

# **PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING**

1. The authority citation for part 1209 continues to read as follows:

**Authority:** 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

2. Amend § 1209.6 at paragraph (a) by revising subparagraphs (a)(4) and (a)(5)(ii) and by adding new subparagraph (a)(6) to read as follows:

## **§ 1209.6 Content of appeal; right to hearing.**

(a) \* \* \*

(4) A description of each disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) \* \* \*

(ii) The personnel action was or will be based wholly or in part on the whistleblowing disclosure, as described in § 1209.4(b) of this part.

(6) An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of this section by filing with the appeal a copy of *Part 2: Reprisal For Whistleblowing* of the complaint form submitted to the Office of Special Counsel (Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.

\* \* \* \* \*

Dated: November 6, 2000

**Robert E. Taylor,**  
Clerk of the Board.

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## **DEPARTMENT OF AGRICULTURE**

### **Commodity Credit Corporation**

#### **7 CFR Part 1424**

#### **RIN 0560-AG16**

#### **Bioenergy Program**

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Credit Corporation (CCC) is adopting as final

the proposed rule published July 27, 2000, in the **Federal Register** to accelerate the development and use of bio-based technologies in stimulating the industrial use of agricultural commodities into bio-based fuels and products. CCC will make incentive cash payments to bioenergy producers who increase their purchases of eligible agricultural commodities, as compared to the corresponding period in the prior fiscal year (FY), and convert that commodity into increased bioenergy production.

**EFFECTIVE DATE:** This program will become effective December 1, 2000. The FY 2001 sign-up period will begin that day and will end December 31, 2000.

**FOR FURTHER INFORMATION CONTACT:** Steve Gill, Director, Warehouse and Inventory Division, FSA, United States Department of Agriculture (USDA), STOP 0553, 1400 Independence Avenue, SW., Washington, DC 20250-0553, telephone (202) 720-2121 or e-mail address, Steve\_Gill@wdc.fsa.usda.gov or Jim Goff at (202) 720-5396. Persons with disabilities who require alternative means of communication for regulatory information (braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

#### **SUPPLEMENTARY INFORMATION:**

##### **Executive Order 12866**

This rule has been determined to be economically significant for the purposes of Executive Order 12866 and therefore has been reviewed by the Office of Management and Budget (OMB). A summary of the cost-benefit assessment is included in the Background section explaining the actions this rule will take.

##### **Small Business Regulatory Enforcement Fairness Act**

This rule was determined to be Major under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Section 801 of SBREFA requires a 60-day delay for Congressional review before Major regulations can go into effect. However, section 808 of SBREFA allows an agency to promulgate a rule at such time as it determines necessary, notwithstanding the Congressional review required by section 801 of SBREFA, if the agency finds for good cause that it is impracticable, unnecessary, or contrary to the public purpose to delay the rule. It is hereby determined that delaying this rule would be contrary to the public interest

and, accordingly, this rule is effective December 1, 2000.

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

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rule making with respect to the matter of this rule.

##### **Executive Order 12372**

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015 subpart V published at 48 FR 29115 (June 24, 1983).

##### **Environmental Assessment**

An environmental assessment has been completed and it has been determined that there will be no significant impact on the environment.

##### **Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to this rule. It will not effect agreements entered into prior to the effective date of the rule. The administrative appeal provisions published at 7 CFR parts 11 and 780 must be exhausted before bringing any action for judicial review.

##### **Executive Order 12612**

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this Rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of Government.

##### **Unfunded Mandates Reform Act of 1995**

This Rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA regulations.

##### **Paperwork Reduction Act**

The information collection reporting and recordkeeping requirements associated with this rulemaking have

been approved by OMB and assigned control number 0560-xxxx. A **Federal Register** notice for this information collection was published on July 27, 2000. No comments were received.

### Background

To encourage bioenergy producers to expand agricultural markets by promoting increased bioenergy (ethanol and biodiesel) production, CCC, in accordance with Executive Order 13134, Developing and Promoting Biobased Products and Bioenergy, and the CCC Charter Act, will make incentive cash payments to bioenergy producers who increase their purchases of agricultural commodities over the previous fiscal year's (FY's) purchases and convert that commodity into increased ethanol and biodiesel production over previous FY ethanol and biodiesel production. This rule provides for payments on purchases of barley, corn, grain sorghum, oats, rice, wheat, soybeans, sunflower seed, canola, crambe, rapeseed, safflower, sesame seed, flaxseed, mustard seed, and cellulosic crops, such as switchgrass and short rotation trees, grown on farms, for the purpose of producing ethanol and or biodiesel used in either ethanol or biodiesel production.

Eligible bioenergy producers will receive incentive cash payments quarterly, based on the producer's total annual bioenergy production increase for the FY to date compared to the same time period in the previous FY. If, at the end of the fourth quarter, overpayments have been made, the bioenergy producer shall repay the overpayment plus interest from the date of the overpayment through the date of repayment to CCC. Eligible bioenergy producers with less than 65 million gallons annual production capacity from all facilities will receive a higher effective payment rate than bioenergy producers with 65 million gallons or more annual production capacity to increase the incentive for smaller plants and thereby further promote expansion of bioenergy production. A higher incentive is needed for smaller plants because, compared to larger plants, they tend to produce a more limited product range during refining, are less able to capture economies of scale, and may not have access to attractive risk management strategies.

Except for FY 2001, bioenergy producers will enter into annual agreements with CCC establishing their eligibility to receive program payments before September of the preceding FY. Once an agreement is entered into, eligible bioenergy producers will submit quarterly applications after the end of

each quarter requesting payments for that quarter. For example, during January 2002, producers may request payments for the period beginning October 1, 2001 through December 31, 2001. CCC will make payments to eligible bioenergy producers within 30 calendar days of receiving a completed eligible application.

CCC will make available up to \$150 million in FY 2001 and \$150 million in FY 2002 for this program. Because payment requests could potentially exceed available program funding, producers will be required to complete an agreement during a sign-up period to be announced by CCC for each FY of the program. The agreement will include an estimate of increased production for the upcoming FY. The total estimated increase in production for the upcoming FY will be used to determine if payment requests will exceed funding. If so, a factor will be used to prorate payments to keep payments at or below the budgeted amount. Eligible producers (agreement holders) will submit applications for program payments after each FY quarter. A producer will enter into a single agreement covering all production facilities operated or planned to be operated during the applicable FY by the producer at sign-up. However, agreement holders must submit separate applications for each facility location each quarter once enrolled in the program. Applicable payments will be based on the total production increase from all facilities FY to date, reconciled each quarter, compared to the producer's production at all locations during the base period. Producers who anticipate having new or expanded production capacity on line during the FY applicable to the sign-up period should enroll that anticipated production increase in the program during sign-up.

Payments under the program will be based on the expected additional amount of agricultural commodities used by producers to produce additional energy. Interested parties will be required to sign up for the program and the total amount of expected claims will then be prorated, as needed, to match the available funding. Actual payments will be made on a quarterly basis by converting the extra fuel production to a gross extra commodity amount by using a factor set by CCC which estimates the amount of corn or other eligible commodity that was used to produce the increase in bioenergy. That figure will then be reduced to payable bushels or other unit of production. For smaller firms, as specified in the rule, payable bushels will be 1 bushel for every 2.5 gross bushels. For larger firms,

it will be 1 bushel for every 3.5 gross bushels. Subject to the proration factor referred to above, a producer's payable bushels will be multiplied by a current (at the time) per bushel dollar amount to reach the payment amount. However, rising commodity prices could mean that funding is exhausted, despite the proration, before the end of the year. Should that happen, the agency will determine the manner in which it will resolve the competing claims but in no case will total payments exceed available funding. All participants will be required to sign an agreement that will set out the terms of the payment and the refund obligations that will apply if the additional commodity use levels are not obtained. The agreement will also set out whatever additional terms and conditions appear to be appropriate to assure that the program obtains its objectives. In all cases, the amount of the payment to which the producer remains eligible will be based on the increases in the energy produced for the year to date (as accounted for each quarter). Hence, changes in production could mean that payments received earlier in the year may have to be returned.

Bioenergy producers, to be eligible for this program, must meet additional requirements specific to the bioenergy fuel being produced. For example, ethanol producers must also be licensed by the Bureau of Alcohol, Tobacco, and Firearms (ATF) for fuel ethanol production.

### Proposed Rule

A proposed rule addressing this matter was published in the **Federal Register** (65 FR 46115) on July 27, 2000. Comments from interested parties were due on or before August 28, 2000. A total of 123 comments were received from 6 different sectors as follows: three Government; 16 ethanol and biodiesel organizations; three Congressional; 17 industry (processors, plants, banks, accounting firms and cooperatives); 31 renderers; and 53 individuals. Comments submitted varied widely in support for the proposed rule. Forty-three supported the rule as written, while all 31 renderers were strongly opposed to the program unless substantial changes are made to include rendered animal by-products and recycled cooking oils as eligible for program payments. Most renderers mentioned in some way perceived unfairness because the grain commodities already are eligible for other USDA program benefits while renderers and recycled products are not eligible.

The proposed rule asked for comments on 8 specific questions. These questions and the responses to them are as follows:

*1. Producers of What Forms of Bioenergy Should be Eligible for Program Payments?*

Ethanol and biodiesel were included in the proposed rule.

*Comments:* The majority of comments (43) supported making payments to only ethanol and biodiesel producers. The remainder of commentators suggested various alternatives such as: focusing incentives on expansion of alternative fuels; transferring funds from farm level price support subsidies to programs such as this to refocus payments for crops used in bioenergy production; adding E-85 (a blend of 85 percent ethanol and 15 percent gasoline); limiting program to biodiesel and ethanol produced from domestic feed stocks; adding E-diesel (less than 5 percent additive and diesel fuel); changing the word gasoline in the definition of ethanol to denaturant; limiting biodiesel producers to commercial producers registered and in good standing with Environmental Protection Agency (EPA) under section 211(b) of the Clean Air Act Amendment of 1990.

*Response:* As supported by the majority of comments received, the program will only cover ethanol and biodiesel production in the US from commodities produced in the US. This has remained unchanged so that the effect of this program will not be diluted but will be confined to traditional uses of those commodities which could, otherwise, produce inventories of goods that would have to be stored at government expense. However, definitions of ethanol and biodiesel fuel have been broadened and requirements have been added to address comments received about E-diesel, the use of gasoline as a denaturant, and to assure that eligible biodiesel producers meet EPA regulatory requirements. No change was made regarding adding E-85 since payments will only be made on increased ethanol production and the percentage of blend with gasoline will not be a factor.

*2. What Agricultural Commodities Used in Bioenergy Production Should be Included in the Program?*

The proposed rule listed barley, corn, grain sorghum, oats, rice, wheat, soybeans, sunflower seed, canola, crambe, rapeseed, safflower, flaxseed, and mustard seed used in either ethanol or biodiesel production.

*Comments:* The majority of respondents were in favor of the proposed eligible commodities. However, we did receive comments favoring the inclusion of sugar and commodities for which there is another statutory program so that incentive payments for using that commodity in this Program will result in lower costs in other Programs in the form of loan deficiency payments (LDP's), forfeitures, storage costs, or other payments to farmers. We also received many (31) letters from renderers recommending the inclusion of animal fats and oils and certain recycled products of these fats and oils as eligible commodities in the Program. Additional items that were suggested to be added to the definition were as follows: tobacco, peanuts, cellulosic crops such as switchgrass, crop residues (such as corn stover), forest residue, non-recyclable cellulosic solid waste (i.e. waste paper), cotton waste, sustainable forest thinning material, soybean wax, and other biomass materials. One respondent was against including recycled and waste products as eligible commodities.

*Response:* In response CCC has decided to add cellulosic crops, such as switchgrass and short rotation trees, grown on farms for the purpose of producing ethanol or biodiesel to the eligible commodity definition. This change allows CCC to support crops with excellent long-run potential for increasing the Nation's supply of ethanol and biodiesel and are the basis for much of USDA's efforts under the President's Bioenergy Initiative and the Biomass Research and Development Act of 2000. While we have an interest in supporting a broad bioenergy industry, the addition of other items proposed needs further analysis and public comment. We plan to specifically request comments on adding animal fats and oils that are first used in ethanol and biodiesel production to this program. For the reasons given earlier, this rule will for the time being focus on field crops for which marketing assistance is provided and which are more customarily the focus of the use of agricultural products to produce ethanol and biodiesel fuel.

*3. At What Plant Capacity Level Should Program Payment Rates Change to Account for Plant Efficiency Variances by Eligible Program Commodity?*

The proposed rule suggested making larger payments to producers with less than 30 million gallon-per-year capacity than to plants with 30 million gallon or more capacity.

*Comments:* Several respondents indicated that, while the 30 million

gallons per year limit has been the "traditional" definition of a "small" ethanol producer, time and technology have changed. One respondent stated, "In a country where there are at least five ethanol plants that can produce at least 100 million gallons per year, a 31 million gallon plant is by no means a large producer and should not be categorized as one for the sake of this program." Since 1990, the majority of the industry's growth has been in smaller, farmer-owned cooperatives. Today, many of these facilities are looking to expand their initial output to more than 30 million gallons per year to take advantage of plant efficiencies, economies of scale, and potential new market demand. The majority of respondents commenting in this area felt the level should be raised to 65 million gallons per year. We also had individual comments to: cap payments to plants with 150 million gallon-per-year production capacity; provide a reduced payment to firms with multiple facilities; and provide the smallest incentives to firms with largest capacities that also have other production.

*Response:* We agree with the majority of respondents and this rule provides for more advantageous payments to producers with less than 65 million gallons-per-year capacity than to producers with 65 million gallons or more capacity. This level appears to be a reasonable line of demarcation, based on the comments, between those producers who may need an extra incentive and those that do not. Under the terms of the rule, that extra incentive will, as indicated, mean that smaller firms will receive payment on a higher percentage of their extra purchases of agricultural commodities. As for capping payments at 150 million gallons per year capacity by producer or considering the number of other production sites, we believe neither would help accomplish the purpose of the program which is increased bioenergy production. In addition, by having a five percent payment limitation, we will restrict payments to very large producers so funding is available to more producers.

*4. How Should Payment Rates Be Established, Especially for Commodities Without CCC Announced Terminal Market Prices?*

The proposed rule limited payments to commodities with established CCC announced terminal prices.

*Comments:* A few respondents suggested: establishing a separate budget for biodiesel and ethanol; changing the time period used in

comparison to determine increase in production; and, structuring payments to allow plant construction or expansion. Individual respondents suggested: considering a flexible mechanism in adjusting payment formulas to maximize removal of commodities from markets; using daily prices by region or area for payments; establishing terminal market prices for those commodities without them or using an average of recent prices paid by the producers.

*Response:* While the suggestion that the time period for comparison be changed, there was no consensus what would be better and the vast majority of respondents recommended no change to the program. Therefore, the comparison time period remains FY compared to the prior FY. However, the formula has been adjusted from a quarterly comparison to FY to date as the FY progresses to level out payments between quarters and reduce the need for end of FY repayments. CCC considered the comments on structuring the payments to allow plant expansion and construction and concluded that the program as proposed met those goals in the short term. Since CCC cannot predict the amount of either ethanol or biodiesel production that will be covered by the program, we do not feel we can accurately establish a separate budget for ethanol versus biodiesel. The sign-up will decide how funding is divided between the two. Based on the limited comments received, no change has been made from the proposed rule in this area. However, since terminal market prices and county differentials are not available for cellulosic crops, such as switchgrass and short rotation trees, grown on farms for the purpose of producing ethanol and or biodiesel that have been added as eligible commodities, CCC will announce how payment rates will be established on these commodities after sign-up occurs and CCC knows payments will be applicable on the commodity.

#### 5. When Payments Are Limited, How Should Payments Be Distributed?

The proposed rule asked for comments on how payments should be prorated in the event that the program should be oversubscribed in the sense that there might be more willing participants than the normal payment formulas and funding would allow. It was contemplated in that respect, however, that there would be a sign-up period so that all interested parties could make their interest known so that the amount of proration could be then adduced. The proposed rule suggested

several methods for dealing with shortage in funding.

*Comments:* We received a variety of comments on how to distribute payments including: supported prorating payments; advance 90 percent of expected payments quarterly with final payments reflecting the balance due; limit the total dollars any one entity could receive; limit program to 30 million gallon-per-year capacity producers; issue payments on a first come first paid basis; and, limit payments to corporations with 125 million gallon-per-year capacity or less capacity for program participation.

*Response:* Based on comments received, we believe the procedure in the proposed rule is best. Therefore, there will be a sign-up period and a proration made on the basis of that sign up as otherwise there would be an overemphasis on early filings. As for limitations on payments to particular entities, while there is a desire to avoid over-concentration of the payment to one or several entities, it was felt that goal is met by setting, in the rule, a limit on the annual amount of program funding that could be received by a particular party.

#### 6. Should the Payment Formulas Be Adjusted if There Is an Under Subscription of the Program, so as to, in Effect, Allow Payments at Higher Than the 100 Percent of Formula Level Contemplated in the Proposed Rule?

*Comments:* A few respondents stated the cap should be 100 percent. Other individual respondents stated that payments should be prorated provided all other criteria are met and a payment cap would not be necessary if bid offer system was used to establish payments.

*Response:* The payment "cap" will stay at 100 percent of formula amount since it appears for now to provide a sufficient incentive for increased production of energy resources using grains and other eligible agricultural commodities. A bid offer system is discussed below under "Change the way payments are established".

#### 7. How Should Increases in Bioenergy Production be Established for the Various Commodities Receiving Program Payments?

The proposed rule compared ethanol and biodiesel production for the just completed FY quarter to the production from the same quarter in the prior FY.

*Comments:* Individual comments received in response to this question included: base program payments on the percentage increase in eligible domestic crop purchases and renewable energy production; proposed rule considers

purchases and production from existing nonproducing plants as increases; payments should reflect changes in feedstock components and commodity prices based on volume and input cost of product.

*Response:* The final rule compares the producer's agricultural commodity energy production at all locations with that producer's production in the previous year at all locations. For the first quarter of the year, energy production will be compared with the production from the first quarter of the previous year. After that quarter, the comparison will be made as a running total. That is, for example, at the end of the third quarter, the payment will be based on the increase in bioenergy for all three quarters, not just the third quarter by itself. This will reduce the need for any producer repayments at the end of the FY. At the same time, it will encourage producers to immediately begin their process of increasing their use of agricultural commodities and increasing their energy production. We concur with the comment that this considers purchases and production from existing nonproducing plants as increases and believe that meets the program's goal of increasing bioenergy production. We also believe that the procedure for establishing program payments addresses the other comments.

#### 8. What are the Expected Impacts of This Program on Agricultural Commodity Prices, Fossil Fuel Energy Prices, Farm Income, Bioenergy Production and Prices, and International Trade in Agricultural and Energy Products?

*Comments:* The majority of respondents that commented (54) stated the program would have a positive impact in these areas. One respondent mentioned the program would provide a market for aflatoxin corn.

A large group of respondents (33) felt the program would have a negative impact in these areas. A couple of respondents stated the program would have a minimal impact in these areas. Specific single negative comments stated the program would: pay incentives for capacity and demand that would have occurred anyway; encourage the building of small plants that may not be financially viable; have a side effect of restraining bioenergy production; discourage construction of new plants or put recently completed plants at a disadvantage; attempt to reward production increases but instead creates uncertainty; and, result in some ethanol and biodiesel production facilities not receiving payments since

they are already at 100 percent production capacity. One respondent advised against the adoption of the proposed rule as currently written.

Several respondents suggested changing the program as follows: emphasize the soy-based biodiesel industry; increase program's life-span to 3 to 6 years; issue Payment-in-Kind (PIK) certificates instead of cash payments; target low-income areas of the county; and, use a per-capita basis for allocating funds.

Additionally some individual respondents suggested that USDA instead of proceeding with the program should: conduct an assessment of impacts on country grain elevators and feed mills before proceeding; establish a strategic corn reserve to remove corn from the market during periods of low prices; and, establish a limited farmer-stored reserve program dedicated to bioenergy feed stock.

*Response:* We agree with the positive comments received and agree that ethanol production does provide a market for aflatoxin corn. The negative comments question the wisdom of the program as it was proposed. USDA has in that respect conducted what it believes to be a thorough evaluation of the program and believes that these incentives will in fact produce appropriate and needed increases in energy production and commodity use. Should the operation of the program have any of the negative impacts cited by respondents or other negative impacts, a reassessment will be made and changes will be made as needed. We believe the program will have a positive impact and therefore it is being implemented. Current available funding does not allow CCC to extend the guaranteed life of the program beyond FY 2002. CCC does not have the inventory needed to support changing payments from cash to PIK. Changing the program to target low-income areas or base payments on a per-capita basis would be counter to the program's goal of increasing bioenergy production as much as possible. Establishing a strategic corn reserve and or a limited farmer-stored reserve program are outside the scope of this rule.

In addition to comments on the eight specific questions above, comments were also received on the following issues:

#### 1. Unspent Funding Allocations for FY 2000

*Comments:* A few respondents wanted CCC to commit the \$100 million for FY 2000 retroactively.

*Response:* Originally it was hoped that this program would be operated in

FY 2000 but that has not proved to be possible. Any retroactive payments would, at this time, not be an incentive payment and thus would not be consistent with the nature of this program.

#### 2. Change Payment Restriction

Under the proposed rule no person could receive more than 10 percent of the total funding available under the program.

*Comments:* Several respondents supported some level of payment limitation. However, a number of respondents favored changes that would increase the number of firms that could receive payments. Comments made by these respondents included: limit gross amount of funding for each large producer to an equitable percent of funding; lower the payment limitation to 8 percent; lower payment limitation to 5 percent; and change payment limitation to per corporation capacity of 125 million gallons per year ethanol. Additionally comments received suggested: having a separate biodiesel payment limitation of 30 percent; limiting payments by single company; and not having a payment limitations.

*Response:* In order to increase the number of producers that can enroll in the program, the payment restriction has been lowered to five percent of total funding so payments will be available to a greater number of producers, and the rule has been clarified that the restriction is by producer for all plants. Without sign-up data and long range commodity price forecasts, we cannot predict what limitation the five percent will establish on producer size or justify establishing a separate limitation for biodiesel producers.

#### 3. Records Inspection

*Comments:* Individual respondents commented that production increases should be verifiable by documentation and record retention should be reduced to only 3 years.

*Response:* We agree with both comments. Record retention has been reduced to 3 years in section 1424.11(b) and the rule requires documentation be kept to support all program payments.

#### 4. Change the way Payments Are Established

*Comments:* One respondent suggested that a reverse auction similar to the Conservation Reserve Program should be used so producers would bid on payments per unit of increased bioenergy production. Another respondent questioned whether the program should expand the use of terminal market prices.

*Response:* We believe a reverse auction would favor large plants at the expense of others and would be contrary to the goals of the program to encourage greater production among all producers and to encourage diversity in production by providing greater incentives to smaller plants. While one respondent questioned using terminal market prices in this program, we consider using them whenever possible as the best option for the program.

#### 5. Change Payment Amounts

*Comments:* A respondent suggested basing payment on grain use instead of increased bioenergy production.

*Response:* The primary goal of the program is to increase bioenergy production and, as structured, payments will also reflect increased commodity use.

#### 6. Clarify Definition of Producer

*Comments:* A respondent asked that we clarify the difference between producer and facility.

*Response:* We agree that there was ambiguity in the proposed rule between these two terms. The definition of producer has been modified to say that a producer is a legal entity (individual, partnership, cooperative, or corporation, etc) who is a producer of bioenergy. Clarification has also been made throughout this rule that payment restrictions apply by producer and payments.

#### Changes From Proposed Rule

CCC is adopting as final the proposed rule published July 27, 2000, in the **Federal Register** with the following changes. First, most of the major payment provisions, for purposes of clarity, have been concentrated in one section rather than spread throughout the regulation, including that portion of the regulation that contains definitions. In that connection, the provision allowing smaller producers to be paid on a higher percentage of the extra units of the agricultural commodity they use for extra energy production has been changed so that the dividing line between small and large producers has been raised from a 30 million gallon per year energy production level to a 65 million gallons per year production level. Also the regulations now reflect that quality factors can be used in determining per unit payment rates for the payable units of the commodity. Also, the proration provision has been amended to correct an error in the original formula and to assure that the proration is as accurate as possible. In that respect as well, terms have been adjusted and reorganized. In addition,

the amended rule, in order to help assure real increases in the use of agricultural commodities to produce fuel, provides that in accounting for production the producer must aggregate production by all persons (not just the producer) at all locations in which the producer had an interest now (in the current FY) or in the previous FY, irrespective of whether the producer still has such an interest in that facility. This will avoid situations in which there could otherwise be an artificial increase due to a mere reorganization or change of ownership, or shift of production from one plant to another. CCC will be able to grant exemptions to that requirement should a need arise. Also, the rule provides that CCC may, in the program agreement, require that the producer certify the amount of the actual increased use of agricultural commodities for energy production at all such locations for the relevant period and make an adjustment in the formulaic payments that would otherwise be made to the producer if there is a difference between that certification and the amount of increased commodity use as calculated under the formula. A provision has also been added which would allow persons who acquire facilities under contract to petition CCC to be permitted to succeed to the existing contract. Still further, a provision has been added to specify that a contract may be terminated if the contracting party fails to retain the ability to assure that the contract obligations and responsibilities will be met over the full life of the contract. of payment to provide greater clarity. Further:

(a) In § 1424.3 the following definitions are changed:

(1) The definition of *biodiesel producer* will require commercial biodiesel producers to also be registered and in good standing with EPA under the Clean Air Act Amendment of 1990, Title II, Section 211(b).

(2) The definition of *eligible commodity* has been expanded to include sesame seed and cellulosic crops, such as switchgrass and short rotation trees, grown on farms for the purpose of producing ethanol and or biodiesel.

(3) The definition of *ethanol* has been changed to state that it "has been rendered unfit for beverage use" instead of composed of 95 percent ethanol and 5 percent gasoline.

(4) The definition of *producer* has been clarified to be "a legal entity (individual, partnership, cooperative, or corporation, etc) who is a commercial producer of bioenergy making application under this program."

(b) 1424.4(a) has been changed to indicate that Agreement forms may be also obtained via the internet.

(c) 1424.4(b) has been changed to indicate that Form CCC-850, Bioenergy Program Agreement, must be submitted to KCCO, Contract Reconciliation Division, STOP 8758, P.O. Box 419205, Kansas City, Missouri 64141-6205;

(d) 1424.5(b) has been changed to indicate Applications are also available via the internet.

(e) 1424.5(c) has been changed to remove the requirement that applications must be submitted within 30 days of the end of a quarter. It now just states that applications must be submitted by 30 days after the end of the applicable FY.

(f) 1424.8(a) has been changed to indicate that unused funds for any FY will not be reallocated and, therefore, will not be carried over.

(g) 1424.8(b) has been changed to state that reconciliations will be year-to-date for each quarter of the FY.

(h) 1424.8(e) has been changed to indicate that no producer may receive more than five percent of the available funding for this program and determinations of payment eligibility shall take that limit into account.

(i) 1424.9 has been changed to indicate that once an eligible producer has submitted an Agreement, Form CCC-850, that producer shall file information for each bioenergy producing facility quarterly through the end of the applicable FY as specified by CCC.

(j) 1424.11 b has been changed to require record retention for 3 years (instead of 6) from the payment date.

#### Cost-Benefit Assessment

The program is projected to provide significant benefits for the agricultural sector. It will expand existing demand for corn and other grains used in ethanol production, and create new markets for oilseed crops, particularly soybeans, through the stimulation of biodiesel production. Impacts of the program were estimated under two scenarios, a low-impact scenario with no other significant policy changes that would increase biofuels demand, and a high-impact scenario, with other policy and program changes in addition to the program that collectively would substantially increase demand for ethanol and biodiesel. Incentive payments during FYs 2001-2002 for the program are expected to range from about \$57 million under a low-impact scenario to about \$164.2 million under a high-impact scenario.

Under the low-impact scenario, average farm prices for corn are

projected to increase by 1 cent per bushel in marketing year 2000/01 and increase by 2 cents per bushel in 2001/02. For soybeans, average farm prices are projected to remain unchanged in marketing year 2000/01 and increase by 1 cent per bushel in marketing year 2001/02. CCC outlays (including direct payments under the program) for feed grains and soybeans are projected to decrease by \$258 million during FYs 2001-2002.

Under the high-impact scenario, average farm prices for corn are projected to increase by 1 and 4 cents per bushel in marketing years 2000/01 and 2001/02 respectively. Soybean farm prices are projected to increase by 1 and 4 cent per bushel in marketing years 2000/01 and 2001/02, respectively. CCC outlays (including direct payments under the program) for feed grains and soybeans are projected to decrease by \$355 million during FYs 2000-2002.

Under the low-impact scenario, ethanol production is projected to reach about 1.730 billion gallons by 2002, about 95 million gallons higher than the baseline level. Biodiesel fuel production is projected to reach about 7 million gallons, 5 million gallons above base levels. Under the high-impact scenario, ethanol production is projected to reach about 1.940 billion gallons by 2002, or about 305 million gallons above baseline levels. Biodiesel fuel production is projected to reach about 14 million gallons, 12 million gallons above the baseline levels.

The small increases in feed costs resulting from the program would not be sufficient to significantly affect livestock and poultry production. Thus, no impacts are expected on consumer prices for meat and poultry products.

Ethanol and biodiesel processors benefit from the program by having reduced production costs. Providing more supply with reduced production costs is expected to increase net returns for participating processors. Minimal effects are expected on ethanol and biodiesel market prices as these prices are largely determined by fossil-based liquid fuel prices. Increased ethanol and biodiesel production is expected to substitute for Methyl Tertiary Butyl Ether (MTBE) and imported oil, helping to achieve the Administration's goals for reducing MTBE use and increasing energy security.

#### List of Subjects in 7 CFR Part 1424

Administrative practice and procedure, Energy—bioenergy, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, 7 CFR Part 1424 Chapter XIV

is amended by adding Part 1424 as set forth below.

## PART 1424—BIOENERGY PROGRAM

Sec.

- 1424.1 Applicability.
- 1424.2 Administration.
- 1424.3 Definitions.
- 1424.4 General eligibility rules.
- 1424.5 Application process.
- 1424.6 Eligibility determinations.
- 1424.7 [Reserved]
- 1424.8 Payment amounts.
- 1424.9 Reports required.
- 1424.10 Succession and control of facilities and production
- 1424.11 Maintenance and inspection of records.
- 1424.12 Appeals.
- 1424.13 Misrepresentation and scheme or device.

**Authority:** 15 U.S.C. 714 c (e); Section 5(e) of the Commodity Credit Corporation Charter Act.

### § 1424.1 Applicability.

This part establishes the Bioenergy Program (Program). It sets forth the terms and conditions a bioenergy producer must meet to obtain payments from the Commodity Credit Corporation (CCC) for eligible bioenergy production. Additional terms and conditions are set forth in Form CCC-850, Bioenergy Program Agreement.

### § 1424.2 Administration.

(a) On behalf of CCC, the Farm Service Agency (FSA) will administer the provisions of this part under the general direction and supervision of the Deputy Administrator, Commodity Operations (Deputy Administrator), FSA.

(b) The Deputy Administrator or a designee may authorize a waiver or modification of deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the Program, and may set such additional requirements as will facilitate the operation of the program.

### § 1424.3 Definitions.

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

*Agreement* means the Bioenergy Program Agreement, Form CCC-850.

*Application* means the Bioenergy Program Application, Form CCC-850-A.

*ATF* is the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury.

*Biodiesel* is a nontoxic, biodegradable replacement for or additive to petroleum diesel derived from the oils and fats of

plants and animals and manufactured in the United States. Chemically, biodiesel is described as a mono alkyl ester.

*Biodiesel producer* is a producer that produces and sells biodiesel who is also registered and in good standing with Environmental Protection Agency under Clean Air Act Amendment of 1990, Title II, Section 211(b).

*Bioenergy* means ethanol and biodiesel produced from eligible commodities.

*Eligible commodity* means barley, corn, grain sorghum, oats, rice, wheat, soybeans, sunflower seed, canola, crambe, rapeseed, safflower, sesame seed, flaxseed, mustard seed, and cellulosic crops, such as switchgrass and short rotation trees, grown on farms for the purpose of producing ethanol and or biodiesel or any other commodity or commodity by-product as determined and announced by CCC used in ethanol and biodiesel production which is produced in the United States and its territories.

*Eligible producer* means a bioenergy producer who has been determined by CCC to be eligible to receive Program payments and has entered into an Agreement with CCC.

*Ethanol* is anhydrous ethyl alcohol manufactured in the United States and sold:

(1) For fuel use and which has been rendered unfit for beverage use in a manner and which is produced at a facility approved by the ATF for the production of ethanol for fuel, or

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

*Ethanol producer* is a producer that has authority from the ATF to produce ethanol.

*FSA* means the Farm Service Agency, USDA.

*FY* means fiscal year beginning each October 1 and ending September 30 of the following year.

*Gallon Conversion factor* shall be:

(1) 2.5 bushels, unless otherwise determined through review of an individual Program participant by CCC, of ethanol produced per bushel of corn used in ethanol production;

(2) 1.4 bushels, unless otherwise determined through review of an individual Program participant by CCC, of biodiesel per bushel of soybeans used in biodiesel production; or

(3) As determined by CCC for other eligible commodities.

*KCCO* means Kansas City Commodity Office.

*Producer* is a legal entity (individual, partnership, cooperative, or corporation, etc.) who is a commercial bioenergy producer making application under this program.

*Quarter* means the respective time periods of October 1 through December 31, January 1 through March 31, April 1 through June 30, and July 1 through September 30 of each FY, as applicable.

*USDA* means the United States Department of Agriculture.

### § 1424.4 General eligibility rules.

To obtain Program payments, a producer must do all of the following:

(a) Obtain an Agreement, Form CCC-850, from the KCCO, Contract Reconciliation Division, STOP 8758, P.O. Box 419205, Kansas City, Missouri 64141-6205 or via the internet at: [www.fsa.usda.gov/daco/bioenergy/bioenergy.htm](http://www.fsa.usda.gov/daco/bioenergy/bioenergy.htm);

(b) Submit a completed Agreement, Form CCC-850, to CCC no later than October 1 of each year or a later date, if announced by CCC, to KCCO, Contract Reconciliation Division, STOP 8758, P.O. Box 419205, Kansas City, Missouri 64141-6205;

(c) Be assigned an Agreement number by KCCO indicating the producer is eligible for program payments;

(d) Maintain records indicating:

(1) Commodities for which it seeks payment;

(2) The quantity of bioenergy produced from an eligible commodity by location during the quarter FY to date compared to the same time period in the previous FY; and

(3) The quantity of eligible commodity used to produce the bioenergy stated in paragraph (d)(2) of this section during the quarter FY to date compared to the same time period in the previous FY;

(e) Furnish CCC such certification, and access to such records, as CCC considers necessary to verify compliance with Program provisions;

(f) Make Application submissions in accordance with § 1424.9;

(g) If not purchasing raw commodity input, be able to prove to CCC's satisfaction that both the producer's net purchases of eligible commodities and net production of bioenergy increased as compared to such production at all locations during the relevant base period. Except as otherwise provided for by CCC, the increase in production must equal or exceed that amount of energy production which would be calculated using the gross amount of agricultural commodities which forms the basis of the payment and the conversion factor set out in § 1424.2. Example: A producer that purchases soy oil from a soybean crushing plant for further refinement into biodiesel must be able to prove to CCC's satisfaction that both soy oil purchases and biodiesel production increased for the applicable quarter;



(h) Certify the accuracy and truthfulness of the information provided in their Agreement on Form CCC-850; and

(i) Allow verification by CCC of all information provided. Refusal to allow CCC or any other agency of USDA to verify any information provided will result in a determination of ineligibility.

(j) Meet all other conditions for payment which are set out in the Agreement or in these regulations or otherwise.

#### **§ 1424.5 Application process.**

To receive payments under this program during a FY, an eligible producer must:

(a) Have an approved Agreement in accordance with § 1424.4(b) and an Agreement number assigned by KCCO under § 1424.4(c);

(b) Obtain an Application, Form CCC-850-A, from the KCCO, Contract Reconciliation Division, STOP 8758, P.O. Box 419205, Kansas City, Missouri 64141-6205 or via the internet at: [www.fsa.usda.gov/daco/bioenergy/bioenergy.htm](http://www.fsa.usda.gov/daco/bioenergy/bioenergy.htm);

(c) Submit applications for each quarter. Submit the last quarterly application of the FY within 30 calendar days of the end of the FY for which payment is requested. If the actual deadline is a non-workday, the deadline will be the next business day;

(d) Submit other relevant documents as required by CCC for the specific commodity; and

(e) Certify with respect to the accuracy and truthfulness of the information provided.

#### **§ 1424.6 Eligibility determinations.**

(a) Applicants will, after Agreements are submitted, if:

(1) Determined eligible, receive notification of eligibility;

(2) Determined ineligible, be notified in writing of ineligibility for program participation and reason for the determination; or

(3) Additional information is needed for CCC to determine eligibility, be contacted for additional supporting documentation.

(b) Applicants will, after Applications are submitted, if:

(1) Determined eligible, receive payment;

(2) Determined ineligible, be notified in writing of ineligibility for payment and reason for determination; or

(3) Additional information is needed for CCC to determine eligibility, be contacted for additional supporting documentation.

#### **§ 1424.7 [Reserved]**

#### **§ 1424.8 Payment amounts.**

(a) Eligible producer may be paid the amount specified in this section, subject to the availability of funds. Funds shall be considered available only to the extent determined appropriate by CCC. Unless otherwise determined by CCC, that amount shall be no more than \$150 million in FY 2001 and no more than an additional \$150 million in FY 2002.

(b) Eligible producer must sign an agreement to participate. Such an agreement must be signed during the designated sign-up period. Thereafter, producers must file a report of their production at all locations for the program year to date through the respective quarter for each such report. Such reports must comply with the terms of the agreement and these regulations.

(c) Persons will be eligible for payments only to the extent that their production of eligible energy from eligible inputs is, for the program year to date, as compared to the comparable portion of the previous year, in excess of their total comparable production at all locations. Producers will not be paid twice for the same increase and any decline in relative production between quarters will require a comparable refund as specified below. That is, for example, if a producer were to be paid, at the end of the first quarter, for an increase of 500 units of energy production, but by the end of the second quarter that producer's production, for the year to date, was down to a net increase for the year of 450 units, then a refund would be due for the loss of the corresponding 50 units of net extra production. For these purposes unless CCC shall agree otherwise in order to facilitate the program, "all locations" for these and other purposes within these regulations shall mean any and all locations in which the producer had an interest now (in the current FY) or in the previous FY, irrespective of whether the producer still has such an interest in that facility. Eligibility determinations will be made on the basis of aggregating production figures from all such locations and shall include production by all persons at those locations for the current and preceding FY, not just the production of the producer. Also, the CCC may in the program agreement require that the producer certify the amount of the actual increased use of agricultural commodities for energy production at all such locations for the relevant period and make adjustment in the formulaic payments that would otherwise be made to the producer if there is a difference between that

certification and the amount of increased commodity use as calculated under the formula.

(d) The submitted agreements filed during the sign-up period will require that the applicant set out the expected increase in production and other information as the agency may demand. Based on expected commodity prices, following the formula set out in this section, all such submissions will be assigned an expected value. Should the total expected value of all such agreements exceed the available funding, then a proration factor will be developed to factor the agreements down to the funding made available by CCC.

(e) Subject to the provisions of this section and conditions specified in the Agreement, a producer's payment eligibility shall be adjusted at the end of each quarter, and figured as follows:

(1) the extra production in energy from eligible inputs will be converted to gross payable bushels (or other applicable agricultural unit) by, unless otherwise determined by CCC:

(i) Allowing, as applicable, 1 bushel of corn for each increase of 2.5 gallons of ethanol;

(ii) Allowing, as applicable, 1 bushel of soybeans for each increase of 1.4 gallons of biodiesel production;

(iii) Such other method for other eligible agricultural commodities as CCC deems appropriate.

(2) The gross payable bushels, or other gross units, calculated under paragraph (e)(1) of this section shall then be converted to a net payable bushel (or other unit amount) by:

(i) For producers whose annual bioenergy production is less than 65 million gallons, allowing 1 net payable bushel for every 2.5 gross payable bushels of corn or soybeans, or by allowing a similar conversion in the event that there are other eligible agricultural commodities involved in the calculation;

(ii) For producers whose annual bioenergy production is equal to or more than 65 million gallons, allowing 1 net payable bushel for every 3.5 gross payable bushels of corn or soybeans, or by allowing a similar conversion in the event that there are other eligible commodities involved;

(3) The net payable bushel (or other unit) agricultural commodity amount calculated under paragraph (e)(2) of this section, shall be then converted to a gross payment by multiplying that commodity amount by the per unit value for the commodity determined as follows:

(i) For those agricultural commodities with established terminal market prices,



the CCC will use the applicable terminal market price for the last day of the program quarter announced daily by the KCCO, FSA, adjusted by the county average differential for the county in which the plant is located and the applicable quality factors determined by CCC. For this purpose the terminal market and differential used by CCC in determining different values for different locations will, to the extent practical, be the same as that used for producers under other major CCC commodity programs for determining marketing loan gains and other matters.

(ii) For those agricultural commodities that do not, as determined by CCC, have acceptable established terminal prices, the price shall be as determined by CCC based on such market data as appears to be appropriate for a fair evaluation.

(4) The gross payment calculated under paragraph (e)(3) of this section shall be reduced to a net payment by multiplying the gross payment figure by the proration factor determined under paragraph (d) of this section.

(5) Subject to other provisions of this section, producers shall be paid the net current payment, if positive, determined for the first quarter.

(6) After the first quarter, adjustments shall be made based on changes in production. New or renewed increases shall be paid using the formula set out above using current per unit values. Refunds, when due, shall be due at the per unit values at which they were paid unless CCC determines otherwise.

(7) If despite or in the absence of a proration under paragraph (d) of this section funds shall not be sufficient to cover payments due for any quarter then CCC shall prorate, or further prorate, the claims in such manner as CCC deems fit.

(8) No producer may receive more than five percent of the available funding for this program and determinations of payment eligibility shall take that limit into account.

#### **§ 1424.9 Reports required.**

Once an eligible producer has submitted an Agreement, Form CCC-850, that producer shall file information for each bioenergy producing facility quarterly through the end of the applicable FY as specified by CCC.

#### **§ Sec. 1424.10 Succession and control of facilities and production.**

A person who obtains a facility which is under contract under this part may request permission to succeed to the program contract and CCC may grant such request if it is determined that permitting such succession would serve

the purposes of the program. As determined to be appropriate, CCC may require the consent of the original party to such succession and likewise CCC may terminate a contract and demand a full refund of payments made if a contracting party loses control of a facility whose increased production is the basis of a program payment or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

#### **§ 1424.11 Maintenance and inspection of records.**

For the purpose of verifying compliance with the requirements of this part, each eligible producer shall make available at one place at all reasonable times for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to the program that is within the control of such entity for not less than 3 years from the payment date.

#### **§ 1424.12 Appeals.**

(a) Any producer who is subject to an adverse determination made under this part shall have a right to appeal the determination by filing a written request with the Deputy Administrator at the following address: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, DC 20250-0550.

(b) Any producer who believes that they have been adversely affected by a determination under this part must seek review with the Deputy Administrator within thirty days of such determination, unless provided with notice by FSA which provides a different time for appealing.

(c) Any producer who believes that they have been adversely affected by a determination by the Agency, must seek review with the Deputy Administrator before any other review may be requested within the Agency.

#### **§ 1424.13 Misrepresentation and scheme or device.**

(a) A producer shall be ineligible to receive payments under this program if CCC determines the producer:

(1) Adopted any scheme or device which tends to defeat the purpose of the program in this part;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a producer engaged in a

misrepresentation, scheme, or device, or to any other person as a result of the bioenergy producer's actions, shall be refunded with interest together with such other sums as may become due, plus damages as may be determined by CCC.

(c) Interest charged under this part shall at the rate of interest which the United States Treasury charges CCC for funds, as of the date CCC made such funds available. Such interest shall accrue from the date such payments were made available to the date of repayment or the date interest increases as determined in accordance with applicable regulations.

(d) CCC may waive the accrual of interest and or damages if CCC determines that the cause of the erroneous determination was not due to any action of the bioenergy producer.

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

(f) The remedies provided in this part shall be in addition to other civil, criminal, or administrative remedies which may apply.

(g) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in, 7 CFR part 1403.

(h) Other limitations may apply.

Signed in Washington, DC, on November 7, 2000.

**Parks Shackelford,**

*Executive Vice President, Commodity Credit Corporation.*

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## **DEPARTMENT OF JUSTICE**

### **Immigration and Naturalization Service**

#### **8 CFR Parts 103 and 214**

[INS 1946-98]

RIN 1115-AF29

#### **Delegation of the Adjudication of Certain Temporary Agricultural Worker (H-2A) Petitions, Appellate and Revocation Authority for Those Petitions to the Secretary of Labor**

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** The Immigration and Naturalization Service (Service) is delaying the effective date of a final rule