

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

RIN 0560-AG84

**Bioenergy Program****AGENCY:** Commodity Credit Corporation, USDA.**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Credit Corporation (CCC) is proposing to amend its Bioenergy Program (program) regulations to bring them into compliance with changes made by the Farm Security and Rural Investment Act of 2002. Changes include modifying the definitions for biodiesel, conversion factor, eligible commodities and ethanol, extending the program beyond Fiscal Year (FY) 2002, and allowing producers to enter into multi-year contracts for program payments. Also, the payment calculations are being revised for eligible commodities. CCC's new authorizing legislation requires these changes and will result in an overall improvement of the program by benefitting more participants.

**DATES:** Comments on this rule must be received on or before October 31, 2002 to be assured of consideration.

**ADDRESSES:** Comments should be sent to James Goff, Commodity Operations, FSA, United States Department of Agriculture (USDA), STOP 0553, 1400 Independence Avenue, SW., Washington, DC 20250-0553. Telephone (202) 720-5396 or e-mail address,

[BioenergyProgram@wdc.fsa.usda.gov](mailto:BioenergyProgram@wdc.fsa.usda.gov). Persons with disabilities who require alternative means for communication for regulatory information (braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:** James Goff at telephone number (202) 720-5396.

*Comments Requested:* Public comments (submitted to the address above) are requested on any aspect of the Program. However, specific comments are requested on how CCC makes payments under the Program and how those payments are calculated under section 1424.8 of the regulation proposed in this rule. Comments received may be viewed during regular business hours by calling the information contact for an appointment. All comments, including names and addresses, will become a matter of public record.

**SUPPLEMENTARY INFORMATION:****Executive Order 12866**

This proposed 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).

**Regulatory Flexibility Act**

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

**Executive Order 12372**

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

**Environmental Assessment**

The environmental impacts of this proposed 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 FSA's regulations for compliance with NEPA, 7 CFR part 799. FSA has completed a draft environmental assessment which will be made available to the public for comment.

**Executive Order 12988**

This proposed rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This proposed rule does not preempt State laws, are not retroactive, and do not involve administrative appeals.

**Executive Order 12612**

This proposed rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this proposed 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 government levels.

**Unfunded Mandates Reform Act of 1995**

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

**Paperwork Reduction Act**

The changes proposed in this rule will affect the paperwork burden that is currently approved by OMB. Thus, in this rule the Agencies are requesting public comment in accordance with 5 CFR 1320.8(d)(1), and welcome suggestions from the public on reducing the requirements in 7 CFR part 1424 proposed herein. An estimate of the paperwork burden of the regulations as affected by this proposed rule are as follows:

*Title:* Bioenergy Program.

*OMB Control Number:* 0560-0207.

*Expiration Date:* November 30, 2003.

*Type of Request:* Request for a revision and extension of a currently approved information collection.

*Abstract:* USDA will collect information from bioenergy producers that request payments under the Bioenergy Program as the Secretary may require to ensure the benefits are paid only to eligible bioenergy producers for eligible commodities. Bioenergy producers seeking program payments will have to meet minimum requirements by providing information concerning the production of bioenergy. Applicants must certify that they will abide by the Bioenergy Program Agreement's provisions.

*Estimate of Respondent Burden:* Public reporting burden for the collection of information is estimated to average 1 hour and 10 minutes per response.

*Respondents:* U.S. bioenergy producers who use agricultural commodities to make bioenergy are eligible to receive payments.

*Estimated Number of Respondents:* 100.

*Estimated Number of Responses per Respondent:* 11 responses per year.

*Estimated Total Annual Burden Hours on Respondents:* 1,286 hours.

Proposed topics include the following: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information technology; or (d) minimizing the burden of the collection of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, OMB, Washington, DC 20503, and to Jim Goff, USDA, FSA, STOP 0553, 1400 Independence Avenue, SW., Washington, DC 20250-0553. Copies of the information collection package may be obtained from Jim Goff at the address listed above.

### Background

In November of 2000, using discretionary authority contained in Section 5 of the CCC Charter Act, 15 U.S.C. 714c, the Department of Agriculture implemented, by rules codified in 7 CFR part 1424, a bioenergy program. Rules for the program were published at 65 FR 67608 (November 13, 2000). Recently, in section 9010 of the 2002 Act, Public Law 107-171, Congress extended authorization of the program.

Section 9010 of the 2002 Act provided that, for purposes of that section, the term "bioenergy" would mean both biodiesel and fuel grade ethanol. In turn, it specified that "biodiesel" would mean a "monoalkyl ester that meets the requirements of an appropriate American Society for Testing and Materials standard." "Eligible commodity" for purposes of that section was defined to mean (A) wheat, corn, grain sorghum, barley, oats, rice, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard, crambe, sesame seed, and cottonseed; (B) a cellulosic commodity (such as hybrid poplar and switch grass); (C) fats, oils, and greases (including recycled fats, oils, and greases) derived from an agricultural product; and (D) any animal byproduct (in addition to oils, fats, and greases) that may be used to produce bioenergy, as determined by the Secretary. "Eligible producer" was defined to mean a producer that uses an eligible commodity to produce bioenergy. With those definitions set out, section 9010 went on to specify that the Secretary would continue the bioenergy program of part 1424 under which the Secretary makes payments to eligible producers to encourage increased purchases of eligible commodities for the purpose of expanding production of such bioenergy and supporting new production capacity for such bioenergy. Section 9010 specified, too, that to be eligible to receive a payment, a producer would be required to (a) enter into a contract with the Secretary to increase bioenergy production for 1 or more fiscal years; and (b) submit to the Secretary such records as the Secretary may require as evidence of increased purchase and use

of eligible commodities for the production of bioenergy. With respect to payment, the law specified that the Secretary would make payments to eligible producers, based on the quantity of bioenergy produced by the eligible producer during a fiscal year that exceeds the quantity of bioenergy produced by the eligible producer during the preceding fiscal year. And, the statute specified that the payment rate to an eligible producer that produces less than 65,000,000 gallons of bioenergy would be such as to provide reimbursement for 1 feedstock unit for every 2.5 feedstock units of eligible commodity used for increased production. For the producers of 65,000,000 or more gallons the law specified that the producer would be reimbursed 1 feedstock unit for every 3.5 feedstock units of eligible commodity used for increased production. Too, section 9010 specified that the Secretary would make payments to an eligible producer for each quarter of the fiscal year. The new law also addresses the possibility that the amount made available for a fiscal year under section 9010 might not be sufficient to allow full payment to all producers. If so, the Secretary was directed to prorate the funds among eligible producers.

Also, the statute specified that if the total amount of payments that an eligible producer receives for a fiscal year exceeds the amount that the producer should have received, they must repay the excess with interest. Further, the legislation provided that no producer could receive more than 5 percent of the total amount made available for a fiscal year. And, it was specified that, to be eligible to receive a payment, a producer had to meet all other requirements of Federal law (including regulations) applicable to the production of bioenergy.

Finally, with respect to funding, the new law provided that of the funds of the Commodity Credit Corporation, the Secretary would be directed to use not more than \$150,000,000 for each of FY 2003 through FY 2006. The statute explicitly provided no funding for 2007.

Many of the provisions of the new law reiterate provisions of the existing regulations. This proposed rule would implement the provision of the new law to the extent that the provisions of the new law are different than those that are contained in the current regulations in part 1424. Accordingly, the proposed rule would: (1) Add cotton seed as an eligible commodity; (2) expand the definition of eligible cellulosic commodities by removing the requirement that cellulosic crops had to

be grown on farms for the purpose of bioenergy production; (3) specify that animal fats and oils, including recycled fats, oils and greases, are eligible commodities; and (4) add that "any animal byproduct (in addition to oils, fats and greases) that may be used to produce bioenergy, as determined by the Secretary" may be an eligible commodity for the production of bioenergy under the program. The definitions for biodiesel and ethanol are also being amended to indicate that biodiesel and ethanol produced in the United States' territories are eligible for program payments when made from eligible commodities. Also, clarifying changes are made in the regulations to reflect that multi-year contracts will be entertained. However, as to compliance, the rule provides that such compliance will be determined on a fiscal-year by fiscal-year basis. This would mean, for example, that if a producer with a multi-year contract produced more energy in FY 2004 than in FY 2003 (as measured under the regulations), the producer could receive a FY 2004 payment. If the producer's production in 2005 was under that for FY 2004, then the producer would not receive a FY 2005 payment but could retain the FY 2004 payment. Also, the rule, to allow maximum flexibility, proposes removing explicit conversion factors which translate additional energy into amounts of those commodities used to make it. Such a translation is part of the payment formula. This flexibility will allow for fine tuning the program without additional rulemaking. The conversion factors that will apply to a particular FY program would, under the proposal, be announced in a press release and otherwise made known to producers wanting to participate in the program. Also, an amendment is proposed with respect to the appeal of determinations made under part 1424. The new language would add a reference to 7 CFR part 11 which allows for appeals to the Department's National Appeals Division (NAD). The amendment would also eliminate an explicit requirement for a prior appeal to the Deputy Administrator overseeing the operation of the program. To the extent that such a pre-NAD appeal would be required would be subject to the same rules that apply to other cases within NAD's jurisdiction.

Encouraging bioenergy producers to expand bioenergy (ethanol and biodiesel) production by reimbursing them for part of their input commodity costs reduces reliance on foreign imports and improves agricultural markets. The bioenergy program began

in FY 2001 in accordance with Executive Order 13134. Expenditures of up to \$150 million of funding were apportioned in FY 2001 and FY 2002. In FY 2002 the announced eligible commodity listing was expanded to include biodiesel production from animal fats and oils. Program payments for FY 2001 totaled \$40.7 million on 147.7 million gallons of increased bioenergy production. For the first two quarters of FY 2002, payments totaled \$32.0 million on 107.0 million gallons of increased bioenergy production.

#### Cost Benefit Assessment

As required under Executive Order 12866, a regulatory impact analysis (cost benefit assessment) is available. Funding is authorized for FY 2003 through 2006 at \$150 million per year from the Commodity Credit Corporation (CCC). Thus the additional cost from this change is a maximum of \$600 million. The program was first implemented in 2001 and funded for FY 2001 and FY 2002 at \$150 million per year. Payments have been well under the annual funding levels—FY 2001 payments totaled \$40.7 million, and for the first half of FY 2002 they were \$32 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 on only 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 primary economic effects of the rule results from revising the payment calculations for biodiesel from a soybean basis to soybean oil basis. This will reduce the payment rate and outlays for biodiesel payments. Soybeans have predominated commodity biodiesel payments to date. Had payments made so far in FY 2002 for soybeans been calculated instead on soybean oil, outlays would have been \$3.1 million lower for this period—about a 60 percent reduction. Future savings on biodiesel will depend on the prevailing market prices and volume of participation. Biodiesel savings could result in reduced total program costs provided available funding is sufficient to allow full payments to all producers (no proration). The switch to a soybean oil payment basis will reduce producer incentives and likely participation. The increased cost from more eligible

commodities will only slightly offset these savings.

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

Administrative practice and procedure, Application process, Payment amounts, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Credit Corporation proposes to amend 7 CFR Part 1424 as follows:

#### PART 1424—BIOENERGY PROGRAM

1. Revise the authority citation for part 1424 to read as follows:

**Authority:** 7 U.S.C. 8108.

2. Amend § 1424.3 by removing the definition of “Gallon Conversion factor”, revising the definitions of “Biodiesel”, “Eligible commodity”, and “Ethanol”, and adding a new definition of “Conversion factor” as follows:

#### § 1424.3 Definitions.

\* \* \* \* \*

*Biodiesel* is 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.

\* \* \* \* \*

*Conversion factor* is the number of bioenergy gallons produced per commodity unit or the number of commodity units used per gallon of bioenergy produced, as applicable. Example: In FY 2002, the conversion factor for corn used in ethanol production was 2.5 gallons of ethanol produced per bushel of corn and from animal fats and oils it was 7.7 pounds of animal fats and oils per gallon of biodiesel produced.

*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 the Secretary determines, which is produced in the United States and its territories.

\* \* \* \* \*

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

(1) For fuel use and which has been rendered unfit for beverage use in a manner and which is produced at a

facility approved by the ATF for the production of ethanol for fuel, or

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

\* \* \* \* \*

3. Amend § 1424.4 by removing paragraph (a), redesignating paragraphs (b) through (j) as paragraphs (a) through (i) respectively, and revising the introductory text and newly designated paragraph (a) to read as follows:

#### § 1424.4 General eligibility rules.

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

(a) During the sign-up period as CCC announces for the applicable FY, submit a completed Agreement on a form as prescribed by CCC.

\* \* \* \* \*

4. Amend § 1424.5 by revising paragraph (b) to read as follows:

#### § 1424.5 Application process.

\* \* \* \* \*

(b) Obtain an Application from FSA;

\* \* \* \* \*

5. Amend § 1424.8 by revising paragraphs (a), (b), (d), (e) introductory text, and (e)(1) through (e)(4), and adding paragraph (f) to read as follows:

#### § 1424.8 Payment amounts.

(a) Eligible producers may be paid the amount specified in this section, subject to funds availability. Available funds shall be \$150 million each FY for 2003 through 2006.

(b) To participate, an eligible producer must submit a signed Agreement during the announced time period that Agreements will be accepted (sign-up period). Agreements may be for single or multiple FY's. However, multiple FY Agreements require annual production estimate reports be submitted during each applicable FY sign-up period. Such reports must comply with the terms of the Agreement and these regulations. In all cases, the accounting for compliance will be made on a per FY basis.

\* \* \* \* \*

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

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

(1) Unless CCC otherwise determines, the extra production in energy from eligible inputs will be converted to gross payable units by:

(i) If, as measured under paragraph (f) of this section, a units per gallon conversion factor is applicable, multiplying the applicable conversion factor times the number of gallons of increased bioenergy; or

(ii) If, as measured under paragraph (f) of this section, a gallons per unit conversion factor is applicable, dividing the gallons of increased bioenergy by the applicable conversion factor.

(2) Gross payable units, calculated using paragraph (e)(1) of this section, shall then be converted to net payable units by dividing the gross payable units, for producers whose annual bioenergy production is:

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

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

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

(i) For those agricultural commodities with established terminal market prices, CCC will use the applicable terminal market price for the last day of the program quarter that KCCO, FSA announces daily, adjusted by the county average differential for the county in which the plant is located and the applicable quality factors CCC determines. For this purpose the terminal market and county average differential CCC uses wording for different locations will, to the extent practicable, be the same as that CCC uses under other major CCC commodity programs for determining marketing loan gains and other matters.

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

(4) The gross payment calculated under paragraph (e)(3) of this section may, when CCC determines it necessary, be reduced to a net payment by multiplying the gross payment figure by the proration factor determined under paragraph (d) of this section.

\* \* \* \* \*

(f) *Announcing conversion factors.* When the commodity's conversion factor has been established, that factor will be announced in the annual sign-up announcement for the FY. If the commodity's conversion factor is not determined when the sign-up is announced, the conversion factor will be provided in the cover letter that accompanies accepted Agreements sent to producers. Also, the announcement will indicate commodities which use a units per gallon versus a gallons per unit conversion factor for purposes of the calculations required in paragraph (e) of this section.

6. Amend § 1424.12 by revising paragraphs (a) and (b) to read as follows:

**§ 1424.12 Appeals.**

(a) Any participant who is subject to an adverse determination made under this part may appeal the determination by filing a written request with the Deputy Administrator at the following address: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, DC 20250-0550. To receive consideration, the participant must file the appeal within 30 days after written notice of the decision which is the subject of the appeal is mailed or otherwise made available to the participant. An appeal shall be considered to have been filed when personally delivered in writing to the Deputy Administrator or when the properly addressed request, postage paid, is postmarked. The Deputy Administrator may accept and act upon an appeal even though it is not timely filed if, in the judgement of the Deputy Administrator, circumstances warrant such action.

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

\* \* \* \* \*

Signed in Washington, DC, on September 20, 2002.

**James R. Little,**  
*Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 02-24539 Filed 9-30-02; 8:45 am]

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**DEPARTMENT OF JUSTICE**

**Immigration and Naturalization Service**

**8 CFR Parts 103, 214, 248 and 264**

[INS No. 2059]

RIN 1115-AF29

**Procedures for Processing Temporary Agricultural Worker (H-2A) Petitions by the Secretary of Labor**

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

**ACTION:** Withdrawal of proposed rule.

**SUMMARY:** On July 13, 2000, the Immigration and Naturalization Service (Service) published a final rule in the **Federal Register** to delegate to the Department of Labor (DOL) the authority to adjudicate petitions for temporary agricultural workers (H-2A). On the same date, in conjunction with that action, the Service published a proposed rule in the **Federal Register**, at 65 FR 43535, providing additional instructions and information on how to petition for agricultural workers (H-2A) once the delegation of authority became effective.

In a separate final rule published elsewhere in this issue of the **Federal Register**, the Service is withdrawing that final rule delegating authority to DOL. Accordingly, for the same reasons, the Service is withdrawing this related proposed rule.

**DATES:** The proposed rule amending 8 CFR parts 103, 214, 248 and 264 published in the **Federal Register** at 65 FR 43535 is withdrawn as of October 1, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mari F. Johnson, Adjudications Officer, Business and Trade Services Branch, Adjudications Division, Immigration and Naturalization Service, 425 I Street NW., Room 3214, Washington, DC 20536, telephone (202) 353-8177.

**SUPPLEMENTARY INFORMATION:**

*Purpose of Delegating Adjudication of Certain H-2A Petitions to the DOL*

In an attempt to streamline the processing of petitions filed for agricultural workers, the Service, in consultation with the DOL, decided to delegate its authority to adjudicate certain H-2A petitions to the DOL. It was estimated that the delegation of authority would shorten the processing time of H-2A petitions by as much as 10 days.