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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1400

RIN 0560-AG86

Income Limits

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule sets forth at 7 CFR part 1400 the regulations to implement provisions of the Farm Security Act of 1985 (1985 Act) as amended by the Farm Security and Rural Investment Act of 2002 (2002 Act) regarding limits on the income of individuals and entities eligible for certain USDA commodity and conservation programs. These regulations set forth the criteria to determine whether income limits have been exceeded by an applicant for those benefits. The final rule, generally, provides that, for individuals, CCC will use the adjusted gross incomes reported in the prior three years to the United States Department of the Treasury, Internal Revenue Service (IRS), and a comparable measure for other entities such as corporations, limited partnerships, and charitable organizations. This rule also includes an addition to subpart C of this part concerning payment eligibility determinations for program participants who are reservist military personnel called to active duty as the result of Operation Iraqi Freedom, and other similar military operations. The rule is intended, as provided by the 1985 Act, to impose limits on the amount of average adjusted gross income that a program participant can have and still remain eligible for program benefits and also allow reservist military personnel called to active duty to remain eligible for payments in certain circumstances.

DATES: This rule is effective on June 3, 2003.

FOR FURTHER INFORMATION CONTACT: Daniel McGlynn, Production, Emergencies and Compliance Division, United States Department of Agriculture (USDA), Stop 0517, 1400 Independence Ave. SW., Washington, DC 20250-0517. Telephone: (202) 720-3463. Electronic mail: Dan_McGlynn@wdc.usda.gov. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Notice and Comment

Section 1601(c) of the 2002 Act provides that the regulations needed to implement Title I of the 2002 Act, including those involved here, may be promulgated without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture effective July 24, 1971, (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking. Because the provisions of this rule are not effective until the 2003 crop, and due to the complexity of the issues presented in the rule, it was determined that it was in the public's interest to solicit comments on the proposed rule before it became effective.

Executive Order 12866

This final rule has been determined to be significant under Executive Order 12866 and has been reviewed by the Office of Management and Budget (OMB).

Federal Assistance Programs

This final rule has a potential impact on all programs listed in the Catalog of Federal Domestic Assistance in the Agency Program Index under the Department of Agriculture, Farm Service Agency and Natural Resources Conservation Service. Other assistance programs are also impacted.

Regulatory Flexibility Act

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

Environmental Assessment

The environmental impacts of this rule have been considered under 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 regulations of the Farm Service Agency (FSA) of the Department of Agriculture (USDA) for compliance with NEPA, 7 CFR part 799. An Environmental Evaluation was completed and the proposed action has been determined not to have the potential to significantly impact the quality of the human environment and no environmental assessment or environmental impact statement is necessary. A copy of the environmental evaluation is available for inspection and review upon request.

Executive Order 12778

This rule has been reviewed under Executive Order 12778. This rule preempts State laws that are inconsistent with it, however, this rule is not retroactive. Before judicial action may be brought concerning this rule, all administrative remedies must be exhausted.

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).

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC was not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject matter of this rule. Also, this rule contains no mandates as defined in sections 202 and 205 of UMRA.

Paperwork Reduction Act

Section 1601(c) of the 2002 Act provides that the promulgation of regulations and the administration of Title I of the 2002 Act shall be done without regard to chapter 5 of title 44 of the United States Code (the Paperwork Reduction Act). Accordingly, these regulations and the forms and other information collection activities

needed to administer the provisions authorized by these regulations are not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

Government Paperwork Elimination Act

FSA is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom to E-File Act, which require Government agencies in general and FSA in particular to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. The form that applicants will use to certify their income has been developed for on-line use. However, because of the nature of the other paperwork and documentation that may be needed to verify eligibility based on income, the use of electronic means of submission for those information collections is not feasible at this time.

Discussion of the Final Rule

Background

The 2002 Act authorized new programs and benefits, including direct payments and counter-cyclical payments for producers of certain covered commodities and for payments and other benefits under a number of new and revised conservation programs. Section 1604 of that Act amended the 1985 Act by adding a new section, 1001D, to provide that individuals or entities shall not be eligible to receive direct payments, counter-cyclical payments, marketing loan gains or a payment under any of the conservation programs authorized under title XII of the 1985 Act, nor a payment under the conservation programs of title II of the 2002 Act, if the three-year average of the adjusted gross income of the individual, or comparable measure for an entity, exceeds \$2.5 million. An exemption, though, is provided where not less than 75 percent of the average adjusted gross income is derived from farming, ranching, or forestry operations. Section 1001D also requires a commensurate reduction in the shares of payments to an entity proportional to the interest held in the entity by parties whose adjusted gross income is more than \$2.5 million.

CCC published a proposed rule as to its intentions for implementing income limits on October 28, 2002 at 67 FR 65738. The Agency received 72 timely filed letters containing 129 comments. Respondents included the following: 21 individuals, 15 corporations and similar entities, 8 commodity groups and

similar organizations, 7 State and Federal agencies, 4 churches, colleges and universities, 2 Certified Public Accountants, 1 financial institution, 10 farm management companies, and 4 research and environmental organizations. Comments were received from respondents in the following States: California, Colorado, Florida, Georgia, Hawaii, Iowa, Indiana, Kansas, Louisiana, Missouri, Minnesota, Mississippi, North Dakota, Nebraska, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and the District of Columbia.

Discussion of Comments and Changes

Specific comments received, addressed in the same sequence as the final rule, are as follows:

Section 1400.600 Applicability

Comments were received from 32 respondents who were concerned about the programs to which the income limits are applied. Some respondents commented that the income limitation will adversely affect participation in conservation and environmental programs. These respondents suggested that conservation and environmental program participants be exempted from income limits. The respondents asserted an exemption was appropriate because the rule may preclude large landowners participation in these programs and thus defeat the purposes of environmental projects and initiatives, both State and Federal. It was also argued that under certain programs, such as the Wetland Reserve Program, easement payments are for reimbursing landowners for rights foregone. As such, in their opinion, these payments should not be classified as benefits and, therefore, not subject to the adjusted gross income limitation. It was also commented that the income limitation would adversely impact compliance with highly erodible land conservation and wetland conservation provisions. Several respondents commented that other programs, not referenced in the proposed rule, which have a gross revenue restriction should use the average adjusted gross income limitation instead. It was also commented that private colleges and educational institutions should be exempt from the rule altogether, as are public institutions, since the missions of the institutions are the same.

The statute provides that the average adjusted gross income limitation applies to any program authorized by title XII of the 1985 Act or titles I or II of the 2002 Act. There are no exceptions for conservation and environmental

programs and, in fact, they are specifically included. Section 1604 of the 2002 Act applies to all payments and covered benefits of the programs under the titles specified. Therefore, no exceptions are made in the final rule for payments and benefits authorized by these titles.

As to the comments concerning the application of this rule to other programs not referenced in the 2002 Act, it is true that a gross revenue restriction has been applied as a requirement for eligibility for other programs not included in the proposed rule. Although the gross revenue restriction and the average adjusted gross income limitation share a similar purpose, there are significant differences, different statutory schemes, and this rule is limited to application of the test provided for in the 2002 Act. For example, although the desire for one rule for all programs is understandable, the application of a qualifying gross revenue restriction per "person" to payments under the Noninsured Crop Disaster Assistance Program (NAP) is required by the statute authorizing NAP. However, for flexibility, provision is made to apply this subpart to other programs if so provided by statute or regulation in the future.

As to the program participants to be covered by these income limits, section 1001D(a)(1) of the 2002 Act provides that " * * * the term 'average adjusted gross income,' with respect to an individual or entity (for purposes of this section as defined in section 1001(e)(2)(A)(ii)), means the three-year average of the adjusted gross income or comparable measure of the individual or entity over the preceding tax years, as determined by the Secretary." Section 1001 of the 1985 Act sets forth the statutory payment limitations applicable to certain commodity and conservation program benefits. Generally, these provisions have been the same since the enactment in 1987, and provide that the total amount of specified payments that a "person" may receive is limited to specified amounts per year.

Section 1001(e)(2)(A) defines the term "person" as follows:

* * * the term "person" means—

(i) An individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or a participant in a similar entity (as determined by the Secretary);

(ii) A corporation, joint stock company, association, limited partnership, charitable organization, or other similar entity (as determined by the Secretary, including any such entity or organization participating in the farming operation as a partner in a general partnership, a participant in a joint

venture, a grantor or a revocable trust, or as a participant in a similar entity (as determined by the Secretary); and

(iii) A State, political subdivision, or agency thereof.

In determining who is a "person" for purposes of section 1001D, an "entity" is specifically defined to be the same as an "entity" as provided in section 1001(e)(2)(A)(ii) of the 1985 Act. Notably, section 1001D does not contain such a mandate to use the definitions in sections 1001(e)(2)(A)(i) and (iii). Accordingly, this final rule provides that the definition of an "entity" shall be the same for purposes of sections 1001 and 1001D of the 1985 Act. Further, in order to provide consistency in the application of both sections 1001 and 1001D, the final rule also provides that the definition of an "individual" will be the same for both purposes.

As to the respondents' suggestion that private schools be exempted from income limits, the definition of "entity" in the 1985 Act does not include States, political subdivisions, and agencies thereof (which include a public school or university), but does include charitable organizations and other nonprofit organizations (including churches and private schools). Furthermore, the 2002 Act does not exempt any charitable or nonprofit organization from the average adjusted gross income limitation. Also, this final rule does not extend the average adjusted gross income limitation to States, counties, political subdivisions, agencies thereof, or recognized Indian tribes because Governmental organizations do not have "income" similar to the other listed individuals and entities. Although a private institution may indeed serve some of the same purposes as some public institution, there is no statutory authority to treat them the same within the context of this rule. Accordingly, this comment was not adopted and this provision of the proposed rule is not changed in the final rule. However, the final rule does recognize the special nature of some activities of such charitable organizations as was set out in the proposed rule.

A respondent commented that the disqualification should include all payment methods for certain benefits, including commodity certificates issued under marketing assistance loans. The respondent believed that the use of such certificates undermines the intent of Congress to limit program payments. Under the 2002 Act, the average adjusted gross income limitation applies to loan deficiency payments and marketing loan gains, but does not include certificate transactions or to

other forms in which loan benefits might otherwise be obtained (such as loan forfeitures). Accordingly, the provisions of this rule cannot be extended to include such transactions.

Other comments on this section included: the \$2.5 million level is too high; the adjusted gross income limitation will force landowners to switch from share leases to cash leases and thus place the operators at substantially greater risk; and the adjusted gross income limitation is not equitable in that a test based on the assets of the potential recipient would be a more equitable test for payment eligibility. The dollar amount of the average adjusted gross income limitation and the disqualifications are provided by statute. There is no discretion to modify the amount or impose an alternative requirement for payment eligibility. Therefore, the final rule makes no changes in this provision.

Section 1400.601 Determination of Average Adjusted Gross Income

Comments were received from 14 respondents on this section of the proposed rule. The comments dealt primarily with the manner in which average adjusted gross income is determined, either by tax information or comparable measure, and the definition of income from farming, ranching and forestry operations. It was commented that "comparable measure" needed to be better defined. Other concerns were that compliance with the average adjusted gross income limitation would be adversely affected if income from various sources that the respondents believed were agricultural or farm-related, but do not fit in certain taxing categories for Internal Revenue Service (IRS) purposes, would not be considered income from farming, ranching or forestry operations. One respondent commented that there are occasions when 2 or more corporations are allowed to file a single, consolidated tax return and suggested that a certification indicating the amount each entity would have paid if separate returns had been filed should be allowed to be submitted.

The term "adjusted gross income," for IRS purposes, applies only to taxpayers who are "individuals." As previewed in the proposed rule, this final rule provides, for individuals, that adjusted gross income be generally based on the IRS definition of that term and associated filings. Section 1001D(a)(1) of the 2002 Act takes into account the limited IRS use of this term by providing that the Secretary is to fashion a "comparable measure" for other entities. Here also, as indicated in

the proposed rule, prior years' tax filings will be the starting point of reference. Due to the severe penalties associated with the filing of a false tax return, such information may be the most credible evidence available to make income determinations.

While this rule defines the adjusted gross income for the different types of program participants, it does not specify the line item on tax returns for participants from which critical information will be gathered since such references may likely change from year-to-year. However, the CCC forms that will be used to make these determinations will specify the specific lines from various IRS forms that will be used to the extent practicable. Also to the extent practicable, for information from the entity that is needed which cannot be ascertained solely from the IRS forms, CCC will specify in its forms what other information is needed.

For individuals, the adjusted gross income would generally be the amount so specified on the individual's final (including amendments) income tax return for the applicable year. Where there is a joint return filed, the adjusted gross income specified on the joint return will be used unless a certified public accountant or attorney provides a certified statement delineating the distribution of income and expenses of the individual seeking payments had such individual filed a separate return. Accordingly, it is possible that one tax return will be used by more than one individual for purpose of this rule.

For corporations, including a "subchapter S corporation," the adjusted gross income will be the final taxable income plus charitable contributions. Charitable contributions are included in order to provide equitable treatment vis-a-vis individuals. For an individual, charitable deductions are deducted from adjusted gross income, along with a variety of other items, to determine the individual's taxable income. Generally, the other items deducted from an individual's adjusted gross income, such as personal exemptions and child care credits, do not have a corresponding relevancy on a corporate return.

No change is made in the final rule to response to the comment about the treatment of corporations filing a single, consolidated tax return. Certifications of average adjusted gross income are required from a payment entity and all individuals and entities with an interest in the payment entity. If one corporation is a subsidiary of another corporation, the average adjusted gross income of the parent corporation would include the average adjusted gross income of the

subsidiary corporation. If the consolidated tax returns indicate the average adjusted gross income of the parent company exceeds the limitation, all subsidiaries of the parent company would also be ineligible according to this subpart.

For charitable or nonprofit organizations with income that is not subject to Federal income taxation, the comparable measure of adjusted gross income is defined in this rule to be the "unrelated business taxable income" of the entity as reported to the Internal Revenue Service less any other income CCC determines to be from non-commercial activities. Currently, that amount is specified on line 34 of Internal Revenue Service Form 990-T. Generally, this excludes receipts that are gifts, grants and contributions that are tax deductible by the donor. Effectively, the adjusted gross income for these entities is the net income from only their commercial activities.

For a limited liability company, limited partnership, limited liability partnership or similar organization, the adjusted gross income is the sum of the income from trade or business activities plus the guaranteed payments to the members as reported for the applicable tax year. Charitable contributions will be dealt with in the same manner as with other entities.

For an estate or trust, the adjusted gross income is the sum of the adjusted total income plus the charitable deductions as reported for the applicable tax year.

As indicated, individuals and entities who have average adjusted gross income in excess of \$2.5 million may still be eligible for covered benefits where their average adjusted gross income from farming, ranching, and forestry is not less than 75 percent of the total. Generally, the average adjusted gross income (AGI) of the individual or entity derived from farming, ranching or forestry will be, under the rule, determined based on the amounts as reported to IRS. The amount reported on applicable forms, currently IRS form 4835 and Schedule F, represent the net income from the farming operation after deductions for the cost of production. Income derived from forestry operations, to the extent it is not reported on these forms, will be the subject of a separate certification by the individual or entity as will be the case with other special income allowed to be counted toward the 75 percent level by the provisions of this rule.

Several respondents were concerned whether income from certain sources would be considered income from farming, ranching and forestry

operations. Of particular concern was the consideration of gains from the sale of assets used in the enterprise; income from the leasing of farmland; income from commercial hunting operations on the farm; proceeds from the sale of water rights; income from contract operations; and, whether income from participation in the Conservation Reserve Program, Wetlands Reserve Program, Environmental Quality Incentives Program and similar programs would be considered farm income.

By denying program benefits to those individuals and entities who have exceeded the \$2.5 million threshold, Congress intended that those individuals and entities who are dependent upon farming, ranching and forestry should be accorded deferential treatment. However, taking that into account and in response to the concerns expressed by respondents, the following clarifications and revisions are made:

(1) Income of a landowner generated by selling the landowner's land (including the sale of easements and development rights) used by the landowner or others for farming, ranching, or forestry operations will be considered to be income derived from farming, ranching or forestry operations;

(2) Income generated by selling farm water rights will be considered to be income derived from farming, ranching or forestry operations;

(3) Income from sales by a retail dealership of implements used in farming, ranching or forestry will not be considered to be income derived from farming, ranching or forestry operations, but income derived from the sale of a farm's agricultural equipment otherwise subject to depreciation expense on the IRS Form 4835 or Schedule F will be considered to be such income;

(4) Income from the rental of land used for farming, ranching or forestry operations will be considered to be income derived from farming, ranching or forestry operations, regardless of whether the rental arrangement is on a cash or crop share basis;

(5) Income from agricultural or conservation program payments will be considered to be income from farming, ranching or forestry operations;

(6) Income from commercial hunting operations on farmland will be considered to be income derived from farming, ranching, or forestry operations;

(7) Income from sales at a market will only be considered to be income derived from farming, ranching or forestry operations if the commodity being sold was produced by the individual or

entity or a joint operation in which the individual or entity had an interest;

(8) Income from sales as a commission broker, auctioneer or warehouse operator or similar enterprise will not be considered to be income derived from farming, ranching or forestry operations; and

(9) In integrated operations, undifferentiated income (for example, income from a forestry operation that could not be differentiated between income from the production of the tree and from the sale of a finished product) will not be considered to be income derived from farming, ranching or forestry operations.

The proposed rule provided that, for the purpose of applying the average adjusted gross income limitation and calculating the three-year average, the average shall be the adjusted gross income for the three tax years immediately preceding the applicable crop, program, or fiscal year, as determined by CCC, excluding any year in which the individual or entity did not have income or had adjusted gross income considered to be zero. Several respondents suggested the exclusion of any year an individual or entity is not required to file a tax return, rather than excluding any year the individual or entity did not have income or the adjusted gross income was zero. The proposed rule was drafted to provide that a producer would not be allowed to average a loss year with a profitable year. Based on the suggestions, the wording of the final rule has been revised to allow for averaging loss years and no-income years with others, but for ongoing operations only. In some cases, the income of new entities will be averaged with those they replace in order to assure proper application of the average. Relief can be provided from that combination to the extent it would work unfairly in a particular instance.

Section 1400.602 Compliance

A total of 18 respondents provided comments on this section of the proposed rule. Some comments suggested that in addition to allowing the certification of compliance by a CPA or an attorney as provided in the proposed rule, certification from other professionals, such as farm management firms, should be allowed. One respondent commented that it would be a burdensome task for an entity with a large number of stockholders to obtain certifications of compliance with the average AGI limitation from stockholders. It was suggested that an exemption be made for corporations with more than 500 stockholders, and that the average AGI limitation be

applied to the corporation, but not to the individual stockholders. There were also concerns expressed as to whether the business information provided to the local FSA offices would remain confidential. In other words, there were concerns about what safeguards and confidentiality measures would be implemented to ensure this information would remain private and not made public in some manner.

The statute requires that to comply with the average AGI limitation, an individual or entity shall provide either: (1) A certification from a “* * * certified public accountant or another third party that is acceptable to the Secretary;” or (2) information and documentation regarding the average adjusted gross income of the individual or entity through other procedures established by the Secretary. The proposed rule indicated that, in addition to a certification from a CPA, the only other acceptable certification from a third party would be from an attorney. Although others may have knowledge of the average adjusted gross income of an individual or entity, the Agency believes that limiting third party certifications to a CPA or an attorney is unlikely to create any hardship on participants and will provide a convenient and proper way of guaranteeing some expertise and training in the particular matter at issue. As to the comment about the application of the average AGI limitation to stockholders of a corporation, the statute requires a reduction in payments to an entity, general partnership or joint venture commensurate with the interest held by each individual who has an average adjusted gross income in excess of the limitation. There is no authority provided in the statute for any exemption to the requirement for a commensurate reduction when an individual who holds an interest in an entity has an average adjusted gross income in excess of the limitation. Therefore, the final rule makes no changes regarding the certification of compliance with this subpart.

With respect to confidentiality, the provisions of the final rule avoid conflict with existing regulations and procedures. All information submitted with respect to AGI matters will be treated with regard to confidentiality concerns in accordance with existing rules. Those rules take into account concerns like those expressed in the comments.

Section 1400.603 Commensurate Reduction

Comments were received from 4 respondents on this section of the proposed rule. It was commented that the number of levels should be lessened to 2 or 3 rather than 5 before a commensurate reduction is applied. However, it was also commented that no level of restriction for the commensurate reduction should be established.

Based upon the agency's experience in administering section 1001 relating to the maximum payments a “person” may receive, CCC has determined that business enterprises comprised of layered ownership are often established simply to maximize the receipt of government payments. The rule should allow sufficient layering to accomplish legitimate business need while affording what otherwise would be a dodge of a statutory test or endless tracing of corporate interests back to individuals. Accordingly, no changes were made in the final rule to this section on commensurate reduction.

Miscellaneous

Miscellaneous comments were received suggesting editorial and grammatical corrections and such. A few editorial changes are made from the text and structure of the proposed rule for clarity and for ease of administration. This rule also includes an addition to the “actively engaged in farming” provisions subpart C of part 1400 to address eligibility issues relating to reservist military personnel called to active duty.

Cost Benefit Assessment

The average adjusted gross income limitation not only applies to payments under the commodity and price support programs, but to all payments and benefits under the conservation and related programs. It includes, but is not limited to, direct and counter-cyclical payments, conservation reserve and environmental quality incentive program payments, loan deficiency payments and marketing loan gains.

For the 2003 through 2007 crop, program or fiscal years, individuals and entities are not eligible for payments or benefits from the above-mentioned programs if their average adjusted gross income exceeds \$2.5 million for the three tax years immediately preceding the applicable crop, program or fiscal year. This requirement applies unless 75 percent or more of that average adjusted gross income amount was derived from farming, ranching or forestry operations.

The determinations necessary for compliance with the average adjusted

gross income limitation will be generally based on Internal Revenue Service concepts and information included on final tax filings. Comparable measures for adjusted gross income have been developed for entities, partnerships and for organizations that do not have such a line item on tax filings, and that are non-profit, or are not required to file tax information.

By statute, under the average adjusted gross income provisions, there is a required commensurate reduction of program payments in the situations where an owner of an entity applying for benefits fails the test. Accordingly, any program payment or benefit issued to an entity, general partnership, or joint venture shall be reduced by an amount commensurate with the direct or indirect interest held by that individual or entity that is determined to have an average adjusted gross income that exceeds the limitation.

Note that those ineligible for marketing loan gains and loan deficiency payments because of the adjusted gross income restriction may still be eligible to participate to a degree in the marketing assistance loan programs. Loans may be obtained and forfeited when commodity prices decrease. An individual or entity that fails the test will still be able to use commodity certificates to repay those loans at a rate lower than the original loan rate. Benefits they realize from the reduced payment rate, essentially the same as marketing loan gains, are not subject to payment limits or the adjusted gross income restrictions.

The 2002 Act mandates that the adjusted gross income limitation apply to the 2003 through 2007 crop years. In May 2002, the Congressional Budget Office estimated that savings from the average adjusted gross income limitation will total \$22 million in fiscal years 2002 through 2006.

The Cost/Benefit Assessment of the adjusted gross income limitation is available from James Baxa, Production, Emergencies, and Compliance Division, United States Department of Agriculture (USDA), 1400 Independence Ave, SW., Washington, DC 20250. Phone: (202) 720-4189. E-mail: James.Baxa@wdc.usda.gov.

List of Subjects in 7 CFR Part 1400

Agriculture, Price support programs, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, 7 CFR part 1400 is amended as follows:

PART 1400—PAYMENT LIMITATION AND PAYMENT ELIGIBILITY

■ 1. The authority section for part 1400 is revised to read as follows:

Authority: 7 U.S.C. 1308 *et seq.*

Subpart A—General Provisions

■ 2. Section 1400.1 is revised to add a new paragraph (h), to read as follows:

§ 1400.1 Applicability.

* * * * *

(h) As provided in Subpart G of this part, additional requirements are applicable to certain of the payments specified in paragraph (g) of this section.

Subpart C—Actively Engaged in Farming Determinations

■ 3. Section 1400.213 is added to read as follows:

§ 1400.213 Military personnel.

If an individual is called to active duty in the military because of Operation Iraqi Freedom, or any other similar military operation, before a determination is made that the individual is actively engaged in farming, the individual may be considered to be actively engaged in farming if the determining authority determines that such individual did make a conscious effort to, and would have been determined to be, actively engaged in farming if the individual would not have been called to active duty. If the individual is called to active duty after being determined to be actively engaged in farming, such determination shall remain in effect for the program year.

■ 4. Subpart G is added to read as follows:

Subpart G—Average Adjusted Gross Income Limitation

Sec.

1400.600 Applicability.

1400.601 Determination of average adjusted gross income.

1400.602 Compliance.

1400.603 Commensurate reduction.

Subpart G—Average Adjusted Gross Income Limitation

§ 1400.600 Applicability.

(a) For the 2003 through 2007 crop years, program years, or fiscal years, an individual or entity is not eligible for any payment or benefit identified in § 1400.1 as being subject to this part if the individual's or entity's average adjusted gross income exceeds \$2.5 million for the three tax years immediately preceding the applicable

crop, program or fiscal year. Payments may also be reduced under the commensurate share rules set out in § 1400.603.

(b) Notwithstanding paragraph (a) of this section, the individual or entity may be considered to meet the requirements of this subpart if not less than 75 percent of the individual's or entity's average adjusted gross income for the three tax years immediately preceding the applicable crop, program or fiscal year, is derived from farming, ranching, or forestry operations.

(c) In addition to payments or benefits identified under § 1400.1, this subpart applies to benefits provided to participants under contracts or agreements entered into for the 2003 through 2007 crop, program or fiscal years for the following programs:

(1) The program authorized by part 1466 of this chapter or its successor regulations;

(2) The program authorized by part 1467 of this chapter or its successor regulations;

(3) The program authorized by part 636 of this chapter or its successor regulations;

(4) Any other program authorized by Title XII of the 1985 Act, as amended, or Title II of the 2002 Act.

(5) Any other program to which this subpart is made applicable by statute or regulation.

(d) Determinations made under this subpart with regard to the programs described in paragraphs (c)(1) through (c)(5) of this section will be based on the year for which the contract or agreement is approved and that determination will apply for the entire term of the subject agreement or contract.

(e) Vendors that receive payment for technical services or assistance provided in conjunction with programs under Title II of the 2002 Act and Title XII of the 1985 Act, but who are not beneficiaries of the program, are not subject to this subpart for services that are of the type that are also performed by the Federal Government in connection with such programs.

(f) Payments to an escrow agent or other of similar capacity in which the recipient is maintaining temporary custody of the funds for eventual disbursement to an eligible program participant are not subject to this subpart so long as the party ultimately receiving the payment is eligible under this subpart.

(g) Payments to States, counties, political subdivisions and agencies thereof, and Indian tribes are not subject to this subpart.

§ 1400.601 Determination of average adjusted gross income.

(a) For purposes of this subpart, *income from farming, ranching or forestry operations* means income of an individual or entity derived from:

(1) Producing crops, livestock or unfinished raw forestry products;

(2) Selling (including the sale of easements and development rights) their own farm, ranch or forestry land or water rights;

(3) Selling, but not as a dealer, equipment purchased to conduct farm, ranch or forestry operations when the equipment is otherwise subject to depreciation expense on the IRS Form 4835 or Schedule F;

(4) Renting land used for farming, ranching or forestry operations; and

(5) Payments made under any program authorized under chapters VI, VII or XIV of this title.

(b) For purposes of this subpart, except as otherwise provided in this subpart, *adjusted gross income* means:

(1) For an individual filing a separate tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the individual for the applicable tax year;

(2) For an individual filing a joint tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the applicable tax year unless a certified statement is provided by a certified public accountant or attorney specifying the manner in which such income would have been declared and reported if the individuals had filed two separate returns and that this calculation is consistent with the information actually supporting the filed joint return;

(3) For a corporation, including a subchapter S corporation, the total reported "taxable income" as reported to the Internal Revenue Service plus the amount of the charitable contributions as reported on the final federal income tax return for the applicable tax year;

(4) For a tax exempt entity, the "unrelated business taxable income" of the entity as reported to the Internal Revenue Service on the final federal income tax return, less any other income CCC determines to be from non-commercial activities;

(5) For a limited liability company, limited partnership, limited liability partnership or similar type of organization, the income from trade or business activities plus the amount of guaranteed payments to the members as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year; and

(6) For an estate or trust, the adjusted total income plus charitable deductions

as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year, or the amount of net increase in the estate's or trust's value resulting from its business or investment interests.

(c) For purposes of applying this subpart and calculating the three-year average referenced in § 1400.600, that average shall be for the adjusted gross income for the three tax years immediately preceding the applicable crop, program or fiscal year, as determined by CCC. For an entity that is not required to file a federal income tax return, or an individual or entity that did not have taxable income in one or more tax years, the average shall be the adjusted gross income, including losses, averaged for the three tax years immediately preceding the applicable crop, program or fiscal year, as determined by CCC. However, a new entity will have its adjusted gross income averaged only for those years of the base period for which it was in business, but a new entity shall not be considered "new" to the extent it takes over an existing operation and has any elements of common ownership or interests with the preceding entity, or with individuals or entities with an interest in the "old" entity. When there is such commonality, income of the "old" entity will be averaged with that of the "new" entity for the base period.

§ 1400.602 Compliance.

(a) To comply with the average adjusted gross income limitation, an individual or entity, including all interest holders in an entity, general partnership or joint venture, shall provide the following as required by CCC:

(1) A certification in the manner prescribed by CCC from a certified public accountant or attorney that the average adjusted gross income of the individual or entity does not exceed this limitation;

(2) A certification in the manner prescribed by CCC from the individual or entity that the average adjusted gross income of the individual or entity does not exceed this limitation; or

(3) Submission to CCC of the relevant Internal Revenue Service documents and supporting financial data as requested by CCC. Supporting financial data may include State income tax returns, financial statements, balance sheets, reports prepared for or provided to another Government agency, information prepared for a private lender, and other credible information relating to the amount and source of the individual's or entity's income.

(b) Audits of certifications of average adjusted gross income may be conducted as necessary to determine compliance with the requirements of this subpart. As a part of this audit income tax returns may be requested and if requested must be supplied. Relevant income tax returns and documentation must be retained a minimum of two years after the end of the calendar year corresponding to the year for which payments or benefits are requested. If an individual or entity has submitted information to CCC, including a certification from a certified public accountant or attorney, that relied upon information from a form previously filed with the Internal Revenue Service, such individual or entity shall provide to CCC a copy of any amended form filed with the Internal Revenue Service within 30 days of the filing.

(c) The individual or entity shall provide all information and documentation the reviewing authority determines necessary to verify any information or certification provided under this subpart, including all documents referred to in paragraph (a)(2) of this section. Failure to provide necessary and accurate information to verify compliance, or failure to comply with this subpart's requirements, will result in ineligibility for all program benefits subject to this subpart for the year or years subject to the request.

(d) All information provided to CCC for the purposes of determining compliance with this subpart will remain confidential and not be subject to any request submitted under the Freedom of Information Act.

§ 1400.603 Commensurate reduction.

(a) Any program payment or benefit subject to this subpart provided to an entity, general partnership or joint venture shall be reduced by an amount commensurate with the direct and indirect ownership interest in the entity, general partnership, or joint venture of each individual or entity determined to have an average adjusted gross income in excess of the limitation under the standards provided elsewhere in this subpart for the direct recipient of such payments.

(b) Ownership interest in an entity shall be reviewed to the fifth level of ownership to determine whether a commensurate reduction is applicable and the extent of such reduction. If an ownership interest is not held by an individual in the fifth level of ownership in an entity, no payment or benefit shall be made with respect to such interest.

Signed in Washington, DC, on May 28, 2003.

James R. Little,

Executive Vice President, Commodity Credit Corporation.

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FARM CREDIT ADMINISTRATION

12 CFR Part 615

RIN 3052-AC14

Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Capital Adequacy—ABS and MBS Investments; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA) published an interim final rule with request for comments under part 615 on March 28, 2003 (68 FR 15045). This interim final rule amends our regulatory capital standards to allow Farm Credit System institutions to use a lower risk weighting for highly rated investments in non-agency asset-backed securities (ABS) and mortgage-backed securities (MBS) that have reduced exposure to credit risk. We are adopting this rule so that the capital requirements for risk weighting of highly rated non-agency ABS and MBS investments will more closely reflect an institution's relative exposure to credit risk and help achieve a more consistent regulatory capital treatment with the other financial regulatory agencies. In accordance with 12 U.S.C. 2252, the effective date of the interim final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is May 13, 2003.

EFFECTIVE DATE: The regulation amending 12 CFR part 615 published on March 28, 2003 (68 FR 15045) is effective May 13, 2003.

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(12 U.S.C. 2252(a)(9) and (10))