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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1435

RIN 0560-AH86

Sugar Program; Feedstock Flexibility Program for Bioenergy Producers

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This rule amends regulations that specify the methods that the Commodity Credit Corporation (CCC) can use to dispose of its sugar inventory and establishes the new Feedstock Flexibility Program (FFP). Through FFP, the Secretary is required to purchase sugar and sell it to produce bioenergy as a means to avoid forfeitures of sugar loan collateral under the Sugar Program. The FFP regulations are required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) amendments to the Food Security and Rural Investment Act of 2002 (the 2002 Farm Bill), and as further amended by the American Taxpayer Relief Act of 2012.

DATES: *Effective date:* **[Insert date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Barbara Fecso; telephone (202) 720-4146. Persons with disabilities who require alternative means for communications (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

Under the Sugar Program, domestic sugar beet or sugarcane processors may borrow from CCC, pledging their sugar production as collateral for any such loan, and then satisfy their loans either by repaying the loan on or before loan maturity or by transferring the title for the collateral to CCC immediately following loan maturity, also known as "forfeiture" of collateral (as specified in 7 CFR 1435.105). The Farm Service Agency (FSA) administers the Sugar Program for CCC. The regulations for sugar loans in 7 CFR 1435 parts A and B are not changing. CCC is required to operate the Sugar Program, to the maximum extent practicable at no cost to the Federal government, by avoiding forfeitures to CCC. If domestic sugar market conditions are such that market rates are less than forfeiture level, current law requires CCC to use FFP to purchase sugar and sell such sugar to bioenergy producers to avoid forfeitures.

This final rule amends the Sugar Program regulations to implement FFP and to establish appropriate methods for the disposition of sugar inventory that CCC has acquired other than through FFP. CCC may acquire sugar through forfeiture of CCC sugar loans or through sugar purchases to reduce the cost of the Sugar Program under the cost reduction options provided by section 1009 of the Food Security Act of 1985 (7 U.S.C. 1308a, Pub. L. 99-198). Implementation of FFP is required by the amendment by section 9001 of the 2008 Farm Bill (Pub. L. 110-246) to section 9010 of the 2002 Farm Bill (7 U.S.C. 8110, Pub. L. 107-171), and as further amended by section 701(f)(9) of the American Taxpayer Relief Act of 2012 (Pub. L. 112-240). Regulations implementing FFP are in 7 CFR part 1435, "Sugar Program," in new subpart G,

"Feedstock Flexibility Program." Regulations implementing sugar disposition methods are in 7 CFR part 1435 in new subpart E, "Disposition of CCC Inventory."

FFP addresses sugar surpluses sooner than the current Sugar Program by permanently removing such sugar from the market for human consumption. The current Sugar Program removes surplus sugar from the market near the end of the crop year as sugarcane and sugar beet processors forfeit sugar loan collateral to CCC. The acquired inventory can be stored for resale to the market upon improvement in market prices. Under FFP, CCC may remove surplus sugar from the market earlier in the year, as FFP requires CCC to avoid sugar loan forfeitures. FFP also requires the surplus sugar to be used to produce bioenergy, which precludes CCC's resale of inventory into the market for human consumption.

Current law provides USDA authority for these programs through the 2013 sugar crop year (which runs from October 1, 2013 to September 30, 2014). Recent indications in the sugar market suggest that forfeitures may occur in crop year 2012. However, if sugar prices remain below the forfeiture level, CCC may be required to use FFP to purchase sugar before August 1, 2013, the first date that 2012-crop loans can be forfeited to CCC. The last year in which sugar loan forfeitures occurred was 2005. The methods specified in this rule for both purchases under FFP and disposition of CCC sugar inventory are not expected to be used in most years.

CCC published a proposed rule in the Federal Register on October 19, 2011 (76 FR 64839-64844), with respect to the 2008 amendments that would establish FFP and restrict CCC sugar inventory disposition outlets to non-food use under non-emergency shortage conditions. CCC received six comments on the proposed rule. The comments

and responses are discussed later in this document. As explained below, no major changes are being made in response to comments, because CCC has determined, based on the evenly balanced opposing and supporting comments for specific changes, that the proposed rule equitably balances the conflicting interests of sugar producers and sugar users. CCC has made other changes from the proposed rule in this final rule clarifying the types of sugar eligible for FFP and eliminating the eligibility requirement that the eligible bioenergy producers' facility be located in the United States.

Sugar Program Background

Administration of the current Sugar Program requires CCC to balance domestic supply with demand so that U.S. sugar prices are no less than levels specified in the 2008 Farm Bill and to maintain an adequate domestic sugar supply. This rule does not change CCC's management of sugar loans, sugar marketing allotments, or import tariff-rate quotas (TRQs). Specifically, this rule introduces purchases and sales of sugar for bioenergy production under FFP as a proactive means for CCC to avoid forfeitures. FFP is expected to be unnecessary in most years, as USDA's long term projections indicate a generally strong domestic sugar market in the future.

Sugar Inventory Disposition

This rule adds a new subpart E, "General Disposition of CCC Inventory," to 7 CFR part 1435 to implement the 2008 Farm Bill requirements and the 2012 amendments to the 2002 Farm Bill. Subpart E applies to sugar in inventory that CCC owns, such as sugar obtained from forfeited loan collateral. CCC does not expect to

regularly use these methods, as it is legislatively required to operate FFP to avoid forfeitures.

As specified in Subpart E, CCC will dispose of sugar held in CCC inventory in ways that do not increase the domestic supply of sugar for human consumption, except in conditions of emergency sugar shortages. CCC may, under non-emergency conditions, dispose of sugar held in inventory through sales under FFP (new subpart G), through the Processor Sugar Payment-in-Kind (PIK) Program (7 CFR part 1435 subpart F, which is not changing), through buybacks of Certificates of Quota Eligibility (CQEs), which are issued under 15 CFR part 2011 to TRQ holding countries and authorize sugar to enter the United States under the TRQs, or through other applicable CCC disposition authority in such a way as not to increase the domestic supply of sugar for human consumption. Under the PIK disposal option, CCC would swap sugar inventory for retired sugarcane or sugar beet acreage. CCC disposed of 473,000 tons of sugar inventory under a similar PIK Program in fiscal year (FY) 2001 and FY 2002. Under the CQE option, CCC would allow traders to swap CQEs for sugar inventory. CCC disposed of 116,000 tons of sugar inventory under CQE swaps in FY 2002 and FY 2003. Both methods reduce sugar in the domestic supply for human consumption. The announcements of the use of such methods to dispose of sugar held in inventory will be placed on the FSA Commodity Operations website at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=landing.

If there is an emergency shortage of sugar for human consumption in the domestic market, the Secretary may use applicable CCC authority to dispose of sugar inventory, including sales for human consumption.

As amended by the 2008 Farm Bill, section 9010 of the 2002 Farm Bill specifies that an emergency shortage of sugar for human consumption in the United States market is one "caused by a war, flood, hurricane, other natural disaster, or other similar event." CCC did not propose to define "emergency shortage" in the proposed rule, and noted that the "similar event" clause provides flexibility to respond to shortages caused by manmade events. In the background section of the proposed rule, CCC requested comments on whether CCC should define "emergency shortage" in the rule, either by listing the specific types of events that cause a shortage or by specifying a formula based on price or stock levels that constitute a shortage. As discussed in more detail later in this document, the comments received were not in agreement on whether there should be a specific definition or what that definition should be. Therefore, CCC has retained the language of section 9010 in the final rule that specifies the causes of an emergency shortage, but has not adopted a specific formula for what constitutes a shortage. CCC therefore retains flexibility to make a determination whether particular circumstances constitute an "other similar event" that has caused an emergency shortage, and whether a particular price or stock level constitutes a shortage. There were no comments received on any other sugar disposition provisions specified in the proposed rule. Consequently, CCC did not make any substantive changes to those provisions.

Subpart G -- Feedstock Flexibility Program

New subpart G specifies how CCC will operate FFP. Through FFP, CCC will buy sugar as needed to avoid forfeitures of sugar loan collateral and sell that sugar to bioenergy producers. Bioenergy, as defined in section 9001 of the 2008 Farm Bill,

amending section 9010 of the 2002 Farm Bill, means fuel grade ethanol and other biofuel.

As amended by the 2008 Farm Bill, section 9010 of the 2002 Farm Bill requires the Secretary to estimate, by September 1 of each year, the likelihood of sugar forfeitures for the following crop year, and announce the quantity of sugar to be made available for purchase and sale for bioenergy production. In addition, CCC will make quarterly announcements of revised estimates of such quantity. CCC's purchase and sale plans will be affected by the large degree of uncertainty in USDA's sugar market projections made early in the year. As specified in this rule, CCC will update the estimated quantity of sugar to be made available for purchase and sale under FFP not later than January 1, April 1, and July 1 of each year. Any FFP purchases expected in calendar year 2013 for the 2012 crop will be announced in the quarterly updates in FY 2013.

The 2008 Farm Bill amendments specify that the only commodities eligible to be made available for purchase under FFP are "raw or refined, or in-process sugar" that would otherwise have been marketed for human consumption in the United States or could otherwise have been used for the extraction of sugar marketed for human consumption.

Applicable law requires that the entity selling sugar to CCC be located in the United States. The 2008 Farm Bill amendments do not require that the sugar buyer's bioenergy facilities be located in the United States. CCC nevertheless initially proposed to limit eligible buyers to those bioenergy producers who would use the purchased sugar to produce bioenergy in their facilities in the United States. This restriction was initially proposed to benefit the American taxpayer, who is paying for FFP, and CCC indeed

received one (favorable) comment related to such proposed restriction. However, section 9010 of the 2002 Farm Bill, as amended, expressly provides that the sale of sugar to bioenergy producers must be conducted in a manner that ensures the Sugar Program is operated at no cost to the Federal Government by avoiding forfeitures to CCC. To restrict eligible buyers to those bioenergy producers whose production facilities are located in the United States may restrict the pool of sugar buyers, potentially increasing the cost to the Federal Government and the likelihood of forfeitures to CCC. Such a result would be contrary to the interests of the American taxpayer. Consequently, the final rule does not adopt this restriction. Ultimately, CCC estimates that few if any prospective buyers would seek to use the sugar to produce bioenergy at facilities outside the United States, as it is not expected to be cost-effective to transport over longer distances sugar that must be used for bioenergy production.

Any biofuel producer that wishes to participate in the Environmental Protection Agency's (EPA's) Renewable Fuel Standard (RFS) program must comply with EPA regulations, in 40 CFR part 80; however, participation in RFS is not a requirement for participation in FFP. Assuming all of the applicable RFS requirements are met, EPA has confirmed that ethanol produced from U.S. sugarcane would qualify for an advanced fuel RIN, and that ethanol produced from U.S. sugar produced from U.S. sugar beets would qualify for a conventional RIN, subject to certain grandfathering provisions.

CCC will invite sugar producers to sell sugar for FFP and shortly thereafter invite bioenergy producers to bid on purchasing sugar for bioenergy production. The terms and conditions of the sugar purchase and sale contracts will be outlined in the dual invitations. The invitations will be placed on the FSA Commodity Operations website at

http://www.fsa.usda.gov/FSA/webapp?area=home&subject=coop&topic=landing. Alternatively, CCC may negotiate contracts directly with sellers or buyers, if CCC determines that such negotiation, compared to other means, either will reduce the likelihood of forfeited sugar or reduce costs of removing sugar from the market. CCC may employ several contracting strategies to discover the most cost-effective strategy to manage FFP.

The 2008 Farm Bill amendments require that purchasers of sugar under FFP take possession within 30 days after the date of purchase from CCC. CCC will therefore attempt, when possible, to identify a bioenergy producer (sugar buyer) before CCC purchases sugar, and require the buyer to take possession of the sugar within 30 days of purchase. Since the law prohibits CCC, to the maximum extent possible, from paying storage fees for FFP sugar, CCC will structure the FFP contracts so that CCC does not pay any storage fees. Specific terms and conditions will be outlined in the invitations to sell and buy sugar for the FFP. For instance, potential sugar buyers will have the opportunity to discuss and arrange storage and load out terms with the sugar seller prior to placing bids. As specified in subpart E, sugar acquired by CCC through methods other than FFP, such as sugar loan forfeitures, may also be sold for bioenergy production through FFP.

Since the value of sugar required to be sold for bioenergy production will likely be less than the market price for sugar used for human consumption, there is an incentive for FFP sugar sold to bioenergy producers to leak into the domestic human consumption market. Therefore, CCC will require proof from each FFP bioenergy producer that the sugar is used in the bioenergy facility for the production of bioenergy. Bioenergy

producers, at minimum, will be required to permit CCC access to the bioenergy facility to verify compliance; however, CCC may also require a performance bond or a similar instrument to assure that the purchased sugar is used to produce bioenergy. Specific terms and conditions of any such bond or instrument will be specified in the invitations to sell and buy sugar for the FFP.

As noted above, CCC is not specifying the precise contracting method or language in the rule in order to maintain maximum flexibility in achieving program goals in the most cost effective way.

Discussion of Comments

The comments CCC received in response to the proposed rule were from a representative of all sugar producers, a representative of sugar beet processors, a representative of companies that use sugar and sweeteners to manufacture foods and beverages, and three members of the general public. Half of the comments offered specific suggestions to amend the provisions in the proposed rule; the rest generally opposed or supported the Sugar Program. There was not a consensus on any of the suggested changes. There was general support for many of the provisions in the proposed rule, including how eligible forms of sugar for FFP are defined and CCC's proposed flexible approach to how purchases will be made if needed. Two commenters recommended terminating the Sugar Program, which CCC does not have authority to do; another comment generally supported FFP. The other comments offered specific suggestions to amend the rule or provided specific suggestions on how the rule should be implemented. The following provides a summary of the issues in the comments and

CCC's responses, including changes being made to the final rule in response to the comments.

Disposition of Sugar Inventory

Comment: CCC should leave "emergency shortage" undefined. Leaving the term undefined would give CCC the flexibility needed to operate the program successfully and that linking the term to a price formula is not authorized by the 2008 Farm Bill amendments. Defining the term in this inventory disposal regulation might automatically, and inappropriately, lead to the same definition being applied to the administration of the TRQs as required by7 U.S.C. 1359kk.

Response: The 2008 Farm Bill amendments specify some of the potential causes of an emergency shortage, but do not define an emergency shortage in terms of either price or a supply disruption. Based on a lack of consensus of commenters, this rule does not define the term. (See below, other commenters suggested that this term be defined.) CCC also wishes to maintain flexibility to determine whether particular events and their consequences give rise to an emergency shortage of sugar for human consumption in the United States market.

Comment: CCC should define the term "emergency shortage" because market participants deserve to have a clear picture of CCC's thinking on this issue. Emergency shortage should be defined the same way it is used when CCC decides to increase the sugar TRQ. The definition should define an emergency shortage in terms of the effects, not the cause (for example, supply disruptions and price spikes). A specific percentage price increase above the loan forfeiture would be a useful way to measure what price

constitutes an emergency shortage. Also, CCC should consider declarations of force majeure, plant closures, slowdowns, and temporary shutdowns in production lines as emergencies. CCC should consider establishing a benchmark of "adequate supplies at reasonable prices," as already specified in the Harmonized Tariff Schedule of the United States, to determine if a shortage exists.

Response: The 2008 Farm Bill amendments specify some of the causes that can give rise to an emergency shortage, but do not define what constitutes a shortage in terms of its effects. Other commenters suggested that this term be left undefined. Based on a lack of consensus of commenters, this rule does not define the term. CCC will use discretion to determine when an emergency shortage exists, and not define a specific formula or price level in the rule. The 2008 Farm Bill amendments require a triggering event before CCC can declare an "emergency shortage." From past experience with sugar shortages caused by disasters, CCC recognizes that it must be flexible to mitigate the unforeseen consequences of disastrous events. However, CCC would consider food manufacturing plant closures and similar events as events that could give rise to an emergency shortage.

Comment: CCC should not limit eligible causes of emergency shortages to only the natural causes specifically mentioned in the 2008 Farm Bill amendments, since the amendments also include references to "other natural disaster, or other similar event." However, the 2008 Farm Bill amendments are clear that the triggering event must be "similar" – it does not give CCC complete discretion to consider any event or market condition as the cause of an emergency shortage. The courts have repeatedly upheld the principle of ejusdem generis – that where general words follow specific ones, the general

words must be construed to include only objects similar to those specified. The final rule should use the 2008 Farm Bill amendments language, but in implementation, it must be clear that mere high prices or low ending stocks do not constitute a similar event to war or hurricane. An eligible manmade event causing a shortage of sugar must be similar to a war, that is, an extreme event that results in massive loss of life, property destruction, or a severe disruption of international trade---not merely low ending stocks or high prices. Similarly, an "other natural disaster" cause of sugar shortage must be on the order of a flood or hurricane that causes death and destruction, and not a more localized event such as a tornado or hail storm.

Response: CCC has decided not to define the "emergency shortage" or its causes in the regulation as there was no consensus among commenters. CCC also wishes to maintain flexibility to determine whether particular events and their consequences give rise to an emergency shortage of sugar for human consumption in the United States market. The final rule uses the specific language from the 2008 Farm Bill amendments to specify what constitutes a cause of an emergency shortage.

Feedstock Flexibility Program

In the proposed rule, CCC requested comment on how CCC should calculate a sugar market surplus, particularly for the required September 1 estimate, when uncertainties are greatest. CCC also requested comments on appropriate methods to estimate the likelihood of forfeitures and to determine the quantity of sugar to be purchased in each quarter. In comments on the proposed rule, both sugar producers and sugar users supported estimating a surplus based on comparing stocks to stock levels that

have resulted in forfeitures in the past. Sugar producers supported a generally flexible approach with no specific numerical trigger for implementing FFP, while sugar users supported an unspecified numerical threshold above the stock level that triggered forfeitures in the past. In the absence of a consensus on a specific formula for determining that forfeitures are likely, CCC retained the flexible language from the proposed rule that does not specify a formula CCC will use to determine the quantity of sugar likely to be forfeited.

In the proposed rule, CCC asked for comments on whether the regulations should specify one particular method of contracting for FFP purchases. There was a consensus that FFP should have the flexibility to determine the most appropriate approach if and when the program is needed.

Comment: The option provided in the proposed rule that CCC declare a sugar market surplus to be any stocks level appearing in USDA's World Agricultural Supply and Demand Estimates (WASDE) report that are over and above the stock level expected to result in forfeitures should be used.

Response: The WASDE stock levels will certainly be considered in analyzing whether a surplus exists. In the absence of a consensus on any specific formula as to what level represents an expectation of forfeitures, CCC has not specified a formula for what constitutes a surplus in this rule.

Comment: The level of stocks that produced forfeitures in the past may not lead to forfeitures in the future. Stocks can be, and have been, somewhat higher than the traditional ideal level of 14.5 percent, or even 15.5 percent, without leading to forfeitures.

Use some projected stock level above the level that has triggered forfeitures in the past to predict surpluses.

Response: In the absence of a consensus on any specific formula as to what level represents an expectation of forfeitures, CCC has not specified what constitutes a surplus in this rule.

Comment: CCC should not use any numerical stipulation to specify the likelihood of forfeitures or for determining quantities to purchase.

Response: There is no formula specified in the rule for what constitutes a surplus. CCC will use objective criteria based on market data to justify its determination of forfeiture risk and quantities to purchase.

Comment: We support CCC's FFP sugar purchase strategy of staggering CCC purchases for biofuel as the market unfolds, rather than one single purchase.

Response: CCC is required by applicable law to estimate the quantity to be made available for purchase and sale under FFP quarterly, but will take a conservative approach early in the year, as discussed in the background section of the proposed rule.

Comment: CCC should wait until the end of the FY, when forfeitures could occur, to make any purchases for FFP.

Response: CCC will make quarterly estimates of the quantity of eligible sugar that will be made available for purchase and sale under the FFP, and announce by press release the quantity, if any, and timing of availability of FFP purchases and sales. If the projected surplus is large, CCC will need to make purchases before the end of the FY to achieve the goal of avoiding sugar loan forfeitures. CCC's purchases will be more conservative earlier in the year than later, due to the greater level of uncertainty early in

the year. CCC cannot wait to make FFP purchases only when forfeitures would occur, for example, in August for FY 2013, because a principal goal of FFP is to prevent forfeitures.

Comment: We support CCC's proposal that to be eligible for FFP, sugar must be processed and located in the United States from domestically-grown sugarcane and sugar beets. Also, only biofuel facilities within the U.S. should be eligible to purchase sugar.

Response: CCC clarifies the language in 7 CFR part 1435, subpart G that to be eligible for FPP, the sugar seller must be located in the United States. As specified in this rule, eligible sugar for FFP purchase must have been processed in the United States from domestically-grown sugarcane and sugar beets. However, eligible buyers are not required to use the purchased FFP sugar in U.S. facilities. Section 9010 of the 2002 Farm Bill, as amended, expressly provides that the sale of sugar to bioenergy producers must be conducted in a manner that ensures the Sugar Program is operated at no cost to the Federal Government by avoiding forfeitures to CCC. To restrict eligible buyers to those bioenergy producers whose production facilities are located in the United States may restrict the pool of sugar buyers, potentially increasing the cost to the Federal Government and the likelihood of forfeitures to CCC. Consequently, the final rule does not adopt this restriction.

Comment: CCC needs to take a flexible approach to contracting to arrive at the most cost-efficient way to manage FFP. We support the approach in the proposed rule that FFP tender offers will include both a seller and buyer of sugar for bioenergy production to minimize FFP costs. We also support the strategy of pre-qualifying bioenergy producers willing to buy FFP sugar.

Response: CCC will generally employ competitive procedures to minimize CCC costs. Since commenters supported a flexible approach, CCC will not specify a specific purchase method in the rule.

Comment: CCC should evaluate offers in light of the forfeiture equivalent price so that sellers do not earn substantially more for selling surplus sugar to FFP than they would by forfeiting sugar to CCC. CCC must structure the contracting procedure to minimize the chance for FFP sugar sellers to receive more than they would if they forfeited sugar under loan.

Response: CCC has the authority to limit bid acceptance; no modification of the rule is necessary to address this comment. The terms of CCC's sugar purchase compared to the terms of forfeiture will determine if CCC can expect to pay more or less under FFP than the forfeiture proceeds. In 2000, a year in which forfeitures previously occurred, CCC limited acceptable offers to less than the forfeiture proceeds, resulting in CCC paying less, and in some cases substantially less, for sugar purchased by processors than the proceeds later retained from forfeiture. However, the storage cost restriction and other FFP requirements may affect CCC's terms of purchase and CCC's determination of an acceptable offer.

Comment: CCC should include an audit clause in the contract to purchase sugar for bioenergy production to avoid fraud and misuse and to ensure the sugar does not enter the human consumption chain.

Response: As specified in this rule, each bioenergy producer that purchases sugar through FFP must provide proof to CCC that the sugar is used by such producer for the production of bioenergy.

Comment: The rule language is not consistent. The language in the example specified in § 1435.602(e), "Eligible commodity to be purchased by CCC," is inconsistent with the proposed rule text in the rest of that paragraph. The example indicates that CCC would only consider a percentage of the refined sugar expected to be made from a sugar bearing product, when the other language in the same paragraph stated that all of the expected sugar to be made from the product would be considered in evaluating a bid.

Response: CCC has corrected the language so that the example is consistent with the rest of the regulatory text in that section.

Summary of Changes

In summary, as discussed above, CCC is making minor changes to the regulatory text in response to comments, including a correction and several clarifications. Sugar buyers and sugar producers had opposing comments on both sugar disposition and FFP, with buyers generally wanting CCC to take actions that would keep prices as low as possible, and sellers wanting CCC to take actions to support prices as high as possible. Given these irreconcilable opposing interests and lack of consensus on approach, CCC has made no substantive changes in response to comments, because the evenly balanced comments reflect that the proposed rule, to the extent possible within the requirements of applicable law, balances the different stakeholder interests.

CCC has made other changes from the proposed rule, not in response to comments, to clarify its evaluation of the types of sugar eligible for FFP and the location of eligible bioenergy producers. CCC has also determined that it should not limit eligible

bioenergy producers to those with production facilities in the United States. Such a limitation was determined to unnecessarily limit competition for CCC sugar and may increase program costs.

Effective Date

The Administrative Procedure Act (5 U.S.C. 553) provides generally that before rules are issued by Government agencies, the rule must be published in the Federal Register, and the required publication of a substantive rule is to be not less than 30 days before its effective date. One of the exceptions is when the agency finds good cause for not delaying the effective date. CCC finds that there is good cause for making this rule effective less than 30 days after publication in the Federal Register because this rule allows CCC to prevent sugar in the U.S. market from being forfeited to CCC. The margin between the raw sugar market price and the raw sugar price level encouraging forfeiture fell in 2012 from 13.8 to 1.6 cents per pound. Therefore, to avoid possible forfeitures for crop year 2012, this final rule is effective when published in the Federal Register.

Executive Orders 12866 and 13563

Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review," direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) designated this rule as significant under Executive Order 12866 and, therefore, OMB reviewed this rule. A summary of the cost-benefit analysis of this rule is provided below and is available at http://www.regulations.gov and from the contact listed above.

Summary of Costs and Benefits

Predicting conditions months into the future is a process that involves inevitable uncertainty, with variables subject to change. Current baseline projections developed by USDA indicate that FFP authorities may be necessary only once during the 10-year baseline period. The analysis estimated a 76.9 percent chance of FFP being activated in FY 2013.

FSA assumes that 300,000 tons of CCC sugar loan collateral will be forfeited in FY 2013 if FFP is not implemented. FFP is expected to cost CCC an estimated $54.5 million more than using the least-cost surplus management option. The total cost associated with FFP is $92.3 million (300,000 tons x 2,000 lbs x 15.38 cents per lb = $92.3 million). Despite this cost, FFP has at least one benefit that is not available with other sugar supply reduction methods. Specifically, FFP will allow the generation of Renewable Identification Numbers (RINs), which will help gasoline and diesel blenders meet their Renewable Fuels Standard (RFS) mandates in 2014.

The current baseline projections indicate that there are no sugar loan forfeitures or CCC purchases of sugar for ethanol expected from FY 2014-2023, because projected raw

cane and refined beet sugar prices are above the minimum prices that would result in forfeitures. More specifically, FFP is projected to be unneeded after FY 2013 because the domestic market is no longer projected to be in surplus, and the world market is projected to affect domestic prices above rate levels specified in the 2008 Farm Bill.

Expected growth in U.S. beet and cane sugar production over the next decade is projected to be very modest--less than 5 percent over the projections period. Sugar use is projected to grow about 0.7 percent a year, or 7 percent over the decade. Mexican imports are expected to average 12.8 percent of U.S. domestic sugar use. TRQ sugar imports from U.S. commitments made to member states of the World Trade Organization (WTO) and under existing trade agreements are expected to average 1.444 million short tons, raw value (STRV) annually. World raw sugar prices (Intercontinental Exchange No.11, nearby futures) forecasts by the Organization for Economic Co-operation and Development (OECD) are used in the analysis, which average 21.58 cents per pound through the projection period, which is above the U.S. Sugar Program's support rate of 20.9 cents per pound.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601, FSA has determined that there will not be a significant economic impact on a substantial number of small entities. The entities that would be affected by this rule are sugar producers and sugar bioenergy producers. The sugar producers are not small businesses according to the North American Industry Classification System and the U.S. Small Business Administration. There are currently no commercial bioenergy producers in the United

States who use sugar solely as a feedstock, although sugar may be blended with other feedstocks currently used in the manufacture of bioenergy. The bioenergy producers in the United States who use other commodities as a feedstock and that might be expected to purchase sugar as a feedstock are not small businesses.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321-4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The changes to the Sugar Program required by Title IX of the 2008 Farm Bill identified in this rule are considered non-discretionary. Therefore, CCC has determined that NEPA does not apply to this rule and no environmental assessment or environmental impact statement will be prepared.

Executive Order 12372

This program is not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs," which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the Federal Register on June 24, 1983 (48 FR 29115).

Executive Order 12988

This rule has been reviewed under Executive Order 12988, "Civil Justice Reform." This rule would not preempt State and or local laws, and regulations, or policies unless they present an irreconcilable conflict with this rule. The rule will not have retroactive effect. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, "Federalism." The policies contained in this rule will not have any substantial direct effect on States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Nor would this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The policies in this rule do not have Tribal implications that preempt Tribal law.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104-4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 for State, local, and Tribal government or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

We anticipate that in the next 3 years fewer than 10 sugar producers will participate in FFP by selling their sugar to CCC. In addition, FSA estimates that in each of the next 3 years, fewer than 10 bioenergy producers will participate in FFP by buying sugar from CCC. Each of these will use a different form to collect different types of information. Therefore, the Paperwork Reduction Act exemption specified in 5 CFR 1320.3(c) applies because fewer than 10 sugar producers or 10 bioenergy producers are expected to need to complete the respective forms for selling or buying sugar for FFP.

E-Government Act Compliance

CCC is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 1435

Loan programs-agriculture, Penalties, Price support programs, Reporting and recordkeeping requirements, Sugar.

For the reasons discussed above, CCC amends 7 CFR part 1435 as follows:

PART 1435—SUGAR PROGRAM

1. Revise the authority citation for part 1435 to read as follows:

Authority: 7 U.S.C. 1359aa–1359jj, 7272, and 8110; 15 U.S.C. 714b and 714c.

2. Add subpart E to read as follows:

Subpart E—Disposition of CCC Inventory

Sec.
1435.400 General statement.
1435.401 CCC sugar inventory disposition.

Subpart E—Disposition of CCC Inventory

§ 1435.400 General statement.

This subpart will be applicable in the event that raw, refined, or in-process sugar is owned and held in CCC inventory (accumulated under the program authorized by section 156 of the Federal Agriculture Improvement and Reform Act, as amended) as specified in subpart B of this part.

§ 1435.401 CCC sugar inventory disposition.

(a) CCC will dispose of inventory in the following manner, if CCC has not determined there is an emergency shortage of sugar for human consumption in the domestic market:

(1) By sale to bioenergy producers under the Feedstock Flexibility Program as specified in subpart G of this part,

(2) By transfer to sugarcane and sugar beet processors under the Processor Sugar Payment-In-Kind Program as specified in subpart F of this part,

(3) By the buyback of certificates of quota eligibility (CQEs), or

(4) By the use of any other authority for the disposition of CCC-owned sugar for nonfood use or otherwise in a manner that does not increase the net quantity of sugar available for human consumption in the United States.

(b) CCC may use any of its authority for the disposition of CCC-owned sugar, if CCC has determined there is an emergency shortage of sugar for human consumption in the domestic market caused by war, flood, hurricane, or other natural disaster, or similar event, as determined by CCC.

3. Add subpart G to read as follows:

Subpart G—Feedstock Flexibility Program

Sec.
1435.600 General statement.
1435.601 Sugar surplus determination and public announcement.
1435.602 Eligible sugar to be purchased by CCC.
1435.603 Eligible sugar seller.
1435.604 Eligible sugar buyer.
1435.605 Competitive procedures.
1435.606 Miscellaneous.
1435.607 Appeals.

Subpart G—Feedstock Flexibility Program

§ 1435.600 General statement.

(a) The provisions of this subpart will be applied when CCC determines that buying sugar is necessary to avoid forfeitures of sugar pledged as collateral for CCC sugar loans.

(b) This subpart will be applicable to:

(1) Any sugar seller who contracts with CCC to sell sugar, and

(2) Any bioenergy producer who contracts with CCC to purchase sugar for the production of bioenergy.

§ 1435.601 Sugar surplus determination and public announcement.

(a) CCC will estimate by September 1 the quantity of sugar that will be made available for purchase and sale under FFP for the following crop year.

(b) Not later than January 1, April 1, and July 1 of the fiscal year, CCC will re-estimate the quantity of sugar that will be made available for purchase and sale under the FFP for the crop year.

(c) CCC will announce by press release the estimates in paragraphs (a) and (b) of this section, which will reflect CCC's forecast of sugar likely to be forfeited to CCC and any uncertainty surrounding that forecast.

§ 1435.602 Eligible sugar to be purchased by CCC.

(a) CCC will only purchase raw sugar, refined sugar, or in-process sugar for FFP that is eligible to be used as collateral under the CCC Sugar Loan Program, as specified in § 1435.102.

(b) Raw sugar, refined sugar, or in-process sugar purchased directly from any domestic sugar beet or sugarcane processor that made the raw sugar, refined sugar, or in-process sugar will be credited against the processor's sugar marketing allocation. (The definition for "marketing" in § 1435.2 applies to this subpart.)

(c) CCC will only purchase sugar located in the United States.

(d) CCC will evaluate an offer to sell sugar to CCC based upon CCC's estimate of the reduction in refined sugar supply available for human consumption due to the purchase. For example, if processing thick juice (an in-process sugar) would yield 70 percent sugar for human consumption, then CCC will only consider 70 percent of the volume of the thick juice in evaluating the per unit sales price.

(e) CCC will only purchase the sugar if such purchase would reduce the likelihood of forfeitures of CCC sugar loans, as determined by CCC.

<u>§ 1435.603 Eligible sugar seller</u>.

(a) To be considered an eligible sugar seller, the sugar seller must be located in the United States.

(b) [Reserved]

<u>§ 1435.604 Eligible sugar buyer</u>.

(a) To be considered an eligible sugar buyer, the bioenergy producer must produce bioenergy products, including fuel grade ethanol or other biofuels.

(b) [Reserved]

§ 1435.605 Competitive procedures.

(a) CCC will generally issue tenders for bids, before entering into contracts with any eligible sugar seller or buyer, with the intent of selecting the bid(s) that represents the least cost to CCC of removing sugar from the market.

(b) CCC may, at times, negotiate contracts directly with sellers or buyers, if CCC determines that such negotiation will result in either reduced likelihood of forfeited sugar under the CCC sugar loan program or reduced costs of removing sugar from the market, which will reduce the likelihood of forfeitures of sugar to CCC.

§ 1435.606 Miscellaneous.

(a) As a sugar buyer, a bioenergy producer must take possession of the sugar no more than 30 days from the date of CCC's purchase.

(b) CCC, to the maximum extent practicable, will not pay storage fees for the sugar purchased under this program. A bioenergy producer must assume any storage costs accrued from date of contract to date of taking possession of the sugar.

(c) Each bioenergy producer that purchases sugar through FFP must provide proof as specified by CCC that the sugar has been used in the bioenergy factory for the production of bioenergy and permit access for USDA to verify compliance.

§ 1435.607 Appeals.

(a) The administrative appeal regulations of parts 11 and 780 of this title apply to this part.

(b) [Reserved]

Signed on July 24, 2013.

Juan M. Garcia,
Administrator,
Farm Service Agency, and
Executive Vice President,
Commodity Credit Corporation.

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