(ii) Misrepresented any material fact affecting a program determination.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs, as determined appropriate under 31 CFR 901.9.

(3) When a refund is due, it must be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the biorefinery, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, and the rate will adjust in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any fraudulent action of the biorefinery.

(5) Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

(f) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 4288.24 Succession and control of facilities and production.

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

§§ 4288.25–4288.100 [Reserved]

Dated: April 5, 2010.

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2010–8283 Filed 4–15–10; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 4288

RIN 0570–AA75

Subpart B—Advanced Biofuel Payment Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Business-Cooperative Service (Agency) is proposing to establish a payment program for producers of advanced biofuels to support existing advanced biofuel production and to encourage new production of advanced biofuels. The Agency would enter into contracts with advanced biofuel producers to pay such producers for the production of eligible advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

DATES: Written comments on the proposed rule must be received on or before May 17, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

ADDRESSES: You may submit comments to this proposed rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: Diane Berger, USDA Rural Development, 1400 Independence Ave., SW., Room 6865, STOP 3225, Washington, DC 20250. Telephone: (202) 260–1508. Fax: (202) 720–2213. E-mail: *diane.berger@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. The Agency has identified potential benefits to the advanced biofuel producer and to the Agency. While unable to quantify any costs or benefits associated with this rulemaking, the Agency believes that the overall effect of the rule may be beneficial.

Unfunded Mandates Reform Act

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

regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

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

National Environmental Policy Act/ Environmental Impact Statement

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Contract Proposal (NOCP). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported. As expected, these applications were not from any concentrated grouping of applicant facilities, but represented a wide variety of applicants for a diverse range of renewable energy proposals. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940–G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9005 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the Congressional goals of advancing biofuels production for the purposes of energy independence and green house gas emission reductions. The impact analyses will be national in scope but will draw upon site-specific data from advanced biofuel facilities funded under Sections 9003, 9004, and 9005 NOFA's (or NOCP's) for FY 2008 and/or FY 2009 as reasonable assumptions for the types of facilities, feedstocks, and impacts likely to be funded under the proposed rulemaking for FY 2010–FY 2012. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, as well, to forecast likely impacts under the proposed rules. Qualitative analyses of likely programmatic impacts beyond the FY 2012 program expiration date will be provided, as appropriate. The draft PEA will be made available to the public for comment on the USDA Rural Business Service's Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 13132, Federalism

It has been determined, under Executive Order 13132, Federalism, that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities. Rural Development made this determination based on the fact that this regulation only impacts those who choose to participate in the Program. Small entity applicants will not be affected to a greater extent than large entity applicants.

The entities affected by the Program are biorefineries. The Agency received approximately 180 applications in fiscal year 2009, and approved 160 entities for participation. In assessing whether these entities are small businesses, the Agency notes that there is no unique Small Business Administration (SBA) definition for biorefineries, because biorefineries are found in a number of North American Industry Classification System (NAICS) codes. The majority of existing biorefineries produce biodiesel, and for these biorefineries, the small business definition is 1,000 employees. Based on Agency experience and in-house knowledge of the fiscal year 2009 applicants and using 1,000 employees as the definition of small business, the majority of biorefineries applying in fiscal year 2009 would be classified as small businesses. The Agency expects this to continue to be true as the Program continues.

The average cost to a biorefinery to participate in the Program is estimated to be approximately $500. This cost is not expected to impose an economically significant impact on these small entities. Because of this minimal cost, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. Further, biorefineries are expected to realize more in payments than in costs for participating in the program. Thus, participating biorefineries will be able to recoup this expense, although small biorefineries are likely to take longer to recoup the expense because they will be producing less advanced biofuel. Also, this regulation only affects biorefineries that choose to participate in the program. Lastly, the program is open to all eligible producers.

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

The regulatory impact analysis conducted for this proposed rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply Distribution and Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution or use.

Section 9005 payments will be made to existing biorefineries. These payments will likely increase quantities of renewable energy produced from domestic feedstock. While an increase in advanced biofuels will likely displace the use of petroleum-based liquid and gaseous fuels, the volumes supported by

this program will not disrupt U.S. energy supply. On the contrary, increased biofuels from domestic feedstock will diversify transportation fuels in the U.S. and replace petroleum imports. Replacing imported petroleum with biofuels from domestic feedstock will reduce the risk of potential disruption in supply or spike in prices from relying on foreign oil imports. The reduction in risks will improve our energy security and stabilize our energy supply.

In sum, because the regulatory impacts analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution or use, a Statement of Energy Effects was not prepared.

Executive Order 12372, Intergovernmental Review of Federal Programs

This Program is not subject to Executive Order 12372, Intergovernmental Review of Federal Programs, because the Program involves no construction and therefore no mitigation or planning activities are involved.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have Tribal implications or preempt Tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175.

Programs Affected

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.867.

Paperwork Reduction Act

The information collection requirements contained in the Notice of Funding Availability for the Section 9005 Advanced Biofuels Payments Program published on June 12, 2009, were approved by the Office of Management and Budget under emergency clearance procedures and assigned OMB Control Number 0570–0057. As noted in the June 12, 2009 notice, the Agency sought emergency clearance to comply with the time frames mandated by a Presidential Memorandum in order to implement the Program as quickly as possible, and that providing for public comment under the normal procedure would unduly delay the provision of benefits associated with this Program and be contrary to the public interest. Now, however, in accordance with the Paperwork Reduction Act of 1995, the Agency is seeking OMB approval for three years of the reporting and recordkeeping requirements contained in this proposed rule and hereby opens a 60-day public comment period.

Title: Advanced Biofuels Producer Payment Program.

Type of Request: New collection.

Abstract: Rural Development is providing payments to eligible producers of advanced biofuels to support and ensure an expanding production of advanced biofuels.

The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of advanced biofuels producers and their products in order to ensure compliance with the provisions of this Program and to ensure that the payments are made to eligible producers and advanced biofuels and is necessary in order to implement this Program.

Advanced biofuel producers seeking to participate in the Program must enroll in the Program by submitting an Agency-approved application. This application requires the advanced biofuel producer to provide information on the applicant; the applicant's biorefineries at which the advanced biofuels are produced, including location and quantities produced and a description of the business; the types and quantities of renewable biomass feedstock being used to produce the advanced biofuels; and the amount of eligible advanced biofuels produced at each biorefinery in the 12 months prior to the first day of the sign-up period for the fiscal year for which the annual application is being submitted. Applicants are also required to submit documentation to support the amount of eligible advanced biofuels reported in the form and to certify the information provided, including that the advanced biofuels are eligible advanced biofuels and that the renewable biomass feedstock used to produce the advanced biofuels are eligible biomass feedstock. Applicants must submit authoritative evidence documenting production of advanced biofuels, and the eligibility of the advanced biofuels.

The information contained in the application will be used by the Agency to determine whether the advanced biofuel producer is eligible to participate in the Program and whether the advanced biofuel being produced is eligible for payments under the Program. The same Agency-approved application form will also be used by the Agency to sign-up advance biofuel producers in subsequent fiscal years (FY) and to obtain information to help determine payment rates.

Before being accepted into the Program, the advanced biofuel producer must also furnish the Agency all required certifications, as applicable, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with program provisions. The required certifications, which must be completed and provided by an accredited independent third party, depend on the type of biofuel produced.

Once an advanced biofuel producer has been approved to participate in the Program, the producer and the Agency enter into an Agency-approved contract. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

Once the contract is signed, the advanced biofuel producer will submit, preferably on a quarterly basis, an Agency-approved form to request payment. This form requires the advanced biofuel producer to provide information on the types and quantities of advanced biofuels produced in each quarter and on the types and quantities of renewable feedstock used to produce those advanced biofuels. In addition, the advanced biofuel producer will report cumulative production of advanced biofuels and the use of renewable biomass feedstock for all advanced biofuel biorefineries. The information for each advanced biofuel biorefinery is to be provided cumulatively and on an individual advanced biofuel biorefinery basis. This information is required in order for the Agency to determine the payments to be made to the eligible producers each quarter and to track the quantities of advanced feedstock for which payments have been made.

The following estimates are based on the average over the first three years the Program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.8 hour per response.

Respondents: Advanced biofuels producers.

Estimated Number of Respondents: 302.

Estimated Number of Responses per Respondent: 9.4.

Estimated Number of Responses: 2,842.

Estimated Total Annual Burden (hours) on Respondents: 2,273.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742 or by calling (202) 692–0043.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

E-Government Act Compliance

Rural Development 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.

I. Background

Rural Development administers a multitude of Federal programs benefitting rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing leadership, infrastructure, venture capital, and technical support that can support rural communities, helping them prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide a support for economic development in rural areas. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) contains several sections under which Rural Development will provide financial assistance for the production and use of biofuels. This proposed rule addresses Section 9005 of the 2008 Farm Bill, which authorizes the Secretary of Agriculture to "make payments to eligible producers to support and ensure an expanding production of advanced biofuels" by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production.

Section 9005 of the Farm Security and Rural Investment Act of 2002 as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to "make payments to eligible producers to support and ensure an expanding production of advanced biofuels" by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production. To be eligible for payments, advanced biofuels produced must be derived from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

Under the proposed rule, the sign-up period for new and current producers of advanced biofuels is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice. An executed contract remains valid until the end of the program (September 30, 2012), or terminated by either the Agency or participating party. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program. Applicants will update production amounts annually during the solicitation process.

Payment rates under the proposed rule are determined based on the size of the facility and whether production is "base" or "incremental." Base production is defined as a facility's existing level of production; any subsequent production that is in excess of the base amount is considered to be incremental. Under the proposed rule, to encourage more production of advanced biofuels, the payment rate for the incremental production will be five times greater than the payment rate for base production. The proposed rule provides that the base and incremental rates will be calculated on a British Thermal Unit basis.

The Agency is also considering an approach to offer different payment rates based on their lifecycle greenhouse gas (GHG) emissions. This approach would offer a significantly higher payment rate for biofuels that are demonstrated to significantly reduce GHGs emissions relative to the conventional fuels that they replace; biofuels that do not demonstrate significant GHG reductions would receive the lower payment rate. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels and so would qualify for the higher payment rate. We request comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. Please provide analytical support for comments provided in response to this request.

Because there is no limit on the number of advanced biofuels producers that enter this program, the actual payment rates will be determined based on the number of eligible applications received each year.

Consistent with the authorizing legislation, the goal of this program is to encourage the expansion of the country's production capacity of advanced biofuels. To help meet this goal, the program would be open to all producers of advanced biofuels given the difficulty of determining the types or technologies that will ultimately create the foundation of this industry at this early stage of development of the industry. In addition, given that the biofuels industry is very capital intensive, the Agency is proposing multi-year contracts to enable advanced biofuels producers the assurance of a multi-year revenue stream. This approach is consistent with the goal of creating a stable industry. Finally, the Agency is proposing a two-tiered payment approach under which incremental production is paid at a significantly higher rate than base production in order to balance the interests of encouraging new production while providing stability to existing production. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable

energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country's energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country's energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Advanced Biofuels Payment Program is one part of Rural Development's contribution to the Department of Agriculture's renewable energy efforts that support the overall Federal renewable energy strategy. This program provides stability and incentives to maintain and grow the advanced biofuels industry.

The development of the advanced biofuels industry will take a strong partnership between the Federal government and the private sector to generate the capital needed to construct and operate these facilities to meet the future energy needs of the country. This program provides funding stability that will assist these advanced biofuels producers to attract the private capital they need to continue expansion of this industry.

II. Discussion of Proposed Rule for Advanced Biofuel Payment Program

On June 12, 2009, the Agency published a Notice, Contract Proposal for Payments to Eligible Advanced Biofuel Producers [74 FR 27998]. (This Notice is referred to in this preamble as the Section 9005 NOCP.) While the Section 9005 NOCP provided requirements for participation in Fiscal Year 2009, most of its provisions are applicable to Fiscal Year 2010 and beyond and, thus, have been carried forward into this proposed rule.

This section describes the Advanced Biofuel Payment Program, first by presenting a brief overview of how the Program will work, then by the overall organization of the Program, and lastly by presenting a section-by-section description. In developing this Program, the Agency relied heavily on the predecessor Bioenergy Program (7 CFR Part 1424), although there are some differences between the two programs. For example, under the Bioenergy Program, payments were made for the production of ethanol and biodiesel from eligible commodities including, but not limited to, barley; corn; grain sorghum; oats; rice; wheat; soybeans; switchgrass; fats, oils, and greases (including recycled fats, oils and greases) derived from an agricultural product; and any animal byproduct. In contrast, under the Section 9005 Program, payments will be made to producers of advanced biofuel and biogas, which is fuel derived from renewable biomass, other than corn kernel starch (cellulose, hemicellulose, or lignin, sugar and starch; waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; vegetable oil and animal fat, *etc.*). Another example is that the Section 9005 Program requires the biorefinery to have at least 51 percent U.S. ownership; the Bioenergy Program did not have this requirement.

By relying on this predecessor program, the Agency believes that the proposed Advanced Biofuel Payment Program is within the guidance of its authorizing statute and will facilitate participation from those producers already familiar with the Bioenergy Program.

A. Program Overview

As noted earlier in this preamble, the Section 9005 Program will make payments to eligible producers for the production of eligible advanced biofuels. Participation in the Program requires advanced biofuel producers to follow the following three steps:

1. Producers submit form RD 4288–1, "Advanced Biofuel Payment Program Annual Application" along with applicable permits, registrations *etc.* Currently, the application form requires the producer to complete the base amount and project the incremental amount for the fiscal year.

2. If the producer meets the eligibility requirements, a contract (form RD 4288–2) will be issued. An executed contract remains valid until the end of the program (September 30, 2012), or until terminated by either the Agency or participating party. The Agency will review all contracts at least annually to ensure compliance with the contract and ensure the integrity of the program.

3. The producer must submit form RD 4288–3, "Advanced Biofuel Payment Program—Payment Request" with documentation verifying the actual amount produced.

Therefore, each fiscal year, current, participating producers complete steps 1 and 3 above. If a producer is new to the Program, the producer must complete steps 1 through 3. The sign-up period for both new and current participating producers is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice.

Each fiscal year, the Agency will notify each eligible applicant of the program payment the applicant may expect to receive for that fiscal year. A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

To ensure compliance with the Section 9005, the Agency will conduct a number of oversight and monitoring activities, including site visits and records review. By conducting such activities, the Agency will be verifying production and feedstock eligibility, the portion of the advanced biofuel eligible for payment, and certificate of analyses records. If the Agency discovers any misrepresentation or fraud by a producer, it may suspend payment, terminate the contract, or debar the producer from participation in any Federal program.

B. Overall Organization of the Advanced Biofuel Payments Program Rule

The proposed Advanced Biofuel Payment Program is divided into four sets of sections, which are described in the following paragraphs.

General Provisions. This set of sections in Subpart B of Part 4288 of title 7 of the CFR (hereafter referred to as Subpart B) contains provisions general to the administration of the Advanced Biofuel Payment Program. It covers the purpose and scope of the Program (§ 4288.101), definitions (§ 4288.102), reviews and appeals (§ 4288.103), compliance with other Federal, State, and local laws (§ 4288.104), oversight and monitoring (§ 4288.105), forms, regulations, and instructions (§ 4288.106), and exception authority (§ 4288.107).

Eligibility Provisions. This set of sections of Subpart B contains provisions addressing the eligibility of applicants (§ 4288.110) and biofuels (§ 4288.111), and the notification process that the Agency will use to inform the public of its eligibility

decisions (§ 4288.112). This section concludes with requirements for records required to document payment requests (§ 4288.113).

Enrollment Provisions. This set of sections contains the provisions associated with enrolling in the Program (§ 4288.120) and on contracts and their termination (§ 4288.121). Figure 1 illustrates the basic steps for initially enrolling in the Program.

Payment Provisions. This set of sections contains the provisions associated with applying for and receiving payments under the Program. Figure 2 illustrates the basic steps for payment applications. Section 4288.130 covers payment application provisions, while §§ 4288.131 through 4288.136 cover procedures associated with determining payment amounts and adjustments, payment liability, refunds and interest payments, unauthorized assistance and offsets, and remedies. This section concludes with provisions addressing the succession and transfer of ownership of biorefineries participating in the Program (§ 4288.137).

There is no competition for available funding. Assistance is based on total requests received and funding available. Each eligible applicant will receive a pro rata share of available funding based on the applicant's production compared to the total production for all eligible applicants.

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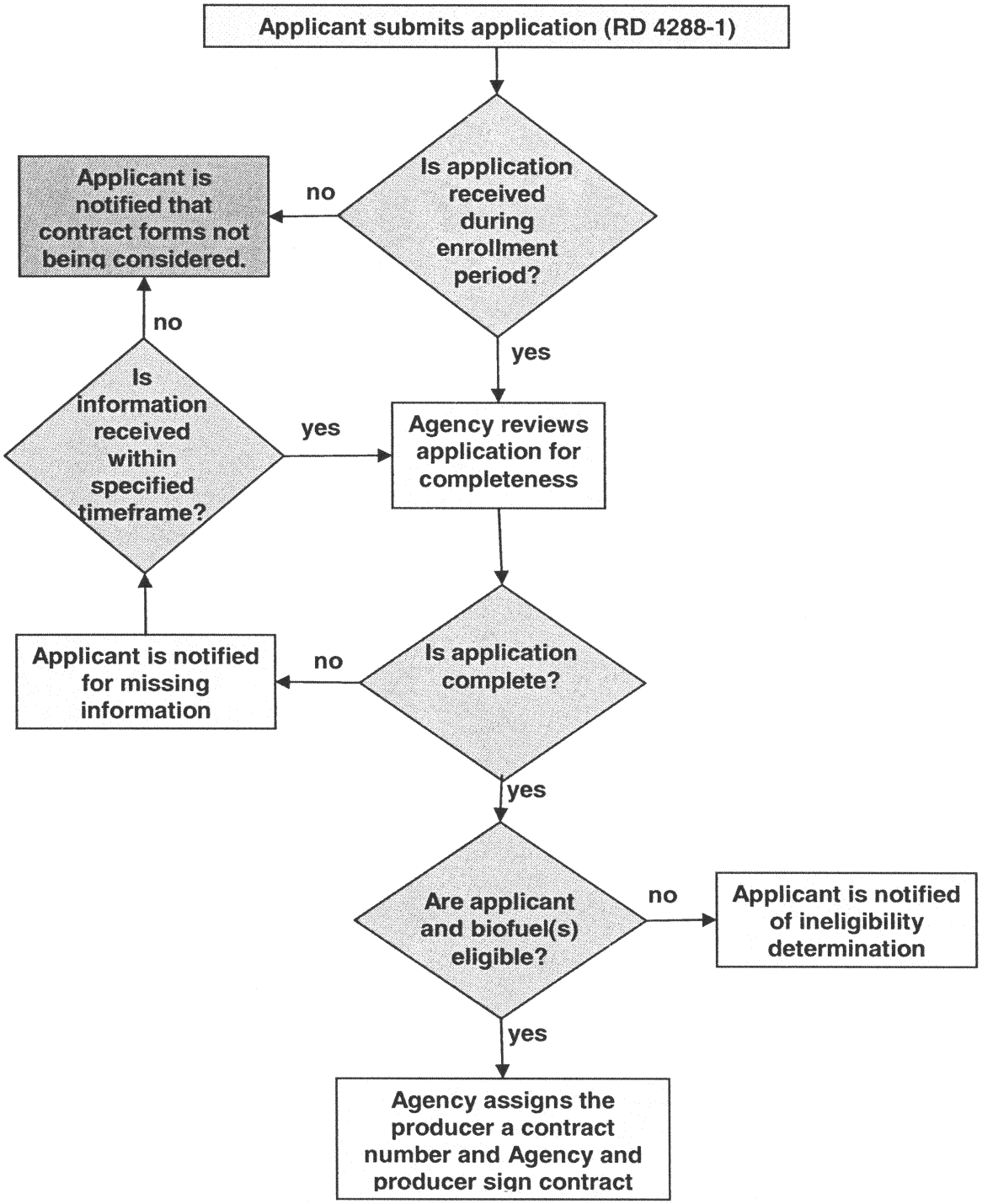

Figure 1. Simplified Initial Enrollment Process

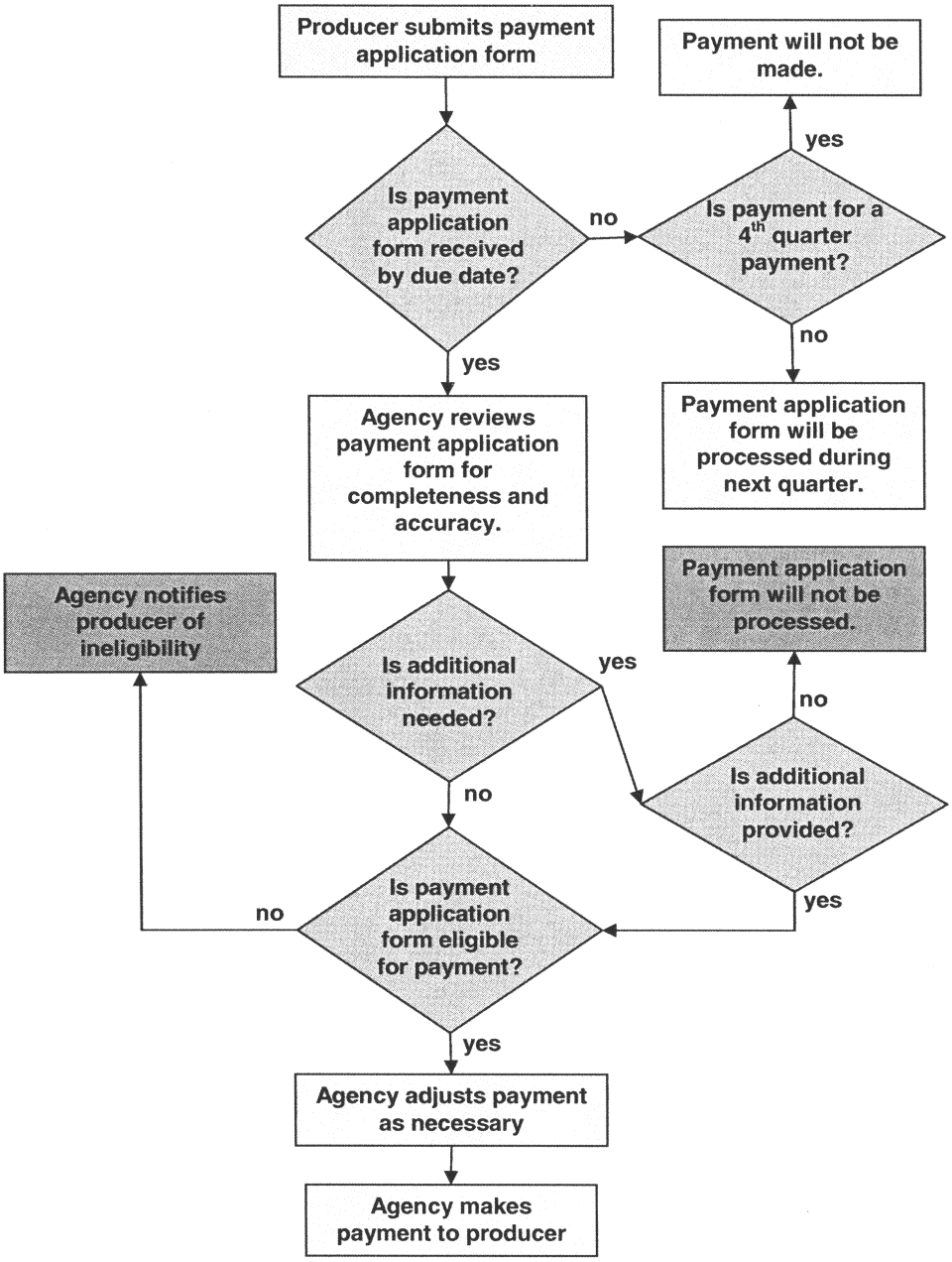

Figure 2. Simplified Payment Application Process

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C. Discussion of Sections

Section A—General Provisions

Purpose and Scope (§ 4288.101)

Paragraph (a) defines the purpose, which is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers. Paragraph (b) identifies the scope, which lays out the terms and conditions an advanced biofuel producer must meet in order to obtain payments from the Agency for eligible advanced biofuel production under the Advanced Biofuel Payment Program. This section also states that additional terms and conditions may be provided in the Program contract and the payment agreement prescribed by the Agency.

Definitions (§ 4288.102)

This section presents the definitions used in this subpart B, including terms that are specified in the 2008 Farm Bill. The definitions contained in this section are found in the Section 9005 NOCP, with revisions to the definitions of base production and incremental production necessary to implement the proposed rule and to the definitions for larger producers and smaller producers. As discussed below, there are four key definitions associated with this rule.

Two of the key definitions are advanced biofuel and renewable biomass. Both terms are defined in the Food, Conservation, and Energy Act of 2008.

With regard to the definition of advanced biofuel, the Agency notes that the statute requires payments to be made for "advanced biofuels," which are fuels derived from renewable biomass

(other than corn kernel starch). The Agency understands the definition to apply to solid, liquid, or gaseous fuels that are final products and not to intermediary components or products that are used in the production of the final advanced biofuel product. Therefore, the Agency is proposing that this rulemaking only applies to producers of solid, liquid, or gaseous advanced biofuels that are final products and not to producers of intermediary components and products used in the production of a final advanced biofuel product (*see* § 4288.111(a)(2) and (3)).

In addition, in order to be eligible for payment under this Program, the Agency is proposing that if the advanced biofuel is used on-site, the producer must be able to verify the quantity of advanced biofuel being consumed on-site using an Agency-approved system (*see* § 4288.111(a)(4)).

While many advanced biofuels are used in the transportation market, there are other end use markets for advanced biofuels. For example, biogas can be used for the production of electricity and replacing petroleum-based gases, such as natural gas, for both mobile and stationary uses. It is the Agency's intent to make the Section 9005 program available to all eligible advanced biofuels, regardless of the end use market. The Agency, however, does expect that the majority of advanced biofuels participating in this program would be used as transportation fuels, thus furthering the goals of the Renewable Fuels Standard mandate. Lastly, the Agency notes that the Section 9005 program is different from the REAP because the REAP program is used to construct facilities, which may include biorefineries, and to make energy efficiency improvements, while the Section 9005 program will make payments to producers for the advanced biofuels produced.

With regard to the definition of renewable biomass, the Agency notes that the definition of renewable biomass provides for a wide range of feedstock to be used in the production of advanced biofuel. For example, sunflower seeds can be used to produce long-chain hydrocarbons; algae and jatropha can be used to produce biodiesel; forest mass can be used to produce alcohols and methanol; and switchgrass can be used to produce ethanol. The only feedstock specifically excluded from the statutory definition of advanced biofuels is corn kernel starch. Further, the Agency points out that both second generation (biochemical) advanced biofuels and third generation (thermochemical) advanced biofuels are eligible for participation in the Program.

The third and fourth key definitions are base production and incremental production. As discussed later in this preamble, the Agency is proposing that payments be made based on both a biorefinery's existing level of production and for increases above the biorefinery's existing level of production. This requires the Agency to define a biorefinery's "existing level of production." This is referred to in the rule as the biorefinery's base production.

Base production. For the Section 9005 rule, the Agency is proposing to determine an advanced biofuel biorefinery's base production using one of two methods, as applicable, which are the same as two of the methods found in the Section 9005 (NOCP). These two methods are:

- If the biorefinery has been in existence for 12 months or more prior to the first day of the sign-up period for the fiscal year (*i.e.,* October 1) for which payment under this Program is sought, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity of eligible advanced biofuel produced at the advanced biofuel biorefinery in the 12 months immediately preceding the first day of the sign-up period. For example, for Fiscal Year 2011, the base production for a biorefinery would be the quantity of eligible advanced biofuel produced from October 1, 2009, through September 30, 2010.
- If the biorefinery has been in existence less than 12 months prior to the first day of the sign-up period for the fiscal year for which payment under this Program is sought or if the biorefinery will begin producing on or after October 1 of the sign-up fiscal year, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity projected to be produced by the biorefinery's producer as reported in Form RD 4288–1, "Advanced Biofuel Payment Program Annual Application."

Incremental production. The fourth key definition is incremental production. As proposed, a biorefinery's incremental production is the quantity of eligible advanced biofuel produced at the biorefinery that is in excess of that biorefinery's base production. However, for a biorefinery that has been in existence less than 12 months before October 1 of the sign-up fiscal year or that begins producing eligible advanced biofuels on or after October 1 of the sign-up fiscal year, there is no incremental production; all production for that sign-up fiscal year will be considered base production and the biorefinery's producer would receive payment at the base production payment rate for that fiscal year. In subsequent fiscal years, the advance biofuel producer for such a biorefinery would be eligible for both base and incremental production payments.

Lastly, the Agency is revising the definitions for "larger producers" and "smaller producers" to clarify the calculation of the amount of advanced biofuel a producer is producing. In the NOCP, the determination of whether a producer was a larger producer or smaller producer did not address the situation where a producer owned more than one advanced biofuel biorefinery. In making this calculation, the Agency will determine the refining capacity of an advanced biofuel producer based on the production of advanced biofuel at all of the advanced biofuel biorefineries in which the producer has 50 percent or more ownership.

Review or Appeal Rights (§ 4288.103)

This section provides the legal basis for a person to seek a review of an adverse Agency decision under this subpart. When the Agency makes an adverse decision, a person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11. This provision is the same as found in the Section 9005 NOCP.

Compliance With Other Laws and Regulations (§ 4288.104)

This section states that advanced biofuel producers must comply with other applicable Federal, State, and local laws including, but not limited to, Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, the American with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

Furthermore, producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. The Agency will not discriminate against an applicant on the basis of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); on the basis of whether all or part of the applicant's income derives from public assistance program; or whether the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Oversight and Monitoring (§ 4288.105)

The provisions in this section, which are substantively the same as found in the Section 9005 NOCP, cover how the Agency will enforce the terms of this Program, including site visits (which the Agency will conduct as frequently as necessary to ensure compliance with the provisions of this Program) and examination of records. In order to ensure the integrity of the Program, the Agency reserves the right to verify, as frequently as necessary, all payment applications and subsequent payments made under paragraph (a) of this section. Enforcement of this Program includes, but will not necessarily be limited to, three key Program aspects as described below. The Agency is focusing on these three areas because they are key to ensuring the integrity of the Program.

• *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of feedstocks used.

• *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

• *Certificate of Analysis.* The Agency will review the producer records to ensure that each certificate of analysis has been issued by a qualified, independent third party.

This section also states that all eligible advanced biofuel producers participating in the Program must make available to the Agency for inspection, at one place and at a reasonable time, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of the producer (§ 4288.105(b)). In addition, these records must be maintained by the producer for not less than three years from each Program payment date. These records are required in order for the Agency to ensure compliance with the Program and that all payments are made appropriately.

Forms, Regulations, and Instructions (§ 4288.106)

This section states that all forms, regulations, instructions, and other materials related to the Program may be obtained from any USDA Rural Development State Office, Rural Energy Coordinator, and the USDA Rural Development Web site at: *http://www.rurdev.usda.gov/rbs/busp/9005Biofuels.htm.* The Agency notes that this link may change in the future.

Exception Authority (§ 4288.107)

This section identifies that condition under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR 4280, subpart B, for the renewable energy systems and energy efficiency improvements program.

Section B—Eligibility

This section addresses the eligibility requirements for advanced biofuel producers and their biofuels, notifications of the Agency's eligibility determinations, and payment record requirements.

Applicant Eligibility (§ 4288.110)

This section identifies the requirements for applicant eligibility and conditions under which an otherwise eligible advanced biofuel producer may be found to be ineligible for participation in the Program. The requirements for applicant eligibility in this section are the same as those in the Section 9005 NOCP, except that the Agency has added provisions to clarify the eligibility of applicants that are subsidiaries and has clarified that public bodies and educational institutions are not eligible for this Program.

To be eligible for this Program, an applicant must be an eligible producer, which is defined as a producer of advanced biofuels (§ 4288.102). This is a statutory requirement. Any applicant that generates biogas from an anaerobic digester, including those located on a farm, would be eligible if all other program requirements are met.

Lastly, applicants will be required to meet the following citizenship requirements, as applicable:

• If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.

• If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. However, this requirement is not applicable if the entity is composed solely of members of an immediate family. In such instances, if at least one of the immediate family members is a citizen or national as described above, then the entity is eligible to participate in this program. Immediate family is being defined as: Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

• If the applicant is a subsidiary, the parent entity or the entities that have an ownership in that applicant must also be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

If an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section III of this preamble, the Agency is seeking comment on this requirement.

To make its determination as to whether or not the applicant is eligible for participation, the Agency will review the application to determine if the information submitted is sufficient to determine if the applicant is eligible. If the Agency determines that the submitted information is insufficient to make this determination, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to what additional information is needed and a timeframe in which to provide the information (§ 4288.110(b)). The Agency is requesting that applicants supply information in a timely fashion in order to setup the payment amounts each fiscal year and to estimate expected payments to each participating producer.

If the additional information is received within the specified timeframe, the Agency will determine the applicant's eligibility for the upcoming fiscal year. However, if the additional information is not received by the Agency within the specified timeframe, the Agency will not consider the applicant any further for the year in which the applicant has submitted its application form. Such an applicant may reapply to participate in the Program during the next sign-up period.

As noted above, this section also contains three conditions under which the Agency may determine that an advanced biofuel producer is no longer eligible to participate in the Advanced

Biofuel Payment Program (§ 4288.110(c)). These conditions, which are the same as in the Section 9005 NOCP, are necessary for ensuring the integrity of the Program. The three conditions are where the producer:

- Refuses to allow the Agency to verify any information provided by the producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;
- Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or
- Fails to comply with all applicable Federal, State, or local laws.

Biofuel Eligibility (§ 4288.111)

This section identifies four criteria that a biofuel must meet in order to be eligible for payment under this Program (§ 4288.111(a)). These four criteria notwithstanding, flared gases would not be eligible for payments under this Program.

First. The biofuel must meet the definition of advanced biofuel. As noted earlier in this preamble, this requirement is based on the authorizing statute that payments are to be made for advanced biofuel.

Second. As discussed earlier in this preamble under the discussion on the definition of advanced biofuel, the biofuel must be a solid, liquid, or gaseous advanced biofuel.

Third. The biofuel must be a final product and not an intermediary component or product to the biofuel. As stated earlier in this preamble, the Agency understands the definition of advanced biofuel applies to solid, liquid, and gaseous fuels that are final products and not to intermediary components or products used in the production of the final advanced biofuel product. We do not believe it is consistent with the Program to pay for both the intermediary components or products and the end product; this would be essentially paying twice for the same advanced biofuel. Therefore, the Agency is proposing that only advanced biofuels that are final products are eligible for payment under this Program, and that production of intermediary components and products are not eligible for payment under this Program. This provision was not specifically articulated in the Section 9005 NOCP.

Fourth. As discussed earlier in this preamble under the discussion on the definition of advanced biofuel, if the advanced biofuel is used on-site, the producer must be able to verify the quantity of advanced biofuel being used on-site using an Agency-approved system.

The Agency notes that, as proposed, the biofuel may be produced in a biorefinery located in either a rural or non-rural area. This is different from the Section 9005 NOCP, which required that the biofuel be produced in a biorefinery located in a rural area in order to be eligible for payment. Lastly, as found in Section III of this preamble, the Agency is seeking public comment on whether this program should limit payments to only those eligible advanced biofuels produced at a biorefinery located in a rural area.

As for when determining applicant eligibility, if the Agency determines that there is insufficient information provided to determine if a biofuel is an eligible advanced biofuel, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to what additional information is needed and a timeframe in which to provide the information (§ 4288.111(b)). If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment in the upcoming fiscal year. The applicant may elect to include such biofuels during the next sign-up period. The Agency notes that determination by the Agency that a biofuel is ineligible or that information is insufficient to make an eligibility determination does not affect the status of other biofuels included in the application form.

Eligibility Notifications (§ 4288.112)

This section presents the process that the Agency will use to notify applicants of its decisions concerning applicant and biofuel eligibility. It also addresses notifications concerning subsequent Agency determinations regarding producer and biofuel eligibility.

With regard to applicant eligibility (§ 4288.112(a)), if the Agency determines that an applicant is eligible for participation in the Program, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

If the Agency determines that an applicant or a biofuel is ineligible (§ 4288.112(b)), the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, and will include the reason(s) for the Agency's determination that the applicant or biofuel was determined to be ineligible.

Lastly, § 4288.112(c) states that the Agency will notify a producer, in writing, whenever the Agency determines that the producer or the producer's biofuel(s) are subsequently determined by the Agency to be ineligible.

Because any finding of ineligibility is an adverse decision, the applicant/producer, as applicable, would have the right to appeal such a decision, as provided in § 4288.103.

The Agency notes that the Section 9005 NOCP addressed notifying the applicant concerning applicant eligibility. The Agency is specifically including in the proposed rule the notification process concerning biofuel eligibility and subsequent ineligibility determinations to more clearly identify its intent to communicate such findings to the producer.

Payment Record Requirements (§ 4288.113)

This section identifies records that an advanced biofuel producer approved for participation in the Advanced Biofuel Payment Program must maintain in order to be eligible to receive payments under this subpart. The records required in the proposed rule are identified in more detail than those identified in the Section 9005 NOCP, but the intent in either case is to ensure that sufficient records are maintained by participating advanced biofuel producers to ensure the integrity of the Program and to allow the Agency to conduct its oversight and monitoring responsibilities. These records are:

- The type and amount of eligible renewable biomass used in the production of advanced biofuel;
- The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel biorefinery;
- The quantity of eligible renewable biomass used at each advanced biofuel biorefinery to produce the advanced biofuel; and
- All other records required to establish Program eligibility and compliance.

The advanced biofuel producer is required to maintain these records for each fiscal year and each fiscal year quarter for each advanced biofuel biorefinery for which the producer has requested payment under this Program. As noted earlier, these records must be maintained by the producer for not less than three years from each Program payment date. The Agency is proposing these records to be kept because they are needed by the Agency in order to verify

that payments made to each producer are in compliance with the provisions of this subpart.

Section C—Enrollment Provisions

In order to participate in the Advanced Biofuel Payment Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling and continued participation in the Advanced Biofuel Payment Program is presented in this subpart. The provisions for enrolling in the Program (§ 4288.120) are consistent with those found in the Section 9005 NOCP. The contract provisions (§ 4288.121), while consistent with the contract identified in the Section 9005 NOCP, are described more specifically in the proposed rule than in the Section 9005 NOCP.

Enrollment (§ 4288.120)

To enroll in the Advanced Biofuel Payment Program, a producer must submit a completed enrollment application (Form RD 4288–1) to the Agency. This form requests information on the advanced biofuel producer; the advanced biofuel biorefineries in which the producer has 50 percent or more ownership and at which the advanced biofuels are produced, including location and quantities produced; the types and quantities of renewable biomass feedstock being used to produce the advanced biofuels; and the amount of eligible advanced biofuels produced at each biorefinery in the 12 months prior to the first day of the sign-up period for the fiscal year for which the enrollment application is being submitted. Applicants are required to submit with this form documentation to support the amount of eligible advanced biofuels reported in the form. The form also requires the advanced biofuel producer to certify the information provided, including that the advanced biofuels are eligible advanced biofuels and that the renewable biomass feedstock used to produce the advanced biofuels are eligible biomass feedstock. The Agency will identify in an annual **Federal Register** notice where this form is to be submitted.

All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1–866–705–5711 or online at *http://fedgov.dnb.com/webform.*

The first time a producer submits Form RD 4288–1, the Agency will make its determination as to whether or not the producer is eligible to participate. If an advanced biofuel producer is determined to be ineligible, the Agency will notify the producer, in writing, as soon as practicable after receipt of the application, of its determination.

After the first year a producer is enrolled in the Program, the producer must submit to the Agency Form RD 4288–1 in each subsequent sign-up period in order to receive payments for the corresponding fiscal year (§ 4288.120(a)(1)). For example, Producer A's first year of participation is FY 2010. In order to receive payments in FY 2011, Producer A must submit Form RD 4288–1 during the sign-up period for FY 2011 in order to be eligible to receive payments during FY 2011.

Eligible advanced biofuel producers may submit Form RD 4288–1 during a fiscal year's sign-up period even if the advanced biofuel biorefinery is scheduled to start producing advanced biofuel in the upcoming fiscal year.

If a participating producer fails to submit Form RD 4288–1 during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year (§ 4288.120(a)(1)). Such a producer must reapply, and sign a new contract, to participate in the Program for the next fiscal year.

In addition to the application form, applicants must also submit the appropriate certifications for the type(s) of advanced biofuels for which they are seeking payment. These certifications, which must be completed and provided by an accredited independent third-party, are those the Agency believes are necessary to ensure that the biofuels being produced are of sufficient quality for sale and use in the marketplace. The certifications producers are required to submit, which are the same as identified in the Section 9005 NOCP (unless otherwise noted), depend on the type of biofuel produced, as summarized below.

- For alcohol, a copy of either the Alcohol Fuel Producers Permit (TTB F 5110.74) or the registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).
- For hydrous ethanol, if the advanced biofuel producer is the hydrous ethanol producer, an affidavit, acceptable to the Agency, from the distiller stating that the applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and that the distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.
- For hydrous ethanol, if the advanced biofuel producer is the distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.
- For biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass, a self-certification by the producer that the producer, the advanced biofuel biorefinery, and the biofuel meet the definition of each term as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act, the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and quality requirements per applicable ASTM International standards (*e.g.,* ASTM D6751) and commercially acceptable quality standards of the local market. The advanced biofuel producer shall also provide the Renewable Identification Number (RIN) for each advanced biofuel and BQ–9000 certification.
- For gaseous advanced biofuel, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine the quantity of advanced biofuel produced are industry standard and properly calibrated by a third party professional; and that the readings have been taken by a qualified individual. The certification provisions for gaseous advanced biofuel have been modified from those in the Section 9005 NOCP to include certification associated with the flow meters and the readings.

In addition, for woody biomass feedstocks, the applicant must submit documentation that the woody biomass feedstock cannot be used as a higher value wood-based product.

Participating producers who enroll and project increased advanced biobased production and all producers enrolling in the program for the first time must submit with their application documentation to support their production projections in the enrollment application. Such documentation may include historical production data, production capacity of the biorefinery, and evidence of ability to distribute final product, including distribution networks and contracts for purchase of final product.

Lastly, applicants will also be required to submit three additional

forms, which are standard Agency requirements for such financial assistance. These three forms, which are the same as found in the Section 9005 NOCP, are submitted once when the applicant first applies for the Program. These three forms will be submitted, as needed, each time an applicant re-enrolls in the program. The three forms are:

- RD Instruction 1940–Q, Exhibit A–1, "Certification for Contracts, Grants and Loans";
- SF–LLL, "Disclosure of Lobbying Activities"; and
- RD 400–4, "Assurance Agreement".

Applicants would be required to submit the application form during the sign-up period, which is October 1 through October 31 of the fiscal year for which payment under the Advanced Biofuel Payment Program is sought, unless the Agency otherwise announces in a **Federal Register** notice (§ 4288.120(b)). For example, for Fiscal Year 2011, the sign-up period is October 1 through October 31, 2010. As another illustration, a producer with a new biorefinery that is expected to become operational in June 2011 must enroll that biorefinery in the Program during Fiscal Year 2011's sign-up period (*i.e.,* October 1 through October 31, 2010) to be eligible to receive Program payments on that new production during Fiscal Year 2011. If the producer does not enroll this biorefinery between October 1 and October 31, 2010, the producer would have to wait until October 2011 to enroll the biorefinery to receive payments for Fiscal Year 2012.

Contract (§ 4288.121)

If an advanced biofuel producer is determined eligible to receive payments, the eligible advanced biofuel producer must then enter into a contract with the Agency using Form RD 4288–2, "Advanced Biofuel Payment Program Contract," (or successor form(s)) in order to participate in this Program. The Agency will forward Form RD 4288–2 to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

Once a contract has been signed, it will remain in force through the end of the contract period unless it is terminated in writing by the Agency. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program. Contracts may be terminated under any one of the following conditions:

- At the mutual agreement of the parties;
- In accordance with applicable Program notices and regulations;
- The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;
- The advanced biofuel producer fails to submit Form RD 4288–1 during a sign-up period;
- The Program is discontinued or not funded;
- All of a participating advanced biofuel producer's advanced biofuel biorefineries no longer exist or no longer produce any eligible advanced biofuel; or
- The Agency determines that the advanced biofuel producer is ineligible for participation.

Section D—Payment Provisions

This section presents the procedures the Agency will use in making payments to eligible advanced biofuel producers under the Advanced Biofuel Payment Program, how the Agency will calculate those payments, how those payments may be adjusted, including refunds to the Agency. This subpart also addresses payment liability, unauthorized assistance and offsets, and succession and loss of control associated with making payments under the Advanced Biofuel Payment Program.

Payment Applications (§ 4288.130)

An advanced biofuel producer participating in the Advanced Biofuel Payment Program must submit a payment application form (Form RD 4288–3, "Advanced Biofuel Payment Program Application" or successor form(s)) to the Agency in order to receive payments under this Program (§ 4288.130(a)). The provisions in the section are essentially the same as found in the Section 9005 NOCP.

Each participating producer is requested to submit payment applications on a quarterly basis. Along with each payment application, the producer is required to:

- Certify with respect to the accuracy of the information provided;
- Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and
- Provide documentation, as requested by the Agency, of the net production of advanced biofuel at all advanced biofuel biorefineries during the relevant quarters.

As noted above, producers are being requested, but are not being required, to submit payment applications on a quarterly basis. This allows a participating producer to submit a payment application that covers multiple consecutive quarters. For example, after each quarter has ended, Producer A may submit a payment application for the first quarter, a second payment application for the second and third quarters, and a third payment application for the fourth quarter. Producer B may submit a payment application for the first and second quarters after the end of the second quarter and a second payment application for the third and fourth quarters after the end of the fourth quarter.

The Agency strongly encourages participating producers to submit payment applications quarterly for several reasons. First, the Agency does not believe that it is reasonable to have eligible advanced biofuel producers wait up to a full year to receive their payments when production occurs throughout the year. Providing payments on a more frequent basis provides these producers with a more useful income stream. Second, these producers are likely to be submitting quarterly tax payments. Providing payments on a quarterly basis would be more consistent with current accounting activities. Third, receiving payment applications on a quarterly basis allows the Agency to better manage its workload and to process applications more efficiently than waiting until the end of the year.

Upon receipt of a payment application, the Agency will review the application to determine whether or not it is eligible for payment (§ 4288.130(b)). In making this determination, the Agency will consider whether the advanced biofuel producer has a valid contract with the Agency for this Program, whether the biofuel for which payment is sought is an eligible advanced biofuel under this Program, and the completeness and accuracy of the calculations provided in the payment application.

If, in reviewing a payment application, the Agency determines that additional documentation is required in order for the Agency to complete its review of the application, the eligible advanced biofuel producer would be required to submit such additional supporting documentation as requested by the Agency. For example, a producer provides with the payment application an internal spreadsheet that they utilized to track production. In this situation, the Agency may request the producer to submit sales receipts to verify the numbers reported in the spreadsheet. If the producer does not provide the requested information to the

Agency within the required time period, the Agency will not process the payment application and, as a result, the producer will not receive payment for that quarter.

Whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment, the Agency will notify the advanced biofuel producer, in writing, as soon as practicable after receipt of the payment application and provide the basis for the Agency's determination of ineligibility (§ 4288.130(c)).

Lastly, the Agency will specify where to submit payment applications in an annual notice published in the **Federal Register**. The payment applications must be submitted no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. Neither complete nor incomplete applications received after this date and time will be considered, regardless of the postmark on the application.

Any payment application form received by the Agency after October 31 of the calendar year for the preceding fiscal year will be ineligible and the Agency will not make payment to the producer. For example, if Producer A submits a payment application covering the third and fourth quarters of Fiscal Year 2011 after October 31, 2011, the producer will not receive any payment for the advanced biofuel produced in the third and fourth quarters of Fiscal Year 2011. The Agency is including this provision because it needs to obligate funds for accounting purposes and for determining the funds that will be carried over to the next fiscal year for the Program.

In all instances, if the actual deadline for payment applications falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

Payment Provisions (§ 4288.131)

This section covers basic provisions associated with the calculation of payment under the Advanced Biofuel Payment Program. Paragraph (a) addresses how the Agency will determine payment rates, paragraph (b) addresses how the Agency will establish the value of each contract; paragraph (c) addresses payment amounts; and paragraph (d) addresses other payment provisions. The provisions in these paragraphs are essentially the same as found in the Section 9005 NOCP.

The basics steps in determining payment to producers as addressed paragraphs (a) through (c) of this section and are outlined below. These six steps will be performed each fiscal year.

Step 1. Determine the quantity of eligible advanced biofuel subject to payment each fiscal year, including both base production quantity and incremental production quantity. This determination will be made for both smaller producers and larger producers.

Step 2. Determine the British Thermal Unit (BTU) content of each of the four advanced biofuel quantities determined under Step 1.

Step 3. Determine the amount of funds available for payment for smaller producers and for larger producers.

Step 4. Determine the payment rates for base production and for incremental production for both smaller producers and larger producers based on the results of Steps 2 and 3.

Step 5. Assign expected payments to each producer based on the results of Step 4 and the base and incremental production in the application.

Step 6. Make payments to each participating advanced biofuel producer each quarter.

The following paragraphs address each of these steps in more detail.

Paragraph (a)(1) of this section addresses the quantity of production that will be eligible for payment. Using information submitted in Form RD 4288–1, from each participating advanced biofuel producer and the information from the previous fiscal year's Form RD 4288–3 from each participating producer, the Agency will determine each producer's base production and incremental production. The Agency will make this calculation for both smaller producers and for larger producers. (The distinction between smaller and larger producers is based on the requirement in the 2008 Farm Bill that the Agency limit the amount of funds available to large producers (*i.e.,* those that produce 150,000,000 or more gallons) to 5 percent of program funds. Small producers (*i.e.,* those that produce less than 150,000,000 gallons) would receive the remaining funds.) This will result in the following four quantities being determined:

- Base production quantity for smaller producers;
- Incremental production quantity for smaller producers;
- Base production quantity for larger producers; and
- Incremental production quantity for larger producers.

When determining these quantities, the Agency will use the documentation submitted with the enrollment application to determine whether the documentation supports the estimated production reported by the producer. If the Agency determines that the documentation does not support the estimated production, the Agency may reduce the production estimates for the purposes of calculating the payment rate. Because a producer will be paid for its actual production, such an adjustment does not affect the quantity of production for which the producer will be paid, but will affect the payment rate. The Agency may adjust a producer's estimated production in order to avoid the potential overestimation of production which has led to a program funds remaining at the end of the fiscal year.

Paragraph (a)(2) of this section addresses advanced biofuels that are blended with ineligible feedstocks (*e.g.,* fossil gasoline or methanol, corn kernel starch). In determining the four quantities under paragraph (a)(1) of this section, if an advanced biofuel is blended with ineligible feedstocks, only the quantity of advanced biofuel being produced from eligible feedstocks will be used, as described below, in determining the payment rates and for which payments will be made. In other words, it is important to note that only advanced biofuels eligible for payment under this Program will be included in these calculations.

Paragraph (a)(3) of this section addresses the conversion of the base production and the incremental production into BTUs determined under § 4288.131(a)(1) and (a)(2). The Agency will make these conversions using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

The Agency is converting the production amounts to BTUs in order to develop a common measure for all types of advanced biofuels that are eligible for this Program. Previously, almost all biofuels were liquids, where a measure such as gallons provided a useful and simple measure. Currently, however, there are many more types of advanced biofuels that are not liquids (*e.g.,* biogases) where a typical measure is cubic feet, not gallons. Thus, it is difficult to compare quantities of the different biofuels being produced based

on common measures such as gallons and cubic feet. Therefore, the Agency is proposing to convert all production into the common measure of BTUs. The Agency believes that this is a reasonable methodology for comparing biofuels and treats all eligible advanced biofuels and their producers fairly and equally.

Paragraph (a)(4) addresses the funds that will be available for the Program. As specified in the statute, "[o]f the funds provided for each fiscal year, not more than 5 percent of the funds shall be made available to eligible producers for production at facilities with a total refining capacity exceeding 150,000,000 gallons per year." Thus, at least 95 percent of the funds provided each year will be made available to eligible producers whose total refining capacity is 150 million gallons or less. Keeping these percentages in mind, the Agency will determine how much money will be available for the Program each fiscal year for smaller producers (*i.e.,* those whose total refining capacity is 150 million gallons or less) and how much will be available for larger producers (*i.e.,* those whose total refining capacity is greater than 150 million gallons). The authorizing statute provides both mandatory and discretionary funding for this Program, and allows for funds to be carried over from one fiscal year to the next. Therefore, each fiscal year, the Agency will determine how much of funding is available to make payments, and how much will be available to smaller producers and to larger producers. The Agency will announce these amounts each fiscal year in a **Federal Register** notice.

Paragraph (a)(5) addresses the calculation of payment rates. As proposed, the Agency would calculate payment rates based on the quantity of BTUs calculated under paragraph (a)(3) and the amount of funds available as determined under paragraph (a)(4). The Agency will calculate a payment rate for base production and a payment rate for incremental production. Separate rates will be calculated for smaller producers and larger producers.

In setting these payment rates, the Agency will set the incremental production rates at a value that is 5 times higher than their respective base production rates. The Agency is doing this in order to encourage growth in the advanced biofuel industry. These rates will be calculated such that all funds allocated for a fiscal year will be distributed for that fiscal year if base production and incremental production quantities projected at the beginning of the fiscal year are met.

Once the Agency has determined the payment rates, it will calculate a fiscal year value for each eligible producer based on the payment rates and the base production and incremental production across a producer's advanced biofuel biorefineries that are identified in Form RD 4288–1 for that fiscal year (*see* § 4288.131(b)). This calculation will take place each fiscal year because the base and incremental production and available funds will change every year. After calculating the fiscal year value, the Agency will notify the producer, in writing, of the estimated payment to the producer for that fiscal year.

Paragraph (c) addresses payments to eligible advanced biofuel producers. The Agency will make payments to an eligible advanced biofuel producer, assuming the availability of funds, based on that producer's quantity of BTUs produced from eligible advanced biofuels and the applicable base and incremental production payment rates. Provided the payment application forms are submitted on a quarterly basis, these payments will also be made on a quarterly basis. The Agency will not pay a producer more than the expected payment established under § 4288.131(b).

Lastly, paragraph (d) of this section addresses six additional payment provisions, the first three of which are the same as found in the Section 9005 NOCP.

First. Paragraph (d)(1) states that advanced biofuel producers will be paid on the basis of the amount of eligible renewable energy content of the advanced biofuels only if the producer provides sufficient documentation, including a Certificate of Analysis for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records. This provision puts producers on notice concerning the need for sufficient documentation for the Agency to make payments under this Program.

Second. Paragraph (d)(2) states that the Agency will make payment to only one eligible advanced biofuel producer per advanced biofuel biorefinery. This provision is intended to ensure that payment is made only once for the same biofuel produced at a biorefinery. Where multiple applications are received for the same biorefinery, the Agency will make payment to only one of the applicants. For example, if Producer A and Producer B both submit applications for advanced biofuel produced at Biorefinery C, the Agency will make only one payment to either Producer A or Producer B. It is the responsibility of such advanced biofuel producers to identify to the Agency to whom the payment will be made. As another example, if Biorefinery D's legal business structure is a partnership, the Agency will make payment to only one individual for Biorefinery D. In all cases where there are multiple owners, it is the owners' responsibility to determine how the received payment will be split.

Third. Paragraph (d)(3) states that, subject to other provisions of this section, advanced biofuel producers will be paid any sum due subject to the requirements and refund provisions of this subpart.

Fourth. Paragraph (d)(4) states that biorefineries signed up for payments in a fiscal year that either have been in existence less than 12 months prior to that fiscal year or begin production in that fiscal year (*e.g.,* signed up in October 2010 for Fiscal Year 2011 and begin production in Fiscal Year 2011) are eligible only for payment at the base production rate. Such biorefineries become eligible for base and incremental production payments in subsequent fiscal years. This provision, not specifically stated in the Section 9005 NOCP, clarifies how the Agency will make payments to such biorefineries and their producers.

Fifth. Paragraph (d)(5) states that if an advanced biofuel producer transfers any production capacity for one biorefinery to another, such transferred production capacity shall be considered base production for the biorefinery to which the production was transferred. This provision is intended to prevent producers from shifting production from one biorefinery to another and receiving the higher incremental production payment rate at the biorefinery to which the production was transferred. In such situations, there is no actual increase in the quantity of advanced biofuels being produced and thus it would be inconsistent with the Program's goal to apply the incremental production payment rate to such transferred production.

Sixth. A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

The Agency notes that paragraph (d)(5) better states its intent that the corresponding provision in the Section

9005 NOCP, which stated "An advanced biofuel biorefinery's base production cannot be transferred to another advanced biofuel biorefinery." It is not the Agency's intent to prohibit the industry from moving its production capacity between biorefineries, but to address how payments will be made for base production and for incremental production.

Payment Adjustments (§ 4288.132)

Under this section, which is the same as found in the Section 9005 NOCP, the Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment. For example, if the Agency finds that it has underpaid a producer, the Agency will correct the underpayment. The Agency may have underpaid a producer, for example, by making an incorrect conversion that underestimates the BTUs for the quantity of advanced biofuel produced. If, on the other hand, the Agency finds that it has overpaid a producer, the Agency may collect such overpayments from the producer. Such overpayments may have occurred, for example, because the Agency overestimated the BTUs for the quantity of advanced biofuel produced or because the Agency determines, for example, that an advanced biofuel originally identified as being eligible is discovered to have not been eligible for payment. If the Agency determines that overpayments were made as the result of fraud or other intentional misrepresentation by a producer, the Agency may seek penalties against the producer as provided under § 4288.134.

Payment Liability (§ 4288.133)

This section, which is the same as found in the Section 9005 NOCP, states that any payment, or portion thereof, made under this subpart must be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

Refunds and Interest Payments (§ 4288.134)

Under this section, otherwise eligible producers who are found by the Agency to be ineligible may be required to refund payments made to that producer under this Program. If the Agency suspects fraudulent representation through its oversight and monitoring activities under § 4288.105(a), it will be referred to the Office of Inspector General for appropriate action. This section also addresses how interest on such refunds would be handled. With the exception of the addition of a provision concerning payments to producers who win an appeal of an adverse decision, the provisions in this section are the same as found in the Section 9005 NOCP.

Paragraph (a) of this section identifies the situations that would result in an otherwise eligible producer becoming an ineligible producer. These situations are where a producer has:

- Made any fraudulent representation; or
- Misrepresented any material fact affecting a Program determination.

The Agency may determine that an advanced biofuel producer is ineligible for participation in the Program. Such producers may appeal this determination. If the producer wins this appeal (*i.e.,* the producer is eligible for participation in the Program), the Agency will make such appropriate and applicable payments to the producer from any Program funds that remain from the fiscal year in which the original Agency adverse decision was made (§ 4288.134(b)). The Agency points out, however, that there may be no funds or insufficient funds from which to make payment.

Where payments have been made to an entity determined by the Agency to be ineligible, such payments must be refunded to the Agency (§ 4288.134(c)). Such refunds must include interest and any other sums as may become due including, but not necessarily limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

When a refund is due, the entity must pay it promptly. If the refund is not paid promptly, the Agency may use all remedies available to it to collect the refund, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice (§ 4288.134(d)).

Refund payments that are received late will be assessed a late payment interest in accordance with provisions and rates as established by the United States Treasury (§ 4288.134(e)). The interest charged will be established by the United States Treasury and will accrue from the date such payments were made to the date of repayment. The Agency, however, may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

Lastly, paragraph (f) of this section states that any producer or person engaged in an act prohibited by this section and any producer or person receiving payment under this subpart would be jointly and severally liable for any refund due under this subpart and for related charges.

Unauthorized Assistance and Offsets (§ 4288.135)

This section, which is not found in the Section 9005 NOCP, addresses the procedures the Agency will use to collect unauthorized assistance made to advanced biofuel producers (§ 4288.135(a)). To illustrate "unauthorized assistance," consider a producer who manufactures an advanced biofuel made from the blending of 100 percent eligible feedstock. This producer applies for the Program and is determined by the Agency to be eligible to participate. The producer submits an application request and payment is made by the Agency. After payment is made, the Agency conducts a site visit at the producer's biorefinery. During that visit, the Agency finds that the advanced biofuel for which payment was made was being produced from feedstock of which only 5 percent is eligible feedstock. Thus, the payment made is incorrect; it is higher than it should have been and the excess amount paid constitutes "unauthorized assistance."

If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments (§ 4288.135(b)).

As stated in paragraph (a) of this section, the Agency will seek to collect from recipients all unauthorized assistance made under this Program. The basic process the Agency will use is summarized below.

First. When the Agency determines that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. The demand letter will:

- Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;
- State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;
- Provide detailed reason(s) why the assistance was determined to be unauthorized;
- State the amount is immediately due and payable to the Agency;
- Describe the rights the producer has for seeking review or appeal of the

Agency's determination pursuant to 7 CFR part 11;

• Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

• Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

A producer who receives a demand letter can meet with the Agency to discuss the letter and will have the opportunity to provide information to refute the Agency's findings. Because the producer may need additional time to assemble the necessary documentation, the producer may request additional time before this meeting occurs. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

In those instances where such producers cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided the following three conditions are met:

• The producer did not provide false information;

• It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

• Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

Such loans will be at the Treasury interest rate in effect on the date the financial assistance was provided and consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner which will adequately protect the Agency's interest during the repayment period will be taken as security.

Producers who receive a demand letter may file an appeal according to the procedures specified in § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

The Agency will treat any failure by a producer to make payment for unauthorized assistance as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer. A producer who wishes to reach a written agreement to repay the debt as an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the proposed agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, the offset will be taken after 30 days, even when a review is requested. The amount of the debt and interest will be withheld from payment to the debtor, but not applied against the debt until the stay expires. If withheld funds are later determined not to be subject to offset, they will promptly be paid to the debtor without interest. Administrative offsets will be taken against delinquent debtors requesting reviews that are pending final determination by the Review Officer. However, a review and appeal will also include the adequacy of any proposed written repayment agreement.

Remedies (§ 4288.136)

This section, which is different from the provisions found in the Section 9005 NOCP, identifies the steps the Agency will take in instances of misrepresentation or fraud by a producer. Such steps are suspension of payment, contract termination, and debarment from participation in any Federal program.

Succession and Loss of Control of Biorefineries and Production (§ 4288.137)

This section addresses conditions under which transfer of a biorefinery under an Advanced Biofuel Payment Program contract may be transferred from one person to another without a loss of payment (§ 4288.137(a)). Such a transfer of control provision is common to other Rural Business-Cooperative Service programs. This section also addresses the loss of control of a biorefinery (§ 4288.137(b)). Both provisions are the same as found in the Section 9005 NOCP.

An entity who becomes the eligible advanced biofuel producer for a biorefinery under contract under this subpart must first request permission from the Agency to succeed to the Program contract. The Agency may grant this request if the Agency determines that the new entity is an eligible producer and permitting such succession would serve the purposes of the Program. In other words, the new entity must meet the same requirements as the old entity. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

The Agency will make payments only for eligible advanced biofuels produced at a biorefinery that is owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at a biorefinery no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

III. Request for Comments

The Agency is requesting comments on the overall program being proposed. The Agency is especially interested in comments on the following areas:

1. If entities do not sell the advanced biofuel, but use the biofuel for internal purposes, should these entities be entitled to Program payments? If so, how should the on-site usage be verified?

2. Whether the proposed rule is following the intent of the Program.

3. The appropriateness of the proposed payment rates.

4. Should the program allow entities that do not meet the proposed citizenship requirements (§ 4288.110(a)) of at least 51 percent domestic ownership to participate, including those entities owned entirely by immediate family members where only one of the family members meets the

citizenship requirements? Please be sure to provide rationale for your position.

5. Should advanced biofuels produced at biorefineries that are located in non-rural areas be eligible for payments under the Program? Please be sure to provide rationale for your position.

6. As proposed, the applicant eligibility requirement for entities would require the entity to be at least 51 percent owned by persons who are either U.S. citizens or nationals unless the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, then the entity is eligible. The Agency is requesting comment on whether this exception should require more than one member of the immediate family be a U.S. citizen or national and, if so, how many or what percentage. Please be sure to provide rationale for your position.

7. The Agency is considering an approach to offer different payment rates based on the advanced biofuels' lifecycle greenhouse gas (GHG) emissions. This approach would offer a significantly higher payment rate for biofuels that are demonstrated to significantly reduce GHGs emissions relative to the conventional fuels that they replace; biofuels that do not demonstrate significant GHG reductions would receive the lower payment rate. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels and so would qualify for the higher payment rate. The Agency requests comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. Please provide analytical support for comments provided in response to this request.

The Agency is particularly interested in the views of program applicants and interested stakeholders.

Submit comments as indicated in the **DATES** and **ADDRESSES** sections.

List of Subjects in 7 CFR Part 4288

Administrative practice and procedure, Energy—advanced biofuel, Renewable biomass, Reporting and recordkeeping.

For the reasons set forth in the preamble, title 7, Chapter XLII of the code of Federal Regulations, is proposed to be amended by adding part 4288 as follows:

CHAPTER XLII—RURAL BUSINESS–COOPERATIVE SERVICE AND UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4288–PAYMENT PROGRAMS

Subpart A [Reserved]

Subpart B–Advanced Biofuel Payments

Section A—General Provisions

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4288.101 Purpose and scope.
4288.102 Definitions.
4288.103 Review or appeal rights.
4288.104 Compliance with other laws and regulations.
4288.105 Oversight and monitoring.
4288.106 Forms, regulations, and instructions.
4288.107 Exception authority.
4288.108–4288.109 [Reserved]

Section B—Eligibility Provisions

4288.110 Applicant eligibility.
4288.111 Biofuel eligibility.
4288.112 Eligibility notifications.
4288.113 Payment record requirements.
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Section C–Enrollment Provisions

4288.120 Enrollment.
4288.121 Contract.
4288.122—4288.129 [Reserved]

Section D—Payment Provisions

4288.130 Payment applications.
4288.131 Payment provisions.
4288.132 Payment adjustments.
4288.133 Payment liability.
4288.134 Refunds and interest payments.
4288.135 Unauthorized payments and offsets.
4288.136 Remedies.
4288.137 Succession and loss of control of facilities and production.
4288.138–4288.200 [Reserved]

Authority: 5 U.S.C. 301.

Section A–General Provisions

§ 4288.101 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers.

(b) *Scope.* This subpart sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions an advanced biofuel producer must meet to obtain payments under this Program from the United States Department of Agriculture for eligible advanced biofuel production. Additional terms and conditions may be set forth in the Program contract and payment agreement prescribed by the Agency.

§ 4288.102 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

Advanced biofuel. A fuel that is derived from renewable biomass, other than corn kernel starch, to include:

(1) Biofuel derived from cellulose, hemicellulose, or lignin;

(2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or

(7) Other fuel derived from cellulosic biomass.

Advanced biofuel producer. An individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces and sells an advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this Program.

Agency. The Rural Business and Cooperative Service on behalf of the U.S. Department of Agriculture.

Alcohol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, rendered unfit for beverage use, produced at a biorefinery and in a manner approved by ATF for the production of alcohol for fuel; or

(2) As denatured alcohol used by blenders and refiners and rendered unfit for beverage use.

Alcohol producer. An advanced biofuel producer authorized by ATF to produce alcohol.

ATF. The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

Base production. The quantity of eligible advanced biofuels produced at an advanced biofuel biorefinery as determined by the Agency under one of the following paragraphs as applicable.

(1) If the biorefinery has been in existence for 12 months or more prior to the first day of the sign-up period for the

fiscal year for which payment under this Program is sought, the biorefinery's base production for each sign-up fiscal year will be equal to the quantity of eligible advanced biofuel produced at the advanced biofuel biorefinery in the 12 months immediately preceding the first day of the sign-up period.

(2) If the biorefinery has been in existence less than 12 months prior to the first day of the sign-up period for the fiscal year for which payment under this Program is sought or if the biorefinery will begin producing on or after October 1 of the sign-up fiscal year, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity projected to be produced by the biorefinery's producer as reported in the enrollment application.

Biodiesel. A mono alkyl ester, manufactured in the United States and its territories, that meets the requirements of the appropriate ASTM International standard.

Biofuel. Fuel derived from renewable biomass.

Biorefinery. A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

Certificate of analysis. A document approved by the Agency that certifies the quality and purity of the advanced biofuel being produced. The document must be from a qualified, independent third party.

Contract. An Agency-approved form, signed by the eligible advanced biofuel producer and the Agency, that defines the terms and conditions for participating in and receiving payment under this Program.

Eligible advanced biofuel producer. A producer of advanced biofuels that meets all requirements of § 4288.110 of this subpart.

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

Eligible renewable energy content. That portion of an advanced biofuel's energy content derived from eligible renewable biomass feedstock. The energy content from any portion of the biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-eligible renewable biomass feedstock (*e.g.,* corn kernel starch) is not eligible for payment under this Program.

Enrollment application. An Agency-approved form submitted by advanced biofuel producers for participation in this Program.

Ethanol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either

(1) For fuel use, and which has been rendered unfit for beverage use and produced at a biorefinery approved by the ATF for the production of ethanol for fuel, or

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

Ethanol producer. An advanced biofuel producer authorized by ATF to produce ethanol.

Flared gas. The burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when the operator cannot transport the gas to market or convert to electricity and cannot use the gas for any other purpose.

Fiscal Year (FY). A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

Immediate family. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

Incremental production. The quantity of eligible advanced biofuel produced at an advanced biofuel biorefinery that is in excess of that biorefinery's base production, except for advanced biofuel biorefineries that either have been in existence less than 12 months prior to October 1 of the sign-up fiscal year or begin producing eligible advanced biofuels on or after October 1 of the sign-up fiscal year. For such biorefineries, all production in the sign-up fiscal year will be considered base production.

Larger producer means an eligible advanced biofuel producer with a refining capacity exceeding 150,000,000 gallons of advanced biofuel per year from all of the advanced biofuel facilities in which the producer has 50% or more ownership.

Payment application. An Agency-approved form submitted by an eligible advance producer to the Agency in order to receive payment under this Program.

Quarter. The Federal fiscal time period for any fiscal year as follows:

(1) 1st Quarter: October 1 through December 31;

(2) 2nd Quarter: January 1 through March 31;

(3) 3rd Quarter: April 1 through June 30; and

(4) 4th Quarter: July 1 through September 30.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Sign-up period. The time period during which the Agency will accept enrollment applications.

Smaller producer. An eligible advanced biofuel producer with a refining capacity of 150,000,000 gallons or less of advanced biofuel per year from all of the advanced biofuel facilities in which the producer has 50% or more ownership.

State. Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

USDA. The United States Department of Agriculture.

§ 4288.103 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

§ 4288.104 Compliance with other laws and regulations.

(a) Advanced biofuel producers must comply with other applicable Federal,

State, and local laws, including, but not limited to, the Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, the American with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

(b) Producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. Rural Development will not discriminate against an applicant on the bases of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

§ 4288.105 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment applications and subsequent payments made under this subpart, as frequently as necessary, to ensure the integrity of the Program. The Agency will conduct site visits as necessary.

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

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records to ensure that each certificate of analysis has been issued by a qualified, independent third party.

(b) *Records.* For the purpose of verifying compliance with the requirements of this subpart, each eligible advanced biofuel producer shall make available at one place at a reasonable time for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of such advanced biofuel producer for not less than three years from each Program payment date.

§ 4288.106 Forms, regulations, and instructions.

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

§ 4288.107 Exception authority.

The Administrator may, on a case-by-case basis, make an exception to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the USDA's interest.

§ 4288.108–4288.109 [Reserved]

Section B—Eligibility Provisions

§ 4288.110 Applicant eligibility.

Section B represents the requirements associated with advanced biofuel producer eligibility, biofuel eligibility, eligibility notifications, and payment record requirements. To be eligible for this Program, the applicant must meet the requirements specified in paragraph (a) of this section and must provide additional information as may be requested by the Agency under paragraph (b) of this section. Public bodies and educational institutions are not eligible for this Program.

(a) *Eligible producer.* The applicant must be an advanced biofuel producer, as defined in § 4288.102, and must meet one of the following citizenship requirements:

(1) If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, as defined in paragraph (b)(2)(i) of this section, then the entity is eligible.

(3) If the applicant is a subsidiary, the parent entity or the entities that have an ownership in that applicant must also be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

(b) *Eligibility determination.* The Agency will determine an applicant's eligibility for participation in this Program. If an applicant's original submittal is not sufficient to verify an applicant's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the applicant's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the Agency will not consider the applicant any further for participation in the upcoming fiscal year. Such applicants may elect to enroll during the next sign-up period.

(c) *Ineligibility determination.* An otherwise eligible producer will be determined to be ineligible if the producer:

(1) Refuses to allow the Agency to verify any information provided by the advanced biofuel producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;

(2) Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or

(3) Fails to comply with all applicable Federal, State, or local laws.

§ 4288.111 Biofuel eligibility.

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

(a) *Eligible advanced biofuel.* The biofuel must:

(1) Meet the definition of advanced biofuel;

(2) Be a solid, liquid, or gaseous advanced biofuel;

(3) Be a final product; and

(4) If the biofuel is used on-site, there must be an Agency-approved system to verify the quantity of biofuel used on-site.

(b) *Eligibility determination.* The Agency will determine a biofuel's eligibility for payment under this Program. If an applicant's original submittal is not sufficient to verify a biofuel's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the biofuel's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment under this Program in the upcoming fiscal year. Applicants may elect to include such biofuels in the application form submitted during the next sign-up period.

§ 4288.112 Eligibility notifications.

(a) *Applicant eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

(b) *Ineligibility notifications.* If an applicant or a biofuel is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to the reason(s) the applicant or biofuel was determined to be ineligible. Such applicant will have appeal rights as specified in this subpart.

(c) *Subsequent ineligibility determinations.* If at any time a producer or an advanced biofuel is determined to be ineligible, the Agency will notify the producer in writing of its determination.

§ 4288.113 Payment record requirements.

To be eligible for Program payments, an advanced biofuel producer must maintain records for all relevant FY's and FY quarters for each advanced biofuel biorefinery indicating:

(a) The type and quantity of eligible renewable biomass used in the production of advanced biofuel;

(b) The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel biorefinery;

(c) The quantity of eligible renewable biomass used at each advanced biofuel biorefinery to produce the advanced biofuel; and

(d) All other records required to establish Program eligibility and compliance.

§§ 4288.114–4288.119 [Reserved]

Section C—Enrollment Provisions

§ 4288.120 Enrollment.

In order to participate in the Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling in the Program is presented in this section. Advanced biofuel producers who expect to produce eligible advanced biofuels at any time during a fiscal year must enroll in the Program as described in this section.

(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. An original, signed hard copy of the enrollment application must be submitted as specified in the annual **Federal Register** notice for this program. All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number.

(1) Eligible advanced biofuel producers must submit enrollment applications during each sign-up period in order to continue participating in this Program. If a participating producer fails to submit the enrollment application during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year. Such a producer must reapply, and sign a new contract, to participate in the Program for future fiscal years.

(2) Eligible advanced biofuel producers may submit an enrollment application during a fiscal year's sign-up period even if the advanced biofuel biorefinery is scheduled to start producing advanced biofuel in that fiscal year.

(3) The producer must furnish the Agency all required certifications before acceptance into the Program, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with Program provisions. The required certifications depend on the type of biofuel produced. Certifications specified in paragraphs (a)(1)(i) through (iv) of this section are to be completed and provided by an accredited independent, third-party.

(i) *Alcohol.* For alcohol producers with authority from ATF to produce alcohol, copies of either

(A) The Alcohol Fuel Producers Permit (TTBF F 5110.74) or

(B) The registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).

(ii) *Hydrous ethanol.* For hydrous ethanol that is upgraded by another distiller to anhydrous ethyl alcohol, the increased ethanol production is eligible for payment one time only. If the advanced biofuel producer entering into this agreement is:

(A) The hydrous ethanol producer, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(*i*) Applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(*ii*) Distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.

(B) The distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.

(iii) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass.* For these fuels, the advanced biofuel producer shall self-certify that the producer, the advanced biofuel biorefinery, and the biofuel meet the definitions of these terms as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act and under the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and the quality requirements per applicable ASTM International standards (*e.g.,* ASTM D6751) and commercially acceptable quality standards of the local market. The advanced biofuel producer shall also provide the Renewable Identification Number (RIN) for each advanced biofuel and BQ–9000 certification.

(iv) *Gaseous advanced biofuel.* For gaseous advanced biofuel producers, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine

the quantity of advanced biofuel produced are industry standard and properly calibrated by a third party professional; and that the readings have been taken by a qualified individual.

(v) *Woody biomass feedstock.* Document that any and all woody biomass feedstock cannot be used as a higher value wood-based product.

(4) *Supporting documentation.* Each participating advanced biofuel producer that is projecting an increase in production from the previous fiscal year and each new applicant must submit documentation to support the production estimates reported in the enrollment application. Such documentation includes, but is not limited to:

(i) Historical production data;

(ii) Production capacity of the biorefinery; and

(iii) Evidence of ability to distribute final product, including distribution networks and contracts for purchase of final product.

(5) *Additional forms.* Applicants must submit the forms specified in this paragraph with the enrollment application when applying for participation under this subpart and as needed when re-enrolling in the program.

(i) RD Instruction 1940–Q, Exhibit A–1, "Certification for Contracts, Grants and Loans".

(ii) SF–LLL, "Disclosure of Lobbying Activities".

(iii) RD 400–4, "Assurance Agreement".

(b) *Sign-up period.* The sign-up period is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice.

§ 4288.121 Contract.

Advanced biofuel producers determined to be eligible to receive payments must then enter into a contract with the Agency in order to participate in this Program.

(a) *Contract.* The Agency will forward the contract to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

(b) *Length of contract.* Once signed, a contract will remain in effect through the end of the contract period unless terminated as specified in paragraph (c) of this section.

(c) *Contract review.* All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

(d) *Contract termination.* Contracts under this Program will be terminated in writing by the Agency. Contracts may be terminated under any one of the following conditions:

(1) At the mutual agreement of the parties;

(2) In accordance with applicable Program notices and regulations;

(3) The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;

(4) The advanced biofuel producer fails to submit the enrollment application during a sign-up period;

(5) The Program is discontinued or not funded;

(6) All of a participating advanced biofuel producer's advanced biofuel biorefineries no longer exist or no longer produce any eligible advanced biofuel; or

(7) The Agency determines that the advanced biofuel producer is ineligible for participation.

§§ 4288.122–4288.129 [Reserved]

Section D—Payment Provisions

§ 4288.130 Payment applications.

Section D identifies the process and procedures the Agency will use to make payments to eligible advanced biofuel producers. In order to receive payments under this Program, eligible advanced biofuel producers with valid contracts must submit a payment application, as required under paragraph (a) of this section. The Agency will review the payment application and, if necessary, may request additional information, as specified under paragraph (b) of this section.

(a) *Applying for payment.* To apply for payments under this subpart during a fiscal year, an eligible advanced biofuel producer must:

(1) After a quarter has been completed, submit a payment application covering one or more quarters;

(2) Certify that the request is accurate;

(3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and

(4) Provide documentation as requested by the Agency of the net production of advanced biofuel at all advanced biofuel biorefineries during the relevant quarters.

(b) *Review of payment applications.* The Agency will review each payment application it receives to determine if it is eligible for payment.

(1) *Review factors.* Factors that the Agency will consider in reviewing payments applications include, but are not necessarily limited to:

(i) *Contract validity.* Whether the entity submitting the payment application has a valid contract with the Agency under this Program;

(ii) *Biofuel eligibility.* Whether the biofuel for which payment is sought is an eligible advance biofuel; and

(iii) *Calculations.* Whether the calculations for determining the requested payment are complete and accurate.

(2) *Additional documentation.* If the Agency determines additional information is required for the Agency to complete its review of a payment application, eligible advanced biofuel producers shall submit such additional supporting documentation as requested by the Agency. If the producer does not provide the requested information within the required time period, the Agency will not make payment.

(c) *Payment application eligibility.* The Agency will notify the advanced biofuel producer, in writing, as soon as practicable after the payment application, whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment and the basis for the Agency's determination of ineligibility.

(d) *Submittal information.* Eligible advanced biofuel producers must submit payment applications as specified in the annual **Federal Register** notice for this program no later than 4:30 p.m. on the last day of the calendar month following the quarter for which payment is being requested. Neither complete or incomplete applications received after this date and time will be considered, regardless of the postmark on the application.

(1) Any payment application form that is received by the Agency after October 31 of the calendar year for the preceding fiscal year is ineligible for payment.

(2) If the actual deadline falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

§ 4288.131 Payment provisions.

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

(a) *Determination of payment rate.* Each fiscal year, the Agency will establish payment rates for both base and incremental production of eligible advanced biofuels for both smaller producers and larger producers using the procedures specified in paragraphs (a)(1) through (5) of this section. These rates will be applied to the actual quantity of eligible advanced biofuel produced when making payments to

eligible advanced biofuel producers, as described below.

(1) Based on the information provided in each eligible enrollment application, the Agency will determine base and incremental eligible advanced biofuel production for both smaller producers and larger producers. If the Agency determines that the amount of advanced biofuel production reported in an enrollment application is not supported by the documentation submitted with the enrollment application, the Agency may reduce the production estimates reported in the enrollment application.

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

(3) For each combination of production type (base, incremental) and producer size (smaller, larger—over 150 million equivalent gallons of production), the Agency will convert the base and incremental production determined to be eligible under paragraph (a)(1) into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate, that it publishes in the **Federal Register**, until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(4) For each fiscal year, the Agency will determine the amount of Program funds available to smaller Producers and to larger producers in the fiscal year.

(5) For each fiscal year, the Agency will determine the base production and incremental production payment rates ($/BTU) for smaller producers and for larger producers. For both smaller producers and larger producers, the incremental production payment rate will be 5 times higher than their respective base production rate, unless otherwise specified in a notice published in the **Federal Register**. These rates will be calculated such that all of the funds allocated will be distributed in the fiscal year.

(b) *Fiscal year payment.* Using the payment rates and the base and incremental production determined under paragraph (a) of this section for each advanced biofuel biorefinery, the Agency will calculate each fiscal year an expected payment for each eligible advanced biofuel producer for that fiscal year using Equation 2 (*see* below). Each fiscal year, the Agency will notify each advanced biofuel producer, in writing, of the expected payment to be made to the producer for that fiscal year.

$$EP_{FY} = (BPPR \times BP) + (IPPR \times IP) \qquad \text{(Eq. 2)}$$

Where:

EP_{FY} = expected payment for the fiscal year
BPPR = base production payment rate, $/BTU
BP = projected eligible base production, BTUs
IPPR = incremental production payment rate, $/BTU
IP = projected eligible incremental production, BTUs

(c) *Payment amount.* Each eligible advanced biofuel producer will be paid for the actual amount of BTUs produced in a quarter from advanced biofuels identified in the enrollment applications for that fiscal year and that have been determined by the Agency as being eligible for payment. The Agency will not pay a producer more than the expected payment established under paragraph (b) for that fiscal year.

(d) *Other payment provisions.* The following provisions apply.

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

(2) Payment will be made to only one eligible advanced biofuel producer per advanced biofuel biorefinery.

(3) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due subject to the requirements and refund provisions of this subpart.

(4) Biorefineries that are signed up for payments in a fiscal year and that either have been in existence less than 12 months prior to that fiscal year or begin production in that fiscal year (*e.g.,* signed up in October 2010 for Fiscal Year 2011 and begin production in Fiscal Year 2011) are eligible only for payment at the base production rate. Such biorefineries become eligible for base and incremental production payments in subsequent fiscal years.

(5) If an advanced biofuel producer transfers any production capacity for one biorefinery to another, such transferred production capacity shall be considered base production for the biorefinery to which the production was transferred.

(6) A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

§ 4288.132 Payment adjustments.

The Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

§ 4288.133 Payment liability.

Any payment, or portion thereof, made under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

§ 4288.134 Refunds and interest payments.

An eligible advanced biofuel producer who receives payments under this subpart may be required to refund such payments as specified in this section. If the Agency suspects fraudulent representation through its site visits and records inspections under § 4288.105(b), it will be referred to the Office of Inspector General for appropriate action.

(a) An eligible advanced biofuel producer receiving payments under this subpart shall become ineligible if the Agency determines the advanced biofuel producer has:

(1) Made any fraudulent representation; or

(2) Misrepresented any material fact affecting a Program determination.

(b) If an Agency determination that a producer is not eligible for participation under this subpart is appealed and overturned, the Agency will make appropriate and applicable payments to the producer from Program funds, to the extent such funds are available, that remain from the fiscal year in which the original adverse Agency decision was made.

(c) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

(d) When a refund is due, it shall be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice.

(e) Late payment interest shall be assessed on each refund in accordance with the provisions and rates as established by the United States Treasury.

(1) Interest charged by the Agency under this subpart shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made to the date of repayment.

(2) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

(f) Any advanced biofuel producer or person engaged in an act prohibited by this section and any advanced biofuel producer or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this subpart and for related charges.

§ 4288.135 Unauthorized assistance and offsets.

When unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency reserves the right to collect from the recipient the sum that is determined to be unauthorized. If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments.

(a) *Unauthorized assistance.* The Agency will seek to collect from recipients all unauthorized assistance made under this Program using the procedures specified in paragraphs (a)(1) through (4) of this section.

(1) *Notification to the producer.* Upon determination that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. Unless the Agency modifies the original demand, it will remain in full force and effect. The demand letter will:

(i) Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;

(ii) State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;

(iii) Provide detailed reason(s) why the assistance was determined to be unauthorized;

(iv) State the amount is immediately due and payable to the Agency;

(v) Describe the rights the producer has for seeking review or appeal of the Agency's determination pursuant to 7 CFR part 11;

(vi) Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

(vii) Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

(A) If the producer meets with the Agency, the producer will be given an opportunity to provide information to refute the Agency's findings.

(B) When requested by the producer, the Agency may grant additional time for the producer to assemble documentation. Such extension of time for payment will be valid only if the Agency documents the extension in writing and specifies the period in days during which period the payment obligation created by the demand letter (but not the ongoing accrual of interest) will be suspended. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

(2) *Payment in full.* If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

(3) *Promissory note.* If the producer agrees with the Agency's determination or is willing to pay the amount in question, but cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided all of the conditions specified in paragraphs (a)(3)(i) through (iii) of this section are met. Loans established under this paragraph will be at the Treasury interest rate in effect on the date the financial assistance was provided and that is consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner that will adequately protect the Agency's interest during the repayment period will be taken as security.

(i) The producer did not provide false information;

(ii) It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

(iii) Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

(4) *Appeals.* Appeals resulting from the demand letter prescribed in paragraph (a)(1) of this section will be handled according to the provisions § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

(b) *Offsets.* Failure to make payment as determined under paragraph (a) of this section will be treated by the Agency as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer.

(1) Any debtor who wishes to reach a written agreement to repay the debt as

an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

(2) When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the proposed agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, the offset will be taken after 30 days, even when a review is requested. The amount of the debt and interest will be withheld from payment to the debtor, but not applied against the debt until the stay expires. If withheld funds are later determined not to be subject to offset, they will promptly be paid to the debtor without interest. Administrative offsets will be taken against delinquent debtors requesting reviews that are pending final determination by the Review Officer. However, a review and appeal will also include the adequacy of any proposed written repayment agreement.

§ 4288.136 Remedies.

If the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance to 7 CFR part 3017, Government-wide Debarment and Suspension:

(a) Suspend payments on the Contract until the violation has been reconciled;

(b) Terminate the Contract; or

(c) Debarment to participate in any Federal Government program.

§ 4288.137 Succession and loss of control of biorefineries and production.

(a) *Contract succession.* An entity who becomes the eligible advanced biofuel producer for a biorefinery that is under contract under this subpart must request permission from the Agency to succeed to the Program contract and the Agency may grant such request if it is determined that the entity is an eligible producer and permitting such succession would serve the purposes of the Program. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

(b) *Loss of control.* Payments will be made only for eligible advanced biofuels produced at a biorefinery owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at a biorefinery no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

§§ 4288.138–4288.200 [Reserved]

Dated: April 5, 2010.

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

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