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producer on the farm has marketed more than 103 percent of such person's proportionate share of the effective farm marketing quota. The notice of the hearing shall request the farm operator and affected producers to bring to the hearing floor sheets and other relevant supporting documents. At least two members of the county FSA committee shall be present at the hearing. The hearing shall be held at the time and place named in the notice and any action taken to impose penalty shall be taken after the hearing. If the farm operator or other affected producer does not attend the hearing, or is not represented, the county FSA committee shall make a determination on the basis of available records and shall assess any penalties that may be required against the applicable person.

(e) *Penalties not to be assessed-burley or flue-cured tobacco.* With respect to burley or flue-cured tobacco, if the operator or another producer on the farm markets a quantity of tobacco above 103 percent of the effective farm marketing quota for the farm and such overage is found to have been caused by the failure to record or improper recording of tobacco poundage data on the marketing card, that amount of the penalty as was due to such failure to record or improper recording will not be required to be paid by the farm operator or other producer if:

(1) For amounts of \$100 or less, the county FSA committee, and

(2) For amounts over \$100, the county FSA committee with approval of the State FSA committee determines that each of the following conditions is applicable:

(i) The failure to record or incorrect recording resulted from action or inaction of a marketing recorder or another FSA employee, and

(ii) The farm operator or another producer on the farm had no knowledge of such failure or error. Overmarketings for a farm for which the marketing penalty will not be paid pursuant to the provisions of this paragraph shall be determined based upon the correct effective farm marketing quota and correct actual marketings of tobacco from the farm.

(f) *Refusal to contribute required assessments.* A marketing penalty at the full

rate per pound is due on each pound of tobacco marketed from a farm when the farm operator or producers refuse to pay no-net-cost or marketing assessments as provided in part 1464 of this title. In all such cases, the farm from which the tobacco has been produced shall be considered to have a marketing quota of zero pounds and an allotment of zero acres.

[55 FR 39914, Oct. 1, 1990, as amended at 57 FR 43583, Sept. 21, 1992; 63 FR 11582, Mar. 10, 1998]

**§ 723.410 Penalties considered to be due from warehouse operators, dealers, buyers, and others excluding the producer.**

Subject to any additional requirements or provisions for remittances which are contained in § 723.409 of this part, any marketing of tobacco under one of the following conditions shall be considered to be a marketing of excess tobacco.

(a) *Auction sale without burley or flue-cured tobacco marketing card.* For burley and flue-cured tobacco, any first marketing of tobacco at an auction sale by a producer which is not identified by a valid marketing card at the time of marketing shall be considered to be a marketing of excess tobacco and the penalty thereon shall be collected and remitted by the warehouse operator unless prior to marketing, an AMS inspection certificate is obtained showing that the tobacco is of a kind not subject to marketing quotas.

(b) *Auction sale without dark air-cured, fire-cured, or Virginia sun-cured tobacco marketing card.* For dark air-cured, fire-cured, or Virginia sun-cured tobacco, any first marketing of tobacco at an auction sale by a producer which is not identified by a valid marketing card (MQ-76 or MQ-77 (including sale memo)) on or before the last warehouse sale day of the marketing season, or within 4 weeks following the date of marketing, whichever comes first, shall be identified by an MQ-82, and shall be presumed, subject to rebuttal, to be a marketing of excess tobacco. The penalty thereon shall be paid by the warehouse operator.

(c) *Burley or flue-cured tobacco non-auction sale.* For burley and flue-cured tobacco, any nonauction marketing of tobacco which:

(1) Is not identified by a valid marketing card and recorded at the time of marketing on MQ-79, Dealer's Report, the marketing card, and MQ-72-2, Report of Tobacco Nonauction Purchase; or,

(2) If purchased prior to the opening of the local auction market for the current year, it is not identified by a valid marketing card and recorded on MQ-79, the marketing card, and MQ-72-2, Report of Tobacco Nonauction Purchase not later than the end of the calendar week which includes the first sale day of the local auction markets, shall be considered a marketing of excess tobacco. The penalty thereon shall be collected by the purchaser of such tobacco, and remitted with MQ-79, unless prior to marketing an AMS inspection certificate is obtained showing that the tobacco is of a kind not subject to marketing quotas.

(d) *Nonauction sale, except burley, flue-cured, and cigar tobacco.* For dark air-cured, fire-cured, or Virginia sun-cured tobacco, any nonauction sale of tobacco which:

(1) Is not identified by an MQ-76 or MQ-77 (including a valid sale memo); and

(2) Recorded on MQ-79, Dealer's Record, not later than the end of the calendar week in which the tobacco was purchased; or

(3) If purchased prior to the opening of the local auction market for the current year, is not identified by an MQ-76 or MQ-77 (including a valid sale memo) and recorded on MQ-79 not later than the end of the calendar week which includes the first day of the local auction markets, shall be presumed, subject to rebuttal, to be a marketing of excess tobacco. The penalty thereon shall be paid by the purchaser of such tobacco.

(e) *Failure to obtain an MQ-76 and sale memo, and failure to record a sale on MQ-76-cigar tobacco.* Any sale of cigar tobacco for which a dealer:

(1) If within quota, fails to record the sale on the marketing card issued for the farm, or

(2) If the tobacco was produced on a farm for which an excess marketing card was issued, fails to obtain a valid sale memo by the end of the sale date, shall be presumed, subject to rebuttal,

to be a marketing of excess tobacco. The penalty thereon shall be paid by the buyer who fails to make the required record.

(f) *Leaf account tobacco.* If warehouse resales exceed prior leaf account purchases, such marketings shall be considered to be a marketing of excess tobacco unless such warehouse operator furnishes evidence acceptable to the State FSA committee showing that such marketing is not a marketing of excess tobacco. However, evidence acceptable to the State FSA committee shall not be based on the warehouse operator's proof of purchase of tobacco that is not in the form normally marketed by producers even though such evidence indicates that resales exceed prior leaf account purchases as a result of the blending of tobacco, which was not in the form normally marketed by producers, with the warehouse operator's prior purchases of leaf account tobacco.

(g) *Dealer tobacco—burley and flue-cured.* The burley or flue-cured tobacco resales by a dealer (as shown or due to be shown on Form MQ-79), which are in excess of such dealer's total prior purchases of the respective kind of tobacco shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess. If the resale which results in penalty being due is made at auction, the warehouse shall deduct the penalty from the proceeds of the sale and shall remit the penalty to the marketing recorder. If the resale which results in penalty being due is made at nonauction, the purchaser shall deduct the penalty from the proceeds of the sale and shall remit the penalty to the applicable State FSA office.

(h) *Resales not reported.* Any resale of tobacco which is required to be reported by a warehouse operator or dealer, but which is not reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouse operator or dealer furnishes proof of such resale which is acceptable to the State FSA executive director. The penalty thereon shall be paid by the warehouse operator or

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dealer who fails to make the report as required.

(i) *Marketing falsely identified by a person other than the producer of the tobacco.* If any marketing of tobacco by a person other than the producer is identified by a marketing card other than the marketing card issued for the farm on which the tobacco was produced, and the source of production of the tobacco is unknown, such marketing shall be presumed, subject to rebuttal, to be a marketing of excess tobacco. The marketing quota penalty shall be paid by the person who marketed the tobacco.

(j) *Carryover tobacco, except cigar tobacco.* Any tobacco on hand, except for cigar tobacco, and reported or due to be reported under § 723.403 of this part for warehouse operators and § 723.404 of this part for dealers shall be included as a resale in determining whether an account for a kind of tobacco has excess resales. Unless the warehouse operator furnishes proof acceptable to the State FSA committee and unless the dealer furnishes proof acceptable to the State FSA executive director, showing that such account does not represent excess tobacco, penalty at the full rate for the respective kind of tobacco shall be paid thereon by such warehouse operator or dealer.

(k) *Unrecorded sale of cigar tobacco.* Any sale of cigar tobacco which is not recorded on MQ-79 (CF&B), Buyer's Record Book, by the 10th day of the month following the month during which the sale dated occurred shall be presumed, subject to rebuttal, to be a marketing of excess tobacco. The penalty thereon shall be paid by the buyer who fails to make the record.

(l) *Floor sweepings.* Any person who markets floor sweepings in excess of allowable floor sweepings shall be subject to a civil penalty of 150 percent of the average market price for the immediately preceding marketing year, as determined by the U.S. Department of Agriculture. The calculated penalty rate shall be rounded to the nearest whole cent. Any floor sweepings on hand more than 30 days (15 days with respect to flue-cured tobacco) after the warehouse closes for the auction season shall be considered marketed. The floor sweepings on hand shall be

weighed by the warehouse operator and the weight shall be certified by the warehouse operator, such weighing to be done in the presence of a representative of either the county FSA committee or State FSA committee. Floor sweepings which are destroyed in the presence of a representative of the county FSA committee, within 30 days (15 days with respect to flue-cured tobacco) after the warehouse closes shall not be considered as marketed when determining the quantity of floor sweepings marketed. If the county FSA committee determines, after the warehouse has been closed for the auction season for more than 30 days (15 days with respect to flue-cured tobacco), that the cumulative quantity of floor sweepings marketed and considered marketed in the current marketing year is in excess of the allowable floor sweepings, the person responsible for such marketings shall be given notice of the determination and shall be afforded an opportunity to request reconsideration of such determination in accordance with the provisions of part 780 of this chapter. A determination that a civil penalty is due for marketing floor sweepings in excess of the allowable floor sweepings shall not become final and shall not be assessed until such person has been afforded an opportunity for a hearing and such person has exhausted the applicable administrative remedies. The notice of assessment shall require such person to pay the civil penalty to the "Farm Service Agency, USDA" within 15 days after the mailing of the notice.

(m) *Blending tobacco not in the form normally marketed by producers—burley and flue-cured tobacco.* Tobacco purchased from processors or manufacturers that is considered not in the form normally marketed by producers that is blended with tobacco in the form normally marketed by producers shall not be credited as a purchase to the dealer's or warehouse operator's account by the State FSA committee when reconciling the warehouse operator's leaf account or the dealer's purchases and resales. Tobacco not in the form normally marketed by producers that is blended with other tobacco shall be deemed to be excess tobacco and penalty shall be due on the pounds

of tobacco by which a warehouse operator's or dealer's resales exceed prior purchases.

(n) *Advances and other cases in which the producer's marketing card is used improperly.* For tobacco of any kind to which this part applies, if tobacco is marketed by a person by using the producer's marketing card or the tobacco is pledged for a price support loan by using that card, but under the provisions of part 1464 of this title, the producer is deemed to have not been an "eligible producer" with respect to the disposition of that tobacco at the time because of an advance or other preauction arrangement, such disposition of the tobacco shall be considered a false identification of the tobacco and may be considered to be a marketing of excess tobacco. In such cases, the person who paid the advance, took possession of the tobacco, or made the agreement with the producer which made the producer no longer an "eligible producer" with respect to the tobacco, shall be jointly and severally liable with the producer for any penalty with respect to such disposition which is levied against the producer under the provisions of this part and additionally, if such disposition is determined to be a marketing of excess tobacco, shall be liable for a penalty calculated by using the penalty rate for the tobacco involved multiplied by the pounds of tobacco involved. These remedies shall be in addition to any other remedies which may apply, including but not limited to, any liability for a refund of any price support loan advances which were paid in the name of, or for the account of, the producer of the tobacco.

[55 FR 39914, Oct. 1, 1990, as amended at 56 FR 21444, May 9, 1991; 57 FR 43583, Sept. 21, 1992; 63 FR 11583, Mar. 10, 1998]

**§ 723.411 Records and reports regarding hauling, processing, and storage of tobacco.**

(a) *Trucker records.* Each trucker shall keep such records as will enable such trucker to furnish the State FSA office a report with respect to each lot of tobacco received by such trucker showing.

(1) The name and address of the producer;

(2) The date of receipt of the tobacco;  
 (3) The number of pounds received;  
 (4) The location where received; and  
 (5) The name and address of the person to whom it was delivered.

(b) *Processor records.* Each firm engaged in the business of processing tobacco shall keep records with respect to each lot of tobacco received by such firm showing:

(1) The name and address of producer, dealer, warehouse operator, or other person for whom the tobacco was received.

(2) The date of receipt of tobacco.

(3) The number of pounds (green weight) received.

(4) The purpose for which tobacco was received (redrying or stemming).

(5) The amount of any advance or loan made by such person on the tobacco.

(6) The disposition of the tobacco including the net weight of the tobacco processed and the number of containers by classification (strips, stems, scrap or leaf).

(7) Person to whom delivered and pounds involved.

Any such firm shall report this information to the State FSA office of the State in which the business is located within 15 days of the end of the marketing year, except for tobacco handled for an association operating the price support program and tobacco purchased at auction or tobacco which was previously reported on Form MQ-79. Where such firm qualifies for the exemption in § 723.405 of this part, such firm is required to report only such tobacco received that does not belong to such firm.

(c) *Records for stored tobacco.* Each firm engaged in storing unprocessed tobacco shall keep records with respect to each lot of unprocessed tobacco received by such firm showing:

(1) The name and address of producer, dealer, warehouse operator, marketing agent or other person for whom the tobacco was received;

(2) The date and receipt of the tobacco;

(3) The number of pounds received;

(4) The amount of any advance or loan made by such firm;

(5) The disposition of the tobacco; and