations in this part govern the availability of records of the Foreign Agricultural Service (FAS) to the public.

### § 1520.2 Location and hours.

Members of the public should contact the FAS FOIA Officer to arrange a place and time to review documents. Contact the U.S. Department of Agriculture, Foreign Agriculture Service, Public Affairs Division, 1400 Independence Avenue SW., Washington, DC 20250–1004. The office will be open from 8:30 a.m. to 5 p.m. Monday through Friday, except national holidays, Tel.: 202–720–3448, Fax: 202–720–1727.

### § 1520.3 Indexes/Record systems.

5 U.S.C. 552(a)(2) required that each agency publish or otherwise make available a current index of all materials for public inspection and copying. The Foreign Agricultural Service maintains the following record systems. FAS regulations, manuals, and notices; attache reports; general publications; and statements of policy and procedures for various FAS programs. Copies of the FAS index may be obtained free of charge by contacting the office specified in §1520.2.

### § 1520.4 Agency FOIA Officer.

Requests for records shall be made to the Freedom of Information Officer, Public Affairs Division, Foreign Agricultural Service, Ag Box 1004, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–1004. Tel.: 202–720–3448, Fax: 202–720–1727.

### § 1520.5 Agency Appeal Official.

Any person whose request under §1520.4 is denied shall have the right to appeal such a denial. For appeals, write to the following official and mark your letters "FOIA Appeal": Administrator, Foreign Agricultural Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250–1004, Attn: FOIA Appeal.

### § 1520.6 Other information.

Many documents are available to the public without having to file an FOIA request. These include press releases, speeches, congressional testimony, program regulations, and some letters and memoranda. Some of this information can be found on the FAS web site, *www.fas.usda.gov*. Also, the FAS annual FOIA report is available on the agency's web site at *www.fas.usda.gov*. Click on FOIA at the bottom of the page. To request a paper copy of the FAS FOAI annual report, write to: Foreign Agricultural Service, U.S. Department of Agriculture, 1400 Independence Ave. SW., Ag Box 1004, Washington, DC 20250–1004, Attn: Freedom on Information Officer.

# PART 1530—THE REFINED SUGAR RE-EXPORT PROGRAM, THE SUGAR CONTAINING PRODUCTS RE-EXPORT PROGRAM, AND THE POLYHYDRIC ALCOHOL PROGRAM

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AUTHORITY: Additional U.S. note 6 to chapter 17 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202); 19 U.S.C. 3314; Proc. 6641, 58 FR 66867, 3 CFR, 1994 Comp., p. 172; Proc. 6763, 60 FR 1007, 3 CFR, 1995 Comp., p. 146.

SOURCE: 64 FR 7062, Feb. 12, 1999, unless otherwise noted.

### § 1530.100 General statement.

This part provides regulations for the Refined Sugar Re-Export Program, the Sugar Containing Products Re-Export Program, and the Polyhydric Alcohol Program. Under these provisions, refiners may enter raw sugar unrestricted by the quantitative limit established for the raw sugar tariff-rate quota or the requirements of certificates of quota eligibility provided for in 15 CFR part 2011, as long as licensees under the programs export an equivalent quantity of refined sugar, either as refined sugar or as an ingredient in sugar containing products, or use the refined sugar in the production of certain polyhydric alcohols.

### § 1530.101 Definitions.

*Affiliated persons* means two or more persons where one or more of said persons directly or indirectly controls or has the power to control the other(s), or, a third person controls or has the power to control the others. Indications of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, and common use of employees.

*Agent* means a person who represents the licensee in any program transaction. An agent shall not, at any time, own any of the product produced by the program licensee. Agents may include brokers, shippers, freight forwarders, expediters, and co-packers.

*Bond or letter of credit* means an insurance agreement pledging surety for the entry of foreign sugar without the required re-export within the program guidelines.

*Certain polyhydric alcohols* means any polyhydric alcohol, except polyhydric alcohol produced by distillation or polyhydric alcohol used as a substitute for sugar as a sweetener in human food.

*Co-packer* means a person who adds value to a licensed manufacturer's product, or produces a product for export by a licensed manufacturer.

*Date of entry* means the date raw sugar enters the U.S. Customs Territory.

*Date of export* means the date refined sugar or sugar containing products are exported from the U.S. Customs Territory, or, if exported to a restricted foreign trade zone, the date shown on the U.S. Customs Service form designating the product as restricted for export.

*Date of transfer* means the date that ownership of program sugar is conveyed from a refiner to a manufacturer or producer licensee.

*Day* means calendar day. When the day for complying with an obligation under this part falls on a weekend or Federal holiday, the obligation may be completed on the next business day.

*Documentation agreement* means a signed and notarized letter from a licensee specifying certain documentation that the licensee shall obtain and maintain on file before said licensee requests from USDA updating of a license balance.

*Enter or entry* means importation into the U.S. Customs Territory, or withdrawal from warehouse for consumption, as those terms are used by the U.S. Customs Service.

*Export* means the conveyance (shipment) of sugar or a sugar containing product from a licensee under this part to a country outside the U.S. Customs Territory, or to a restricted foreign trade zone.

*Licensing Authority* means a person designated by the Director, Import Policies and Programs Division, Foreign Agricultural Service, USDA.

*Manufacturer* means a person who produces or causes to be produced on their behalf a sugar containing product for export under the provisions of this part.

*Person* means any individual, partnership, corporation, association, estate, trust, or any other business enterprise or legal entity.

*Program sugar* means sugar that has been charged or credited to the license

of a licensee in conformity with the provisions of this part.

*Program transaction* means an appropriate entry, transfer, use, or export of program sugar.

*Refined sugar* means any product that is produced by a refiner by refining raw cane sugar and that can be marketed as commercial, industrial or retail sugar.

*Refiner* means any person in the U.S. Customs Territory that refines raw cane sugar through affination or defecation, clarification, and further purification by absorption or crystallization.

*Sugar containing product* means any product, other than those products normally marketed by cane sugar refiners, that is produced from refined sugar or to which refined sugar has been added as an ingredient.

*Transfer* means the transfer of legal title of program sugar from a licensed refiner to a licensed manufacturer of a sugar containing product or a licensed producer of certain polyhydric alcohols for the production of sugar containing products or the production of certain polyhydric alcohols.

*Unique number* means a tracking number established by a licensee for a transaction (entry, transfer, export, or use). A unique number is established for a transaction to or from a specific country or licensee. The unique number is also assigned by the licensee to a file that contains all of the supporting documentation for the transaction for which it was established. The unique number is the means by which program transactions will be tracked.

**§ 1530.102 Nature of the license.**

(a) A person who wishes to participate in the Refined Sugar Re-export Program, the Sugar Containing Products Re-export Program, or the Polyhydric Alcohol Program must first obtain a license from the USDA, through the Licensing Authority.

(b) A license under the Refined Sugar Re-export Program permits a refiner to enter raw cane sugar under subheading 1701.11.20 of the HTS, and export an equivalent quantity of refined sugar onto the world market or transfer an equivalent quantity of refined sugar to licensees under the Sugar Containing Products Re-export Program or the Polyhydric Alcohol Program.

(c) A license under the Sugar Containing Products Re-export Program or Polyhydric Alcohol Program permits licensees to receive transfers and export an equivalent quantity of sugar as an ingredient in sugar containing products, or use an equivalent quantity of sugar in the production of certain polyhydric alcohols.

(d) All refining, manufacturing, and production shall be accomplished in the U.S. Customs Territory, and within time-frames and quantity limitations prescribed in this part. Program sugar and non-program sugar are substitutable.

(e) A licensee must establish a bond or a letter of credit in favor of the U.S. Department of Agriculture to charge program sugar in anticipation of the export or transfer of refined sugar, the export of sugar in sugar containing products, or the production of certain polyhydric alcohols.

**§ 1530.103 License eligibility.**

(a) A raw cane sugar refiner, a manufacturer of sugar containing products, or a producer of certain polyhydric alcohols, that owns and operates a facility within the U.S. Customs Territory, is eligible for a license to participate in the Refined Sugar Re-export Program, the Sugar Containing Products Re-export Program, or the Polyhydric Alcohol Program, respectively.

(b) No person may apply for or hold more than one license, including a license held by an affiliated person.

(c) Notwithstanding paragraph (b) of this section, a person who owns one or more wholly-owned subsidiary corporations manufacturing sugar containing products or producing certain polyhydric alcohols, which would otherwise qualify for an individual license, is eligible for a consolidated license to cover the program transactions and other program activities of both the parent corporation and the subsidiary corporation(s). The program transactions and other program activities of the subsidiary corporation(s) covered by a consolidated license shall be treated as the activities of the corporation holding the consolidated license.

(d) Notwithstanding paragraph (c) of this section, each wholly-owned subsidiary manufacturing sugar containing products or producing certain polyhydric alcohols may establish a license for program activities instead of the parent corporation establishing a consolidated license. The sum total of license limits for the parent corporation and its wholly-owned subsidiary corporation(s) shall not exceed the quantitative limits established in § 1530.105 of this part.

**§ 1530.104 Application for a license.**

(a) A person seeking a license shall apply in writing to the Licensing Authority and shall submit the following information:

(1) The name and address of the applicant;

(2) The address at which the applicant will maintain the records required under § 1530.110;

(3) The address(es) of the applicant's processing plant(s), including any wholly-owned subsidiary(s) and plant(s) in the case of a consolidated license, and including those of any co-packer(s);

(4) In the case of a refined sugar product, the polarity of the product and the formula proposed by the refiner for calculating the refined sugar in the product;

(5) In the case of a sugar containing product, the percentage of refined sugar (100 degree polarity), on a dry weight basis, contained in such product(s);

(6) In the case of polyhydric alcohol, the quantity of refined sugar used producing certain polyhydric alcohols; and

(7) A certification explaining that the applicant is not affiliated with any other licensee, or explaining any affiliations, should they exist.

(b) A documentation agreement must be concluded with the Licensing Authority.

(c) If any of the information required by paragraph (a) of this section changes, the licensee shall promptly apply to the Licensing Authority to amend the application to include such changes.

**§ 1530.105 Terms and conditions.**

(a) A licensed refiner (refiner) shall, not later than 90 days after entering a quantity of raw cane sugar under subheading 1701.11.20 of the HTS, export or transfer an equivalent quantity of refined sugar if the entry results in a positive license balance.

(b) A licensed sugar containing products manufacturer (manufacturer) or a licensed polyhydric alcohol producer (producer) shall, not later than 18 months from the date of transfer of a quantity of refined sugar from a refiner, export an equivalent quantity of refined sugar as an ingredient in a sugar containing product if the transfer results in a positive license balance, or use an equivalent quantity of refined sugar in the production of certain polyhydric alcohols if the transfer results in a positive license balance, respectively.

(c) Notwithstanding paragraphs (a) and (b) of this section, licensees may receive credit for the exportation or transfer of refined sugar, the exportation of a sugar containing product, or the production of certain polyhydric alcohols prior to the corresponding date of entry of raw cane sugor the date of transfer of refined sugar.

(d) Licensees are encouraged to submit monthly program transaction reports, but shall report no later than 90 days from the date of entry, transfer, export, or use.

(e) A refiner may enter raw sugar, or a manufacturer or producer may receive a transfer of refined sugar, in anticipation of the transfer or export of refined sugar (refiner), the export of sugar in sugar containing products (manufacturer) or the production of a polyhydric alcohol (producer) not to exceed the value of a bond or letter of credit, which must be established pursuant to § 1530.107 of this part. The value of a bond or letter of credit shall not exceed the license limits established in this section.

(f) A refiner shall not exceed a license balance of 50,000 metric tons, raw value for the sum of all charges and credits.

(g) A refiner may enter raw sugar from Mexico and re-export, within 30 days of entry, refined sugar to Mexico without a charge against the refiner's

license balance. If the refined sugar is not re-exported to Mexico within 30 days of entry, the license shall be charged the quantity that has not been re-exported.

(h) A manufacturer or a producer shall not exceed a license balance of 10,000 short tons, refined value for the sum of all charges and credits.

(i) A manufacturer's or a producer's consolidated license balance, or the sum of a parent company and wholly-owned subsidiary license balances if held separately, shall not exceed a license balance of 25,000 short tons, refined value for the sum of all charges and credits.

(j) For the purposes of the programs governed by this part, sugar is fully substitutable. The refined sugar transferred, exported, or used does not need to be the same sugar produced by refining raw sugar entered under subheading 1701.11.20 of the HTS.

(k) A licensee may use an agent to carry out the requirements of participation in the program. The licensee must retain ownership of and responsibility for the product until exported from the U.S. Customs Territory, to a restricted foreign trade zone, or used in the production of certain polyhydric alcohols, and must establish and maintain sufficient documentation, as agreed in the documentation agreement pursuant to § 1530.110, to substantiate export of the product or the production of certain polyhydric alcohols.

(l) A license may be assigned only with the written permission of the Licensing Authority and subject to such terms and conditions as the Licensing Authority may impose.

(m) The Licensing Authority may impose such conditions, limitations or restrictions in connection with the use of a license at such time and in such manner as the Licensing Authority, at his or her discretion, determines to be necessary or appropriate to achieve the purposes of the relevant program.

### § 1530.106 License charges and credits.

(a) A license shall be charged or credited for the quantity of sugar entered, transferred, exported, or used, adjusted to a dry weight basis. Refiner quantities shall be adjusted to raw value, using the formulas set forth in paragraphs (a) (1), (2), and (3) of this section. Manufacturer and producer quantities shall be adjusted to 100 degrees polarity on a dry weight basis.

(1) To adjust the raw value for sugar with a polarization of less than 92 degrees, divide the total sugar content by 0.972 (polarization × outturn weight/ .972).

(2) To adjust the raw value for sugar with polarization of 92 degrees or above, multiply the polarization times 0.0175, subtract 0.68, and multiply the difference by the outturn weight (((polarization × 0.0175) − 0.68) × outturn weight).

(3) To determine the quantity of refined sugar that must be transferred or exported to equal a corresponding quantity of entered raw sugar charged to a license, divide the quantity of entered raw sugar by 1.07 (raw quantity/ 1.07).

(b) [Reserved]

### § 1530.107 Bond or letter of credit requirements

(a) The licensee may charge program sugar in anticipation of the transfer or export of refined sugar, the export of sugar in sugar containing products, or the production of certain polyhydric alcohols, if the licensee establishes a performance bond or a letter of credit with the U.S. Department of Agriculture, which meets the criteria set forth in this section.

(b) The bond or letter of credit may cover entries made either during the period of time specified in the bond (a term bond) or for a specified entry (a single entry bond).

(c) Only the licensee who will refine the sugar, manufacture the sugar containing product, or produce certain polyhydric alcohols may be the principal on the bond or letter of credit covering such sugar to be re-exported or used in the production of certain polyhydric alcohols. The surety or sureties shall be among those listed by the Secretary of the Treasury as acceptable on Federal bonds.

(d) The obligation under the bond or letter of credit shall be made effective no later than the date of entry of the

sugar for refiners or the date of transfer of the corresponding sugar for manufacture into a sugar containing product or certain polyhydric alcohols.

(e) The amount of the bond or letter of credit shall be equal to 20 cents per pound of sugar to be entered under the license.

(f) If a licensee fails to qualify for credit to a license within the specified time period of the date of export or use of corresponding sugar in an amount sufficient to offset the charge to the license for that corresponding sugar, payment shall be made to the U.S. Treasury. The payment shall be equal to the difference between the Number 11 contract price and the Number 14 contract price (New York Coffee, Sugar and Cocoa Exchange) in effect on the last market day before the date of entry of the sugar or the last market day before the end of the period during which export or use was required, whichever difference is greater. The difference shall be multiplied by the quantity of refined sugar, converted to raw value, that should have been exported in compliance with this part. If there was not a Number 11, or a Number 14 contract price for the relevant market day, the Licensing Authority may estimate such price as he or she deems appropriate.

### § 1530.108 Revocation or surrender of licenses.

(a) A license may be revoked upon written notice by the Licensing Authority.

(b) A licensee may surrender a license when the sum of all credits is equal to or greater than the sum of all charges.

### § 1530.109 Reporting.

(a) A licensee may submit as often as monthly for charges and credits against a license balance, but must submit at least a quarterly report to the Licensing Authority not later than 90 days after the earliest transaction in the report for which credits or charges are being submitted. The licensee need not report when there have not been transactions during the reporting period.

(b) Reports may be submitted by e-mail, U.S. mail, private courier, or in person, but must be in an integrated database format acceptable to the Licensing Authority. A copy of this format may be obtained from the Licensing Authority. Applicants unable to submit a report in the specified electronic format may seek a temporary waiver to permit them to submit the report on paper.

(c) The reports must include the following for all program transactions:

(1) A unique number associated with the transaction;

(2) The date of the entry, transfer (only a refiner shall report transfers to the Licensing Authority), export, or use;

(3) The quantity of program sugar entered, transferred, exported as refined sugar, or used in the production of certain polyhydric alcohols;

(4) The licensee's license number, or if a transfer is being reported, the licensee's license number as well as the transfer recipient's license number;

(5) The country of origin (entry of raw sugar) or final destination (refined exports), using the exact country code designated in the HTS; and

(6) The initial and final polarization, and final weight (when available) for entries of raw sugar.

(d) Licensees have an affirmative and continuing duty to maintain the accuracy of the information contained in previously submitted reports.

(1) The licensee shall immediately notify the Licensing Authority and promptly request that previously claimed credits be charged back upon discovery that previously claimed exports of refined sugar, refined sugar in sugar containing products, or refined sugar used in the production of polyhydric alcohol were re-entered into the U.S. Customs Territory without substantial transformation, not used in the production of certain polyhydric alcohols, made under a false underlying proof of export, or made but previously submitted exports do not otherwise satisfy the requirements of regulations or the documentation agreement.

(2) Charge backs shall be as of the date of the erroneously claimed credit.

**§ 1530.110 Records, certification, and documentation.**

(a) A licensee shall establish a documentation agreement with the Licensing Authority before submitting for credit against a license. The licensee shall propose to the Licensing Authority a list of documents to substantiate entries, transfers, exports, or use as appropriate. The Licensing Authority shall consider the licensee's proposal to assure that it provides that a program transaction is fully substantiated, and shall then respond in writing to the licensee in a timely fashion outlining any deficiencies. Once agreed, the licensee shall submit a notarized letter specifying the documents to be maintained on file and certifying that the charges and credits made pursuant to § 1530.106 will be kept on file, identifiable by a unique number, and available for inspection pursuant to § 1530.110.

(b) For all transactions, the documentation shall:

(1) Substantiate the information required in § 1530.109 (c), and the completion of the reported transaction;

(2) Establish the buyer and seller specifications for a transaction;

(3) Include all U.S. Customs forms submitted in the entry or export process;

(4) Provide the correct telephone numbers and addresses of any agents, consignees, foreign purchasers, and non-vessel operating common carriers used in completing the transaction;

(5) Indicate the port of entry or export for the program transaction;

(6) Provide the percentage of sugar in a sugar containing product or certain polyhydric alcohols; and

(7) Provide the name of export carrier, vessel name, and container number.

(c) The licensee shall maintain the documentation established in the documentation agreement for 5 years from the date of such program transaction.

(d) Upon request, the licensee shall make the records, outlined by the documentation agreement and identified (associated) by the unique number assigned by the licensee to the program transaction as reported to the Licensing Authority for posting against a license balance, available for inspection and copying by the Licensing Authority, the Compliance Review Staff of the Foreign Agricultural Service, and/or the Office of the Inspector General, USDA, the U.S. Department of Justice, or any U.S. Government regulatory or investigative office.

**§ 1530.111 Enforcement and penalties.**

(a) The Licensing Authority may revoke credits granted on a license if the credits granted do not meet the requirements set forth in the regulations of this part, or if the licensee does not voluntarily charge back credits erroneously claimed in accordance with these regulations. The Licensing Authority may also recommend revocation of a license, if the licensee has been in violation of § 1530.109 (c) of this part.

(b) The Administrator of the Foreign Agricultural Service, USDA, may suspend or revoke a license upon recommendation of the Licensing Authority. Suspension of a license will be governed by 7 CFR part 3017, subpart D and debarment will be governed by 7 CFR part 3017, subpart C.

**§ 1530.112 Administrative appeals.**

(a) The licensee may appeal the Licensing Authority's determination by filing a written notice of appeal, signed by the licensee or the licensee's agent, with the Director, Import Policies and Programs Division, Foreign Agricultural Service (Director), or his or her designee. The decision on such an appeal shall be made by the Director, and will be governed by § 3017.515 of this title. The appeal must be filed not later than 30 days after the date of the Licensing Authority's determination, and shall contain the licensee's written argument.

(b) The licensee may request an informal hearing. The Director shall arrange a place and time for the hearing, except that it shall be held within 30 days of the filing date of the notice of appeal if the licensee so requests.

(c) The licensee may be represented by counsel, and shall have full opportunity to present any relevant evidence, documentary or testimonial. The Director may permit other individuals to present evidence at the hearing and the licensee shall have an opportunity to question those witnesses.

(d) The licensee may request a verbatim transcript of the hearing, and shall be responsible for arranging for a professional reporter and shall pay all attendant expenses.

(e) The Director shall make the determination on appeal, and may affirm, reverse, modify or remand the Licensing Authority's determination. The Director shall notify the licensee in writing of the determination on appeal and of the basis thereof. The determination on appeal exhausts the licensee's administrative remedies.

### § 1530.113 Waivers.

Upon written application of the licensee or at the discretion of the Licensing Authority, and for good cause, the Licensing Authority may extend the period for transfer, export, or production, and/or may temporarily increase a maximum license limit, may extend the period for submitting regularly scheduled reports, or may temporarily waive or modify any other requirement imposed by this part if the Licensing Authority determines that such a waiver will not undermine the purpose of the relevant program or adversely affect domestic sugar policy objectives. The Licensing Authority may specify additional requirements or procedures in place of the requirements or procedures waived or modified.

### § 1530.114 Implementation.

Current program participants may qualify under this rule upon concluding a documentation agreement with the Licensing Authority, but must conclude a documentation agreement within 24 months of the effective date of this rule. Participant license balances, as of the effective date of this rule, shall continue under this rule.

### § 1530.115 Paperwork Reduction Act assigned number.

Licensees are not required to respond to requests for information unless the form for collecting information displays a currently valid Office of Management and Budget (OMB) control number. OMB has approved the information collection requirements contained in this part in accordance with 44 U.S.C. chapter 35. OMB number 0551–0015 has been assigned and will expire November 30, 1999.

# PART 1540—INTERNATIONAL AGRICULTURAL TRADE

## Subpart A—Emergency Relief From Duty-Free Imports of Perishable Products

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1540.1 Applicability of subpart.
1540.2 Definitions.
1540.3 Who may file request.
1540.4 Contents of request.
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## Subpart B—Emergency Relief From Certain Perishable Products Imported From Israel

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1540.40 Applicability of subpart.
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1540.43 Contents of request.
1540.44 Submission of recommendations by the Secretary of Agriculture.
1540.45 Information.

AUTHORITY: Sec. 213(f), Pub. L. 98–67, 97 Stat. 391 (19 U.S.C. 2703(f)); 5 U.S.C. 301; sec. 404, Pub. L. 98–573, 98 Stat. 3016, as amended (19 U.S.C. 2112 note); 5 U.S.C. 301.

## Subpart A—Emergency Relief From Duty-Free Imports of Perishable Products

AUTHORITY: Sec. 213(f), Pub. L. 98–67, 97 Stat. 391 (19 U.S.C. 2703(f); 5 U.S.C. 301.

SOURCE: 49 FR 22265, May 29, 1984, unless otherwise noted.

CROSS REFERENCE: For United States International Trade Commission regulations on investigations of import injury and the rules pertaining to the filing of a section 201 petition, see 19 CFR part 206.

### § 1540.1 Applicability of subpart.

This subpart applies to requests for emergency relief from duty-free imports of perishable products filed with the Department of Agriculture under section 213(f) of the Caribbean Basin Economic Recovery Act of 1983, title II of Pub. L. 98–67, 97 Stat. 384 (19 U.S.C. 2701 *et seq.*) (the Act).

### § 1540.2 Definitions.

(a) *Perishable product* means:

(1) Live plants provided for in subpart A of part 6 of schedule 1 of the Tariff Schedules of the United States (TSUS);

(2) Fresh or chilled vegetables provided for in items 135.10 through 138.42 of the TSUS;

(3) Fresh mushrooms provided for in item 144.10 of the TSUS;

(4) Fresh fruit provided for in items 146.10, 146.20, 146.30, 146.50 through 146.62, 146.90, 146.91, 147.03 through 147.33, 147.50 through 149.21 and 149.50 of the TSUS;

(5) Fresh cut flowers provided for in items 192.17, 192.18, and 192.21 of the TSUS; and

(6) Concentrated citrus fruit juice provided for in items 165.25 and 165.35 of the TSUS.

(b) *Beneficiary country* means any country listed in section 212(b) of the Act with respect to which there is in effect a proclamation by the President designating such country as a beneficiary country for purposes of the Act.

### § 1540.3 Who may file request.

A request under this subpart may be filed by an entity, including a firm, or group or workers, trade association, or certified or recognized union which is representative of a domestic industry producing a perishable product like or directly competitive with a perishable product that such entity claims is being imported into the United States duty-free under the provisions of the Act from a beneficiary country(ies) in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to such domestic industry.

### § 1540.4 Contents of request.

A request for emergency action under section 213(f) of the Act shall be submitted in duplicate to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250. Such requests shall be supported by appropriate information and data and shall include to the extent possible:

(a) A description of the imported perishable product(s) allegedly causing, or threatening to cause, serious injury;

(b) The beneficiary country(ies) of origin of the allegedly injurious imports;

(c) Data showing that the perishable product allegedly causing, or threatening to cause, serious injury is being imported from the designated beneficiary country(ies) in increased quantities as compared with imports of the same product from the designated beneficiary country(ies) during a previous representative period of time (including a statement of why the period used should be considered to be representative);

(d) Evidence of serious injury or threat thereof to the domestic industry substantially caused by the increased quantities of imports of the product from the beneficiary country(ies); and

(e) A statement indicating why emergency action would be warranted under section 213(f) of the Act (including all available evidence that the injury caused by the increased quantities of imports from the beneficiary country(ies) would be relieved by the suspension of the duty-free treatment accorded under the Act).

A copy of the petition and the supporting evidence filed with the United States International Trade Commission under section 201 of the Trade Act of 1974, as amended, must be provided with the request for emergency action.

### § 1540.5 Submission of recommendations.

If the Secretary has reason to believe that the perishable product which is the subject of a petition under § 1540.4 of this subpart is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing a perishable product like or directly

competitive with the imported perishable product and that emergency action is warranted, the Secretary, within 14 days after the filing of the petition under § 1540.4 of this subpart, shall recommend to the President that the President take emergency action. If the Secretary determines not to recommend the imposition of emergency action, the Secretary shall publish a notice of such determination and will so advise the petitioner within 14 days after the filing of the petition.

### § 1540.6 Information.

Persons desiring information from the Department of Agriculture regarding the Department's implementation of section 213(f) of the Act should address such inquiries to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250.

### § 1540.7 Paperwork Reduction Act assigned number.

The Office of Management and Budget has approved the information collection requirements contained in these regulations in accordance with 44 U.S.C. chapter 25, and OMB number 0551–0018 has been assigned.

## Subpart B—Emergency Relief From Certain Perishable Products Imported From Israel

AUTHORITY: Sec. 404, Pub. L. 98–573, 98 Stat. 3016, as amended (19 U.S.C. 2112 note); 5 U.S.C. 301.

SOURCE: 50 FR 43692, Oct. 29, 1985, unless otherwise noted.

CROSS REFERENCE: For U.S. International Trade Commission regulations concerning investigations of import injury and the rules pertaining to the filing of a section 201 petition, see 19 CFR part 206.

### § 1540.20 Applicability of subpart.

This subpart applies to requests filed with the Department of Agriculture under section 404 of the Trade and Tariff Act of 1984, Pub. L. 98–573, for emergency relief from imports of certain perishable products from Israel entering the United States at a reduced rate of duty or duty-free pursuant to a trade agreement between the United States and Israel entered into under section 102(b)(1) of the Trade Act of 1974, as amended.

### § 1540.21 Definition.

*Perishable product* means:

(a) Live plants provided for in subpart A of part 6 of schedule 1 of the 1985 Tariff Schedules of the United States (the "TSUS");

(b) Fresh or chilled vegetables provided for in items 135.03 through 138.46 of the TSUS;

(c) Fresh mushrooms provided for in item 144.10 of the TSUS;

(d) Fresh fruits provided for in items 146.10, 146.20, 146.30, 146.50 through 146.62, 146.90, 146.91, 147.03 through 147.44, 147.50 through 149.21 and 149.50 of the TSUS;

(e) Fresh cut flowers provided for in items 192.17, 192.18, and 192.21 of the TSUS; and

(f) Concentrated citrus fruit juice provided for in items 165.25, 165.29 and 165.36 of the TSUS.

### § 1540.22 Who may file request.

A request under this subpart may be filed by an entity, including a firm, or group or workers, trade association, or certified or recognized union which is representative of a domestic industry producing a perishable product like or directly competitive with a perishable product that such entity claims is being imported from Israel into the United States at a reduced duty or duty-free under the provisions of a trade agreement between the United States and Israel entered into under section 102(b)(1) of the Trade Act of 1974, as amended, in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to such domestic industry.

### § 1540.23 Contents of request.

A request for emergency action under section 404 of the Trade and Tariff Act of 1984 shall be submitted in duplicate to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250. Such request shall be supported by appropriate information and data and shall include to the extent possible:

(a) A description of the imported perishable product(s) allegedly causing, or threatening to cause, serious injury;

(b) Data showing that the perishable product allegedly causing, or threatening to cause, serious injury is being imported from Israel in increased quantities as compared with imports of the same product from Israel during a previous representative period of time (including a statement of why the period selected by the petitioner should be considered to be representative);

(c) Evidence of serious injury or threat thereof to the domestic industry substantially caused by the increased quantities of imports of the product from Israel; and

(d) A statement indicating why emergency action would be warranted under section 404 (including all available evidence that the injury caused by the increased quantities of imports from Israel would be relieved by the withdrawal of the reduction of the duty or elimination of the duty-free treatment provided to the product under the trade agreement). A copy of the petition and the supporting evidence filed with the United States International Trade Commission under section 201 of the Trade Act of 1974, as amended, must be provided with the request for emergency action.

### § 1540.24 Determination of the Secretary of Agriculture.

If the Secretary of Agriculture has reason to believe that the perishable product(s) which is the subject of a petition under this subpart is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing a perishable product like or directly competitive with the imported perishable product and that emergency action is warranted, the Secretary, within 14 days after the filing of the petition under § 1540.23 shall recommend to the President that the President take emergency action. If the Secretary determines not to recommend the imposition of emergency action, the Secretary, within 14 days after the filing of the petition, will publish in the FEDERAL REGISTER a notice of such determination and will so advise the petitioner.

### § 1540.25 Information.

Persons desiring information from the Department of Agriculture regarding the Department's implementation of section 404 of the Trade and Tariff Act of 1984 should address such inquiries to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250.

### § 1540.26 Paperwork Reduction Act assigned number.

The Office of Management and Budget has approved the information collection requirements contained in these regulations in accordance with 44 U.S.C. chapter 25, and OMB number 0551–0023 has been assigned.

## Subpart C—Emergency Relief From Duty-Free Imports of Perishable Products From Certain Andean Countries

AUTHORITY: Title II, sec. 204(e), Pub. L. 102–182, 105 Stat. 1239 (19 U.S.C. 3203(e)); 5 U.S.C. 301.

SOURCE: 58 FR 16104, Mar. 25, 1993, unless otherwise noted.

CROSS REFERENCE: For United States International Trade Commission regulations on investigations of import injury and the rules pertaining to the filing of a section 201 petition, see 19 CFR part 206.

### § 1540.40 Applicability of subpart.

This subpart applies to requests for emergency relief from duty-free imports of perishable products filed with the Department of Agriculture under section 204(e) of the Andean Trade Preference Act, title II of Public Law 102–182, 105 Stat. 1236 (19 U.S.C. 3201 *et seq.*) (the "Act").

### § 1540.41 Definitions.

(a) *Perishable product* means:

(1) Live plants and fresh cut flowers provided for in chapter 6 of the Harmonized Tariff Schedule (HTS);

(2) Fresh or chilled vegetables provided in heading 0701 through 0709 (except subheading 0709.52.00) and heading 0714 of the HTS;

(3) Fresh fruit provided for in subheadings 0804.20 through 0810.90 (except citrons of subheadings 0805.90.00, tamarinds and kiwi fruit of subheading 0810.90.20, and cashew apples, mameyes colorados, sapodillas, soursops and sweetsops of subheading 0810.90.40) of the HTS; or

(4) Concentrated citrus fruit juice provided for in subheadings 2009.11.00, 2009.19.40, 2009.20.40, 2009.30.20, and 2009.30.60 of the HTS.

(b) *Beneficiary country* means any country listed in subsection 203(b)(1) of the Act with respect to which there is in effect a proclamation by the President designating such country as a beneficiary country for purposes of the Act.

### § 1540.42 Who may file request.

A request under this subpart may be filed by an entity, including a firm, or group of workers, trade association, or certified or recognized union which is representative of a domestic industry producing a perishable product like or directly competitive with a perishable product that such entity claims is being imported into the United States duty-free under the provisions of the Act from a beneficiary country(ies) in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to such domestic industry.

### § 1540.43 Contents of request.

(a) A request for emergency action under section 204(e) of the Act shall be submitted in duplicate to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250. Such request shall be supported by appropriate information and data and shall include to the extent possible:

(1) A description of the imported perishable product(s) allegedly causing, or threatening to cause, serious injury;

(2) The beneficiary country(ies) of origin of the allegedly injurious imports;

(3) Data showing that the perishable product allegedly causing, or threatening to cause, serious injury is being imported from the designated beneficiary country(ies) in increased quantities as compared with imports of the same product from the designated beneficiary country(ies) during a previous representative period of time (including a statement of why the period used should be considered to be representative);

(4) Evidence of serious injury or threat thereof to the domestic industry substantially caused by the increased quantities of imports of the product from the beneficiary country(ies); and

(5) A statement indicating why emergency action would be warranted under section 204(e) of the Act (including all available evidence that the injury caused by the increased quantities of imports from the beneficiary country(ies) would be relieved by the suspension of duty-free treatment accorded under the Act).

(b) A copy of the petition and the supporting evidence filed with the United States International Trade Commission under Section 201 of the Trade Act of 1974, as amended, must be provided with the request for emergency action.

### § 1540.44 Submission of recommendations by the Secretary of Agriculture.

If the Secretary has reason to believe that the perishable product(s) which is the subject of a petition under § 1504.43 of this subpart is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing a perishable product like or directly competitive with the imported perishable product and that emergency action is warranted, the Secretary, within 14 days after the filing of the petition under § 1540.43 of this subpart, shall recommend to the President that the President take emergency action. If the Secretary determines not to recommend the imposition of emergency action, the Secretary within 14 days after the filing of the petition shall publish a notice of such determination and so advise the petitioner.

### § 1540.45 Information.

Persons desiring information from the Department of Agriculture regarding the Department's implementation

of section 204(e) of the Act should address such inquiries to the Administrator, Foreign Agricultural Service, United States Department of Agriculture, Washington, DC 20250. Issued at Washington, DC this 19th day of March, 1993.

# PART 1560—PROCEDURES TO MONITOR CANADIAN FRESH FRUIT AND VEGETABLE IMPORTS

Sec.
1560.1 Scope.
1560.2 Definitions.
1560.3 Determination of fresh fruit or vegetable.
1560.4 Calculation of data to support imposition of temporary duty.
1560.5 Calculation of data to support removal of temporary duty.

AUTHORITY: Secs. 105 and 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100–449 (102 Stat. 1855 and 1865–67).

SOURCE: 54 FR 1327, Jan. 13, 1989, unless otherwise noted.

## § 1560.1 Scope.

This part outlines the procedures that will be used by the Administrator of the Foreign Agricultural Service to monitor and inform the Secretary of Agriculture of data regarding the importation of fresh fruits and vegetables from Canada.

## § 1560.2 Definitions.

The following definitions shall be applicable to this part:

(a) *Administrator* means the Administrator of the Foreign Agricultural Service, United States Department of Agriculture.

(b) *Average Monthly Import Price* means the average unit value for all shipments of a particular Canadian fresh fruit or vegetable imported into the United States from Canada during a particular calendar month based on official data from the U.S. Customs Service and/or the Bureau of Census, and shall be calculated by dividing the total value of the fresh fruit or vegetable imported in that month by the total quantity of the fresh fruit or vegetable imported in that month.

(c) *Average Planted Acreage* means the average of the annual planted acreage in the U.S. for a particular fresh fruit or vegetable for the preceding five years excluding the years with the highest and lowest acreages based on available data from agencies within the United States Department of Agriculture and data from appropriate state agencies, as required.

(d) *Canadian fresh fruit or vegetable* means a fresh fruit or vegetable that is a product of Canada as determined in accordance with the rules of origin set forth in section 202 of the U.S.-Canada Free-Trade Agreement Implementation Act of 1988.

(e) *Corresponding Five-Year Average Monthly Import Price* for a particular day means the average import price of a Canadian fresh fruit or vegetable imported into the United States from Canada, for the calendar month in which that day occurs, for that month in each of the preceding 5 years, excluding the years with the highest and lowest monthly averages.

(f) *F.O.B. Point of Shipment Price in Canada* means the daily average of prices of a particular Canadian fresh fruit or vegetable imported into the United States from Canada that are reported to the U.S. Customs Service at the U.S. border as part of the official documentation accompanying such shipments less freight costs where applicable.

(g) *Fresh Fruit or Vegetable* means a fruit or vegetable determined in accordance with § 1560.3 within one of the HS headings.

(h) *HS heading* means any of the following tariff headings of the Harmonized System (HS) as modified by the description for each heading:

| HS tariff heading | Description |
|---|---|
| 07.01 | Potatoes, fresh or chilled. |
| 07.02 | Tomatoes, fresh or chilled. |
| 07.03 | Onions, shallots, garlic, leeks, and other alliaceous vegetables, fresh or chilled. |
| 07.04 | Cabbages, cauliflowers, kohlrabi, kale and similar edible brassicas, fresh or chilled. |
| 07.05 | Lettuce (lactica sativa) and chicory (cichorium spp.), fresh or chilled. |
| 07.06 | Carrots, salad beets or beetroot, salsify, celeriac, radishes and similar edible roots (excluding turnips), fresh or chilled. |
| 07.07 | Cucumbers and gherkins, fresh or chilled. |
| 07.08 | Leguminous vegetables, shelled or unshelled, fresh or chilled. |
| 07.09 | Other vegetables (excluding truffles), fresh or chilled. |
| 08.06.10 | Grapes, fresh. |

| HS tariff heading | Description |
|---|---|
| 08.08.20 | Pears and quinces, fresh. |
| 08.09 | Apricots, cherries, peaches (including nectarines), plums and sloes, fresh. |
| 08.10 | Other fruit (excluding cranberries and blueberries), fresh. |

(i) *Import Price* means the unit value based on data available from the U.S. Customs Service of a particular Canadian fresh fruit or vegetable imported into the U.S. from Canada taking into account any other relevant data, as necessary.

(j) *Secretary* means the Secretary of Agriculture.

(k) *United States* means the United States Customs Territory which includes the fifty states, the District of Columbia and Puerto Rico.

(l) *Wine Grape* means grapes of labrusca, vinifera or hybrid vinifera varieties used for making wine.

(m) *Working Day* means a day which falls on a Monday through Friday, excluding holidays observed by the United States Government and days in which the U.S. Customs Service is not operating.

### § 1560.3 Determination of fresh fruit or vegetable.

The specific group of articles that will be monitored as a particular fresh fruit or vegetable will be determined based on the practicability of monitoring at the eight digit subheading level of the Harmonized Tariff Schedule of the United States. The determination of practicability will be made by the Administrator taking into account: (a) The availability of reliable volume and price data on imports from Canada and data on U.S. planted acreage, (b) market differentiation for the group of articles, and (c) such other factors as the Administrator determines to be appropriate.

### § 1560.4 Calculation of data to support imposition of temporary duty.

The Administrator will inform the Secretary when the following conditions are met with respect to a particular fresh fruit or vegetable imported into the United States from Canada:

(a) If for each of five consecutive working days the import price of the fresh fruit or vegetable is below ninety percent of the corresponding five-year average monthly import price for such fresh fruit or vegetable excluding the years with the highest and lowest corresponding monthly import price; and

(b) The planted acreage in the United States for such fresh fruit or vegetable based on the most recent data available is no higher than the average planted acreage over the preceding five years excluding the years with the highest and lowest planted acreages. For the purposes of calculating any planted acreage increase attributed directly to a reduction in wine grape planted acreage existing on October 4, 1987 shall be excluded.

### § 1560.5 Calculation of data to support removal of temporary duty.

During the time a temporary duty on a particular fresh fruit or vegetable is imposed pursuant to section 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, the Administrator will inform the Secretary if the F.O.B. point of shipment price in Canada of such fresh fruit or vegetable exceeds, for five consecutive working days, ninety percent of the corresponding five-year average monthly import price excluding the years with the highest and lowest average corresponding monthly import price, adjusted to an F.O.B. point of shipment price, if necessary, for that fresh fruit or vegetable.

# PART 1570—EXPORT BONUS PROGRAMS

## Subpart A—Sunflowerseed Oil Assistance Program and Cottonseed Oil Assistance Program Criteria

Sec.
1570.10 General statement.
1570.20 Criteria.

## Subpart B—SOAP and COAP Drawback Certification

1570.1100 Drawback certification.

SOURCE: 56 FR 42223, Aug. 27, 1991, unless otherwise noted.

## Subpart A—Sunflowerseed Oil Assistance Program and Cottonseed Oil Assistance Program Criteria

AUTHORITY: 7 U.S.C. 5663.

### § 1570.10 General statement.

This subpart sets forth the criteria to be considered in evaluating and approving proposals for initiatives to facilitate export sales under the Sunflowerseed Oil Assistance Program (SOAP) and Cottonseed Oil Assistance Program (COAP) administered by the Foreign Agricultural Service (FAS). These criteria are interrelated and will be considered together in order to select eligible countries for SOAP and COAP initiatives which will best meet the programs' objective. The objective of the programs is to encourage the sale of additional quantities of sunflowerseed oil and cottonseed oil in world markets at competitive prices. Under the SOAP and the COAP, bonuses are made available by FAS to enable exporters to meet prevailing world prices for sunflowerseed oil and cottonseed oil in targeted destinations. In the operation of the SOAP and the COAP, FAS will make reasonable efforts to avoid the displacement of usual marketings of U.S. agricultural commodities.

### § 1570.20 Criteria.

The criteria considered by FAS in reviewing proposals for SOAP and COAP initiatives will include, but not be limited to, the following:

(a) The expected contribution which initiatives will make toward realizing U.S. agricultural export goals and, in particular, in developing, expanding, or maintaining markets for U.S. sunflowerseed and/or cottonseed oil;

(b) The subsidy requirements of proposed initiatives in relation to the sums made available to operate the programs in any given fiscal year; and

(c) The likelihood that sales facilitated by initiatives would have the unintended effect of displacing normal commercial sales of sunflowerseed and/or cottonseed oil.

## Subpart B—SOAP and COAP Drawback Certification

AUTHORITY: 7 U.S.C. 5676.

### § 1570.1100 Drawback certification.

An offer submitted by an exporter to FAS for an export bonus under the SOAP or the COAP must contain, in addition to any other information required by FAS, a certification stating the following: "None of the eligible commodity (sunflowerseed oil and/or cottonseed oil) has been or will be used as the basis for a claim of a refund, as drawback, pursuant to section 313 of the Tariff Act of 1930 (19 U.S.C. 1313) of any duty, tax, or fee imposed under Federal law on an imported commodity or product." This certification must be signed by the exporter, if the exporter is an individual, or by a partner or officer of the exporter, if the exporter is a partnership or a corporation, respectively. FAS will reject any offer that does not contain the prescribed certification.

# PART 1580—TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

Sec.

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AUTHORITY: 19 U.S.C. 2401.

SOURCE: 75 FR 9089, Mar. 1, 2010, unless otherwise noted.

**§ 1580.101 General statement.**

This part provides regulations for the Trade Adjustment Assistance (TAA) for Farmers program as authorized by the Trade Act of 1974, amended by Subtitle C of Title I of the Trade Act of 2002 (Pub. L. 107–210), and re-authorized and modified by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5). The regulations establish procedures by which a group of producers of raw agricultural commodities or fishermen (jointly referred to as "producers") can petition for certification of eligibility and through which individual producers covered by a certified petition can apply for technical assistance and cash benefits for the development and implementation of approved business adjustment plans.

**§ 1580.102 Definitions.**

As used in the part, the following terms mean:

*Agricultural commodity* means any commodity in its raw or natural state; found in chapters 1, 3, 4, 5, 6, 7, 8, 10, 12, 14, 23, 24, 41, 51, and 52 of the Harmonized Tariff Schedule of the United States (HTS).

*Articles like* or *directly competitive* generally means products falling under the same HTS number used to identify the agricultural commodity in the petition. A "like" product means substantially identical in inherent or intrinsic characteristics, and the term "directly competitive" means articles that are substantially equivalent for commercial purposes (*i.e.*, adapted to the same uses and essentially interchangeable therefore). For fishery products, competition could be either from farm-raised or wild-caught products.

*Authorized representative* means an entity that represents a group of agricultural commodity producers or fishermen.

*Average price received by the producer* means the average of the 3 marketing year prices per unit received by the producer from the first level of sales for the commodity.

*Cash receipts* mean the value of commodity marketings during the calendar year, irrespective of the year of production, as calculated by the Economic Research Service of the USDA.

*Certification of eligibility* means the date on which the Administrator (FAS) announces in the FEDERAL REGISTER or by Department news release, whichever comes first, a certification of eligibility to apply for trade adjustment assistance.

*Contributed importantly* means a cause which is important, but not necessarily more important than any other cause.

*County price maintained by the Secretary* means a daily price obtained from a USDA agency for the commodity and producer location, except that weekly or monthly prices may be used if daily prices are unavailable.

*Department* means the U.S. Department of Agriculture.

*Deputy Administrator* means the Deputy Administrator for Farm Programs of the Farm Service Agency (FSA).

*Family member* means an individual to whom a producer is related as spouse, lineal ancestor, lineal descendent, or sibling, including:

(1) Great grandparent;

(2) Grandparent;

(3) Parent;

(4) Children, including legally adopted children;

(5) Grandchildren;

(6) Great grandchildren;

(7) Sibling of the family member in the farming operation; and

(8) Spouse of a person listed in paragraphs (1) through (7) of this definition.

*Filing period* means the dates during which petitions may be submitted, as published in the FEDERAL REGISTER.

*FSA* means the Farm Service Agency of the U.S. Department of Agriculture.

*Group* means three or more producers who are not members of the same family.

*Impacted area* means one or more States of the United States.

*Marketing year* means the marketing season or year designated by the Administrator (FAS) with respect to an agricultural commodity. In the case of an agricultural commodity that does not have a designated marketing year, a calendar year will be used.

*National average price* means the average price paid to producers for an agricultural commodity in a marketing year as determined by the National Agricultural Statistics Service (NASS) of the U.S. Department of Agriculture, or

the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, when available, or when unavailable, as determined by the Administrator (FAS).

*NIFA* means the National Institute of Food and Agriculture, the Federal agency within the U.S. Department of Agriculture which administers the Federal agricultural extension programs.

*Producer* means a person who shares in the risk of producing an agricultural commodity and is entitled to a share of the commodity for marketing; including an operator, a sharecropper, or a person who owns or rents the land on which the commodity is produced; or a person who reports gain or loss from the trade or business of fishing on the person's annual Federal income tax return for the taxable year that most closely corresponds to the marketing year with respect to which a petition is filed.

*Raw* or *natural state* means unaltered by any process other than cleaning, grading, coating, sorting, trimming, mixing, conditioning, drying, dehulling, shelling, chilling, cooling, blanching, irradiating, or fumigating.

*State Cooperative Extension Service* means an organization established at the land-grant college or university under the Smith-Lever Act of May 8, 1914, as amended (7 U.S.C. 341–349); section 209(b) of the Act of October 26, 1974, as amended (D.C. Code, through section 31–1719(b)); or section 1444 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3221).

*United States* means the 50 States of the United States, the District of Columbia, and Puerto Rico.

*Value of production* means the value of commodities produced during the crop year calculated as production times the marketing year average price. This may be equal to cash receipts when the crop year for the commodity runs from January through December.

### § 1580.201 Petitions for trade adjustment assistance.

(a) A group of producers in the United States or its authorized representative may file a petition for trade adjustment assistance.

(b) Filings may be written or electronic, as provided for by the Administrator (FAS), and submitted to FAS no later than the last day of the filing period announced in the FEDERAL REGISTER. Petitions received after this date will be returned to the sender.

(c) Petitions shall include the following information.

(1) Name, business address, phone number, and e-mail address (if available) of each producer in the group, or its authorized representative. The petition shall identify a contact person for the group.

(2) The agricultural commodity and its Harmonized Tariff Schedule of the United States (HTS) number.

(3) The production area represented by the group or its authorized representative. The petition shall indicate if the group is filing on behalf of all producers in the United States, or if it is filing solely on behalf of all producers in a specifically identified impacted area. In the latter case, at least one member of the group must reside in each State within the impacted area.

(4) The beginning and ending dates for the marketing year upon which the petition is based. A petition may be filed for only the most recent full marketing year for which data are available for national average prices, or quantity of production, or value of production, or cash receipts.

(5) A justification statement explaining why the petitioners should be considered eligible for adjustment assistance.

(6) Supporting information justifying the basis of the petition, including required data for the petitioned marketing year and the previous 3 marketing years.

(i) Whenever possible, the petitioners shall use national average data compiled by the National Agricultural Statistics Service (NASS) or the National Marine Fisheries Service (NMFS), to determine national average prices, or quantity of production, or value of production, or cash receipts. If NASS or NMFS has not compiled such data for the commodity, the petitioners shall provide alternative data for the marketing year under review and for the

previous 3 marketing years, and identify the source of the data. In such cases the Administrator (FAS) shall determine if the alternative data is acceptable.

(ii) If the petition is filed on behalf of producers in a specifically identified impacted area, the petitioners shall provide the national average prices or county prices if applicable, or quantity of production or value of production, or cash receipts for the petitioned commodity in the impacted area for the marketing year under review and for the previous 3 marketing years, and identification of the data source.

(iii) The Administrator (FAS) may request petitioners to provide records to support their data.

(d) Once the petition is received, the Administrator (FAS) shall determine if it meets the requirements of § 1580.201(c) of this part, and if so, publish notice in the FEDERAL REGISTER that a petition has been filed and that an investigation is being initiated. The notice shall identify the agricultural commodity, including any like or directly competitive commodities, the marketing year being investigated, the data being used, and the production area covered by the petition. The notice may also announce the scheduling of a public hearing, if requested by the petitioner. If the petition does not meet the requirements of § 1580.201(c) of this part, the Administrator (FAS) shall notify as soon as practicable the contact person or the authorized representative for the group of the deficiencies.

### § 1580.202 Hearings, petition reviews, and amendments.

(a) If the petitioner, or any other person found by the Administrator (FAS) to have a substantial interest in the proceedings, submits not later than 10 days after the date of publication of notice in the FEDERAL REGISTER under § 1580.201(d) of this part, a request in writing for a hearing, the Administrator (FAS) shall provide for a public hearing and afford such interested person an opportunity to be present, to produce evidence, and to be heard.

(b) If the petitioner or any other person having an interest in the proceedings takes issue with any of the information published in the FEDERAL REGISTER concerning the petition, such person may submit to the Administrator (FAS) their comments in writing or electronically for consideration by the Administrator (FAS) not later than 10 days after the date of publication of notice in the FEDERAL REGISTER under § 1580.201(d) of this part.

(c) A producer or group of producers that resides outside of the State or region identified in the petition filed under paragraph (a) of this section, may file a request to become a party to that petition not later than 15 days after the date that the notice is published in the FEDERAL REGISTER under § 1580.201(d) of this part. The Administrator (FAS) may amend the original petition to expand the impacted area and include the additional filer, or consider it a separate filing.

(d) The Administrator (FAS) shall publish in the FEDERAL REGISTER as soon as practicable any changes to the original notice resulting from any actions taken under this section.

### § 1580.203 Determination of eligibility and certification by the Administrator (FAS).

(a) As soon as practicable after the petition has been filed, but in any event not later than 40 days after that date, the Administrator (FAS) shall certify a group of producers as eligible to apply for adjustment assistance under this chapter if the Administrator (FAS) determines:

(1) At least one of the following:

(i) The national average price of the agricultural commodity produced by the group during the most recent marketing year for which data are available is less than 85 percent of the average of the national average price for the commodity in the 3 marketing years preceding such marketing year; or

(ii) The quantity of production of the agricultural commodity produced by the group during such marketing year is less than 85 percent of the average of the quantity of production of the commodity produced by the group in the 3 marketing years preceding such marketing year; or

(iii) The value of production of the agricultural commodity produced by

the group during such marketing year is less than 85 percent of the average value of production of the commodity produced by the group in the 3 marketing years preceding such marketing year; or

(iv) The cash receipts for the agricultural commodity produced by the group during such marketing year are less than 85 percent of the average of the cash receipts for the commodity produced by the group in the 3 marketing years preceding such marketing year;

(2) The volume of imports of articles like or directly competitive with the agricultural commodity produced by the group in the marketing year with respect to which the group files the petition increased compared to the average volume of such imports during the 3 marketing years preceding such marketing year; and

(3) The increase in such imports contributed importantly to the decrease in the national average price, or quantity of production, or value of production, or cash receipts for, the agricultural commodity.

(b) In any case in which there are separate classes of goods within an agricultural commodity, the Administrator (FAS) shall treat each class as a separate commodity in determining:

(1) Group eligibility;

(2) The national average price, or quantity of production, or value of production, or cash receipts; and

(3) The volume of imports.

(c) Upon making a determination, whether affirmative or negative, the Administrator (FAS) shall promptly publish in the FEDERAL REGISTER a summary of the determination, together with the reasons for making the determination.

(d) In addition, the Administrator (FAS) shall notify producers covered by a certification how to apply for adjustment assistance. Notification methods may include direct mailings to known producers, messages to directly affected producer groups and organizations, electronic communications, Web site notices on the Internet, use of broadcast print media, and transmittal through local USDA offices.

(e) Whenever a group of agricultural producers is certified as eligible to apply for assistance, the Administrator (FAS) shall notify NIFA, the Agricultural Marketing Service, and FSA who will assist in informing other producers about the TAA for Farmers program and how they may apply for trade adjustment assistance.

### § 1580.301 Application for trade adjustment assistance.

(a) Only producers covered by a certification of eligibility under § 1580.203 of this title, may apply for adjustment assistance.

(b) An eligible producer may submit an application for adjustment assistance by submitting to FSA a designated application form at any time after the certification date but not later than 90 days after the certification date. If the 90-day application period ends on a weekend or legal holiday, the producer may apply the following business day.

(c) When submitting an application, the producer shall provide sufficient documentation to establish that:

(1) The producer produced the agricultural commodity in the marketing year for which the petition is filed and in at least 1 of the 3 marketing years preceding that marketing year;

(2) There has been a decrease in the quantity of the agricultural commodity produced by the producer in the marketing year for which the petition is certified from the most recent prior marketing year preceding that marketing year for which data is available; or

(3) There has been a decrease in the price of the agricultural commodity based on:

(i) The price received for the agricultural commodity by the producer during the marketing year with respect to which the petition is filed from the average price for the commodity received by the producer in the 3 marketing years preceding that marketing year; or

(ii) The effective posted county price maintained by the Secretary for the agricultural commodity on the date on which the Administrator (FAS) accepts a petition for consideration as published in the FEDERAL REGISTER from

the average effective posted county level price for the commodity in the 3 marketing years preceding that date. If USDA prices are not available, prices from verifiable sources, including universities, cooperatives, or local markets, may be used.

(4) If a petition is certified with respect to a commodity not produced by the producer every year, the producer may establish the average price received by the producer for the commodity in the 3 marketing years preceding the year in which the petition is filed by using annual price data for the 3 most recent marketing years in which the producer produced the commodity.

(5) The producer must certify that the producer has not received cash benefits under the Trade Adjustment Assistance for Workers or Trade Adjustment Assistance for Firms programs; or TAA for Farmers benefits based on the production of an agricultural commodity covered by another TAA for Farmers petition.

(d) The producer must certify that:

(1) For petitions certified for 2008 crops, their compliance with person determinations set forth in part 1400 of this title, subpart B and average adjusted gross income limitation requirements set forth in subpart G, effective July 18, 1996.

(2) For petitions certified for 2009 and subsequent crops, their average gross nonfarm income and average adjusted gross farm income meet requirements set forth in part 1400 of this title, subpart F, and payment limitation requirements set forth in part 1400 of this title, subparts A and B, effective December 29, 2008; and,

(e) The total amount of payments made to a producer for which the application was approved may not exceed the limitations on payments applicable to:

(1) For petitions certified for 2008 crops, counter-cyclical payments, set forth in part 1400 of this title, subpart A, effective July 18, 1996.

(2) For petitions certified for 2009 and subsequent crops, the counter-cyclical payments, including the Average Crop Revenue Election (ACRE) set forth in part 1400 of this title, subparts A and B, effective December 29, 2008; and

(f) If requested by FSA, a producer must provide documentation regarding average adjusted gross income and payment limitations.

### § 1580.302 Technical assistance and services.

(a) *Initial Technical Assistance:* A producer covered by a certification who has been determined by FSA to meet the requirements of § 1580.301 of this part, is eligible to receive Initial Technical Assistance through NIFA to be completed within 180 days of petition certification. Such assistance shall include information regarding:

(1) Improving the yield and marketing of that agricultural commodity, and

(2) The feasibility and desirability, of substituting one or more agricultural commodities for that agricultural commodity.

(b) *Intensive Technical Assistance:* Upon completion of Initial Technical Assistance, a producer is eligible to participate in Intensive Technical Assistance. Intensive Technical Assistance shall consist of:

(1) A series of courses to further assist the producer in improving the competitiveness of producing the agricultural commodity certified under § 1580.203 of this part, or another agricultural commodity, and

(2) Assistance in developing an initial business plan based on the courses completed under paragraph (a) of this section.

(c) *During Intensive Technical Assistance:* NIFA shall deliver and the producer shall be required to attend a series of Intensive Technical Assistance workshops relevant to the circumstances of the producer.

(d) *Initial Business Plan:* Upon completion of the Initial and Intensive Technical Assistance, the producer shall be required to develop an Initial Business Plan recommended by NIFA and approved by the Administrator (FAS) before receiving an adjustment assistance payment. The Initial Business Plan will:

(1) Reflect the skills gained by the producer through the courses described in paragraph (c) of this section; and

(2) Demonstrate how the producer will apply those skills to the circumstances of the producer.

(e) Upon approval of the Initial Business Plan, the producer will receive an amount not to exceed $4,000 to implement the Initial Business Plan or develop a Long-Term Business Adjustment Plan.

(f) A producer who completes the Intensive Technical Assistance and whose Initial Business Plan has been approved shall be eligible, in addition to the amount under paragraph (e) of this section, for assistance in developing a Long-Term Business Adjustment Plan.

(g) *Long-Term Business Adjustment Plan:* The Long-Term Business Adjustment Plan shall:

(1) Include steps reasonably calculated to materially contribute to the economic adjustment of the producer to changing market conditions;

(2) Take into consideration the interests of the workers employed by the producer; and

(3) Demonstrate that the producer will have sufficient resources to implement the business plan.

(h) Upon recommendation by NIFA and approval of the producer's Long-Term Business Adjustment Plan by the Administrator (FAS), the producer shall be entitled to receive an amount not to exceed $8,000 to implement their Long-Term Business Adjustment Plan.

(i) The Initial Business Plan and Long-Term Business Adjustment Plan must be completed and approved within 36 months after a petition is certified.

(j) A producer shall not receive a combined total of more than $12,000 for the Initial Business Plan and the Long Term Business Adjustment Plan in the 36-month period following petition certification.

(k) The Administrator (FAS) may authorize supplemental assistance necessary to defray reasonable transportation and subsistence expenses incurred by a producer in connection with the initial technical assistance, if such initial technical assistance is provided at facilities that are not within normal commuting distance of the regular place of residence of the producer. NIFA and FSA will work with the producer and the Administrator (FAS) to facilitate application for and proper payment of reasonable allowable supplemental expenses. The Administrator (FAS) will not authorize payments to a producer:

(1) For subsistence expenses that exceed the lesser of:

(i) The actual per diem expenses for subsistence incurred by a producer; or

(ii) The prevailing per diem allowance rate authorized under Federal travel regulations; or

(2) For travel expenses that exceed the prevailing mileage rate authorized under the Federal travel regulations.

### § 1580.303 Adjustment assistance payments.

(a) If the Administrator (FAS) determines that insufficient appropriated fiscal year funds are available to provide maximum cash benefits to all eligible applicants, after having deducted estimated transportation and substance payments and administrative and technical assistance costs, the Administrator (FAS) shall prorate cash payments to producers for the approved initial and long-term business plans.

(b) Any producer who may be entitled to a payment may assign their rights to such payment in accordance with 7 CFR part 1404 or successor regulations as designated by the Department.

(c) In the case of death, incompetency, disappearance, or dissolution of a producer that is eligible to receive benefits in accordance with this part, such producer or producers specified in 7 CFR part 707 may receive such benefits.

### § 1580.401 Subsequent year petition re-certification.

(a) Prior to the anniversary of the petition certification date:

(1) Groups or authorized representatives that provided the data to justify their initial petition shall provide the Administrator (FAS) data for the most recent marketing year, and

(2) The Administrator (FAS) shall make a determination with respect to the re-certification of petitions for the subsequent year by applying criteria as set forth in § 1580.203 of this part for the most recent marketing year.

(b) The Administrator (FAS) will promptly publish in the FEDERAL REGISTER the determination with the reasons for the determination.

(c) If a petition is re-certified, only eligible producers who did not receive training and cash benefits under this program may apply.

### § 1580.501 Administration.

(a) The petition process will be administered by FAS. FAS will publish in the FEDERAL REGISTER the filing dates for commodity groups to file petitions.

(b) FSA will administer the producer application and payment process.

(c) State and county FSA committees and representatives do not have the authority to modify or waive any of the provisions of this part.

(d) The technical assistance process and the recommendation for approval of all producer business plans will be under the general supervision of NIFA. NIFA may award the technical assistance and services to a state cooperative extension service.

(e) The Deputy Administrator may, in consultation with the Administrator, FAS, authorize the State and County committees to waive or modify non-statutory deadlines or other program requirements in cases where lateness or failure to meet such other requirements by applicants does not adversely affect the operation of the program.

### § 1580.502 Maintenance of records, audits, and compliance.

(a) Producers making application for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified herein, as may be requested. Such records and accounts must be retained for 2 years after the date of the final payment to the producer under this program.

(b) At all times during regular business hours, authorized representatives of the U.S. Department of Agriculture or any agency thereof, the Comptroller General of the United States shall have access to the premises of the producer in order to inspect, examine, and make copies of the books, records, and accounts, and other written data as specified in paragraph (a) of this section.

(c) Audits of certifications of average adjusted gross income may be conducted as necessary to determine compliance with the requirements of this subpart. As a part of this audit, income tax forms may be requested and if requested, must be supplied. If a producer has submitted information to FSA, including a certification from a certified public accountant or attorney, that relied upon information from a form previously filed with the Internal Revenue Service, such producer shall provide FSA a copy of any amended form filed with the Internal Revenue Service within 30 days of the filing.

(d) If requested in writing by the U.S. Department of Agriculture or any agency thereof, or the Comptroller General of the United States, the producer shall provide all information and documentation the reviewing authority determines necessary to verify any information or certification provided under this subpart, including all documents referred to in § 1580.301(c) of this part, within 30 days. Acceptable production documentation may be submitted by facsimile, in person, or by mail and may include copies of receipts, ledgers, income statements, deposit slips, register tapes, invoices for custom harvesting, records to verify production costs, contemporaneous measurements, truck scale tickets, fish tickets, landing reports, and contemporaneous diaries that are determined acceptable. Failure to provide necessary and accurate information to verify compliance, or failure to comply with this part's requirements, will result in ineligibility for all program benefits subject to this part for the year or years subject to the request.

### § 1580.503 Recovery of overpayments.

(a) If the Administrator (FAS) determines that any producer has received any payment under this program to which the producer was not entitled, or has expended funds received under this program for purpose that was not approved by the Administrator (FAS) such producer will be liable to repay such amount. The Administrator (FAS) may waive such repayment if it is determined that:

(1) The payment was made without fault on the part of the producer; and

(2) Requiring such repayment would be contrary to equity and good conscience.

(b) Unless an overpayment is otherwise recovered, or waived under paragraph (a) of this section, the Administrator (FAS), shall recover the overpayment as a debt following the procedures in 7 CFR part 3. The requirement for demand and notice and opportunity for a hearing under the debt collection procedures in 7 CFR part 3 shall satisfy the notice and hearing requirements under 19 U.S.C. 2401f(c), and the appeal procedures in §1580.505 of this part shall not apply to collection of overpayments

### §1580.504 Debarment, suspension, and penalties.

(a) *Generally*. The regulations governing Governmentwide Debarment and Suspension (Nonprocurement), 7 CFR part 3017, and Government Requirements for Drug-Free Workplace (Financial Assistance), 7 CFR part 3021, apply to this part.

(b) *Additional specific suspension and debarment provision for this program*. In addition to any other debarment or suspension of a producer under paragraph (a) of this section, in connection with this program, if the Administrator (FAS) or a court of competent jurisdiction, determines that a producer:

(1) Knowingly has made, or caused another to make, a false statement or representation of a material fact, or

(2) Knowingly has failed, or caused another to fail, to disclose a material fact; and, as a result of such false statement or representation, or of such nondisclosure, such producer has received any payment under this program to which the producer was not entitled, the Administrator (FAS) shall suspend and debar such producer from any future payments under this program, as provided in 19 U.S.C. 2401f(b).

(c) *Criminal penalty*. Whoever makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, for the purpose of obtaining or increasing for himself or for any other producer any payments authorized to be furnished under this program shall be fined not more that $10,000 or imprisoned for not more than 1 year, or both.

### §1580.505 Appeals.

(a) A producer adversely affected by a determination with respect to their application for trade adjustment assistance under §1580.301 of this part or with respect to the receipt of technical assistance or payments under §1580.302 of this part may file a notice of appeal within 30 days of the date that the notification of the adverse determination was sent.

(b) A producer may not seek judicial review of any adverse decision under this paragraph without receiving a final determination pursuant to this paragraph.

### §1580.506 Judicial review.

Any producer aggrieved by a final agency determination under this part may appeal to the U.S. Court of International Trade for a review of such determination in accordance with its rules and procedures.

### §1580.602 Paperwork Reduction Act assigned number.

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and been assigned OMB control number 0551–0040.

## PART 1599—McGOVERN-DOLE INTERNATIONAL FOOD FOR EDUCATION AND CHILD NUTRITION PROGRAM

Sec.

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## § 1599.1 General statement.

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Foreign Agricultural Service (FAS) of the U.S. Department of Agriculture (USDA) to participants in the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program). Under the McGovern-Dole Program, participants use the donated commodities, proceeds from the sale of such commodities, or funds provided by FAS to implement activities in a foreign country pursuant to an agreement with FAS. FAS administers the McGovern-Dole Program and acts on behalf of the Commodity Credit Corporation (CCC) in cases where the agreement is funded with CCC resources.

(b) In addition to the provisions of this part, other regulations of general application issued by the Department, including the regulations set forth in Chapter 30 of this title, are applicable to the McGovern-Dole Program. In cases where an agreement is funded with CCC resources, provisions of the CCC Charter Act (15 U.S.C. 714 et seq.) and any other statutory provisions that are generally applicable to CCC are applicable to McGovern-Dole Program and the regulations set forth in this part.

(c) This part shall not apply to a donation by FAS to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under the McGovern-Dole Program.

## § 1599.2 Definitions.

The following definitions are applicable to this part:

*Activity* means a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* means a legally binding agreement entered into between FAS and a participant to implement activities under the McGovern-Dole Program.

*CCC* means the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*Donated commodities* mean the commodities donated by FAS to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service of the United States Department of Agriculture.

*FAS-provided funds* means U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and handling of the donated commodities, expenses involved in the administration and monitoring of the activities under the agreement, and the costs of activities conducted in the targeted country that would enhance the effectiveness of the activities implemented by the participant under the McGovern-Dole Program.

*Force majeure* is a common clause in contracts, exempting the parties for non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and other sources.

*McGovern-Dole Program* means the McGovern-Dole International Food for Education and Child Nutrition Program.

*Participant* means an entity with which FAS has entered into an agreement.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a

participant for the purpose of implementing in the targeted country activities described in a McGovern-Dole Program agreement and that is accountable to such participant for the use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Targeted country* means the country in which activities are implemented under an agreement.

**§ 1599.3 Eligibility determination.**

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

(1) Organizational experience in implementing and managing awards, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;

(2) Experience working in the proposed targeted country;

(3) An adequate financial framework to implement the activities the entity proposes to carry out under McGovern-Dole Program. In order to determine whether the entity is financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a McGovern-Dole Program agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1499 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

**§ 1599.4 Application process.**

(a) An entity seeking to enter into an agreement with FAS shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under the McGovern-Dole Program in the proposed targeted country. An application shall contain the items specified in paragraph (b) of this section and shall be submitted electronically to FAS at the address set forth at *http://www.fas.usda.gov*. An entity that has not yet met the eligibility requirements in § 1599.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1599.3.

(b) An applicant shall include the following items in its application:

(1) A completed Form SF–424, which is a standard application for Federal assistance;

(2) An introduction that contains the elements specified in paragraph (c) of this section; and

(3) A plan of operation that contains the elements specified in paragraph (d) of this section.

(c) The introduction shall include:

(1) An explanation of the need for food aid in the targeted country and how the applicant's proposed activities would address that need;

(2) An explanation of the need for a school feeding program in the targeted country and information regarding:

(i) The country's current school feeding operations, if they exist, the length and sessions of a typical school year, and current funding resources; and

(ii) Teacher training, parent-teacher associations, community infrastructure, and health, nutrition, water and sanitation conditions;

(3) Information regarding the applicant's ability to become registered and operate in the targeted country;

(4) Information about the applicant's past food aid projects;

(5) Methods that the applicant proposes to use to involve indigenous institutions as well as local communities and governments in the development and implementation of the activities in order to foster local capacity building and leadership;

(6) A budget that details the amount of any sale proceeds, income, and FAS-provided funds that the applicant proposes to use to fund:

(i) Administrative costs;

(ii) Inland transportation, storage and handling costs; and

(iii) Activity costs;

(7) A statement verifying the commitment of the government of the targeted country to work toward, through a national action plan, the goals of the World Declaration on Education for All convened in 1990 in Jomtien, Thailand, and the follow-up Dakar Framework for Action of the World Education Forum, convened in 2000; and

(8) A description of:

(i) How the benefits of education, enrollment, and attendance of children in schools in the targeted communities will be sustained when the assistance under the McGovern-Dole Program terminates; and

(ii) The estimated period of time required until the targeted country or the applicant would be able to sustain the program without additional assistance under the McGovern-Dole Program.

(d) A plan of operation shall include:

(1) The name of the targeted country where the proposed activities would be implemented;

(2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefor, and the proposed delivery schedule;

(3) If monetization or barter is proposed:

(i) The quantity of the requested commodities that would be sold or bartered;

(ii) The amount of sale proceeds anticipated;

(iii) The amount of income expected to be generated;

(iv) The anticipated monetization completion date;

(v) The goods or services to be generated from the barter of the requested commodities;

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities; and

(vii) A justification for monetizing the requested commodities that discusses why monetization would provide a greater benefit than the receipt of FAS-provided funds to carry out activities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, literacy rates, and any other required items set forth on the FAS Web site at *http://www.fas.usda.gov*.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution or barter of the requested commodities or funded by FAS-provided funds, sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities and FAS-provided funds requested, and of any sale proceeds and income expected to be generated, to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-FAS sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which the McGovern-Dole Program will strengthen or increase the capabilities of such entities

to further educational and economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's progress towards achieving the objectives of the proposed activities and the McGovern-Dole Program, which include:

(i) Increased enrollment and attendance rates, especially for girls;

(ii) Improved student achievement levels through improvements in the learning environment;

(iii) Improved maternal, child and student health and nutrition;

(iv) Attracting non-FAS contributions to development activities;

(v) Enabling community support for infrastructure development; and

(vi) Increased government and community support in education;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of any port, transportation, storage, and warehouse facilities that would be used with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste, and, in cases where the applicant proposes to distribute some or all of the requested commodities, a description of how they would be transported from the receiving port to the point at which distribution is made to the beneficiaries;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the applicant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at *http://www.fas.usda.gov*.

**§ 1599.5 Agreements.**

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of FAS and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or FAS-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated, except as approved by FAS.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and FAS-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or FAS-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that

the participant is aware of, and has the capacity to complete, all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using FAS-provided funds to acquire goods and services, either directly or indirectly through another party, from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by FAS of the agreement in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for as long as such donated commodities are controlled by the participant.

(g) FAS may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) FAS may provide donated commodities and FAS-provided funds under a multiyear agreement contingent upon the availability of commodities and funds.

**§ 1599.6 Payments.**

(a) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant seeks payment directly, the participant shall, as specified in the agreement, either submit to FAS, or maintain on file and make available to FAS, the following documents:

(1) A signed copy of the completed Form CCC–512;

(2) The original, or a true copy of, each on-board bill of lading indicating the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes, a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of the liner booking note or charter party covering ocean transportation of the cargo;

(6) In the case of charter shipments, a signed notice of arrival at the first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs other than at load port, and other expenses approved by FAS indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in § 1599.6(a) in order to receive payment from FAS.

(c) In no case will FAS reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing the donated commodities from the designated port or point of entry, the participant will be reimbursed in the manner set forth in the agreement.

(e) If the agreement authorizes the payment of FAS-provided funds, FAS will pay these funds to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of FAS-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance if:

(i) It is received earlier than 60 days after the date of a previous advance made in connection with the same agreement; or

(ii) Any required reports, as specified in §1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by FAS. The account shall be interest-bearing, unless the exceptions in §3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to FAS any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS accounting for all funds advanced and all interest earned.

(3) The participant shall return to FAS any funds that are advanced by FAS if such funds have not been obligated as of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to FAS in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment according to the purchase contract.

### §1599.7 Transportation of goods.

(a) Shipments of donated commodities are subject to the requirements of 46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by FAS under the McGovern-Dole Program will be acquired under a specific agreement in the manner determined by FAS. Such transportation will be acquired by:

(1) FAS in accordance with the Federal Acquisition Regulations (FAR), the Department's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR) and directives issued by the Director, Office of Procurement and Property Management, U.S. Department of Agriculture; or

(2) The participant, with reimbursement by FAS, in the manner specified in the agreement.

(c) A participant that acquires transportation in accordance with paragraph (b)(2) of this section may only use the services of a freight forwarder that is licensed by the Federal Maritime Commission (FMC) and that would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(1) Is not engaged, and will not engage, in supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under any McGovern-Dole Program agreement to which the participant is a party; and

(2) Is not affiliated with the participant and has not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) A participant that is responsible for transportation under paragraph (b)(2) of this section shall declare in the transportation contract the point at which the ocean carrier will take custody of commodities to be transported.

### §1599.8 Entry and handling of commodities.

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the

donated commodities from the designated point and time where title to the commodity passes to the participant by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the reprocessed product;

(iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered;

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

(i) Banners, posters or other media informing the public of the name and source of the donated commodities; and

(ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(d) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

### § 1599.9 Damage to or loss of commodities.

(a) FAS will be responsible for the donated commodities prior to the transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer as specified in the agreement.

(b) A participant shall inform FAS, in the manner and within the time period set forth in the agreement, of any damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of FAS with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant. The agreement will specify whether the participant is responsible for obtaining a survey in the event that the donated commodities are damaged or lost following the transfer of title to the commodities to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor, FAS will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

(i) The participant was required by the agreement to pay for the survey;

(ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or

(iii) The survey was not conducted contemporaneously with the discharge of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, and the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to:

(i) Observe the discharge of the cargo;

(ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales are not used, state the reason therefor and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the participant has title to the donated commodities, and the value of any damaged donated commodities is in excess of $1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The value of damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

(1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or

(2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

(i) Sale for the most appropriate use, *i.e.*, animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;

(ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or

(iii) Destruction of the commodities if they are unfit for any use, in such manner as to prevent their use for any purpose.

(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e)(1) of this section and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e) of this section, including the quantities, values and dispositions of commodities determined to be unfit.

**§ 1599.10 Claims for damage to or loss of commodities.**

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be $20,000 or greater, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be less than $20,000, the participant will be responsible for providing detailed information about the damage or loss in the next report required to be filed under § 1599.13(c)(1) or (2) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities, less any funds generated if such commodities are sold in accordance with § 1599.9(e)(1).

(e) If FAS determines that a participant is not exercising due diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

**§ 1599.11 Use of commodities and sale proceeds.**

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity or affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1599.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines that this requirement would constitute an undue burden.

(f) A participant may use sale proceeds or income to purchase real or personal property only if local law permits the participant to retain title to

such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(g) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. As provided for in the agreement, the participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

### § 1599.12 Subrecipients.

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or FAS-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or FAS-provided cash funds that are not used in accordance with the subagreement or are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient, FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or FAS-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and that performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter XXX of this title.

### § 1599.13 Recordkeeping and reporting requirements.

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section, as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated

commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the program agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and, in the case of bartered commodities, covering the services and goods derived from the barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the sale proceeds and income have been disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(4) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of two years after the agreement has been closed out.

(5) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an annual financial audit with respect to a particular agreement, and FAS provides funds for this purpose, the participant shall arrange for such audit and submit to FAS, in the manner specified in the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

(i) Is financially and legally separate from the participant's organization;

(ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;

(iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;

(iv) Uses local consultants, as appropriate, to conduct portions of the evaluation; and

(v) Provides a detailed outline of the evaluation, major tasks, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (e)(1) of this section is a condition for the participant to retain any funds provided by FAS to carry out the evaluations.

(f) A participant shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The agreement will specify the acceptable forms and time requirements for submission.

### § 1599.14 Noncompliance with an agreement.

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, or FAS-provided funds are lost due to an action or omission of the participant.

### § 1599.15 Suspension, termination, and closeouts of agreements.

(a) An agreement may be suspended or terminated by FAS if it determines that:

(1) The continuation of the assistance provided under the agreement is no longer necessary or desirable; or

(2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title.

(c) An agreement will be considered completed when FAS and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The procedures in §§ 3019.71 through 3019.73 of this title will apply to the closeout of a completed agreement.

### § 1599.16 Appeals.

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

### § 1599.17 Paperwork Reduction Act.

The information collection requirements contained in this regulation have been approved by OMB under provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Number 0551–0035.

# FINDING AIDS

A list of current CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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