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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1409

RIN 0560-AI51

Trade Mitigation Program

AGENCY: Commodity Credit Corporation, Agricultural Marketing Service, Food and Nutrition Service, and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Commodity Credit Corporation (CCC) is revising the regulations to implement a Trade Mitigation Program (TMP) for producers of 2019 agricultural commodities that have been significantly impacted by trade actions of foreign governments resulting in the loss of exports. As part of TMP, the Market Facilitation Program (MFP) regulation specifies the eligibility requirements, payment calculations, and application procedures. The details for specific commodities and the relevant application start dates will be announced in applicable notices of funds availability (NOFAs). As part of TMP, the Expanded Domestic Commodity Donation Program (EDCDP) regulation specifies disposition of surplus commodities through outlets not currently used in existing Food and Nutrition Service (FNS) programs, the application process, eligibility, and use of grants or cooperative agreements. The details for specific commodities and conditions will be announced in applicable notices of commodity availability (NOCAs). This rule adds new subparts to the TMP regulation to address the 2019 agricultural commodities.

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

FOR FURTHER INFORMATION CONTACT: For information related to FSA, contact William L. Beam; telephone: (202) 720-3175; email: Bill.Beam@usda.gov.

Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720-2600 (voice). For information related to FNS, contact: Laura Castro; telephone: (703) 305-2680; email: Laura.Castro@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The imposition of tariffs by other countries on U.S. agricultural products has been and continues to disrupt the marketing of agricultural commodities and are outside of the control of the agricultural producers who are being negatively impacted. In response to the trade actions of foreign governments resulting in the loss of exports, the President has pledged that up to \$16 billion in financial assistance will be made available for certain agricultural commodities. This assistance will be made available under section 5 of the CCC Charter Act (15 U.S.C. 714c) for the 2019 crop year. This section authorizes CCC to assist in the disposition of surplus commodities and to increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.

The MFP regulation in 7 CFR part 1409 was implemented initially for 2018 agricultural commodities. The MFP regulation specifies the eligibility requirements, payment calculations, and application procedures. This rule expands the regulation, revising the title to “Trade Mitigation Program,” moving the prior regulation into a new

subpart A and adding new subparts B and C to address the 2019 agricultural commodities. Some of the ways in which the program is being implemented for the 2019 agricultural commodities is consistent with the implementation for the 2018 agricultural commodities. There are expected to be new participants; therefore, we are revising the regulations in 7 CFR part 1409 to provide the entire program regulation in the new subparts, instead of revising individual portions of the 2018 regulation. Subparts A and B provide the 2018 and 2019 MFP regulations, respectively, and subpart C provides the EDCDP regulations. The Farm Service Agency (FSA) will administer subparts A and B on behalf of CCC and FNS and the Agricultural Marketing Service (AMS) will administer subpart C on behalf of CCC.

The 2019 MFP payments constitute one portion of financial assistance to farmers of up to \$14.5 billion. The 2019 MFP payments will aid producers in the disposition of surplus commodities and aid in the expansion of domestic markets or aid in the development of new and additional markets and uses for the specific crops or commodities that are negatively impacted by trade actions of foreign governments. The 2019 MFP payments will provide producers with financial assistance that gives them the ability to absorb some of the additional costs from having to delay or reorient marketing of the new crop due to the trade actions of foreign governments resulting in the loss of exports. The determination of commodities that are included in MFP and specific program requirements applicable to the commodities, such as enrollment periods, will be announced in the applicable NOFAs published in the *Federal Register*.

In 2018, under section 5(d) of the CCC Charter Act, CCC acquired surpluses of some of the commodities impacted by the imposition of tariffs by other countries on U.S.

agricultural products. Those commodities were offered to State agencies and eligible recipient agencies primarily in The Emergency Food Assistance Program (TEFAP), which is administered by FNS. In reviewing the use of TEFAP to provide the surplus commodities to food and nutrition assistance outlets, CCC has determined, taking into account the commodities and products that are currently subject to the trade actions of foreign governments resulting in the loss of exports, greater flexibility in the use of surplus commodities may be warranted than the flexibility provided under TEFAP if existing distribution channels are unable to absorb the commodities provided. Section 5(e) of the CCC Charter Act provides that CCC may increase the domestic consumption of agricultural commodities (other than tobacco) by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities. Surplus commodities which are acquired at market prices under section 5(d) will continue to be provided through TEFAP and other FNS Food Distribution Programs, and FNS will continue to work with States to use current operational flexibilities to ensure maximum distribution through the existing infrastructure. However, given the variety of potential products and capacity of organizations that States currently use to distribute food through FNS' food distribution programs, there may be a need for CCC to provide food to other outlets outside of existing FNS programs. States have discretion to choose agencies that distribute food from FNS' food distribution programs; therefore, there may be entities with sufficient operational capacity that are not currently participating in FNS' nutrition assistance programs that would be capable of distributing these foods to low-income individuals. To provide CCC with maximum flexibility in the event that the current

distribution system is unable to use the commodities acquired, this rule adds a subpart C to 7 CFR part 1409 to specify the process by which CCC will notify the public through notices of commodity eligibility published in the *Federal Register* and on the FNS website. These notices will specify:

1. The types of surplus commodities available for use in accordance with section 5(d);
2. Entities that may receive such commodities and related financial assistance, if any, from CCC for use in distribution and handling;
3. Terms and conditions applicable to the use of the commodities; and
4. The process for submitting an application to receive such commodities.

Should EDCDP need to be used, it is not expected to divert currently participating organizations or food resources from existing FNS programs. This is because the significant amount of administrative funding that FNS currently provides to existing organizations would not be available to support the much smaller pool of organizations expected to receive food through EDCDP. In addition, EDCDP is designed to be implemented only if currently existing FNS program organizations are unable to absorb the commodities. FNS and AMS will work to ensure that the administration of EDCDP includes standards for food safety, administrative oversight and accountability.

TMP Subpart B Description

MFP will be available to producers of those commodities determined by the Secretary to have been adversely affected by the trade actions of foreign governments resulting in the loss of exports.

The 2019 MFP payment rates and units of measure will be in effect no later than July 29, 2019. USDA will continue to monitor the situation with respect to adverse effects felt by American commodity producers as a result of trade actions of foreign governments resulting in the loss of exports and will determine whether additional assistance is necessary at a later date, considering additional available data and updated methodologies.

Producer Eligibility Requirements

Under MFP, CCC will provide payments to producers of those commodities determined by the Secretary to have been adversely affected by the trade actions of foreign governments resulting in the loss of exports. Participation in other CCC programs is not a prerequisite to participate in MFP.

Non-specialty Crops

For the purposes of MFP for 2019, agricultural commodities referred to as “non-specialty crops” include : alfalfa hay, barley, canola, corn, crambe, dried beans, dry peas, extra long staple cotton, flaxseed, lentils, long grain and medium grain rice, millet, mustard seed, oats, peanuts, rapeseed, rye, safflower, sesame seed, small and large chickpeas, sorghum, soybeans, sunflower seed, temperate japonica rice, triticale, upland cotton, and wheat. If warranted, additional non-specialty crops may be included in MFP in which case the availability of assistance will be specified in a NOFA published in the *Federal Register*. Generally, payments will be available to those producers who:

1. Have an ownership interest in the 2019 crop of any non-specialty crop that was planted; and

2. Would have had such an interest in the crop but were prevented from planting the crop due to adverse weather but were able to plant a CCC approved cover crop on such acreage.

All applicants must have reported to FSA on form FSA-578, "Report of Acreage" (acreage report) the acreage planted to these crops for the 2019 crop year by the applicable acreage reporting dates. Producers who did not file a 2019 acreage report by applicable acreage reporting dates must file a "late filed" acreage report under existing FSA procedures. Similarly, producers who were prevented from planting a crop by the final acreage reporting date must submit a "late filed" acreage report regarding the CCC approved cover crop that was planted.

The payment rate used by CCC to issue payments will be on a county-by-county basis and will take into account the degree of impact in a county on producers of non-specialty crops from the trade actions of foreign governments on U.S. agricultural products resulting in the loss of exports. The payment rate for a county may be found at www.fsa.usda.gov.

Producers of non-specialty crops will receive payments based on 2019 planted acres of non-specialty crops multiplied by the payment rate for the relevant county. As specified in the applicable NOFA, payments may be adjusted by CCC if 2019 planted acres on a farm exceed 2018 planted acres to non-specialty crops, if the trade situation changes, or if CCC determines such adjustments are warranted.

Specialty Crops, Dairy, and Livestock

Producers of specialty crops that are specified in the applicable NOFA will receive a payment based on 2019 bearing acres of the specialty crops multiplied by the

payment rate for the relevant specialty crop. Specialty crops include the following crops: almonds, cranberries, cultivated ginseng, fresh grapes, fresh sweet cherries, hazelnuts, macadamia nuts, pecans, pistachios, and walnuts. If warranted, additional specialty crops may be included in MFP as specified in the applicable NOFA published in the *Federal Register*.

Producers of dairy and livestock that are specified in the applicable NOFA will receive a payment calculated on production, similar to the manner in which MFP payments were calculated in 2018 as specified in 7 CFR part 1409 (now subpart A).

Adjusted Gross Income and Payment Limitation Requirements

The average adjusted gross income (AGI) limitations specified in 7 CFR part 1400 apply to MFP. No person or legal entity (excluding a joint venture or general partnership), as defined and determined under 7 CFR part 1400 may receive, directly or indirectly, more than \$250,000 in MFP payments for each crop year as specified in the applicable NOFA. The application of the payment limitation will be specified in the NOFA. For example, certain commodities may have a combined payment limitation.

For the \$250,000 annual payment limit, payments will be determined through current attribution rules used in other CCC agricultural programs. The regulations in 7 CFR 1400.105 specify how payments are attributed; the total payment amount is attributed to a person by taking into account the direct and indirect ownership interests of the person in a legal entity that is eligible to receive payments. In the case of a legal entity, the same payment is attributed to the direct payee in the full amount and to those that have an indirect interest to the amount of that indirect interest.

A person or legal entity is ineligible for payments if the person's or legal entity's AGI for the applicable program year is more than \$900,000 unless at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry related activities. If at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry related activities and the participant provides the required certification and documentation, the person or legal entity, other than a joint venture or general partnership, is eligible to receive 2019 MFP payments, directly or indirectly up to the payment limit, as discussed above. The relevant years used to calculate average AGI are the 3 consecutive tax years immediately preceding the year before the payment year, which will be the crop year, or the marketing year for livestock or dairy. For example, for 2019 the relevant years to calculate AGI are the 2015, 2016 and 2017 tax years.

In addition to having a share in the commodity, to be eligible for an MFP payment for non-specialty crops, each applicant is required to be a person or legal entity who was actively engaged in farming, as provided in 7 CFR 1409.3, in the 2019 crop year.

Payment Calculations

The payment calculations for specific commodities will be specified in the applicable NOFA.

MFP General Requirements

Producers will apply to receive an MFP payment using the MFP application form. Such producers must comply with the provisions of 7 CFR part 1409 and any applicable NOFA published in the *Federal Register* by CCC.

General requirements that apply to other CCC programs also apply to MFP including compliance with the provisions of 7 CFR part 12, “Highly Erodible Land and Wetland Conservation,” during the year for which assistance is made available.

Federal, State, and local governments are not eligible for MFP payments.

The regulations at 7 CFR Part 1400 Subpart E are applicable to the eligibility of foreign persons.

There is no requirement to have crop insurance coverage or coverage under the Noninsured Crop Disaster Assistance Program (NAP) to be eligible for participation in MFP.

Appeal regulations specified in 7 CFR parts 11 and 780 apply. MFP commodity eligibility and other matters of general applicability that are not in response to, or result from, an individual set of facts in an individual participant’s application for payment are not matters that can be appealed.

Application Process

To apply for MFP, each applicant must submit a complete “Market Facilitation Program 2019 (MFP 2019) Application” (form CCC-913) either in person, by mail, e-mail, or facsimile to an FSA county office, or through www.farmers.gov. For many crops, FSA possesses the producer share data from the applicable crop year’s acreage report for producers who participate in other FSA-administered CCC programs. For crops, the applicant’s crop share interest on an MFP application cannot be greater than the crop share interest as reported on the acreage report. FSA will verify and confirm the applicant’s crop share interest reported on the MFP application by comparing it to the

applicant's crop share interest as reported on that farm's acreage report for the applicable crop year.

For livestock, the application will include number of head (production) and ownership share information as provided in the applicable NOFA. For dairy, the application will include the amount of historical production as provided in the applicable NOFA.

If FSA decides it is necessary to confirm the planting of the commodity, the applicant will be required to submit evidence upon request, such as seed receipts, custom harvesting receipts, bale gin lists, or purchase or sales receipts. In addition, the applicant must provide supporting documentation for the amount of production as specified in the applicable NOFA.

Documentation for MFP Applications

FSA will require producer specific documentation of the amount of production for all dairy and livestock, as applicable.

MFP Payments

The payments will be provided in up to 3 payments. The first payment will be up to 50 percent of the total calculated payment. CCC will determine if any further payments are warranted. If CCC determines that a second payment is warranted, it will be up to 75 percent of the total calculated payment less the amount received in the first payment and the second payment period will begin in November 2019. If CCC determines that a final payment is warranted, it will be for up to the remaining amount of the total calculated payment, unless otherwise adjusted by CCC, and the last payment period will begin in January 2020.

Provisions Requiring Refund to CCC

In the event that any application for an MFP payment resulted from erroneous information reported by the producer, the payment will be recalculated, and the participant must refund any excess payment to CCC; if the error was the applicant's error, the refund must include interest to be calculated from the date of the disbursement to the MFP participant. If, for whatever reason, FSA determines that the applicant misrepresented either the total amount or producer's share of the crop, head of livestock, or production, or if the MFP payment would exceed the participant's correct payment, the application will be disapproved and the full MFP payment for that crop or livestock for that participant will be required to be refunded to CCC with interest from the date of disbursement. If any corrections to the ownership interest in the crop are made to the acreage report after the MFP application deadline, and would have resulted in a lower MFP payment, the applicant will be required to refund the difference with interest from date of disbursement.

TMP Subpart C Description

Subpart C establishes EDCDP under which CCC may provide to eligible non-profit entities surplus commodities CCC has acquired in response to trade actions taken by foreign governments resulting in the loss of exports. The types and quantities of commodities made available under subpart C depend to a large extent upon the ability of CCC to use such commodities through existing domestic feeding programs administered by FNS. EDCDP is intended to provide commodities to low income individuals, primarily through eligible entities not participating in existing FNS food distribution programs.

Effective Date and Notice and Comment

The Administrative Procedure Act (5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves specified actions, including matters relating to benefits. This rule governs the program for payments to certain agricultural commodity producers and thus falls within that exemption. Due to the nature of the rule and the need to implement the regulations expeditiously to provide assistance to agricultural producers, CCC finds that notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act, CCC is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective upon publication in the *Federal Register*.

Executive Orders 12866, 13563, 13771 and 13777

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. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” established a federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this rule as economically significant under Executive Order 12866, and therefore, OMB has

reviewed this rule. The costs and benefits of this rule are summarized below. The full cost benefit analysis is available in the docket on regulations.gov.

OMB guidance in M-17-21, dated April 5, 2017, specifies that “transfer rules” are not covered by Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” Transfer rules are Federal spending regulatory actions that cause only income transfers between taxpayers and program beneficiaries. Therefore, this is considered a transfer rule by OMB and is not covered by Executive Order 13771.

Cost Benefit Analysis Summary

The 2019 MFP payments will provide producers with financial assistance that gives them the ability to absorb some of the additional costs from having to delay or reorient marketing of the 2019 crop due to the trade actions of foreign governments resulting in the loss of exports. Payment calculations for specific commodities are specified in the applicable NOFA. In general, for non-specialty crops, a single average payment rate per acre will be determined for each county, based on fixed average planted acres and yields for non-specialty crops in each county and the assessed amount of damage calculated due to trade actions of foreign governments resulting in the loss of exports for these crops. The total number of acres used to calculate a MFP payment on a farm is equal to 2019 reported planted acreage for a farm not to exceed the sum of planted acres and prevented planted acres of non-specialty crops on the farm in 2018, and available acreage from 2018 expired Conservation Reserve Program contracts. The use of a single county-wide payment rate per acre for all non-specialty crops will minimize cross-commodity production distortions and better account for cross-commodity market effects from disrupted trade, which are the basis for the payments relating to specific crops or commodities that are negatively impacted by actions of foreign governments.

For specialty crops, 2019 MFP payments will be based on 2019 bearing acres of each specialty crop multiplied by the payment rate for the relevant specialty crop and the relevant state. For dairy and hogs, 2019 MFP payments will be made in a similar manner to payments made under the 2018 MFP – production of the commodity (hundredweight or number of animals) times the applicable national payment rate per unit for the commodity.

USDA has revised estimation of the impacts of the trade actions of foreign governments resulting in the loss of exports based on a longer-term analysis of U.S. commodity exports to affected markets than was used for the 2018 MFP. The revised method better accounts for the longer than expected duration of trade retaliation. USDA estimates that for TMP, MFP payments will total up to \$14.5 billion and purchases of surplus commodities and food products will total up to \$1.4 billion. The payments and purchases represent benefits to producers, which is the cost to the government for TMP.

Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by the Administrative Procedure Act or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because CCC is not required by Administrative Procedure Act or any law to publish a proposed rule for this rulemaking.

Environmental Review

The environmental impacts of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

While OMB has designated this rule as “economically significant” under Executive Order 12866, “... economic or social effects are not intended by themselves to require preparation of an environmental impact statement” (40 CFR 1508.14), when not interrelated to natural or physical environmental effects. TMP was designed to avoid skewing planting decisions one way or another. Farmers continue to make their planting and production decisions with the market signals in mind, rather than any expectation of a new USDA program might or might not look like. The discretionary aspects of TMP (for example, determining AGI and payment limitations) were designed to be consistent with established FSA and CCC programs and are not expected to have any impact to the human environment, as MFP payments will only be made after the commodity has been reported for non-specialty or specialty crops and produced for dairy and livestock.

Accordingly, the following Categorical Exclusions in 7 CFR part 799.31

apply: § 799.31(b)(6)(iii) applies to financial assistance to supplement income, manage the supply of agricultural commodities, or influence the cost and supply of such commodities; § 799.31(b)(6)(iv) applies to individual farm participation in FSA-administered programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) applies to “safety net” programs administered by FSA. No Extraordinary Circumstances (§ 799.33) exist.

Additionally, as specified in 7 CFR 1b.4, FNS is categorically excluded. As such, the implementation of TMP and the participation in TMP do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, CCC will not prepare an environmental assessment or environmental impact statement for this regulatory action and this rule serves as documentation of the programmatic environmental compliance decision for this federal action.

Executive Order 12372

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. For reasons specified in the final rule related notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” This rule will not preempt State or local laws, regulations, or policies unless they represent 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 do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does 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 in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal government and Indian Tribes.

The USDA’s Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule does not, to our knowledge, have Tribal implications that required Tribal consultation under Executive Order 13175. If a Tribe requests consultation, FSA and CCC will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications are not expressly mandated by legislation.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to assess the effects of their regulatory actions on State, local, and 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. The 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, as defined in Title II of the UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

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.

Federal Assistance Programs

The title and number of the Federal Domestic Assistance Program found in the Catalog of Federal Domestic Assistance to which this rule applies is 10.123 - Market Facilitation Program.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, the information collection request that supports MFP was submitted to OMB for emergency approval. OMB

approved the 6-month emergency information collection. FSA will merge the approved information collection burden under OMB control number 0560-0292.

If, in the course of implementing the EDPCP, either FNS or AMS determine that there are new information collection requirements, they will request approval from OMB.

List of Subjects in 7 CFR Part 1409

Agriculture, Agricultural commodities, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, CCC amends 7 CFR part 1409 as follows:

PART 1409 – TRADE MITIGATION PROGRAM

1. The authority citation for part 1409 continues to read as follows:

Authority: 15 U.S.C. 714b and 714c.

2. Revise the heading for part 1409 to read as set forth above.

§§ 1409.1 through 1409.7 [Redesignated as Subpart A]

3. Redesignate §§ 1409.1 through 1409.7 as subpart A and add a heading for subpart A to read as follows:

Subpart A – 2018 Market Facilitation Program (MFP)

§ 1409.1 [Amended]

4. In § 1409.1, remove “part” and add “subpart” in its place and at the end of the first sentence, add the words “for 2018 crops”.

5. Add subpart B, consisting of §§ 1409.101 through 1409.107, to read as follows:

Subpart B –2019 Market Facilitation Program (MFP)

Sec.

- 1409.101 Applicability.
- 1409.102 Definitions.
- 1409.103 Producer eligibility requirements.
- 1409.104 Method of application.
- 1409.105 Calculation of payments.
- 1409.106 Eligibility subject to verification.
- 1409.107 Miscellaneous provisions.

§ 1409.101 Applicability.

This subpart specifies the eligibility requirements and payment calculations for the MFP for 2019 agricultural commodities. MFP will provide payments with respect to agricultural commodities that have been impacted by trade actions of foreign governments resulting in the loss of exports. Any specific program requirements for a commodity will be specified in a notice of funding availability published by the Commodity Credit Corporation (CCC) in the *Federal Register*.

§ 1409.102 Definitions.

The following definitions apply to MFP. The definitions in 7 CFR part 718 and parts 1400 and 1421 of this chapter apply, except where they conflict with the definitions in this section.

Application means the MFP application form.

Commodity means an agricultural commodity produced in the United States intended to be marketed for commercial purposes that has been designated as eligible for payments under MFP.

County payment rate means the per acre value determined by: Historical acres and yields of non-specialty crops planted in that county and the amount of damage

calculated due to trade actions of foreign governments resulting in the loss of exports represented as a per unit (for example, bushel or pound).

Crop means the non-specialty crops and specialty crops.

Crop year means:

(1) For insurable crops, the crop year as defined according to the applicable crop insurance policy; and

(2) For NAP covered crops, the crop year as provided in part 1437 of this chapter.

MFP means the Market Facilitation Program funded by CCC and administered by the Farm Service Agency (FSA).

NOFA means a notice of funds availability published by CCC in the *Federal Register* that specifies terms and conditions of MFP that are applicable to a specific commodity.

Non-specialty crop means any of the following crops: alfalfa hay, barley, canola, corn, crambe, dried beans, dry peas, extra long staple cotton, flaxseed, lentils, long grain and medium grain rice, millet, mustard seed, oats, peanuts, rapeseed, rye, safflower, sesame seed, small and large chickpeas, sorghum, soybeans, sunflower seed, temperate japonica rice, triticale, upland cotton, and wheat. If warranted, additional non-specialty crops may be included in MFP in which case the availability of assistance will be specified in a NOFA published in the *Federal Register*

Producer means a livestock producer, dairy producer, or a producer of a crop as defined in 7 CFR 718.2.

Specialty crops means any of the following crops: almonds, cranberries, cultivated ginseng, fresh grapes, fresh sweet cherries, hazelnuts, macadamia nuts, pecans, pistachios, and walnuts. If warranted, additional specialty crops may be included in MFP in which case the availability of assistance will be specified in a NOFA published in the *Federal Register*.

§ 1409.103 Producer eligibility requirements.

(a) To be eligible for an MFP payment, a producer must meet all of the requirements in this part and the NOFA that is applicable to the commodity.

(b) A producer's share in the crop must be reported for the 2019 crop year on form FSA-578, Report of Acreage, submitted to FSA, and must be on file in the FSA county office by the applicable reporting dates, or no later than the date specified in the applicable NOFA.

(c) For non-specialty crops, except as determined by CCC, each applicant must be a person or legal entity who was actively engaged in farming, as provided in part 1400 of this chapter.

(d) For livestock and dairy, a producer must have had an ownership interest in livestock or dairy production during the applicable time period established by CCC in the applicable NOFA.

§ 1409.104 Method of application.

(a) To apply for a payment, the producer must submit an MFP application on the form designated by CCC to an FSA county office.

(b) In the event that the producer does not submit documentation in response to any request of CCC to support the producer's application or documentation furnished

does not show the producer had ownership in the commodity as claimed, the application for that commodity will be disapproved.

(c) A request for a payment will not be approved by CCC until all the applicable eligibility provisions have been met and the producer has submitted all required forms and supporting documentation. In addition to the completed application form, if the following forms and documentation are not on file in the FSA county office or are not current for the 2019 crop year of the crop or applicable year for the commodity for which MFP has been announced as available, the producer must also submit:

(1) A farm operating plan for an individual or legal entity as provided in part 1400 of this chapter;

(2) An average adjusted gross income statement for the applicable year entity as provided in part 1400 of this chapter;

(3) A highly erodible land conservation and wetland conservation certification as provided in part 12 of this title;

(4) For non-specialty and specialty crops, an acreage report for the applicable crop year as provided in 7 CFR part 718; and

(5) For dairy and livestock, verifiable records that substantiate the amount of production as specified in the applicable NOFA.

§ 1409.105 Calculation of payments.

(a) For non-specialty crops, the payment under this subpart will be calculated by multiplying the county payment rate by the 2019 reported planted acreage for a farm not to exceed the sum of planted and prevented planted acres of non-specialty crops on the farm in 2018, and available acreage from 2018 expired Conservation Reserve Program

contracts. Producers' payments may be adjusted as determined by CCC and as detailed in the applicable NOFA.

(b) For non-specialty prevented planted crops followed by a CCC approved cover crop, the payment rate will be \$15 per acre.

(c) For dairy and livestock, the payment under this subpart will be calculated by multiplying the total production of the commodity times the producer's eligible share of the commodity times the payment rate for that commodity, as provided for in a subsequent NOFA.

(d) For specialty crops, the payment under this subpart will be calculated by multiplying 2019 bearing acres of the specialty crop by the payment rate for the relevant specialty crop.

(e) For MFP payments:

(1) The first payment will be up to 50 percent of the total calculated payment.

(2) CCC will determine if any further payments are warranted. If CCC determines that a second payment is warranted, it will be up to 75 percent of the total calculated payment less the amount received in the first payment and the second payment period will begin in November 2019.

(3) If CCC determines that a final payment is warranted, it will be for up to the remaining amount of the total calculated payment, unless otherwise adjusted by CCC, and the last payment period will begin in January 2020.

§ 1409.106 Eligibility subject to verification.

(a) Producers approved for participation in MFP are required to retain documentation in support of their application for 3 years after the date of approval.

(b) Producers must submit documentation to CCC as requested to substantiate an application.

(c) Producers receiving payments or any other person who furnishes such information to CCC must permit authorized representatives of USDA or the General Accounting Office during regular business hours to inspect, examine, and to allow such representatives to make copies of such books, records, or other items for the purpose of confirming the accuracy of the information provided by the producer.

§ 1409.107 Miscellaneous provisions.

(a) If an MFP payment resulted from erroneous information provided by a producer, or any person acting on their behalf, the payment will be recalculated and the producer must refund any excess payment to CCC with interest calculated from the date of the disbursement of the payment.

(b) The refund of any payment to CCC is in addition to liability under any other provision of law including, but not limited to: 18 U.S.C. 286, 287, 371, 641, 651, 1001, and 1014; 15 U.S.C. 714; and 31 U.S.C. 3729.

(c) The regulations in 7 CFR parts 11 and 780 part 1400 of this chapter apply to determinations under this subpart.

(d) Any payment under this part will be made without regard to questions of title under State law and without regard to any claim or lien against the commodity or proceeds from the sale of the commodity.

(e) The \$900,000 average AGI limitation provisions in part 1400 of this chapter relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, apply to each applicant for MFP unless at least 75 percent of the

person or legal entity's average AGI is derived from farming, ranching or forestry related activities. If at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry related activities, the person or legal entity, other than a joint venture or general partnership, is eligible to receive 2019 MFP payments up to the \$250,000 payment limitation specified in the applicable NOFA. The average AGI will be calculated for a person or legal entity based on the 3 complete tax years that precede the year for which the payment is made (for the 2019 crop year or marketing year for livestock and dairy the tax years are 2015, 2016, and 2017).

(f) No person or legal entity, excluding a joint venture or general partnership, as determined by the rules in part 1400 of this chapter may receive, directly or indirectly, more than \$250,000 in payments as specified in the applicable NOFA.

(g) The direct attribution provisions in part 1400 of this chapter apply to MFP. Under those rules, any payment to any legal entity will also be considered for payment limitation purposes to be a payment to persons or legal entities with an interest in the legal entity or in a sub-entity. If any such interested person or legal entity is over the payment limitation because of direct payment or their indirect interests or a combination thereof, then the payment to the actual payee will be reduced commensurate with the amount of the interest of the interested person in the payee. If anyone with a direct or indirect interest in a legal entity or sub-entity of a payee entity exceeds the AGI levels that would allow a producer to directly receive an MFP payment, then the MFP payment to the actual payee will be reduced commensurately with that interest.

(h) For the purposes of the effect of lien on eligibility for Federal programs (28 U.S.C. 3201(e)), CCC waives the restriction on receipt of funds under MFP but only

as to beneficiaries who, as a condition of such waiver, agree to apply the MFP payments to reduce the amount of the judgment lien.

(i) The provisions of 7 CFR 718.304, "Failure to Fully Comply," do not apply to this part.

6. Add subpart C, consisting of §§ 1409.201 through 1409.207, to read as follows:

Subpart C – Expanded Domestic Commodity Donation Program (EDCDP)

Sec.

- 1409.201 Applicability.
- 1409.202 Definitions.
- 1409.203 Application process.
- 1409.204 Award process.
- 1409.205 Execution of agreement.
- 1409.206 Eligibility subject to verification.
- 1409.207 Miscellaneous provisions.

Subpart C – Expanded Domestic Commodity Donation Program (EDCDP)

1409.201 Applicability.

(a) This subpart specifies the process for eligible non-profit entities to receive commodities from the Commodity Credit Corporation (CCC) that CCC has acquired in response to trade actions taken by foreign governments resulting in the loss of exports. The types and quantities of commodities made available under this subpart, if any, is dependent upon the ability of CCC to use such commodities through existing domestic feeding programs administered by the Food and Nutrition Service (FNS). In the event that these domestic feeding programs are unable to use the commodities acquired by CCC, EDCDP is intended to provide the remaining commodities to low income

individuals, primarily through eligible entities not participating in existing FNS food distribution programs.

(b) CCC, as specified in the applicable Notice of Commodity Availability, will use grants and cooperative agreements to conduct the Expanded Domestic Commodity Donation Program (EDCDP).

(c) The Food and Nutrition Service and the Agricultural Marketing Service will administer the EDCDP on behalf of CCC.

1409.202 Definitions.

Commodity means an agricultural commodity produced in the United States intended to be marketed for commercial purposes.

Eligible entity means an incorporated nonprofit entity that is operating for religious, charitable, or educational purposes, and does not provide net earnings to or operate in any other manner that inures to the benefit of any officer, employee, or shareholder of the entity as defined in section 22 of the Child Nutrition Act of 1966 (42 U.S.C. 1791) and meets the requirements of § 1409.203.

Notice of Commodity Availability (NOCA) means the notice published by CCC specifying: the types of commodities available for use under this subpart; the terms and conditions that are in addition to the requirements of this subpart regarding approved uses of such commodities; the requirements a non-profit entity must meet to be an eligible entity; and whether funds will be made available by CCC regarding storage, handling, transportation and other administrative costs.

1409.203 Application process.

(a) A non-profit entity that seeks approval for participation in EDCDP, as specified in the applicable NOCA must submit to the U.S. Department of Agriculture office identified in the NOCA:

(1) The application form;

(2) A copy of the entity's 501(c)(3) tax exempt status letter from the Internal Revenue Service (IRS);

(3) A copy of the entity's most recent IRS Form-990; and

(4) Any other supporting documents specified in the NOCA.

(b) After CCC has determined that the entity has met all eligibility requirements, the eligible entity may be considered for participation in EDCDP. After approval by CCC, the eligible entity must execute the applicable grant or cooperative agreement presented by CCC.

1409.204 Award process.

(a) CCC intends to make awards to responsive applicants able to fully meet the requirements of the program subject to the priority criteria outlined below.

(b) To the extent that it is unable to make awards to all fully qualified applicants due to the limited quantity of commodities that will be available under this subpart, CCC reserves the right to both make awards on a prorated basis and to prioritize awards on the criteria listed below. CCC will consider the following factors in accepting offers for participation:

(1) The extent to which an eligible entity is already a participant in existing FNS administered programs with priority placed upon those entities that are not participating in such programs;

(2) The ability of the eligible entity to receive, store, and distribute at least 20,000 pounds of food per shipment and any other requirements as outlined in the NOCA, as determined by CCC, to successfully implement the proposed program activity;

(3) The eligible entity's operational and financial capability to receive and distribute commodities provided by CCC under this subpart;

(4) The scope of the proposed program activity in terms of its intended use of such commodities in low income areas, as determined by CCC using United States Census Bureau data and information available from federal means tested programs; and

(5) Any other criteria specified in the NOCA.

(c) An eligible entity may submit only one program proposal in response to a NOCA for the same geographic area.

1409.205 Execution of agreement.

CCC will enter into a grant or cooperative agreement with an eligible entity regarding the entity's approved program proposal. The eligible entity may not assign or delegate any required action or responsibility of the entity except as provided in the applicable grant or cooperative agreement. Any modification of the grant or cooperative agreement must be made with the written approval of CCC.

1409.206 Eligibility subject to verification.

(a) Eligible entities participating in EDCDP are required to retain documentation relating to the EDCDP for 3 years after the date of approval of the grant or cooperative

agreement. However, records pertaining to claims or audits that remain unresolved in this period of time must be retained until such actions have been resolved.

(b) Eligible entities participating in EDCDP must permit authorized representatives of the U.S. Department of Agriculture or the General Accounting Office during regular business hours to inspect, examine, and to allow such representatives to make copies of such books, records, or other items for the purpose of confirming the accuracy of the information provided by such entity.

1409.207 Miscellaneous provisions.

(a) An eligible entity must comply with the provisions of:

(1) 2 CFR Chapters I and II (Office of Management and Budget Government-wide Guidance for Grants and Agreements);

(2) 2 CFR Parts 200 and 400 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards);

(3) 2 CFR Part 415 (General Program Administrative Regulations); and

(4) 2 CFR Part 418 (New Restrictions on Lobbying).

(b) An eligible entity that does not comply with the terms of the applicable grant or cooperative agreement is subject to the provisions of: 18 U.S.C. 286, 287, 371, 641, 651, 1001, and 1014; 15 U.S.C. 714; and 31 U.S.C. 3729.

Stephen Censky,
Deputy Secretary,
Vice Chairman,

Commodity Credit Corporation

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