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DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 4288

Advanced Biofuel Payment Program

RIN 0570-AA75

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Business-Cooperative Service (Agency or RBS) published an interim rule in the Federal Register on February 11, 2011. Through this action, RBS finalizes the rule based on public comments and new program requirements established in the Agricultural Improvement Act of 2018 (2018 Farm Bill).

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For the Advanced Biofuel Payment Program, contact Anthony Crooks, USDA Rural Development, 1400 Independence Avenue, SW, STOP 3225, Washington, DC 20250-3225. Telephone: (202) 205-9322. Fax: (202) 720-2213. Email: Anthony.Crooks@usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule has been determined to be non-significant for purposes of Executive Order (EO) 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this final rule: (1) all State and local laws and regulations that are in direct conflict with this rule will be preempted; (2) No retroactive effect will be given to this rule; and (3) Administrative proceedings of the National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule.

Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require a consultation with State and local officials. See the final rule related document entitled, "Department Programs and Activities Excluded from Executive Order 12372" (50 FR 47034) advising that RBS payment programs, loans and loan guarantees were not covered by Executive Order 12372.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) the undersigned has determined and

certified by signature of this document that this rule, while affecting small entities, will not have an adverse economic impact on small entities. This rule does not impose any significant new requirements on program recipients nor does it adversely impact proposed real estate transactions involving program recipients as the buyers.

National Environmental Policy Act/Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1970, subpart A, "Environmental Policies." It is the determination of the Agency that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and, in accordance with the National Environmental Policy Act of 1969, Public Law 91-190, neither an Environmental Assessment nor an Environmental Impact Statement is required.

Catalog of Federal Domestic Assistance

The affected programs are listed in the Catalog of Federal Domestic Assistance (CFDA) Program under 10.865, Biorefinery Assistance. This catalog is available electronically through the free CFDA Web site on the

Internet at <https://www.cfda.gov/>. The print edition may be purchased by calling the Superintendent of Documents at (202) 512-1800 or toll free at (866) 512-1800, or by ordering online at <https://bookstore.gpo.gov/>.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Pub. L. 104-4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for

State, local, and tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E-Government Act Compliance

RBS is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This final rule has been designated as Non-Significant by OMB under Executive Order 12866. The promulgation of

this regulation will not have a significant affect on energy supply, distribution, or use.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

The Agency has determined that the final rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, this final rule is not subject to the requirements of Executive Order 13175. Consequently, the Agency will not conduct tribal consultation sessions. If a Tribe determines that this rule has implications of which RBS is not aware and would like to requires government-to-government consultation on this rule, please contact USDA Rural Development's Native American Coordinator at (720) 544-2911 or AIAN@usda.gov.

Civil Rights Impact Analysis

Rural Development has reviewed this rule in accordance with USDA Regulation 4300-4, Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After review

and analysis of the rule and available data, it has been determined that based on the analysis of the program purpose, application submission and eligibility criteria, issuance of this final rule will neither adversely nor disproportionately impact very low, low and moderate-income populations, minority populations, women, Indian tribes or persons with disability, by virtue of their race, color, national origin, sex, age, disability, or marital or familiar status.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the information collection activities associated with this rule are covered under OMB Number: 0570-0063. This final rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995.

I. Background

The Advanced Biofuel Payment Program is authorized by Section 9005 of the Farm Security and Rural Investment Act of 2002 as amended by the Agricultural Improvement Act of 2018 (P.L. 115-334). Section 9005 authorizes the

Secretary of Agriculture to “make payments to eligible producers to support and ensure an expanding production of advanced biofuels” by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production. To be eligible for payments, advanced biofuels produced must be derived from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

On February 11, 2011, the Agency published an interim rule with request for comment for the Advanced Biofuel Payment Program at 7 CFR part 4288, subpart B, at 76 FR 7936. Comments that were received in response to publication of the Advanced Biofuel Payment Program proposed rule, published April 16, 2010 [75 FR 20085], were addressed in the preamble of the interim rule. After publication of a proposed rule and an interim rule, the Agency is now publishing this final rule for the Advanced Biofuel Payment Program. All changes made from the interim rule will be addressed in Section II.

Final Rule. USDA Rural Development is issuing this regulation as a final rule, effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

II. Summary of Changes to the Interim Rule

This section presents changes to the interim rule for the Advanced Biofuel Payment Program, as published on, February 11, 2011 [76 FR 7936]. Changes are a result of Agency experiences and lessons learned from administering the program, the need to bring the program into statutory compliance, a need to clarify earlier provisions, and the Agency's consideration of public comments. Unless otherwise indicated, rule citations refer to those in this final rule.

A. 7 CFR 4288.102 Definitions.

This section is being amended in part. To conform with changes made to 7 CFR 4288.111, Biofuel eligibility, the definitions -- "Final Product", "bailment", "derived", "sale", "third party production", and "toll producer" have been added.

The definition of "eligible advanced biofuel producer" is revised to include governmental entities, schools, and other types of educational facilities. The definition "biofuel facility", is rescinded and replaced with the definition "biorefinery" in conformance with the statute.

To conform with changes made to 7 CFR 4288.131:

The definitions - "forest biomass", "incremental

production", "larger producer", and "smaller producer", are rescinded.

The definitions "large producer" and "parent company" are added to ensure compliance with the statutory funding limitation for producers of a certain size. The refining capacity equivalence for biogas and solid eligible advanced biofuels of 15,900,000 Million British Thermal Units (MMBTU) of biogas and/or solid advanced biofuel per year as established in the interim rule is continued in this final rule. The Agency is moving away from the use of "refining capacity" however, and instead is using "production in the prior fiscal year" in relation to the 150,000,000 gallons or equivalents. Experience led us to conclude that "refining capacity" is insufficiently specific to its purpose of imposing a funding limitation upon producers of a certain size. Therefore, the Agency determined instead to use the producer's reported advanced biofuel production in the previous year as a measurable proxy for refining capacity. Included also in this measure, is the prior year advanced biofuel production of any company/corporation in which the reporting producer has a controlling interest. The definition of "parent company" is added to ensure that all related biorefineries are being considered in the size threshold.

The definition of commodity is added to assist with program compliance of the statutory equitable distribution limitation that governs eligible feedstock, which provides that the total amount of payments made in a fiscal year under 7 U.S.C 8105 to producers for a single commodity shall not exceed one-third of the funds made available.. "Eligible renewable biomass" is amended to refer to commodity in conformance with this change.

B. 7 CFR 4288.105 Oversight and monitoring.

7 CFR 4288.105(a) (1) Production and feedstock verification, is amended to refer to commodity.

7 CFR 4288.105(a) (3) Is amended to allow a Certificate of Analysis to be issued by an Agency-approved qualified entity, which may include the blender only if the blender is not associated with the biorefinery.

C. 7 CFR 4288.106 Forms, regulations, and instructions.

This section is revised to update the Rural Development Website as, <https://www.rd.usda.gov/>.

D. 7 CFR 4288.111 Applicant eligibility.

7 CFR 4288.111(c) (1) is amended to replace "biofuel producer" with "producer".

E. 7 CFR 4288.111 Biofuel Eligibility.

Several changes are made to the biofuel eligibility provisions, § 4288.111.

(1) Section 4288.111(a) (3) is amended to provide that the advanced biofuel must be a Final Product. The definition of Final Product is being added based on Agency experience in administering the program. The definition will help ensure that payments are not being made for products that are used as feedstocks for advanced biofuels.

(2) Section 4288.111(b), is amended to state explicitly that certain biofuels are ineligible for payment. The Agency determined that flared gases are not a Final Product. The Agency also determined that waste stream products derived from paper milling and other processes commonly ascribed to wood products manufacturing and generically referred to as "liquor" (e.g., black liquor, red liquor, brown liquor, white liquor, green liquor, etc.), which typically are blended with diesel and burned as boiler fuel are not products of an advanced biofuel Biorefinery. The Agency also determined that the production of advanced biofuel "derived" from eligible

renewable biomass involves a conversion process that creates a physical, and/or chemical, and/or biological change in the Renewable Biomass/feedstock. An example of change in physical state includes processing energy grasses and/or woody biomass through a hammermill and pellet die at pressures sufficient to cause the feedstock to heat up and release natural lignins that bind the material together into pellets. An example of a biological change is the anaerobic digestion of livestock manure and food processing waste into biogas. Examples of chemical changes include the fatty acid methyl ester processing of fats, oils, and greases into biodiesel; the enzymatic hydrolysis of cellulosic material into fuel ethanol; and the torrefaction (a thermal process) of woody biomass into solid fuel. For purposes of this program, to be derived from eligible renewable biomass and so qualify as an advanced biofuel as defined in this subpart, a minimum of one change (physical, chemical, or biological) must occur in the feedstock. The activities of collection, baling, bundling, chopping, or chipping, are not considered advanced biofuel production. Baled/rolled energy grasses, screened/chipped/chunked woody biomass, and chopped firewood are not eligible advanced biofuels because in these examples no conversion process is evident. Payments will be made for the production of

advanced biofuels in which the renewable biomass/feedstock (other than corn kernel starch), has undergone a conversion process, as described.

Lastly, § 4288.111(b)(4), incorporates the added definitions -- bailment, derived, sale, third party production, and toll producer, and makes ineligible, "biofuels produced under bailment." This Agency-determined prohibition is based upon numerable and significant concerns regarding: a disproportionately large amount of available funds paid to biofuels produced under bailment, coupled with the risks of duplicative or improper payments, and the overwhelming amount of administrative staff time and resources required to police this activity.

(3) Eligibility determination, formerly § 4288.111(b), is reassigned to § 4288.111(c).

F. 7 CFR 4288.120 Enrollment.

This section is amended to include the requirement for applicants to be registered in the System for Award Management (SAM) prior to submitting an enrollment application and to rescind § 4288.120(a)(4), Supporting documentation. Additionally, this section is amended to renumber paragraph (a)(5) as paragraph (a)(4).

G. 7 CFR 4288.130 Payment applications.

Section 4288.130(d), Submittal information, is amended to provide that unless otherwise specified in a notice published in the Federal Register, eligible advanced biofuel producers must submit payment applications for this program no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested.

H. 7 CFR 4288.131 Payment provisions.

To bring the program into statutory compliance, improve program delivery, customer service, and administrative processes for participants and Agency staff, a number of fundamental changes are made to the payment provisions, § 4288.131.

(1) The two-tiered (actual and incremental) payment approach formerly outlined in 7 CFR 4288.131(a) is rescinded and replaced with a single tier based on actual production.

The two tiered approach was established originally to assist the advanced biofuels industry in maintaining its production capacity while the economy recovered (from the economic downturn). As the economy improved and as the demand for energy increased, the Agency believed it

appropriate to focus the program on encouraging new production. The Agency also believed at the time that incremental payments would encourage production increases among producers that are likely to sustain such increases over time vis-à-vis producers who "wildly" vary production from year to year based on short term market conditions. What was not understood at the time was that the uncertainty surrounding incremental payments was chief among the causes of that "wildly" varying production.

The Agency now believes this single-tiered approach is best to encourage both existing and new advanced biofuel production for two reasons.

First, the single tiered scheme provides greater payment certainty to all eligible participants. Under the two tiered scheme, how much a producer could expect to receive from actual payment production and from incremental production was uncertain due to a number indeterminate factors that affected payments -- the number of eligible participants, volumes of fuel produced, and most importantly, the portion of production eligible for incremental production payments. The single tiered approach eliminates altogether the incremental payment calculation.

Second, the single tiered payment system distributes

equitably among all producers, what was the incremental payments portion, which amounted to one-half of available funds under the interim rule, and would otherwise have been awarded to a disproportionately few number of producers.

Under the single tiered system, payments are made for actual production during the fiscal year and on a quarterly basis for actual production during the quarter for which payments are sought. Payment rate calculations are based on available funds and on the amount of eligible advanced biofuel produced. Participating producers are required to submit payment request applications each quarter. Should a producer fail to submit a payment request by the submission deadline, the producer will not receive payment for that quarter. No payment is made for incremental production.

To conform with these changes, the bonus and discount rates applied to various types of biofuels and the incremental payment provision that a facility have no more than 20 days of nonproduction, formerly found in 7 CFR 4288.131(a) and (c), respectively, are rescinded.

A payment provision is also added in compliance with the statutory "equitable distribution amount" requirement to, "limit the amount of payments that may be received by a single eligible producer under this section in order to distribute the total amount of funding available in an

equitable manner.” This limitation amounts to eight percent of available funds per year and applies to any individual producer that is not a large producer.

A procedure is also provided to explain how payments are made to large producers and eligible advanced biofuel producers that are not large producers, subject to each payment provision.

I. 7 CFR 4288.190 Fiscal Year 2010 applications.

Section 4288.190 is removed in its entirety as it is no longer applicable and is now reserved.

III. Summary of Comments and Responses

On February 11, 2011, Rural Business Cooperatives Service (RBS) published an interim rule in the Federal Register (76 FR 7935) for a payment program for producers of advanced biofuels to support existing advanced biofuel production and to encourage production of new advanced biofuels. The Agency enters into contracts with advanced biofuel producers to pay such producers to produce eligible advanced biofuels. To be eligible for payments, advanced biofuels must be derived from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

Four commenters - 1 from Industry, 2 from Sponsoring organizations, and 1 from an individual not identified with an organization, provided a total of 22 comments in response to the interim rule. Ten of the comments were supportive of the changes to the interim rule.

Comments on rural area: Three comments supported the removal of the requirement that a facility had to be in a rural area and one comment did not support the removal of the rural area.

Response: The Agency disagrees with the comment that does not support the rescinded requirement that a facility be located in a rural area. Beneficial impacts of the program accrue generally to rural areas even if various biofuel facilities are not located there. Renewable biomass production occurs largely in rural areas. Rural economies benefit substantially from biofuel facilities' procurement and use of the renewable biomass in the production of advanced biofuels.

Domestic Ownership: Two comments supported the removal of the domestic ownership requirement. One comment did not support the removal of the domestic ownership requirement.

Reponse: The Agency disagrees with the comment that

does not support the removal of the domestic ownership requirement. The program will have beneficial impacts, such as increased production of advanced biofuels and improved economic stability at the local level regardless of ownership, so long as the biorefinery is physically located in a State; which is why the domestic ownership requirement was removed from the interim rule.

Twelve of the 22 comments were averse to certain changes in the interim rule.

Incremental payment provision: Three comments did not support the incremental production payment provision, recommended the elimination of the disparity between the actual and incremental payments, and proposed a single level payment for all eligible fuels.

Response. The Agency agrees that there is a disparity between the base and incremental payments and is replacing the two tiered, actual and incremental payment provision with a single payment system based on actual production.

Non-production days. Two comments did not support the requirement that a facility can only have 20 days of non-

production to be eligible for incremental payment.

Response. The incremental payment provision that a facility have no more than 20 days of nonproduction is rescinded as a conforming change with the replacement of the two tiered, actual and incremental payment provision with a single payment system based on actual production. Also rescinded are the use of terms - base production, base payments, incremental production, and incremental payments.

Bonus and discount rates. Two comments recommended payments be augmented with bonus BTUs for those fuels that meet a Renewable Fuel Standard identified by the EPA.

Response. The Agency disagrees with the comment. The two-tiered (actual and incremental) payment approach is rescinded and replaced with a single tier based on actual production. The Agency believes this single-tiered approach is best to encourage both existing and new advanced biofuel production for two reasons: it provides greater payment certainty to all eligible participants and it distributes equitably among all producers, the incremental payments portion, which amounted to one-half of available funds under the interim rule, and would otherwise be awarded to a disproportionate few number of producers. These payments are made for actual production during the

fiscal year and on a quarterly basis for actual production during the quarter for which payments are sought. Payment rate calculations are based on available funds and on the amount of eligible advanced biofuel produced. To conform with these changes, the bonus and discount rates applied to various types of biofuels as well as the incremental payment provision that a facility have no more than 20 days of nonproduction, formerly outlined at 7 CFR 4288.131(c) and (a), respectively, are rescinded.

Third-party certification. Two comments indicated concern that the provision in the interim rule on independent third-party certification of analysis could be interpreted that it is required for every eligible gallon of biodiesel.

Response. The Agency agrees that third-party certification is not required for every gallon of Advanced Biofuel produced.

Two comments supported the removal of the BQ9000 certification requirement. One comment supported how the Agency defined large producers by the refining capacity if the producer owns more than 50% of the facility.

Response. The Agency acknowledges the supportive

comments. The Agency is moving away from the use of "refining capacity" however, and instead is using "production in the prior fiscal year" in relation to the 150,000,000 gallons or equivalents. Experience led us to conclude that "refining capacity" is insufficiently specific to its purpose of imposing a funding limitation upon producers of a certain size. Therefore, the Agency determined instead to use the producer's reported advanced biofuel production in the previous year as a measurable proxy for refining capacity. Included also in this measure, is the prior year advanced biofuel production of any company/corporation in which the reporting producer has a controlling interest. The definition of "parent company" is added to ensure that all related biorefineries are being considered in the size threshold.

IV. Advanced Biofuel Payment Program Applications

A Notice of Contract Proposals (NOCP) will be published separately from this rule and for each fiscal year, as necessary.

List of Subjects in 7 CFR Part 4288

Administrative practice and procedure, Biobased products, Energy, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Agency adopts the interim rule amending 7 CFR part 4288 which was published at 76 FR 7936 on February 11, 2011, is adopted as final with the following changes:

PART 4288 - PAYMENT PROGRAMS

1. The authority citation for part 4288 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

Subpart B - Advance Biofuel Payment Program General Provisions

2. Section 4288.102 is amended by:

a. Revising the definition of "Advanced biofuel producer";

b. Adding the definition "Bailment" in alphabetical order;

c. Removing the definition for "Biofuel facility";

d. Adding the definitions "Biorefinery", "Commodity", and "Derived" in alphabetical order;

e. Revising the definition of "Eligible renewable biomass";

f. Adding the definition "Final Product" in

alphabetical order;

g. Removing the definition of "Forest biomass";

h. Adding the definition "Large producer" in alphabetical order;

i. Removing the definition of "Larger producer";

j. Adding the definitions "Parent company" and "Sale" in alphabetical order;

k. Removing the definition of "Smaller producer";

l. Adding the definitions "Third party production" and "Toll producer" in alphabetical order.

The revisions and additions read as follows:

§ 4288.102 Definitions.

* * * * *

Advanced biofuel producer. An individual, corporation, company, foundation, governmental entity, school or other educational facility, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this subpart. An entity that produces biofuel exclusively under a toll/bailment arrangement/third part production contract

is not considered an advanced biofuel producer under this subpart.

* * * * *

Bailment. The temporary placement of control over, or possession of property by an individual or entity, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed. For purposes of this Program any advanced biofuel produced by a toll producer of any form, or under any form of third-party production agreement, is regarded/considered as produced under bailment and is ineligible for payment; to either bailor or bailee.

* * * * *

Biorefinery. The term "biorefinery" means a facility (including equipment and processes) that-

(1) Converts renewable biomass or an intermediate ingredient or feedstock of renewable biomass into any 1 or more, or a combination, of-

- (i) Biofuels;
- (ii) Renewable chemicals; or
- (iii) Biobased products; and

(2) May produce electricity.

* * * * *

Commodity. Renewable biomass, other than corn kernel starch, used primarily for the purposes of this Program, by advanced biofuel producers as feedstock from which to produce/derive advanced biofuel. Eligible renewable biomass is organized into the following commodity categories:

(1) Title I grains and oilseeds including: Wheat, corn, grain sorghum, barley, oats, and rice; sugars, and starches (other than corn kernel starch); Soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard, crambe, sesame, and peanuts; as identified under Title I, Pub. L. 115-334, and as determined by the Secretary;

(2) Other oilseeds and nuts including cottonseed, palm, camelina, coconut, and olive; and algae;

(3) A cellulosic commodity grown for energy purposes, such as, hybrid poplar and other energy trees, switch grass and other energy grasses; cellulose, hemicellulose, or lignin;

(4) Waste material, including crop residue/Stover, other vegetative waste material/orchard waste, animal

waste/manure, food waste/food processing waste, and yard waste/biodegradable solid waste/organic matter;

(5) Fats, oils, and greases, derived from an agricultural product, including: recycled fats, oils, and greases, such as used cooking oil and reclaimed-industrial grade-distillers' corn/sorghum oil; tallow, white grease, yellow grease, and other livestock renderings; and

(6) Any animal byproduct (in addition to oils, fats, and greases) that may be used to produce bioenergy, as determined by the Secretary.

* * * * *

Derived. A process that creates a physical, and/or chemical, and/or biological change in renewable biomass/feedstock.

* * * * *

Eligible renewable biomass. Renewable biomass, as defined in this section, excluding corn kernel starch. See also commodity.

* * * * *

Final Product. A product of a biorefinery that is ready for sale/distribution without further processing. For purposes of this Program, an advanced biofuel is a Final Product eligible for payment if it is ready for distribution and sale as a fuel.

* * * * *

Large producer. (1) An advanced biofuel producer which in the prior fiscal year, produced more than:

(i) 150,000,000 gallons of liquid advanced biofuel per year; or

(ii) 15,900,000 Million British Thermal Units (MMBTU) of biogas and/or solid advanced biofuel per year.

(2) The amount of gallons and MMBTUs listed in paragraphs (1)(i) and (ii) of this definition include the advanced biofuel production at all facilities, in the United States, in which the producer and/or its parent company(ies) have a 50-percent or greater ownership.

Parent company. A company/corporation that has a controlling interest in another company/corporation, giving it control of its operations. The company is deemed a

subsidiary of the parent company.

* * * * *

Sale. A transaction between two or more parties, typically a buyer and a seller, in which goods or services are exchanged for money or other assets.

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Third party production. Third party production involves outsourcing production processes to a third-party company whereby the third-party company, hired to produce, is supplying the manufacturing process as well as sourcing the raw materials/commodity feedstock. The contract producer is responsible for manufacturing the product to specification and disposition/delivery requirements. For purposes of this Program, any advanced biofuel produced under a contractual third-party production agreement is ineligible for payment. A producer that is strictly a third-party contractor produces no eligible advanced biofuel.

Toll producer. See also bailment. Toll production/manufacturing is an arrangement, where a company with specialised equipment processes raw materials or unfinished goods for a different company. A toll producer of advanced biofuels produces advanced biofuels for another company. For purposes of this Program, any advanced biofuel produced by a toll producer of any form, or under any form of third-party production agreement, is regarded/considered as produced under bailment and is ineligible for payment.

* * * * *

3. Amend § 4288.105 by revising paragraphs (a) (1) and (3) to read as follows:

§ 4288.105 Oversight and monitoring.

(a) * * *

(1) *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of

commodity/eligible renewable biomass used.

* * * * *

(3) *Certificate of Analysis*. The Agency will review the producer records for quarterly payments to ensure that each Certificate of Analysis has been issued by an Agency-approved qualified entity, which may include the blender only if the blender is not associated with the biorefinery.

* * * * *

4. Revise § 4288.106 to read as follows:

§ 4288.106 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this Program may be obtained from the USDA Rural Development State Office, Rural Energy Coordinator and the USDA Rural Development Web site at <https://www.rd.usda.gov/>.

§ 4288.110 [Amended]

5. Amend § 4288.110(c)(1) by removing "advanced biofuel producer" and adding in its place "producer".

6. Amend § 4288.111 by:

- a. Revising the introductory text and paragraph (a) (3);
- b. Redesignating paragraph (b) as paragraph (c); and
- c. Adding new paragraph (b).

The revisions and addition read as follows:

§ 4288.111 Biofuel eligibility.

To be eligible for this Program, a biofuel must meet the requirements specified in paragraph (a) of this section, and must not be listed in paragraph (b) of this section, and the biofuel's producer must provide additional information as may be requested by the Agency under paragraph (c) of this section.

(a) * * *

(3) The advanced biofuel must be a Final Product; and

* * * * *

(b) *Ineligible fuels.* Notwithstanding the provisions of paragraph (a) of this section, for the purposes of this Program, the following fuels, and as may be supplemented by the Agency through the publication of documents in the Federal Register, are not eligible for payment:

(1) Flared gases;

(2) Fuels derived from paper milling and other processes commonly ascribed to wood products manufacturing

and generically referred to as "liquor" (e.g., black liquor, red liquor, brown liquor, white liquor, green liquor, etc.), which typically are blended with diesel and burned as boiler fuel;

(3) Biofuels produced from solid eligible renewable biomass primarily by mechanical means, whether by hand or by machine, such as collecting, baling, bundling, chopping, screening, and chipping of the renewable biomass. Examples of ineligible biofuels that are not eligible advanced biofuels for the purposes of this subpart include, but are not limited to, baled energy grasses, chipped or chunked woody biomass, and chopped or split firewood; and

(4) Any advanced biofuel produced under bailment or third-party production contract and/or any variation thereof.

* * * * *

7. Amend § 4288.120 by:

- a. Revising paragraph (a) introductory text;
- b. Removing paragraph (a) (4); and
- c. Redesignating paragraph (a) (5) as paragraph (a) (4); and

d. In newly redesignated paragraph (a) (4), removing the paragraph heading and removing "this paragraph" and adding "this paragraph (a) (4)" in its place.

The revision reads as follows:

§ 4288.120 Enrollment.

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(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. Applicants must be registered in the System for Award Management (SAM) prior to submitting an application; which can be obtained at no cost via a toll-free request line at (866) 705-5711 or online at www.sam.gov/SAM. Registration of a new entity in SAM requires an original, signed, and notarized letter stating that the applicant is the authorized Entity Administrator, before the registration will be activated.

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8. Amend § 4288.130 by revising paragraph (d) introductory text to read as follows:

§ 4288.130 Payment applications.

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(d) *Submittal information.* Unless otherwise specified in a notice published in the Federal Register, eligible advanced biofuel producers must submit payment applications for this Program no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. No payment applications received after the specified date and time will be considered, regardless of the postmark on the application.

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9. Revise § 4288.131 to read as follows:

§ 4288.131 Payment provisions.

Payments to advanced biofuel producers for eligible advanced biofuel production will be determined in accordance with the provisions of this section.

(a) *Actual production.* Participating producers will be paid on a quarterly basis for the actual quantity of eligible advanced biofuel produced during the quarter. Payment for actual production will be determined according to paragraph (d) of this section.

(b) *Amount of payment funds available.* Based on the amount of funds made available to this Program each fiscal year, the Agency will allocate available program funds according to paragraphs (c), (d), and (e) of this section.

(c) *Quarterly allocations.* For each fiscal year, the Agency will allocate in each quarter one-fourth of the funds identified in paragraph (b) of this section allocated for the entire fiscal year.

(d) *Determination of payment rate.* Each quarter, the Agency will establish an actual production payment rate using the procedures specified in paragraphs (d)(1) through (4) of this section. This rate will be applied to the actual quantity of eligible advanced biofuel produced to determine payments to eligible advanced biofuel producers.

(1) Based on the information provided in each payment application, the Agency will determine the eligible advanced biofuel production. If the Agency determines that the amount of advanced biofuel production reported in a payment application is not supported by the documentation submitted with the payment application, the Agency may revise the reported production to an amount that is commensurate with the submitted documentation.

(2) For each producer, the Agency will convert the production determined to be eligible under paragraph (c) of

this section into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (EIA) (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency, in consultation with other Federal agencies, will establish and use a conversion formula as appropriate, until the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(3) For each quarter, the Agency will determine the actual production payment rate (\$/BTU) based on paragraphs (b), (c), and (d) of this section. The rate will be calculated such that all quarterly funds for actual production will be distributed, subject to the payment provisions specified in paragraph (e) of this section.

(4) Using the actual production payment rate determined and the actual production for each type of advanced biofuel produced at a biorefinery, the Agency will calculate each quarter payment for each eligible advanced biofuel producer for that quarter.

(e) *Other payment provisions.* The following provisions apply:

(1) Notwithstanding any other provisions in this section, the Agency will provide payments to one or more eligible advanced biofuel producers from a single eligible Commodity, including intermediate ingredients of that single Commodity or use of that single Commodity and its intermediate ingredients in combination with another Commodity, of not more than one-third of available program funds in each quarter.

(i) Payments to producers for advanced biofuel derived from a commodity listed in Title I grains and oilseeds (as defined paragraph (1) of the definition of commodity in § 4288.102), are subject to the one-third limitation as tracked individually for each commodity. For example, with respect to the Title I grains and oilseeds commodity - grain sorghum, all payments for the quarter to producers of advanced biofuel derived from grain sorghum are tabulated and subject to the one-third payment limitation. This is similarly true for each commodity listed under Title I grains and oilseeds -- barley, oats, rice, soybeans, etc.

(ii) Payments to producers for advanced biofuel derived from a commodity listed in paragraphs (2) through (6) of the definition of commodity in § 4288.102,

inclusively, are subject to the one-third limitation as tracked cumulatively with each commodity group. For example, with respect to the commodity in paragraph (2) of the definition of commodity (other oilseeds and nuts including cottonseed, palm, camelina, coconut, and olive and algae), all payments for the quarter to producers of fuel derived from "other oilseeds, nuts and algae" are tabulated cumulatively (all are tracked as "other oilseeds, nuts, and algae" whether olive, or coconut, or camelina, etc.) and subject cumulatively to the one-third payment limitation. This is similarly true for the commodity in paragraphs (3) through (6) of the definition of commodity.

(2) Notwithstanding any other provision of this section, the Agency will provide payments to large producers of not more than five (5) percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to large producers would be reached, the Agency will pro-rate payments to large producers based on the BTU content of their eligible advanced biofuel production so as not to exceed the limit.

(3) Notwithstanding any other provision of this section, the Agency will provide payments to any eligible advanced biofuel producer, that is not a large producer, of not more than eight (8) percent of available funds in any

fiscal year. At any time during the year, if the eight percent to the advanced biofuel producer would be reached, the Agency will pro-rate payments based on the BTU content of the eligible advanced biofuel production so as not to exceed the limit.

(4) Advanced biofuel producers will be paid based on the amount of eligible renewable energy content of the advanced biofuels only if the producer provides sufficient documentation, including a Certificate of Analysis, for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(5) Payment will be made to only one eligible advanced biofuel producer per biorefinery. If a producer owns more than one facility, the Agency's tracking system will add all actual BTUs and calculate one payment amount. For facilities owned by more than one producer, only one payment will be issued per facility.

(6) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due.

(7) A producer will be paid only for the advanced biofuels identified in the enrollment application submitted during the sign-up period and which are produced during the

fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer may identify new advanced biofuels and production levels compared to the previous year.

(8) When determining the quantity of eligible advanced biofuel, if an applicant is blending its advanced biofuel using ineligible feedstocks (e.g., fossil gasoline or methanol, corn kernel starch), only the quantity of advanced biofuel being produced from Renewable Biomass, other than corn kernel starch, will be used in determining the payment rates and for which payments will be made.

§ 4288.190 [Removed and Reserved]

10. Remove the undesiganted center heading "Fiscal Year 2010 Applications" and remove and reserve § 4288.190.

Bette Brand,
Administrator,
Rural Business-Cooperative Service.

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