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Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1424

Bioenergy Program; Final Rule

DEPARTMENT OF AGRICULTURE**Commodity Credit Corporation****7 CFR Part 1424**

RIN 0560-AG84

Bioenergy Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule finalizes a proposed rule to amend the existing regulations of the Commodity Credit Corporation (CCC) Bioenergy Program (program) in order to implement section 9010 of the Farm Security and Rural Investment Act of 2002 (the 2002 Act). These changes include: modifying the definitions for biodiesel, eligible commodities, and ethanol; extending the program beyond Fiscal Year (FY) 2002; and allowing producers to enter into multi-year agreements for program payments. Additional changes, based on comments received on the proposed rule, include: modifying the conversion factor provisions, making biodiesel payments on a soybean basis, making biodiesel payments on all biodiesel production, basing program payments on market prices as of the 10th business day before the production quarter, and establishing a target notification period for changes to conversion factors. Under the rule, CCC will pay incentives to ethanol producers to increase their use of eligible agricultural commodities in an FY as compared to the corresponding period in the prior FY. For biodiesel, CCC will pay incentives to biodiesel producers for FY 2003 through FY 2005 on all biodiesel production from eligible agricultural commodities. For FY 2006, CCC will pay biodiesel producers incentives only on their increased biodiesel production.

DATES: Effective October 1, 2002. The FY 2003 and beyond sign-up period will end June 6, 2003.

FOR FURTHER INFORMATION CONTACT: Jim Goff, Warehouse and Inventory Division, Farm Service Agency (FSA), United States Department of Agriculture (USDA), STOP 0553, 1400 Independence Avenue, SW., Washington, D.C. 20250-0553, telephone (202) 720-5396 or e-mail address:

BioenergyProgram@wdc.fsa.usda.gov. Persons with disabilities who require alternative means of communication (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 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 2002 Actions this rule will take.

Small Business Regulatory Enforcement Fairness Act

This rule will be submitted to Congress as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*) The rule has been determined not to be a major regulatory action. Thus, the 60-day delay required by section 801 of SBREFA for Congressional review is not applicable.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rule making for the subject matter of this rule.

Executive Order 12372

This program is not subject to 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

The environmental impacts of this rule have been considered in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508); and FSA's regulations for compliance with NEPA, 7 CFR part 799. FSA has concluded that the rule will not have any significant impacts upon the human environment as documented through the completion of a final environmental assessment (FEW) that is on file and available to the public in the Administrative Record at the address specified above by contacting the official named above. The FEW is also available electronically at <http://www.fsa.usda.gov/dafp/cepd/epb/nepa.htm>.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The rule specifies that production will be eligible retroactively beginning October 1, 2002. 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

The Federalism implications of this rule are not sufficient to warrant preparation of a Federalism Assessment. 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 as defined in 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 sections 202 and 205 of UMRA.

Paperwork Reduction Act

The information collection reporting and recordkeeping requirements associated with this rulemaking have been approved by OMB and assigned control number 0560-0207. The proposed rule contained a notice for this information collection (67 FR 61565, October 1, 2002) as required by 5 CFR 1320.8 (d) (1). Two comments were received supporting the FY 2002 recordkeeping burden.

Discussion of the Final Rule

In November of 2000, USDA implemented a Bioenergy Program. The 2002 Act extended the program through FY 2006 and made several changes to the program. A proposed rule addressing these changes was published in the **Federal Register** on October 1, 2002 (67 FR 61565). Comments were accepted on the proposed rule until October 31, 2002.

Comments on the Proposed Rule

Responses to the proposed rule were received from 1,994 interested parties representing five different sectors as follows: 1,521 from individuals; 194 comments from 137 companies; 186 comments from 119 cooperatives; 48 comments from 44 trade organizations and special interest groups—mainly representing the American Soybean Association and the National Renderers Association; and 45 from State and local Governments. Most respondents made multiple comments.

How Payments Are Determined**Soybean or Soybean Oil Basis**

CCC received 2,131 comments expressing concern about how CCC proposed to base program payments on

biodiesel production on soybean oil prices instead of on a raw soybean basis. A large majority, 1,635 respondents, wanted the program to increase rather than decrease payments; 296 opposed lowering the payment; 60 supported the proposed change; one stated payments should not be changed until after FY 2003; one supported higher overall payments for all biodiesel payments; and one suggested equal payment for all commodities based on soy oil. Related to the soybean payment issue, 197 respondents wanted increased program payments on animal fats and oils. The majority of respondents opposed proposed changes that revised biodiesel payment calculations, resulting in lower subsidy payments. Many respondents argued that the reduced biodiesel payments would not provide sufficient support to ensure biodiesel's affordability and maintain industry

growth. Some also argued that CCC's Bioenergy Program was the primary federal program providing support to the biodiesel industry and was largely responsible for biodiesel becoming one of the fastest growing alternative energy sources. A number of respondents argued that changes in the proposed rule contradicted the intent of Congress and the stated goal of increasing bioenergy production.

CCC agrees with many of the respondents' comments on several factors: Program biodiesel payments should be increased not reduced; payments on production from animal fats and oils should be increased; and all biodiesel payments should be based on the FY 2002 soybean payment formula. Therefore, in the final rule, 7 CFR 1424.3 has been adjusted. Also, the proposed language in 7 CFR 1424.8(e) related to gross payable units has been

moved to 7 CFR 1424.7. CCC will base all biodiesel payments on a soybean conversion and price, adjusted further by comparing the applicable oil or grease (animal fats and oils) price to the soy oil price. These changes will provide additional support to the biodiesel industry, maintain former payment levels for production from soybeans, and raise payments on production from animal fats and oils. This will reduce disparities between commodities in program payments for biodiesel production. The following table demonstrates how biodiesel payments will be determined taking into account the size-adjustment factor for large and small plants (which is statutory) and accounting for differences in feedstock to produce the eligible biodiesel.

Example:

Item	Soybeans	Animal fats and oils	Mustard seed
Gross Payable Units (Bushels)	714.30	.....	.....
Size Factor (2.5 if under 65 million gallons per year total capacity or 3.5)	2.50	.....	.....
Adjusted Bushels (Gross Bushels/Size Factor)	285.7	.....	.....
Soybean PCP, Macon County, Illinois ¹	\$5.59	.....	.....
Soybean Gross Payment (Soybean PCP × Adjusted Bushels)	\$1,597	\$1,597	\$1,597
Soy Oil Price, Cents per pound ¹ .....	.....	22.59	22.59
Feedstock Price, Cents per pound ¹ .....	.....	10.00	12.30
Feedstock Factor (Feedstock Price/Soy Oil Price) .....	.....	0.44	0.54
Gross Program Payment (Soybean Gross Payment × Feedstock Factor)	\$1,597	\$707	\$869

¹ Price on November 1, 2002.

No change is being made to the proposed rule's ethanol provisions in this area because there does not appear to be a similar need for adjustment.

Volume Basis for Payments

Forty-six respondents suggested program payments be made on all biodiesel production—base production (the previous FY volume) plus increased production this FY. One respondent suggested a two-tier payment with different payment rates used for base and increased biodiesel production, and another suggested a higher payment specifically for biodiesel. Respondents indicated that the biodiesel industry needs higher levels of support to maintain or increase industry growth.

CCC agrees with respondents that the biodiesel industry needs additional program support through higher payments. Consistent with the previous program, the 2002 Act requires the Secretary to make payments on the quantity of bioenergy produced during an FY that exceeds the quantity of bioenergy produced in the prior FY to date. Payment on increased production within a given FY may not provide sufficient incentives for long-term

investments in the biodiesel industry. Currently, biodiesel is not cost-competitive with conventional diesel. The payment on FY to FY increases therefore implicitly subsidizes base production of biodiesel, making it cost-competitive. As a result, each successive FY that a producer participates in the program, the level of implicit support for biodiesel production declines as the base production grows larger relative to the yearly increase in production. Furthermore, this may create a potential inequity in the market as newer producers may receive implicitly higher subsidies and, as a result, be more cost-competitive than established producers. This suggests that previous provisions carried forward by reference, arguably, in the new legislation may, if continued without amendment, promote instability, which would impede the goal of fostering growth in the industry. This situation does not apply to the ethanol industry with its more mature market and other Federal and State support programs. In addition, basing a payment only on increased year-to-year biodiesel production may encourage participants to frustrate the goals of the

program by increasing production one year, dropping it the next, then increasing it the following year in order to qualify for higher program payments. To avoid that result, CCC will use its original and continuing authority under section 5 of the CCC Charter Act, 15 U.S.C. 714c, as needed, and the program funding provided by the 2002 Act to make biodiesel production eligible for the program that would not be eligible solely under the bioenergy provisions of the 2002 Act by allowing payments on all of a producer's production and not just the increase in one year as compared with the preceding year. This support will be reduced each FY of the program to encourage industry independence from program payments. In no event will program funding exceed the \$150 million per FY funding provided by the 2002 Act. Accordingly, among other changes, 7 CFR 1424.7 as added in the final rule provides that biodiesel may receive payments in the normal manner on production eligible under the 2002 Act (year-to-year increases) plus a payment on the remaining production at 50 percent of that rate in FY 2003, 30 percent in FY

2004, 15 percent in FY 2005, and 0 percent in FY 2006. No change is being made to the rules for ethanol in this regard because there is not the same need.

Definition of Biodiesel

CCC received 194 comments that supported the proposed change in the biodiesel definition and supported additional feedstocks being eligible for biodiesel production. Three respondents suggested adding an American Society for Testing and Materials standard as a requirement to the biodiesel definition. Four comments supported eligibility for all biodiesel uses, whether for fuel or not, and expansion of the biodiesel definition to include other bio-oil/solvent products. Finally, two respondents suggested the program make payments on lower grades of bio fuels that are used for industrial uses.

Section 9010(b)(3)(A) of the 2002 Act specifically defines biodiesel as “a monoalkyl ester that meets the requirements of an appropriate American Society for Testing and Materials standard.” The language of the 2002 Act indicates that the intent of Congress was that eligible biodiesel be that used for fuel use only. Therefore, no change is made to the biodiesel definition.

Plant Capacity Conversion Factor

Two respondents suggested that the program change from using 2.5 to 1.1 as a divisor for producers with total plant capacity of under 65 million gallons per year and from using 3.5 to 2.1 for producers with total plant capacity of 65 million gallons or more per year. However, sections 9010(b)(3)(B)(i) and (ii) of the 2002 Act specifically provide for use of the 2.5 and 3.5 factors, respectively. The regulations follow the statute.

Refunds of Overpayments

One respondent, in addressing the program's requirement for refunds when increased production is not maintained for the entire FY, suggested that the program should “not force production of baseline if market cannot support the demand.”

Section 9010(b)(5) of the 2002 Act specifically states, “If the total amount of payments that an eligible producer receives for an FY under this section exceeds the amount that the eligible producer should have received under this subsection, the eligible producer shall repay the amount of the overpayment to the Secretary, with interest (as determined by the Secretary).” Accordingly, no change is made in this area. However, the change

made with regard to basing program payments on all biodiesel production should minimize the impact of this requirement on program biodiesel participants.

Determining Commodity Market Price

One respondent suggested that the program, when making payment calculations, use the average commodity price for the production quarter rather than the price as of the last business day of the quarter in which production occurred. This issue, although it was the subject of one comment on this rule, has been an issue in program administration in both FY 2001 and FY 2002. Program participants in those years complained that their actual feedstock costs were established before production, not after, and that knowing the program payment rate earlier would help them price their contracts. To address this concern, without compromising the purpose of the program to try to approximate actual conditions, 7 CFR 1424.8(d)(2) has been changed to adopt for use the price of the commodity on the 10th business day before the start of the production quarter to establish program payments.

Conversion Factors

The rule resulted in 3,471 comments being received concerning conversion factors for eligible commodities. Of those, 1,829 respondents requested conversion factors be issued more timely, more predictably, and with more sensitivity toward the potential impact of changes after they are announced. An additional 1,640 respondents suggested that conversion factors be more predictable, not be subject to annual change, and codified in the regulations. One respondent recommended the conversion factor for all eligible commodities be codified in the regulations, and one respondent generally opposed removing conversion factors from the regulations.

These comments may have resulted from the proposed rule's suggested adoption of a new biodiesel soybean conversion factor. With the exception of the disparity in program payments for biodiesel made from soybeans and soy oil versus animal fats and oils, no complaints had been received in FY 2001 or FY 2002 on the program's conversion factors and no general discontent was expressed by participants about the factors used in those years. The broad list of potential program eligible commodities, many currently not used in bioenergy production, makes publication of a conversion factor for every eligible commodity unrealistic. In addition, as manufacturing processes improve and

industry conversion factors improve, CCC needs to be able to reflect the bioenergy producer's true costs of production in a more timely fashion than that allowed by notice and comment rulemaking. From a review of the comments, it appears the real goal is for producers to be able to accurately estimate program payments when they contract future sales prices. To address that, 7 CFR 1424.8(e) has been changed to state, “After FY 2003, changes to established conversion factors shall be announced in a press release issued by CCC 90 calendar days before the applicable FY's sign-up, to the extent practicable.” This should give program participants a 120-day notification (90 days before sign-up plus 30-day sign-up period) before applicable production is produced. Conversion factors, as they are established, will also be posted to the program's Internet website.

Source Used for Fats and Oil Market Prices

Fifty-one respondents commented on this aspect of the program. Fifty suggested that CCC use the “Jacobsen Fats and Oils Bulletin” for oil feedstock prices without applicable Posted County Prices; one suggested CCC use the Chicago Board of Trade for all virgin crude oil prices with 5-year trade adjustments from that for cottonseed oil, corn oil, and canola oil prices. Respondents expressed the belief that the “Jacobsen Fats and Oils Bulletin” provided a more accurate market price for animal fats and oils than the USDA's “Weekly National Carlot Meat Report,” which was used by the program in FY 2002.

The program's regulations do not specify the source CCC will use for feedstock prices for eligible commodities without a Posted County Price—only that the market price will be “as determined by CCC.” For FY 2002, CCC used the U.S. Department of Agriculture's Agricultural Marketing Service's “Springfield Report” for corn oil prices and the USDA's “Weekly National Carlot Meat Report” for animal fats and oils prices. However, based on comments received, CCC has reviewed the data provided by the “Jacobsen Fats and Oils Bulletin” and has determined it does provide an accurate regional price for animal fats and oils. Therefore, CCC will use the “Jacobsen Fats and Oils Bulletin” to the extent possible for oil feedstock prices without a Posted County Price. This policy will also be announced in the FY 2003 sign-up press release announcement. 7 CFR 1424.8(d)(2)(ii) is changed to indicate that as a step in the final calculation of payments the biodiesel gross payment

will be determined for biodiesel made from eligible commodities that have a corresponding oil or grease market price, using the Posted County Price for soybeans for the county where the plant is located. If the biodiesel is made from soybeans or soy oil, this is the gross payment without a further feedstock adjustment (but subject to other possible adjustments). For biodiesel made from other than soy oil or soybeans, the applicable feedstock's oil or yellow grease (for animal fats and oils) market price, as determined by CCC, will be divided by the soy oil price published in the Agricultural Marketing Service's weekly "Soybean Crush Report (Central Illinois (Decatur, Macon County, Illinois))" for the applicable date. The resulting percentage will be multiplied by the soybean gross payment to determine the producer's gross payment eligibility subject to such other adjustments as provided in the regulations.

Eligible Commodities and Fuels

The proposed rule elicited 53 comments in this area. Of these, 50 supported the addition of animal fats and oils as program eligible commodities. Also, three suggested that CCC allow producers to use different eligible commodities during the same FY and not make producers commit at sign-up to which feedstocks will be used in bioenergy production.

CCC recognizes the difficulty producers have in forecasting which feedstocks will be used a year ahead of actual production. However, potential program payments must be estimated after that FY's sign-up is concluded to determine if a payment factor will be required to keep program expenditures within budgetary authority during the FY. CCC also recognizes that program projections for FY 2001 and FY 2002 were excessive compared to actual production. To address this, the bioenergy agreements will continue to request the maximum possible production by eligible commodity but will separately request the maximum total production increase. Producers will separately list the estimated production by eligible commodity and the total maximum increase from all eligible commodities. The total maximum increase reported will no longer be tied to the estimated production by eligible commodity. When added, the estimated production by commodity may now exceed the total maximum increase reported. This will allow producers to switch production between eligible commodities while still providing CCC the data necessary to

project program costs based on eligible commodities being used.

Producer Eligibility

Fifty-four respondents felt that program payments should only be made to bona fide producers—not marketers. FSA reviews each applicant thoroughly for eligibility before they are approved for the program. To be eligible, a producer must have, among other requirements, risk of loss during the production process. A producer need not own the facility producing the fuel. All program payments are monitored and thorough, on-site examinations are conducted of all program participants' operations to verify program compliance. If noncompliance or over payments are discovered, repayments are required. In addition, program provisions are only applicable to a producer's bioenergy production activities—not to other business activities that producer may be involved in. However, to address this issue and also the issue of producers moving production between different plants between FY's to gain larger program payments, 7 CFR 1424.7(c) has been updated to state that there can only be one producer per plant and that when producers transfer all of their operations to a different plant, their prior FY's production will be the greater of the production at the plants they operated in the prior FY or the prior FY production at plants they are taking over in the next FY. Also, to help insure that the program accomplishes its goals, the rule provides that "Otherwise, for purposes of computing whether a producer has increased production in the current year from the previous year, the determination will be made by comparing for the current year the producer's production figures from all locations in which the producer has an interest with, for the previous year the sum of (i) production at those locations by any person including, but not limited to, the producer, and (ii) additional production by the producer at any other location in that year. Also, as needed to avoid frustrating the goals of the program, the Executive Vice President of CCC may treat producers with common interests, common ownership, or common facilities or arrangements as the same producer. These provisions mirror provisions in the current rule and are provided for additional clarity.

Although FY 2003 sign-up will be held after October 1, 2002, FY 2003 bioenergy production beginning October 1, 2002 will be eligible for FY 2003 program payments.

Miscellaneous Comments

Twelve miscellaneous comments were received, with nine of those stating general support for the program. However, responses to the biodiesel issue also seem to indicate that those respondents would support the program even if biodiesel payments are reduced by the final rule. Another two respondents supported the program's current recordkeeping or paperwork burden. One respondent urged CCC to remove all support for continuance of current bioenergy programs and instead provide greater attention to supporting on farm fuel production for use in food production crops. The 2002 Act requires CCC to continue the program through FY 2006.

Cost-Benefit Assessment

The 2002 Act authorizes bioenergy program funding of up to \$150 million per year for FY's 2003 through 2006. Section 743 of the Consolidated Appropriations Resolution, 2003, Public Law 108-7, limits FY 2003 payments to eligible bioenergy producers to 77 percent of the amount that those producers would otherwise earn under the program. The President's Budget for FY 2004 also proposes to limit the program to \$100 million in FY 2004. The program was first implemented during FY 2001 and funded for FY 2001 and FY 2002 at \$150 million each year. Payments have been well under the annual funding levels—FY 2001 payments totaled \$40.7 million; FY 2002 payments totaled \$78.7 million. The list of eligible commodities is expanded to include cottonseed and any animal byproduct (in addition to oils, fats, and greases) that may be used to produce bioenergy. However, because payments have been made only on corn, grain sorghum, wheat, soybeans, and animal fats and oils, it is difficult to forecast additional payments on the newly eligible commodities. Assuming that some of the new commodities do enter the program, the volume is likely to be small, and the outlay effects negligible. The number of participants receiving payments is expected to increase only slightly. Because of very strong incentives to increase ethanol production independent of the bioenergy program, FY 2003-ethanol production and payments are projected to increase sharply from FY's 2001 and 2002. Program payments for ethanol are expected to be highest in FY 2003 and then decline, because the rate of increase in production is projected to slow as California completes the transition to ethanol. Thus, the cost of the program is expected to be higher

initially than in FY's 2001 and 2002. Soybeans have been the predominant commodity for biodiesel payments to date. This is not likely to change substantially due to the expansion in eligible commodities. However, revisions in payment calculations will raise payment rates for animal fats and oils. This will increase incentives to use these commodities for biodiesel production.

List of Subjects in 7 CFR Part 1424

Administrative practice and procedure, Energy—bioenergy, Fuel additives, Gasohol, Oils and fats, Oilseeds, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, 7 CFR part 1424 is amended as set forth below:

PART 1424—BIOENERGY PROGRAM

■ 1. Part 1424 is revised to read as follows:

PART 1424—BIOENERGY PROGRAM

Sec.

- 1424.1 Applicability.
- 1424.2 Administration.
- 1424.3 Definitions.
- 1424.4 General eligibility rules.
- 1424.5 Agreement process.
- 1424.6 Payment application process.
- 1424.7 Gross payable units.
- 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.
- 1424.14 Offsets, assignments, interest and waivers.

Authority: 7 U.S.C. 8108, 15 U.S.C. 714b and 714c.

§ 1424.1 Applicability.

This part sets out regulations for the Bioenergy Program (program). It sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions a bioenergy producer must meet to obtain payments under this program and part from the Commodity Credit Corporation (CCC) for eligible bioenergy production. Additional terms and conditions may be set forth in the document required to request program benefits and in the program contract or agreement prescribed by CCC. This program is effective October 1, 2002, through September 30, 2006.

§ 1424.2 Administration.

This part shall be administered by the Executive Vice President, CCC, under

the general direction and supervision of the Executive Vice President or designee. The Executive Vice President or a designee may authorize a waiver or modification of deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the program, and may set such additional requirements as will facilitate the operation of the program. The funds available for the program shall be limited as set by this rule, otherwise announced by the Executive Vice President, CCC, or limited by law.

§ 1424.3 Definitions.

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

Agreement means the Bioenergy Program Agreement or other form prescribed by CCC that must be executed for participation in the program.

Application means the application form prescribed by CCC or another form that contains the same terms, conditions, and information required.

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

Base production means a biodiesel producer's current FY's biodiesel production from eligible commodities that is not an increase over biodiesel production in the previous FY to date.

Biodiesel means a mono alkyl ester manufactured in the United States and its territories that meets the requirements of an appropriate American Society for Testing and Materials Standard.

Biodiesel producer means a producer that produces and sells biodiesel who is also registered and in compliance with section 211 (b) of the Environmental Protection Agency Clean Air Act Amendment of 1990.

Bioenergy means ethanol and biodiesel produced from eligible commodities.

Conversion factor means:

(1) For ethanol production, a factor that converts the number of ethanol gallons back to commodity units as determined in the manner announced by CCC;

(2) For biodiesel production, the factor that will treat 1.4 gallons of biodiesel produced as having involved the consumption of one bushel of soybeans in any case when the feedstock was an eligible commodity that has a corresponding oil or grease market price; if there is none, then the factor shall be as determined and announced by CCC.

Eligible commodity means barley; corn; grain sorghum; oats; rice; wheat; soybeans; cotton seed; sunflower seed; canola; crambe; rapeseed; safflower; sesame seed; flaxseed; mustard seed; cellulosic crops, such as switchgrass and hybrid poplars; fats, oils, and greases (including recycled fats, oils and greases) derived from an agricultural product; and any animal byproduct (in addition to oils, fats and greases) that may be used to produce bioenergy, as CCC determines, that is produced in the United States and its territories.

Eligible producer means a bioenergy producer who meets all requirements for program payments.

Ethanol means anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

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

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

Ethanol producer means a person authorized by ATF to produce ethanol.

FSA means the Farm Service Agency, USDA.

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

KCCO means the FSA, Kansas City Commodity Office.

Posted County Price means the same Posted County Price for different locations as is used under other CCC commodity programs for marketing loan gains and other matters.

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

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

Sign-up period means the time period announced by CCC during which CCC will accept program agreements.

USDA means the United States Department of Agriculture.

§ 1424.4 General eligibility rules.

(a) An applicant must be determined eligible by KCCO and be assigned an agreement number.

(b) To be eligible for program payments, a producer must maintain records indicating for all relevant FY's and FY quarters:

(1) The use of eligible commodities in bioenergy production;

(2) The quantity of bioenergy produced from an eligible commodity by location;

(3) The quantity of eligible commodity used by location to produce the bioenergy referred to in paragraph (b)(2) of this section; and

(4) All other records, needed, or required by the agreement to establish program eligibility and compliance.

(c) A producer must allow verification by CCC of all information provided. Refusal to allow CCC or any other agency of USDA to verify any information provided will result in a producer being determined not eligible.

(d) For producers not purchasing raw commodity inputs, the production must equal or exceed that amount of production that would be calculated using the raw commodity inputs and the conversion factor set out in § 1424.3. A producer that purchases soy oil from a soybean crushing plant for further refinement into biodiesel must be able to prove to CCC's satisfaction both soy oil purchases and biodiesel production for the applicable quarter. Any special conversion factors needed will be the province of CCC and CCC alone and CCC's decision will be final.

(e) A producer must meet all other conditions set out in these regulations, in the agreement, or in other program documents.

§ 1424.5 Agreement process.

(a) To participate, an eligible producer must submit a signed agreement during the FY sign-up period. Agreements may be for single or multiple FY's. However, multiple FY agreements require producers to submit annual production estimate reports during each applicable FY sign-up period. Such reports must comply with the terms of the agreement and this part. In all cases, the accounting for compliance will be made on a per FY basis.

(b) Sign-up each FY will be held for 30 calendar days beginning for:

(1) FY 2003 on the date of publication of this rule;

(2) FY 2004 and beyond on August 1 of the FY before the applicable FY.

(c) After agreements are submitted:

(1) If determined eligible by KCCO, an agreement number will be assigned, and a notification will be mailed to the producer;

(2) If additional information is needed for KCCO to determine eligibility, the producer will be contacted as soon as practicable and requested to provide additional supporting documentation;

(3) If determined ineligible by KCCO, producers will be notified in writing that their agreement was rejected and the reason for the determination.

§ 1424.6 Payment application process.

(a) To apply for payments under this program during an FY, an eligible producer must:

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

(2) Certify with respect to the accuracy and truthfulness of the information provided;

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

(4) Provide documentation as requested by CCC of both the producer's net purchases of eligible commodities and net production of bioenergy compared to such production at all locations during the relevant periods. CCC may adjust the formulaic payments otherwise payable to the producer if there is a difference between the amount actually used and certified and the amount of increased commodity use calculated under the formula.

(b) After applications or reports are submitted, eligible producers:

(1) Shall submit such additional supporting documentation as requested by KCCO when additional information is needed to determine eligibility;

(2) Will be notified in writing of their ineligibility and reason for the determination, when the application is determined ineligible by KCCO; and

(3) Shall promptly refund payments when a refund to CCC is due. If a refund is not made promptly, CCC may establish a claim.

§ 1424.7 Gross payable units.

(a) For ethanol, producers will be eligible for payments on gross payable units for only their ethanol production from eligible inputs that exceeds, for the program year to date, their total comparable production at all locations as compared to the comparable portion of the previous year. Producers of ethanol are not eligible for base production payments. Producers shall not be paid twice for the same increase and any decline in relative production between quarters will require a comparable refund. For example, if at the end of the first quarter, a producer were to be paid for an increase of 500 gallons of ethanol, but at the end of the second quarter, that producer's year-to-date production was down to a net increase for the year of 450 gallons, then a refund would be due for the loss of the

corresponding 50 gallons of net extra production. Repayment rates shall be based on previous payment rates. Unless otherwise determined by CCC, the extra ethanol production from eligible inputs will be converted to gross payable units by dividing the gallons of increased ethanol by the applicable conversion factor.

(b) Biodiesel producers will be eligible for payments on gross payable units for all biodiesel production from eligible inputs. For eligibility purposes there will be two kinds of payment: additional production payments (APP), and base production payments (BPP). Repayment rates shall be based on previous payment rates. Unless otherwise determined by CCC, gross payable units for biodiesel production from eligible inputs will be calculated as follows:

(1) For APP, by dividing the gallons of increased biodiesel by the biodiesel conversion factor of 1.4. APP payments will be made on increases as compared with the previous FY. Producers will not be paid twice for the same production. Failure to maintain year to date biodiesel production increases between quarters will require a comparable APP refund as specified below. That is, for example, if a producer were to be paid, at the end of the first quarter, for 500 gallons of increased biodiesel production, but by the end of the second quarter that producer's production, for the year to date, was only 450 gallons, then a refund of the APP premium would be due for the loss of the corresponding 50 gallons of net production increase.

(2) For BPP, which will be made on production not eligible for the APP, by dividing the base production by the biodiesel conversion factor of 1.4 and multiplying the result by 0.5 in FY 2003, 0.3 in FY 2004, 0.15 in FY 2005, or 0.0 (zero) in FY 2006 to determine base biodiesel production gross payable units.

(3) Adding the APP and BPP to determine biodiesel gross payable units.

(c) There shall only be one eligible producer per plant location.

(1) When producers move production from one plant to another between FY's, the prior FY's production for the producer for program payment calculations tied to increases in production shall be the greater of:

(i) The production at the plant operated by the producer in the prior FY, or

(ii) The production in the prior FY at the plant being taken over by the producer in the current FY.

(2) New producers who are taking over a plant with prior bioenergy

production shall assume that production history for program purposes. For example: in FY 2002, Producer A produced 1,000 gallons of bioenergy in plant 1 and Producer B produced 500,000 of bioenergy in plant 2. In FY 2003, Producer A assumes operation of plant 2; Producer B moves to plant 3, which was not in the program in FY 2002, but with FY 2002 production of 400,000 gallons from eligible commodities; and Producer C assumes operations of plant 1. In FY 2003, for program purposes solely based on these respective plants, Producer A would have a prior FY production of 500,000 gallons; Producer B would have a prior FY production of 500,000 gallons; and Producer C would have a prior FY production of 1,000 gallons. These examples would apply when a producer moves its entire operation from one plant to another. Otherwise, for purposes of computing whether a producer has increased production in the current year from the previous year, the determination will be made by comparing for the current year the producer's production figures from all locations in which the producer has an interest with, for the previous year, the sum of:

(i) Production at those locations by any person including, but not limited to, the producer, and

(ii) Additional production by the producer at any other location in that year.

(3) Also, as needed to avoid frustrating the goals of the program, the Executive Vice President of CCC may treat producers with common interests, common ownership, or common facilities or arrangements as the same producer.

§ 1424.8 Payment amounts.

(a) An eligible producer may be paid the amount specified in this section, subject to the availability of funds. Total available funds shall be as determined appropriate by CCC and shall not exceed \$150 million in any of FY's 2003 through 2006.

(b) For agreements submitted during an FY sign-up, applicants must project increases in production. Based on expected commodity prices, using the formula set out in this section, submissions will be assigned an expected payment value. When the payment value of all timely submitted and validly executed agreements exceed available funding, CCC may, at its discretion, prorate payments to be made under such agreements based on total available funding.

(c) When the payment value of all timely submitted applications exceed

available funding, CCC will prorate payments based on total available funding.

(d) Subject to this section and conditions in the agreement, a producer's payment eligibility shall be adjusted at the end of each quarter, and calculated as follows:

(1) Gross payable units, calculated and determined in accordance with § 1424.7, shall be converted to net payable units for producers whose annual bioenergy production is:

(i) Less than 65 million gallons, by dividing by 2.5;

(ii) Equal to or more than 65 million gallons, by dividing by 3.5;

(2) Net payable units calculated under paragraph (d)(1) of this section shall then be converted to a gross payment by multiplying net payable units by the per-unit value of the commodity as of the 10th business day before the start of the production quarter, determined as follows:

(i) For ethanol:

(A) For those agricultural commodities with an established Posted County Price, CCC will use the Posted County Price that CCC announces daily for the county in which the plant is located and applicable quality factors as CCC may establish.

(B) For agricultural commodities that CCC determines do not have Posted County Prices, CCC will use market data CCC determines to be appropriate for the applicable commodity.

(ii) For biodiesel made from:

(A) Soybeans or soy oil, CCC will use the Posted County Price for soybeans for the county where the plant is located.

(B) Eligible commodities other than soybeans or soy oil that have a corresponding oil or grease market price, CCC will first use the soybeans Posted County Price for Macon County, Illinois. Then, the applicable feedstock's oil or yellow grease (for animal fats and oils) market price, as determined by CCC, will be divided by the soy oil price published in the Agricultural Marketing Service's weekly "Soybean Crush Report" (Central Illinois (Decatur, Macon County, Illinois)) for the applicable date. The resulting percentage will be multiplied by the soybean gross payment to determine the producer's gross payment.

(C) Eligible commodities that do not have a corresponding oil or grease market price, in a manner as determined by CCC.

(3) The gross payment calculated under paragraph (d)(2) of this section shall be reduced to a net payment by multiplying the gross payment figure by the proration factor determined under paragraph (c) of this section.

(4) Subject to other provisions of this section, producers shall be paid the net current payment, if positive, determined for the quarter, subject to the requirements and refund provisions of this part.

(5) After the first quarter, adjustments shall be made based on changes in production. Refunds, when due, shall be due at the per unit values at which they were paid.

(6) For an FY, no producer may receive more than 5 percent of the available funding for this program.

(e) When the commodity's conversion factor has been established, that factor will, as practicable, be posted on the program's website.

(1) If the commodity's conversion factor is not determined when the sign-up is announced, the conversion factor will be provided in a letter to producers with accepted agreements to the extent practicable.

(2) After FY 2003, changes to established conversion factors shall be announced in a press release issued by CCC 90 calendar days before the applicable FY's sign-up, to the extent practicable.

§ 1424.9 Reports required.

Once an eligible producer has submitted a payment application, that producer shall file cumulative and per-plant information for each relevant bioenergy producing facility quarterly through the end of the applicable FY as specified by CCC or as otherwise needed to establish compliance with this part.

§ 1424.10 Succession and control of facilities and production.

A person who obtains a facility that is under contract under this part may request permission to succeed to the program agreement and CCC may grant such request if it is determined that permitting such succession would serve the purposes of the program. If appropriate, CCC may require the consent of the original party to such succession. Also, CCC may terminate a contract and demand full refund of payments made if a contracting party loses control of a facility whose increased production is the basis of a program payment or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

§ 1424.11 Maintenance and inspection of records.

For the purpose of verifying compliance with the requirements of this part, each eligible producer shall make available at one place at all reasonable times for examination by

representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to the program that is within the control of such entity for not less than three years from the payment date.

§ 1424.12 Appeals.

(a) A participant subject to an adverse determination under this part may appeal by submitting a written request to: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, D.C. 20250-0550. The appeal must be delivered in writing to the Deputy Administrator or postmarked within 30 days after the date the Agency decision is mailed or otherwise provided to the participant. The Deputy Administrator may consider a late appeal if determined warranted by the circumstances.

(b) The regulations at 7 CFR part 11 apply to decisions made under this part.

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

§ 1424.13 Misrepresentation and scheme or device.

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

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

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a producer engaged in a misrepresentation, scheme, or device, or to any other person as a result of the bioenergy producer's actions, shall be refunded with interest together with such other sums as may become due, plus damages as may be determined by CCC.

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

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

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions and rates prescribed in part 1403 of this chapter.

§ 1424.14 Offsets, assignments, interest and waivers.

(a) Any payment or portion thereof to any person shall be made without

regard to questions of title under State law and without regard to any claim or lien against the bioenergy, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found in part 1403 of this chapter shall be applicable to agreement payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this chapter.

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

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

Signed in Washington, DC, on May 1, 2003.

James R. Little,

Executive Vice President, Commodity Credit Corporation.

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