

**§§ 4287.381–4287.399**

in the loan and the Loan Note Guarantee is returned to the Agency to be canceled.

**§§ 4287.381–4287.399 [Reserved]**

**§ 4287.400 OMB control number.**

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in the subsequent interim rule have been submitted to the Office of Management and Budget (OMB) under OMB Control Number 0570–0065 for approval. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**PART 4288—PAYMENT PROGRAMS**

**Subpart A—Repowering Assistance Payments to Eligible Biorefineries**

- Sec.
- 4288.1 Purpose and scope.
- 4288.2 Definitions.
- 4288.3 Review or appeal rights.
- 4288.4 Compliance with other laws and regulations.
- 4288.5 Oversight, monitoring, and reporting requirements.
- 4288.6 Forms, regulations, and instructions.
- 4288.7 Exception authority.
- 4288.8–4288.9 [Reserved]
- 4288.10 Applicant eligibility.
- 4288.11 Eligible project costs.
- 4288.12 Ineligible project costs.
- 4288.13 Payment information.
- 4288.14–4288.19 [Reserved]
- 4288.20 Submittal of applications.
- 4288.21 Application review and scoring.
- 4288.22 Ranking of applications.
- 4288.23 Notifications.
- 4288.24 Program payment provisions.
- 4288.25 Succession and control of facilities and production.
- 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.
- 4288.27–4288.100 [Reserved]

**Subpart B—Advanced Biofuel Payment Program**

**GENERAL PROVISIONS**

- 4288.101 Purpose and scope.
- 4288.102 Definitions.
- 4288.103 Review or appeal rights.
- 4288.104 Compliance with other laws and regulations.
- 4288.105 Oversight and monitoring.
- 4288.106 Forms, regulations, and instructions.
- 4288.107 Exception authority.

**7 CFR Ch. XLII (1–1–23 Edition)**

4288.108–4288.109 [Reserved]

**ELIGIBILITY PROVISIONS**

- 4288.110 Applicant eligibility.
- 4288.111 Biofuel eligibility.
- 4288.112 Eligibility notifications.
- 4288.113 Payment record requirements.
- 4288.114–4288.119 [Reserved]

**ENROLLMENT PROVISIONS**

- 4288.120 Enrollment.
- 4288.121 Contract.
- 4288.122–4288.129 [Reserved]

**PAYMENT PROVISIONS**

- 4288.130 Payment applications.
- 4288.131 Payment provisions.
- 4288.132 Payment adjustments.
- 4288.133 Payment liability.
- 4288.134 Refunds and interest payments.
- 4288.135 Unauthorized payments and offsets.
- 4288.136 Remedies.
- 4288.137 Succession and loss of control of advanced biofuel facilities and production.
- 4288.138–4288.200 [Reserved]

**AUTHORITY:** 5 U.S.C. 301; 7 U.S.C. 1989.

**SOURCE:** 76 FR 7926, Feb. 11, 2011, unless otherwise noted.

**Subpart A—Repowering Assistance Payments to Eligible Biorefineries**

**§ 4288.1 Purpose and scope.**

(a) *Purpose.* The purpose of this program is to provide financial incentives to biorefineries in existence on June 18, 2008, the date of the enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) (Pub. L. 110–246), to replace the use of fossil fuels used to produce heat or power at their facilities by installing new systems that use renewable biomass, or to produce new energy from renewable biomass.

(b) *Scope.* The Agency may make payments under this program to any biorefinery that meets the requirements of the program up to the limits established for the program. Based on our research and survey of medium-sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

(1) The Agency will determine the amount of payments to be made to a biorefinery taking into consideration the percentage reduction in fossil fuel

used by the biorefinery (including the quantity of fossil fuels a renewable biomass system is replacing), and the cost and cost-effectiveness of the renewable biomass system.

(2) The Agency will determine who receives payment under this program based on the percentage reduction in fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system; the cost and cost-effectiveness of the renewable biomass system; and other scoring criteria identified in § 4288.21. The above criteria will be used to determine priority for awards of 50 percent of total eligible project costs, up to the maximum award applicable for the fiscal year.

#### § 4288.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

*Agency.* The USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

*Application period.* The time period announced by the Agency during which the Agency will accept applications.

*Base energy use.* The amount of documented fossil fuel energy use over an extended operating period.

(1) The extended operating period must be at least 24 months of recorded usage, and requires metered utility records for electric energy, natural gas consumption, fuel oil, coal shipments and propane use, as applicable for providing heat or power for the operation of the biorefinery.

(2) Utility billing, oil and coal shipments must be actual bills, with meter readings, applicable rates and tariffs, costs and usage. Billing must be complete, without gaps and arranged in chronological order. Drop shipments of coal or oil can be substituted for metered readings, provided the biorefinery documents the usage and its relationship to providing heat or power to the biorefinery.

(3) A biorefinery in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide at least 12 months of data supported by engineering and design cal-

culations, and site plans, prepared by the construction engineering firm.

*Biobased products.* Products determined by the Secretary to be commercial or industrial products (other than food or feed) that are:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) Intermediate ingredients or feedstocks.

*Biofuel.* Fuel derived from renewable biomass.

*Biorefinery.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products, and may produce electricity.

*Eligible biorefinery.* A biorefinery that has been in existence on or before June 18, 2008.

*Energy Information Agency (EIA).* The statistical agency of the Department of Energy and source of official energy statistics from the U.S. Government.

*Feasibility study.* An Agency-acceptable analysis of the economic, environmental, technical, financial, and management capabilities of a proposed project or business in terms of its expected success. A list of items that must be included in a feasibility study is presented in § 4288.20(c)(9) of this subpart.

*Financial interest.* Any ownership, creditor, or management interest in the biorefinery.

*Fiscal year.* A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

*Fossil fuel.* Coal, oil, propane, and natural gas.

*Renewable biomass.*

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land or public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health; and

(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 as per paragraphs (e)(2), (e)(3), and (e)(4), and large tree retention as per paragraph (f), of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); 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 feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Rural or rural area.* Any area of a State not in a city or town that has a population of more than 50,000 inhabitants according to the most recent decennial Census of the United States, not in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and which excludes certain populations pursuant to 7 U.S.C. 1991(a)(13)(H) and (I), as well as any area that has been determined to be “rural in character” by the Under Secretary for Rural Development, or as otherwise identified in this definition.

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(3) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are “not urban in character.”

(4) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(5) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(6) The determination that an area is “rural in character” will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is “rural in character” under this definition will apply to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within one-quarter mile of a rural area.

(ii) Units of local government may petition the Under Secretary of Rural Development for a “rural in character” designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (6)(i)(A) or (6)(i)(B) of this definition and discuss why the petitioner believes the area is “rural in character,” including, but not limited to, the area’s population density, demographics, and topography and how

## **RBS and RUS, USDA**

## **§ 4288.5**

the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency's Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

[76 FR 7926, Feb. 11, 2011, as amended at 80 FR 9913, Feb. 24, 2015; 87 FR 38645, June 29, 2022]

### **§ 4288.3 Review or appeal rights.**

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

### **§ 4288.4 Compliance with other laws and regulations.**

Participating biorefineries must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunities Act, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, 7 CFR Part 1901, subpart E, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Applicants must submit and will be subject to pre-award and post award compliance reviews with the terms and conditions set forth in Form RD 400-1, "Equal Opportunity Agreement" and Form RD 400-4, "Assurance Agreement."

### **§ 4288.5 Oversight, monitoring, and reporting requirements.**

(a) *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made

under this program, including field visits, as frequently as necessary to ensure the integrity of the program. Documentation provided will be used to verify, reconcile, and enforce the payment terms of Form RD 4288-5, "Repowering Assistance Program—Agreement," along with any potential refunds that the recipient will be required to make should they fail to adequately document their request.

(b) *Records.* (1) For purposes of verifying the eligible project costs supporting payments under this subpart, each biorefinery must maintain in one place such books, documents, papers, receipts, payroll records and bills of sale adequate to identify the purposes for which, and the manner in which funds were expended for eligible project costs. The biorefinery must maintain copies of all documents submitted to the Agency in connection with payments made hereunder. These records must be available at all reasonable times for examination by the Agency and must be held and be available for Agency examination for a period of not less than 3 years from the final payment date.

(2) For the purpose of verifying compliance with the fossil fuel reduction and energy production requirements of this subpart, each biorefinery must make available and provide for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass. These records must be held in one place and be available at all reasonable times for examination by the Agency. Such records include all books, papers, contracts, scale tickets, settlement sheets, invoices, and any other documents related to the program that are within the control of the biorefinery. These records must be held and made available for Agency examination for a period of not less than 3 years from the date the repowering project becomes operational.

(c) *Reporting.* Upon completion of the repowering project, the biorefinery must submit a report using Form RD 4288-6, "Repowering Assistance Programs—Reporting Form," to the Agency annually for the first 3 years after

## § 4288.6

## 7 CFR Ch. XLII (1–1–23 Edition)

completion of the project. The reports are to be submitted as of October 1 of each year. The report must include the items specified in paragraphs (c)(1) and (c)(2) of this section.

(1) Documentation regarding the usage and production of energy at the biorefinery during the previous year, including both the previous and current fossil fuel load and the renewable biomass energy production.

(i) Metered data documenting the production of heat, steam, gas and power must be obtained utilizing an Agency approved measurement device.

(ii) Metered data must be verifiable and subject to independent calibration testing.

(2) Current utility billing data, indentifying metered loads, from the base energy use period.

### § 4288.6 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this program may be obtained from the USDA Rural Development State Office, Renewable Energy Coordinator and the USDA Rural Development Web site at <http://www.rurdev.usda.gov/regs/>.

### § 4288.7 Exception authority.

The Administrator of the Agency (“Administrator”) may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government’s interest.

### §§ 4288.8–4288.9 [Reserved]

### § 4288.10 Applicant eligibility.

(a) *Eligible projects.* To be eligible for this program, the applicant must be an eligible biorefinery utilizing only renewable biomass for replacement fuel, and must meet the requirements specified in paragraphs (a)(1) through (a)(5) of this section.

(1) *Timely complete application submission.* To be eligible for this program, the applicant must submit a complete

application within the application period. Projects will be selected based on ranking which is derived from the application of the selection criteria stated in § 4288.21.

(2) *Multiple biorefineries.* Corporations and entities with more than one biorefinery can submit an application for only one of their biorefineries. However, if a corporation or entity has multiple biorefineries located at the same location, the entity may submit an application that covers such biorefineries provided the heat and power used in the multiple biorefineries are centrally produced.

(3) *Cost-effectiveness.* The application must be awarded at least minimum points for cost-effectiveness under § 4288.21(b)(1).

(4) *Percentage of reduction of fossil fuel use.* The application must be awarded at least minimum points for percentage of reduction of fossil fuel use under § 4288.21(b)(2).

(5) *Full project financing.* The applicant must demonstrate that it has sufficient funds or has obtained commitments for sufficient funds to complete the repowering project taking into account the amount of the payment request in the application.

(b) *Ineligible projects.* A project is not eligible under this subpart if it is using feedstocks for repowering that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008.

### § 4288.11 Eligible project costs.

Eligible project costs will be only for project related construction costs for repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

### § 4288.12 Ineligible project costs.

Any project costs incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment assistance.

### § 4288.13 Payment information.

(a) *Maximum payment.* For purposes of this program, the maximum payment

an applicant may receive will be 50 percent of total eligible project costs up to the applicable fiscal year's maximum award as announced in an annual FEDERAL REGISTER notice. There is no minimum payment to an applicant.

(b) *Reimbursement payments.* The Agency shall only make payments based on the biorefinery's expenditures on eligible project costs. Payments shall be determined by multiplying the amount of eligible expenditures stated on the payment request by a percentage obtained by dividing the aggregate payment award by total eligible project costs.

(c) *Timing of payments.* The Applicant may request payments not more frequently than once a month by submitting an original, completed, validly signed Standard Form (SF) 271, "Outlay Report and Request for Reimbursement for Construction Programs" including the supporting documentation identified in § 4288.23, to reimburse the applicant for the Agency's pro rata share of funds expended on eligible project costs. The Agency shall make such payments until 90 percent of the total payment award has been expended. The final 10 percent of the payment award will be paid upon completion of the repowering project and satisfactory evidence has been received by the Agency demonstrating that the biorefinery is operating as described in the Agency approved application.

#### §§ 4288.14–4288.19 [Reserved]

#### § 4288.20 Submittal of applications.

(a) *Address to make application.* Application must be submitted to USDA, Rural Development-Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250-3225.

(b) *Content and form of submission.* Applicants must submit a signed original and one copy of an application containing the information specified in this section. The applicant must also furnish the Agency the required documentation identified in Form RD 4288-4, "Repowering Assistance Program Application," to verify compliance with program provisions before acceptance into the program. Note that appli-

cants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1-866-705-5711, or online at <http://fedgov.dnb.com/webform>. Applicants must submit to the Agency the documents specified in paragraphs (b)(1) through (b)(6) of this section.

(1) *Form RD 4288-4.* Applicants must submit this form and all necessary attachments providing project information on the biorefinery; the facility at which the biorefinery operates, including location and products produced; and the types and quantities of renewable biomass feedstock being proposed to produce heat or power. This form requires the applicant to provide relevant data to allow for technical analysis of their existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. The applicant must also submit evidence that the biorefinery was in existence on or before June 18, 2008. The applicant is required to certify the information provided.

(2) RD Instruction 1940-Q, Exhibit A-1, "Certification for Contracts, Grants and Loans."

(3) Form RD 400-1.

(4) Form RD 400-4.

(5) Environmental documentation in accordance with 7 CFR part 1970.

(6) Certifications. The applicant must furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions. The applicant must submit forms or other written documentation certifying to the following:

(i) AD-1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions" or other written documentation.

(ii) AD-1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions" or other written documentation.

(iii) SF–LLL, “Disclosure of Lobbying Activities.”

(c) *Application package contents.* Applicants are required to provide relevant data to allow for technical analysis of their existing facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm. All applicants must submit the information specified in paragraphs (c)(1) through (c)(9) of this section as part of their application package.

(1) *Contact data.* Contact information for the primary technical contact for the biorefinery.

(2) *Biorefinery data.* Basic information on facility operations over time (hours/day, days/year).

(3) *Electric use data.* Information on existing electric service to the facility, data on consumption, peak and average demand, and monthly/seasonal use patterns.

(4) *Fuel use data.* Information on natural gas and current fuel use for boilers and heaters, including fuel type, costs, and use patterns.

(5) *Thermal loads.* Information on existing thermal loads, including type (steam, hot water, direct heat), conditions (temperature, pressure) and use patterns.

(6) *Existing equipment.* Information on existing heating and cooling equipment, including type, capacities, efficiencies and emissions.

(7) *Site-specific data.* Information on other site-specific issues, such as expansion plans or neighborhood considerations that might impact the proposed new system design or operation; or environmental impacts.

(8) *Biofuel and biobased product production.* Information on biofuel and biobased product production, including quantity and units of production.

(9) *Feasibility study.* The applicant must submit a feasibility study by an independent qualified consultant, which has no financial interest in the biorefinery, and demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system. The feasibility study must include the components specified in paragraphs (c)(9)(i) through (c)(9)(x) of this section.

(i) An executive summary, including resume of the consultant, and an introduction/project overview (brief general overview of project location, size, *etc.*).

(ii) An economic feasibility determination, including:

(A) Information regarding the project site;

(B) Information on the availability of trained or trainable labor; and

(C) Information on the availability of infrastructure and rail and road service to the site.

(iii) A technical feasibility determination, including a report that:

(A) Describes the repowering project, including:

(1) Information on heating and cooling equipment, including type, capacities, efficiencies and emissions;

(2) Anticipated impacts of the repowering project on the information requested above relating to electric use data, fuel use data, thermal loads and biofuel and biobased product production; and

(3) A project development schedule as more fully described in § 4288.21(b)(4)(iv);

(B) Is based upon verifiable data and contains sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of energy production that are projected in the statements. The report must provide the information in a format that is responsive to the scoring criteria specified in § 4288.21(b)(1) through (5) and applicants should identify in their report the information that corresponds to each of the scoring criteria; and

(C) Identifies and estimates project operation and development costs and specifies the level of accuracy of these estimates and the assumptions on which these estimates have been based.

(iv) A financial feasibility determination that discusses the following:

(A) Repowering project construction funding, including repayment terms and security arrangements. Attach any documents relating to the project financing;

(B) The reliability of the financial projections and assumptions on which the project is based including all sources of project capital, both private and public, such as Federal funds;

(C) Projected balance sheets and costs associated with project operations;

(D) Cash flow projections for 3 years;

(E) The adequacy of raw materials and supplies;

(F) A sensitivity analysis, including feedstock and energy costs, product/co-product prices;

(G) Risks related to the project; and

(H) The continuity, maintenance and availability of records.

(v) A management feasibility determination.

(vi) Recommendations for implementation.

(vii) The environmental concerns and issues of the system.

(viii) The availability of feedstock, including discussions of:

(A) Feedstock source management;

(B) Estimates of feedstock volumes and costs;

(C) Collection, pre-treatment, transportation, and storage; and

(D) Impacts on existing manufacturing plants or other facilities that use similar feedstock.

(ix) The feasibility/plans of project to work with producer associations or co-operatives including estimated amount of annual feedstock from those entities.

(x) If woody biomass from National forest system lands or public lands is proposed as the feedstock, documentation must be provided that it cannot be used as a higher value wood-based product.

[76 FR 7926, Feb. 11, 2011, as amended at 81 FR 11053, Mar. 2, 2016]

#### § 4288.21 Application review and scoring.

The Agency will evaluate projects based on the cost, cost-effectiveness, and capacity of projects to reduce fos-

sil fuels. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

(a) *Review.* The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be conducted by experts in the Agency and other Federal agencies, including the U.S. Department of Energy based on the information provided by the applicant.

(b) *Scoring.* The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are specified in paragraphs (b)(1) through (b)(6) of this section.

(1) *Cost-effectiveness.* Cost-effectiveness will be scored based on the anticipated simple payback period, or "simple payback." Anticipated simple payback will be demonstrated by calculating documented base energy use costs for the 24-month period prior to submission of the application or at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

(i) The simple payback period is calculated as follows:

- Simple payback =  $C/S$

Where:

C = eligible capital expenses of the repowering project

S = savings in annual operating costs.

*Example:* Eligible capital expenses of the repowering project, including handling equipment, biomass boiler, piping improvements and plant modifications, are equal to \$5,300,500. The annual difference in fossil fuel cost versus the cost for renewable biomass is \$990,500. Assume these costs and uses are based on a yearly operating cycle, which

§ 4288.21

7 CFR Ch. XLII (1-1-23 Edition)

may include handling, storage and treatment costs. In this example, C = \$5,300,500; S = \$990,500; simple payback = 5.35 years (C/S = simple payback).

(ii) A maximum of 20 points will be awarded as follows:

(A) If the anticipated simple payback is less than or equal to 4 years, award 20 points.

(B) If the anticipated simple payback is greater than 4 years but less than or equal to 6 years, award 10 points.

(C) If the anticipated simple payback will be greater than 6 years but less than or equal to 10 years, award 5 points.

(D) If the anticipated simple payback will be greater than 10 years, award 0 points.

(2) *Percentage of reduction of fossil fuel use.* The anticipated percent reduction in the use of fossil fuels will be measured using the same evidence provided by the applicant for measuring cost-effectiveness. However, this set of criteria will measure actual fossil fuel use for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm. All fossil fuel use, for thermal loads as well as for electric use, will be evaluated by using information provided by the Energy Information Agency (EIA). The Agency will determine the percentage reduction of fossil fuel use based on and in cooperation with the applicant's submission of electric power provider contracts, power agreements, and utility billings in relation to available information from the EIA. A maximum of 35 points will be awarded as follows:

(i) Applicant demonstrates an anticipated annual reduction in fossil fuel use of 100 percent, award 35 points.

(ii) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 80 percent but less than 100 percent, award 25 points.

(iii) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 60 percent but less than 80 percent, award 15 points.

(iv) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 40 percent but less than 60 percent, award 5 points.

(v) Applicant demonstrates an anticipated annual reduction in fossil fuel use of less than 40 percent, award 0 points.

(vi) If any of the fossil fuel being replaced is natural gas, deduct 5 points.

(3) *Renewable biomass factors.* If an applicant demonstrates at the time of application that it has on site available access to renewable biomass or enforceable third party commitments to supply renewable biomass for the repowering project for at least 3 years, 5 points will be awarded. If an applicant cannot demonstrate this, no points will be awarded.

(4) *Technical review factors.* Technical reviews will be conducted by a team of experts, including rural energy coordinators and State engineers. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. Each section of the technical review will be scored within a range of possible points available within that section. A maximum of 25 points will be awarded as follows:

(i) *Qualifications of the applicant's project team.* The applicant must describe the qualifications of those individuals who will be essential to successful performance of the proposed project. This will include information regarding professional credentials, relevant experience, and education, and must be supported with documentation of service capabilities, professional credentials, licenses, certifications, and resumes, as applicable. Award 0-5 points.

(ii) *Agreements and permits.* The applicant must describe the agreements and permits necessary for project implementation. An Agency-acceptable schedule for securing the required documents and permits must be provided. Award 0-4 points.

(iii) *Design and engineering.* The applicant must describe the design, engineering, and testing needed for the proposed project. The Design and Engineering documents shall demonstrate that they meet the intended purpose, ensure public safety, and comply with

## RBS and RUS, USDA

## § 4288.24

all applicable laws, regulations, agreements, permits, codes, and standards. Award 0–4 points.

(iv) *Project development schedule.* The applicant must provide a detailed plan for project development including a proposed schedule of activities, a description of each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. This description must address the applicant's project development cash flow requirements. Award 0–3 points.

(v) *Equipment procurement.* The applicant must describe the equipment needed, and the availability of the equipment needed, to complete installation and activation of the new system. The description supports that the required equipment is available, and can be procured and delivered within the proposed project development schedule. Award 0–3 points.

(vi) *Equipment installation.* The applicant must provide a satisfactory description of the plan for site development and system installation that reflects the soundness of the project plan. Award 0–3 points.

(vii) *Operations and maintenance.* The applicant must describe the operations and maintenance requirements of the system necessary for the system to operate as designed and provide the savings and efficiencies as described. The description and requirements noted must be supportable by the technical review. Award 0–3 points.

(5) *Liquid transportation fuels.* If the biorefinery primarily produces liquid transportation fuels, award 10 points.

(6) *Rural area.* If the biorefinery is located in a Rural Area, award 5 points.

### § 4288.22 Ranking of applications.

All scored applications will be ranked by the Agency as soon after the application deadline as possible. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments.

(a) *Selection of applications for payments.* Using the application scoring criteria point values specified in

§ 4288.21 of this subpart, the Agency will select applications for payments.

(b) *Availability of funds.* As applications are funded, if insufficient funds remain to pay the next highest scoring application, the Agency may elect to pay a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

### § 4288.23 Notifications.

(a) *Successful applicants.* Successful applicants will receive an award letter notifying them of the award, including the terms and conditions, and Form RD 4288-5. Each funded project is unique, and, therefore, conditions of Form RD 4288-5 may vary among projects. Successful applicants must execute and return the Form RD 4288-5, accompanied by any additional items identified in the award letter.

(b) *Unsuccessful applicants.* Unsuccessful applicants will receive a letter notifying them of their application score and ranking and the score necessary to qualify for payments.

### § 4288.24 Program payment provisions.

The procedure the Agency will use to make payments to eligible biorefineries is specified in paragraphs (a) through (e) of this section.

(a) *Payment applications.* The Agency shall make payments based on the biorefinery's expenditures on eligible project costs. To request payments under this program during a fiscal year, an eligible biorefinery must:

(1) Submit an original, validly signed and completed SF 271 to the Agency not more frequently than once a month with the following supporting documentation:

(i) Evidence of expenditure of funds on eligible project costs which shall include paid third party invoices, receipts, bills of sale, and/or payroll records. Such records must be adequate to identify that funds to be reimbursed

**§ 4288.25**

**7 CFR Ch. XLII (1–1–23 Edition)**

were spent on eligible project costs; and

(ii) Evidence that construction of the repowering project is in compliance with the project development schedule.

(2) Certify that the request is accurate.

(3) Furnish the Agency such certifications as required in Form RD 4288–4, Part C, and access to records that verify compliance with program provisions.

(b) *Clarifying information.* After payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment.

(c) *Notification.* The Agency will notify the biorefinery, in writing, whenever the Agency determines that a payment request is ineligible and why the request was determined ineligible.

(d) *Refunds and interest payments.* An eligible biorefinery that has received a payment under this program may be required to refund such payment as specified in paragraphs (d)(1) through (d)(5) of this section.

(1) An eligible biorefinery receiving payment under this program will become ineligible for payments if the Agency determines the biorefinery has:

(i) Made any material fraudulent representation;

(ii) Misrepresented any material fact affecting a program determination; or

(iii) Upon completion of the repowering project, failed to reduce its fossil fuel consumption, produce energy from renewal biomass or otherwise operate as described in its Agency approved application.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs, as determined appropriate under 31 CFR 901.9.

(3) When a refund is due, it must be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial

judgment against the biorefinery, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, and the rate will adjust in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any fraudulent or negligent action of the biorefinery.

(5) A biorefinery or person receiving payment under this program will be liable for any refund or related charges associated with their project due under this program.

(e) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

**§ 4288.25 Succession and control of facilities and production.**

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass 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.

**§ 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.**

Any entity that submitted an application for payment to the Agency

under this program prior to March 14, 2011 will have their payments made and serviced in accordance with the provisions specified in this subpart.

§§ 4288.27–4288.100 [Reserved]

**Subpart B—Advanced Biofuel Payment Program General Provisions**

AUTHORITY: 5 U.S.C. 301.

SOURCE: 76 FR 7967, Feb. 11, 2011, unless otherwise noted.

**§ 4288.101 Purpose and scope.**

(a) *Purpose.* The purpose of this subpart is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers.

(b) *Scope.* This subpart sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions an advanced biofuel producer must meet to obtain payments under this Program from the United States Department of Agriculture for eligible advanced biofuel production. Additional terms and conditions may be set forth in the Program contract and payment agreement prescribed by the Agency.

**§ 4288.102 Definitions.**

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

*Advanced biofuel.* A fuel that is derived from renewable biomass, other than corn kernel starch, to include:

- (1) Biofuel derived from cellulose, hemicellulose, or lignin;
- (2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
- (3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;
- (4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;
- (5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or

(7) Other fuel derived from cellulosic biomass.

*Advanced biofuel producer.* An individual, corporation, company, foundation, governmental entity, school or other educational facility, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this subpart. An entity that produces biofuel exclusively under a toll/bailment arrangement/third part production contract is not considered an advanced biofuel producer under this subpart.

*Agency.* The USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

*Alcohol.* 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 biofuel facility and in a manner approved by the Bureau of Alcohol, Tobacco, Firearms, and Explosives for the production of alcohol for fuel; or
- (2) As denatured alcohol used by blenders and refiners and rendered unfit for beverage use.

*Alcohol producer.* An advanced biofuel producer authorized by ATF to produce alcohol.

*ATF.* The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

*Bailment.* The temporary placement of control over, or possession of property by an individual or entity, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed. For purposes of this Program any advanced biofuel produced by a toll producer of any form, or under any form of third-party production agreement, is regarded/considered as produced under bailment and is ineligible for payment; to either bailor or bailee.

*Biodiesel.* A mono alkyl ester, manufactured in the United States and its

territories, that meets the requirements of the appropriate ASTM International standard.

*Biofuel.* Fuel derived from renewable biomass.

*Biorefinery.* The term “biorefinery” means a facility (including equipment and processes) that—

(1) Converts renewable biomass or an intermediate ingredient or feedstock of renewable biomass into any 1 or more, or a combination, of—

- (i) Biofuels;
  - (ii) Renewable chemicals; or
  - (iii) Biobased products; and
- (2) May produce electricity.

*Blender.* A blender is a processor of fuels who combines two or more fuels, one of which must be an advanced biofuel, for distribution and sale. Producers who blend one or more of their own fuels are not blenders under this definition.

*Certificate of analysis.* A document approved by the Agency that certifies the quality and purity of the advanced biofuel being produced. The document must be from a qualified, independent third party.

*Commodity.* Renewable biomass, other than corn kernel starch, used primarily for the purposes of this Program, by advanced biofuel producers as feedstock from which to produce/derive advanced biofuel. Eligible renewable biomass is organized into the following commodity categories:

(1) Title I grains and oilseeds including: Wheat, corn, grain sorghum, barley, oats, and rice; sugars, and starches (other than corn kernel starch); Soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard, crambe, sesame, and peanuts; as identified under Title I, Public Law 115-334, and as determined by the Secretary;

(2) Other oilseeds and nuts including cottonseed, palm, camelina, coconut, and olive; and algae;

(3) A cellulosic commodity grown for energy purposes, such as, hybrid poplar and other energy trees, switch grass and other energy grasses; cellulose, hemicellulose, or lignin;

(4) Waste material, including crop residue/Stover, other vegetative waste material/orchard waste, animal waste/manure, food waste/food processing

waste, and yard waste/biodegradable solid waste/organic matter;

(5) Fats, oils, and greases, derived from an agricultural product, including: Recycled fats, oils, and greases, such as used cooking oil and reclaimed-industrial grade-distillers’ corn/sorghum oil; tallow, white grease, yellow grease, and other livestock renderings; and

(6) Any animal byproduct (in addition to oils, fats, and greases) that may be used to produce bioenergy, as determined by the Secretary.

*Contract.* Form RD 4288-2, “Advanced Biofuel Payment Program Contract,” signed by the eligible advanced biofuel producer and the Agency, that defines the terms and conditions for participating in and receiving payment under this Program.

*Derived.* A process that creates a physical, and/or chemical, and/or biological change in renewable biomass/feedstock.

*Eligible advanced biofuel producer.* A producer of advanced biofuels that meets all requirements of § 4288.110 of this subpart.

*Eligible renewable biomass.* Renewable biomass, as defined in this section, excluding corn kernel starch. See also commodity.

*Eligible renewable energy content.* That portion of an advanced biofuel’s energy content derived from eligible renewable biomass feedstock. The energy content from any portion of the biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-eligible renewable biomass feedstock (e.g., corn kernel starch) is not eligible for payment under this Program.

*Enrollment application.* Form RD 4288-1, “Advanced Biofuel Payment Program Annual Application,” which is submitted by advanced biofuel producers for participation in this Program.

*Ethanol.* Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, and which has been rendered unfit for beverage use and produced at an advanced biofuel facility approved by the ATF for the production of ethanol for fuel, or

(2) As denatured ethanol used by blenders and energy refiners, which has been rendered unfit for beverage use.

*Ethanol producer.* An advanced biofuel producer authorized by ATF to produce ethanol.

*Final Product.* A product of a biorefinery that is ready for sale/distribution without further processing. For purposes of this Program, an advanced biofuel is a Final Product eligible for payment if it is ready for distribution and sale as a fuel.

*Fiscal Year.* A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

*Flared gas.* The burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when the operator cannot transport the gas to market or convert to electricity and cannot use the gas for any other purpose.

*Incremental production.* The quantity of eligible advanced biofuel produced at an advanced biofuel biorefinery in the fiscal year for which payment is sought that exceeds the quantity of advanced biofuel produced at the biorefinery over the prior fiscal year.

*Large producer.* (1) An advanced biofuel producer which in the prior fiscal year, produced more than:

- (i) 150,000,000 gallons of liquid advanced biofuel per year; or
- (ii) 15,900,000 Million British Thermal Units (MMBTU) of biogas and/or solid advanced biofuel per year.

(2) The amount of gallons and MMBTUs listed in paragraphs (1)(i) and (ii) of this definition include the advanced biofuel production at all facilities, in the United States, in which the producer and/or its parent company(ies) have a 50-percent or greater ownership.

*Parent company.* A company/corporation that has a controlling interest in another company/corporation, giving it control of its operations. The company is deemed a subsidiary of the parent company.

*Payment application.* Form RD 4288-3, "Advanced Biofuel Payment Program—Payment Request," which is submitted by an eligible advance producer to the Agency in order to receive payment under this Program.

*Quarter.* The Federal fiscal time period for any fiscal year as follows:

- (1) 1st Quarter: October 1 through December 31;
- (2) 2nd Quarter: January 1 through March 31;
- (3) 3rd Quarter: April 1 through June 30; and
- (4) 4th Quarter: July 1 through September 30.

*Renewable biomass.*

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts 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 paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); 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 feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Sale.* A transaction between two or more parties, typically a buyer and a seller, in which goods or services are exchanged for money or other assets.

*Sign-up period.* The time period during which the Agency will accept enrollment applications.

*State.* Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

*Third party production.* Third party production involves outsourcing production processes to a third-party company whereby the third-party company, hired to produce, is supplying the manufacturing process as well as sourcing the raw materials/commodity feedstock. The contract producer is responsible for manufacturing the product to specification and disposition/delivery requirements. For purposes of this Program, any advanced biofuel produced under a contractual third-party production agreement is ineligible for payment. A producer that is strictly a third-party contractor produces no eligible advanced biofuel.

*Toll producer.* See also bailment. Toll production/manufacturing is an arrangement, where a company with specialised equipment processes raw materials or unfinished goods for a different company. A toll producer of advanced biofuels produces advanced biofuels for another company. For purposes of this Program, any advanced biofuel produced by a toll producer of any form, or under any form of third-party production agreement, is regarded/considered as produced under bailment and is ineligible for payment.

*USDA.* The United States Department of Agriculture.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71301, Dec. 27, 2019]

#### § 4288.103 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

#### § 4288.104 Compliance with other laws and regulations.

(a) Advanced biofuel producers must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age

Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

(b) Producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. Rural Development will not discriminate against an applicant on the bases of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

#### § 4288.105 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment applications and subsequent payments made under this subpart, as frequently as necessary, to ensure the integrity of the Program. The Agency will conduct site visits as necessary.

(1) *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of commodity/eligible renewable biomass used.

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records for quarterly payments to ensure that each Certificate of Analysis has been issued by an Agency-approved qualified entity, which may include the blender only if the blender is not associated with the biorefinery.

(b) *Records.* For the purpose of verifying compliance with the requirements of this subpart, each eligible advanced biofuel producer shall make available at one place at a reasonable time for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price

## RBS and RUS, USDA

## § 4288.111

quotations, and other documents related to the Program that is within the control of such advanced biofuel producer for not less than 3 years from each Program payment date.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71302, Dec. 27, 2019]

### § 4288.106 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this Program may be obtained from the USDA Rural Development State Office, Rural Energy Coordinator and the USDA Rural Development website at <https://www.rd.usda.gov/>.

[84 FR 71302, Dec. 27, 2019]

### § 4288.107 Exception authority.

The Administrator of the Agency (“Administrator”) may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government’s interest.

### §§ 4288.108–4288.109 [Reserved]

#### ELIGIBILITY PROVISIONS

### § 4288.110 Applicant eligibility.

Sections 4288.110 through 4288.119 present the requirements associated with advanced biofuel producer eligibility, biofuel eligibility, eligibility notifications, and payment record requirements. To be eligible for this Program, the applicant must meet the requirements specified in paragraph (a) of this section and must provide additional information as may be requested by the Agency under paragraph (b) of this section. Public bodies and educational institutions are not eligible for this Program.

(a) *Eligible producer.* The applicant must be an advanced biofuel producer, as defined in this subpart.

(b) *Eligibility determination.* The Agency will determine an applicant’s eligibility for participation in this Program. If an applicant’s original sub-

mittal is not sufficient to verify an applicant’s eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant’s eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the applicant’s eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the Agency will not consider the applicant any further for participation in the upcoming fiscal year. Such applicants may elect to enroll during the next sign-up period.

(c) *Ineligibility determination.* An otherwise eligible producer will be determined to be ineligible if the producer:

(1) Refuses to allow the Agency to verify any information provided by the producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;

(2) Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or

(3) Fails to comply with all applicable Federal, State, or local laws.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71302, Dec. 27, 2019]

### § 4288.111 Biofuel eligibility.

To be eligible for this Program, a biofuel must meet the requirements specified in paragraph (a) of this section, and must not be listed in paragraph (b) of this section, and the biofuel’s producer must provide additional information as may be requested by the Agency under paragraph (c) of this section.

(a) *Eligible advanced biofuel.* For an advanced biofuel to be eligible, each of the following conditions must be met, as applicable:

(1) The advanced biofuel must meet the definition of advanced biofuel and be produced in a State;

**§ 4288.112**

**7 CFR Ch. XLII (1–1–23 Edition)**

(2) The advanced biofuel must be a solid, liquid, or gaseous advanced biofuel;

(3) The advanced biofuel must be a Final Product; and

(4) The advanced biofuel must be sold as an advanced biofuel through an arm's length transaction to a third party.

(b) *Ineligible fuels.* Notwithstanding the provisions of paragraph (a) of this section, for the purposes of this Program, the following fuels, and as may be supplemented by the Agency through the publication of documents in the FEDERAL REGISTER, are not eligible for payment:

(1) Flared gases;

(2) Fuels derived from paper milling and other processes commonly ascribed to wood products manufacturing and generically referred to as "liquor" (e.g., black liquor, red liquor, brown liquor, white liquor, green liquor, etc.), which typically are blended with diesel and burned as boiler fuel;

(3) Biofuels produced from solid eligible renewable biomass primarily by mechanical means, whether by hand or by machine, such as collecting, baling, bundling, chopping, screening, and chipping of the renewable biomass. Examples of ineligible biofuels that are not eligible advanced biofuels for the purposes of this subpart include, but are not limited to, baled energy grasses, chipped or chunked woody biomass, and chopped or split firewood; and

(4) Any advanced biofuel produced under bailment or third-party production contract and/or any variation thereof.

(c) *Eligibility determination.* The Agency will determine a biofuel's eligibility for payment under this Program. If an applicant's original submittal is not sufficient to verify a biofuel's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the biofuel's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency

within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment under this Program in the upcoming fiscal year. Applicants may elect to include such biofuels in the application form submitted during the next sign-up period.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71302, Dec. 27, 2019]

**§ 4288.112 Eligibility notifications.**

(a) *Applicant eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

(b) *Ineligibility notifications.* If an applicant or a biofuel is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to the reason(s) the applicant or biofuel was determined to be ineligible. Such applicant will have appeal rights as specified in this subpart.

(c) *Subsequent ineligibility determinations.* If at any time a producer or an advanced biofuel is determined to be ineligible, the Agency will notify the producer in writing of its determination.

**§ 4288.113 Payment record requirements.**

To be eligible for Program payments, an advanced biofuel producer must maintain records for all relevant fiscal years and fiscal year quarters for each advanced biofuel facility indicating:

(a) The type of eligible renewable biomass used in the production of advanced biofuel;

(b) The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel facility;

(c) The quantity of eligible renewable biomass used at each advanced biofuel facility to produce the advanced biofuel; and

(d) All other records required to establish Program eligibility and compliance.

## §§ 4288.114–4288.119 [Reserved]

## ENROLLMENT PROVISIONS

## § 4288.120 Enrollment.

In order to participate in the Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling in the Program is presented in this section. Advanced biofuel producers who expect to produce eligible advanced biofuels at any time during a fiscal year must enroll in the Program as described in this section.

(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. Applicants must be registered in the System for Award Management (SAM) prior to submitting an application; which can be obtained at no cost via a toll-free request line at (866) 705-5711 or online at [www.sam.gov/SAM](http://www.sam.gov/SAM). Registration of a new entity in SAM requires an original, signed, and notarized letter stating that the applicant is the authorized Entity Administrator, before the registration will be activated.

(1) Eligible advanced biofuel producers must submit enrollment applications during each sign-up period in order to continue participating in this Program. If a participating producer fails to submit the enrollment application during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year. Such a producer must reapply, and sign a new contract, to participate in the Program for future fiscal years.

(2) Eligible advanced biofuel producers may submit an enrollment application during a fiscal year's sign-up period even if the advanced biofuel facility is not currently producing, but is scheduled to start producing advanced biofuel in that fiscal year.

(3) The producer must furnish the Agency all required certifications before acceptance into the Program, and furnish access to the advanced biofuel producer's records required by the

Agency to verify compliance with Program provisions. The required certifications depend on the type of biofuel produced. Certifications specified in paragraphs (a)(3)(i) through (a)(3)(iv) of this section are to be completed and provided by an accredited independent third party.

(i) *Alcohol.* For alcohol producers with authority from ATF to produce alcohol, copies of either

(A) The Alcohol Fuel Producers Permit (TTB F 5110.74) or

(B) The registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).

(ii) *Hydrous ethanol.* For hydrous ethanol that is upgraded by another distiller to anhydrous ethyl alcohol, the increased ethanol production is eligible for payment one time only. If the advanced biofuel producer entering into this agreement is:

(A) The hydrous ethanol producer, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(1) Applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(2) Distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.

(B) The distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.

(iii) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass.* For these fuels, the advanced biofuel producer shall certify that the producer, the advanced biofuel facility, and the biofuel meet the definitions of these terms as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act and under the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and the

§ 4288.121

7 CFR Ch. XLII (1–1–23 Edition)

quality requirements per applicable ASTM International standards (e.g., ASTM D6751) and commercially acceptable quality standards of the local market. If a Renewable Identification Number has been established, the advanced biofuel producer shall also provide documentation of the most recent Renewable Identification Number for a typical gallon of each type of advanced biofuel produced.

(iv) *Gaseous advanced biofuel.* For gaseous advanced biofuel producers, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine the quantity of advanced biofuel produced are industry standard and properly calibrated by a third-party professional; and that the readings have been taken by a qualified individual.

(v) *Woody biomass feedstock.* If the feedstock is from National Forest system land or public lands, documentation must be provided that it cannot be used as a higher value wood-based product.

(4) Applicants must submit the forms specified in this paragraph (a)(4) with the enrollment application when applying for participation under this subpart and as needed when re-enrolling in the program.

(i) RD Instruction 1940-Q, Exhibit A-1, “Certification for Contracts, Grants and Loans.”

(ii) SF-LLL, “Disclosure of Lobbying Activities.”

(iii) Form RD 400-4, “Assurance Agreement.”

(b) *Sign-up period.* The sign-up period is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a FEDERAL REGISTER notice.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71302, Dec. 27, 2019]

§ 4288.121 **Contract.**

Advanced biofuel producers determined to be eligible to receive payments must then enter into a contract with the Agency in order to participate in this Program.

(a) *Contract.* The Agency will forward the contract to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and con-

ditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

(b) *Length of contract.* Once signed, a contract will remain in effect until terminated as specified in paragraph (d) of this section.

(c) *Contract review.* All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

(d) *Contract termination.* Contracts under this Program will be terminated in writing by the Agency. Contracts may be terminated under any one of the following conditions:

(1) At the mutual agreement of the parties;

(2) In accordance with applicable Program notices and regulations;

(3) The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;

(4) The advanced biofuel producer fails to submit the enrollment application during a sign-up period;

(5) The Program is discontinued or not funded;

(6) All of a participating advanced biofuel producer’s advanced biofuel facilities no longer exist or no longer produce any eligible advanced biofuel; or

(7) The Agency determines that the advanced biofuel producer is ineligible for participation.

§§ 4288.122–4288.129 [Reserved]

PAYMENT PROVISIONS

§ 4288.130 **Payment applications.**

Sections 4288.130 through 4288.189 identify the process and procedures the Agency will use to make payments to eligible advanced biofuel producers. In order to receive payments under this Program, eligible advanced biofuel producers with valid contracts must submit a payment application, as required under paragraph (a) of this section. The Agency will review the payment application and, if necessary, may request additional information, as specified under paragraph (b) of this section.

(a) *Applying for payment.* To apply for payments under this subpart for a fiscal year, an eligible advanced biofuel producer must:

## RBS and RUS, USDA

## § 4288.131

(1) After a quarter has been completed, submit a payment application covering the quarter;

(2) Certify that the request is accurate;

(3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and

(4) Provide documentation as requested by the Agency of the net production of advanced biofuel at all advanced biofuel facilities during the relevant quarter.

(b) *Review of payment applications.* The Agency will review each payment application it receives to determine if it is eligible for payment.

(1) *Review factors.* Factors that the Agency will consider in reviewing payments applications include, but are not necessarily limited to:

(i) *Contract validity.* Whether the entity submitting the payment application has a valid contract with the Agency under this Program;

(ii) *Biofuel eligibility.* Whether the biofuel for which payment is sought is an eligible advanced biofuel; and

(iii) *Calculations.* Whether the calculations for determining the requested payment are complete and accurate.

(2) *Additional documentation.* If the Agency determines additional information is required for the Agency to complete its review of a payment application, eligible advanced biofuel producers shall submit such additional supporting documentation as requested by the Agency. If the producer does not provide the requested information within the required time period, the Agency will not make payment.

(c) *Payment application eligibility.* The Agency will notify the advanced biofuel producer, in writing, as soon as practicable after the payment application, whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment and the basis for the Agency's determination of ineligibility.

(d) *Submittal information.* Unless otherwise specified in a notice published in the FEDERAL REGISTER, eligible advanced biofuel producers must submit payment applications for this Program

no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. No payment applications received after the specified date and time will be considered, regardless of the postmark on the application.

(1) Any payment application form that is received by the Agency after October 31 of the calendar year for the preceding fiscal year is ineligible for payment.

(2) If the actual deadline falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

[76 FR 7967, Feb. 11, 2011, as amended at 84 FR 71302, Dec. 27, 2019]

### § 4288.131 Payment provisions.

Payments to advanced biofuel producers for eligible advanced biofuel production will be determined in accordance with the provisions of this section.

(a) *Actual production.* Participating producers will be paid on a quarterly basis for the actual quantity of eligible advanced biofuel produced during the quarter. Payment for actual production will be determined according to paragraph (d) of this section.

(b) *Amount of payment funds available.* Based on the amount of funds made available to this Program each fiscal year, the Agency will allocate available program funds according to paragraphs (c), (d), and (e) of this section.

(c) *Quarterly allocations.* For each fiscal year, the Agency will allocate in each quarter one-fourth of the funds identified in paragraph (b) of this section allocated for the entire fiscal year.

(d) *Determination of payment rate.* Each quarter, the Agency will establish an actual production payment rate using the procedures specified in paragraphs (d)(1) through (4) of this section. This rate will be applied to the actual quantity of eligible advanced biofuel produced to determine payments to eligible advanced biofuel producers.

(1) Based on the information provided in each payment application, the Agency will determine the eligible advanced biofuel production. If the Agency determines that the amount of advanced

biofuel production reported in a payment application is not supported by the documentation submitted with the payment application, the Agency may revise the reported production to an amount that is commensurate with the submitted documentation.

(2) For each producer, the Agency will convert the production determined to be eligible under paragraph (c) of this section into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (EIA) (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency, in consultation with other Federal agencies, will establish and use a conversion formula as appropriate, until the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(3) For each quarter, the Agency will determine the actual production payment rate (\$/BTU) based on paragraphs (b), (c), and (d) of this section. The rate will be calculated such that all quarterly funds for actual production will be distributed, subject to the payment provisions specified in paragraph (e) of this section.

(4) Using the actual production payment rate determined and the actual production for each type of advanced biofuel produced at a biorefinery, the Agency will calculate each quarter payment for each eligible advanced biofuel producer for that quarter.

(e) *Other payment provisions.* The following provisions apply:

(1) Notwithstanding any other provisions in this section, the Agency will provide payments to one or more eligible advanced biofuel producers from a single eligible Commodity, including intermediate ingredients of that single Commodity or use of that single Commodity and its intermediate ingredients in combination with another Commodity, of not more than one-third of

available program funds in each quarter.

(i) Payments to producers for advanced biofuel derived from a commodity listed in Title I grains and oilseeds (as defined paragraph (1) of the definition of commodity in §4288.102), are subject to the one-third limitation as tracked individually for each commodity. For example, with respect to the Title I grains and oilseeds commodity—grain sorghum, all payments for the quarter to producers of advanced biofuel derived from grain sorghum are tabulated and subject to the one-third payment limitation. This is similarly true for each commodity listed under Title I grains and oilseeds—barley, oats, rice, soybeans, etc.

(ii) Payments to producers for advanced biofuel derived from a commodity listed in paragraphs (2) through (6) of the definition of commodity in §4288.102, inclusively, are subject to the one-third limitation as tracked cumulatively with each commodity group. For example, with respect to the commodity in paragraph (2) of the definition of commodity (other oilseeds and nuts including cottonseed, palm, camelina, coconut, and olive and algae), all payments for the quarter to producers of fuel derived from “other oilseeds, nuts and algae” are tabulated cumulatively (all are tracked as “other oilseeds, nuts, and algae” whether olive, or coconut, or camelina, etc.) and subject cumulatively to the one-third payment limitation. This is similarly true for the commodity in paragraphs (3) through (6) of the definition of commodity.

(2) Notwithstanding any other provision of this section, the Agency will provide payments to large producers of not more than five (5) percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to large producers would be reached, the Agency will prorate payments to large producers based on the BTU content of their eligible advanced biofuel production so as not to exceed the limit.

(3) Notwithstanding any other provision of this section, the Agency will provide payments to any eligible advanced biofuel producer, that is not a large producer, of not more than eight

(8) percent of available funds in any fiscal year. At any time during the year, if the eight percent to the advanced biofuel producer would be reached, the Agency will pro-rate payments based on the BTU content of the eligible advanced biofuel production so as not to exceed the limit.

(4) Advanced biofuel producers will be paid based on the amount of eligible renewable energy content of the advanced biofuels only if the producer provides sufficient documentation, including a Certificate of Analysis, for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(5) Payment will be made to only one eligible advanced biofuel producer per biorefinery. If a producer owns more than one facility, the Agency's tracking system will add all actual BTUs and calculate one payment amount. For facilities owned by more than one producer, only one payment will be issued per facility.

(6) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due.

(7) A producer will be paid only for the advanced biofuels identified in the enrollment application submitted during the sign-up period and which are produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer may identify new advanced biofuels and production levels compared to the previous year.

(8) When determining the quantity of eligible advanced biofuel, if an applicant is blending its advanced biofuel using ineligible feedstocks (*e.g.*, fossil gasoline or methanol, corn kernel starch), only the quantity of advanced biofuel being produced from Renewable Biomass, other than corn kernel starch, will be used in determining the payment rates and for which payments will be made.

[84 FR 71302, Dec. 27, 2019]

#### § 4288.132 Payment adjustments.

The Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

#### § 4288.133 Payment liability.

Any payment, or portion thereof, made 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 advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

#### § 4288.134 Refunds and interest payments.

An eligible advanced biofuel producer who receives payments under this subpart may be required to refund such payments as specified in this section. If the Agency suspects fraudulent representation through its site visits and records inspections under § 4288.105(b), it will be referred to the Office of Inspector General for appropriate action.

(a) An eligible advanced biofuel producer receiving payments under this subpart shall become ineligible if the Agency determines the advanced biofuel producer has:

(1) Made any fraudulent representation; or

(2) Misrepresented any material fact affecting a Program determination.

(b) If an Agency determination that a producer is not eligible for participation under this subpart is appealed and overturned, the Agency will make appropriate and applicable payments to the producer from Program funds, to the extent such funds are available, that remain from the fiscal year in which the original adverse Agency decision was made.

(c) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

(d) When a refund is due, it shall be paid promptly. If a refund is not made

promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice.

(e) Late payment interest shall be assessed on each refund in accordance with the provisions and rates as established by the United States Treasury.

(1) Interest charged by the Agency under this subpart shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made by the Agency to the date of repayment by the producer.

(2) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

(f) Any advanced biofuel producer or person engaged in an act prohibited by this section and any advanced biofuel producer or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this subpart and for related charges.

**§ 4288.135 Unauthorized payments and offsets.**

When unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency reserves the right to collect from the recipient the sum that is determined to be unauthorized. If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments.

(a) *Unauthorized assistance.* The Agency will seek to collect from recipients all unauthorized assistance made under this Program using the procedures specified in paragraphs (a)(1) through (a)(4) of this section.

(1) *Notification to the producer.* Upon determination that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. Unless the Agency modifies the original demand, it will

remain in full force and effect. The demand letter will:

(i) Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;

(ii) State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;

(iii) Provide detailed reason(s) why the assistance was determined to be unauthorized;

(iv) State the amount is immediately due and payable to the Agency;

(v) Describe the rights the producer has for seeking review or appeal of the Agency's determination pursuant to 7 CFR part 11;

(vi) Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

(vii) Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

(A) If the producer meets with the Agency, the producer will be given an opportunity to provide information to refute the Agency's findings.

(B) When requested by the producer, the Agency may grant additional time for the producer to assemble documentation. Such extension of time for payment will be valid only if the Agency documents the extension in writing and specifies the period in days during which period the payment obligation created by the demand letter (but not the ongoing accrual of interest) will be suspended. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

(2) *Payment in full.* If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

(3) *Promissory note.* If the producer agrees with the Agency's determination or is willing to pay the amount in question, but cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided all of the conditions specified in paragraphs (a)(3)(i) through (a)(3)(iii) of this section are met. Loans established under this paragraph will be at the Treasury interest rate in effect on the date the financial assistance was provided and that is consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner that will adequately protect the Agency's interest during the repayment period will be taken as security.

(i) The producer did not provide false information;

(ii) It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

(iii) Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

(4) *Appeals.* Appeals resulting from the demand letter prescribed in paragraph (a)(1) of this section will be handled according to the provisions of § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

(b) *Offsets.* Failure to make payment as determined under paragraph (a) of

this section will be treated by the Agency as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer.

(1) Any debtor who wishes to reach a written agreement to repay the debt as an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

(2) When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the initial agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, payment will be deferred pending resolution of the review.

#### § 4288.136 Remedies.

In addition to the steps available under the provisions of §§ 4288.134 and 4288.135, if the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance with 2 CFR part 417:

(a) Suspend payments on the Contract until the violation has been reconciled;

(b) Terminate the Contract; or

(c) Debarment to participate in any Federal Government program.

[76 FR 7967, Feb. 11, 2011, as amended at 85 FR 31939, May 28, 2020]

#### § 4288.137 Succession and loss of control of advanced biofuel facilities and production.

(a) *Contract succession.* An entity who becomes the eligible advanced biofuel producer for an advanced biofuel facility that is under contract under this subpart must request permission from the Agency to succeed to the Program

**§§ 4288.138–4288.200**

contract and the Agency may grant such request if it is determined that the entity is an eligible producer and permitting such succession would serve the purposes of the Program. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

(b) *Loss of control.* Payments will be made only for eligible advanced biofuels produced at an advanced biofuel facility owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at an advanced biofuel facility no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

**§§ 4288.138–4288.200 [Reserved]**

**PART 4290—RURAL BUSINESS INVESTMENT COMPANY (“RBIC”) PROGRAM**

**Subpart A—Introduction to Part 4290**

- Sec.
- 4290.10 Description of the Rural Business Investment Company Program.
- 4290.15 Leveraged and Non-leveraged Rural Business Investment Companies.
- 4290.20 Legal basis and applicability of this part 4290.
- 4290.30 Amendments to Act and regulations.
- 4290.40 How to read this part 4290.
- 4290.45 Responsibility for implementing this part 4290.

**Subpart B—Definition of Terms Used in Part 4290**

- 4290.50 Definition of terms.

**Subpart C—Qualifications for the RBIC Program**

**ORGANIZING A RBIC**

- 4290.100 Business form.
- 4290.110 Qualified management.
- 4290.120 Plan to invest in Rural Areas.
- 4290.130 Identified Rural Areas.
- 4290.140 Approval of initial Management Expenses.
- 4290.150 Management and ownership diversity requirement.
- 4290.160 Special rules for Partnership RBICs and LLC RBICs.
- 4290.165 Obligations of Control Persons.

**7 CFR Ch. XLII (1–1–23 Edition)**

**CAPITALIZING A RBIC**

- 4290.200 Adequate capital for RBICs.
- 4290.210 Minimum capital requirements for RBICs.
- 4290.230 Private Capital for RBICs.
- 4290.240 Limitations on non-cash capital contributions in Private Capital.

**Subpart D—Application and Approval Process for RBIC Licensing**

- 4290.300 When and how to apply for a RBIC License.
- 4290.310 Contents of application.
- 4290.320 Contents of comprehensive business plan.
- 4290.330 Guarantee fee.

**Subpart E—Evaluation and Selection of RBICs**

- 4290.340 Evaluation and selection—general.
- 4290.350 Eligibility and completeness.
- 4290.360 Initial review of Applicant’s management team’s qualifications.
- 4290.370 Evaluation criteria.
- 4290.380 Selection.
- 4290.390 Licensing as a RBIC.

**Subpart F—Changes in Ownership, Structure, or Control**

**CHANGES IN CONTROL OR OWNERSHIP OF A RBIC**

- 4290.400 Changes in ownership of 10 percent or more of RBIC but no change of Control.
- 4290.410 Changes in Control of RBIC (through change in ownership or otherwise).
- 4290.420 Prohibition on exercise of ownership or Control rights in RBIC before approval.
- 4290.430 Notification of transactions that may change ownership or Control.
- 4290.440 Standards governing prior approval for a proposed transfer of Control.
- 4290.450 Notification of pledge of RBIC’s shares.

**RESTRICTIONS ON COMMON CONTROL OR OWNERSHIP OF TWO OR MORE RBICs**

- 4290.460 Restrictions on Common Control or ownership of two (or more) RBICs.

**CHANGE IN STRUCTURE OF RBIC**

- 4290.470 Prior approval of merger, consolidation, or reorganization of RBIC.
- 4290.480 Prior approval of changes to RBIC’s business plan.