

## DEPARTMENT OF AGRICULTURE

## Commodity Credit Corporation

## 7 CFR Part 1485

## Agreements for the Development of Foreign Markets for Agricultural Commodities

AGENCY: Commodity Credit Corporation (CCC).

ACTION: Final rule.

**SUMMARY:** This final rule adopts the substantive provisions of the Interim Rules published August 16, 1991, (56 FR 40747) and November 17, 1993, (58 FR 60550) regarding implementation of the Market Promotion Program with changes to reflect public comments and recent legislative changes to the authorizing statute. The interim rule was also edited to present a more logical and understandable regulation.

**EFFECTIVE DATE:** February 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Sharon L. McClure, Director, Marketing Operations Staff, Foreign Agricultural Service, United States Department of Agriculture, 14th and Independence Avenue, SW., Washington, DC, 20250-1042. Telephone: (202) 720-5521. The Final Regulatory Impact Analysis concerning this rule is available on request from the Director, Marketing Operations Staff, Foreign Agricultural Service, United States Department of Agriculture, 14th and Independence Avenue, SW., Washington, DC, 20250-1000. Telephone: (202) 720-5521. The United States Department of Agriculture (USDA) prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs and marital or familial status. Persons with disabilities who require alternative means for communication of program information (braille, large print, audiotape, etc.) should contact the USDA Office of Communications at (202) 720-5881 (voice) or (202) 720-7808 (TDD).

**SUPPLEMENTARY INFORMATION:** This rule is issued in conformance with Executive Order 12866. Based on information compiled by USDA it has been determined that this rule is "economically significant" and has been reviewed by the Office of Management and Budget.

This final rule amends the existing information collection as approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), under OMB control numbers 0563-0001, 0563-0003, and 0563-0029.

Due to the time constraints of implementing the rule immediately, the agency has requested emergency clearance of this addendum from OMB. Comments on the information collection may be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, room 10202, NEOB, Washington, DC 20503.

Attention: Desk Officer for USDA.

It has been determined that the Regulatory Flexibility Act is not applicable to the final rule since CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of rulemaking with respect to the subject matter of this rule.

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

This rule has been reviewed under the Executive Order 12778, Civil Justice Reform. The rule would have preemptive effect with respect to any state or local laws, regulations, or policies which conflict with such provisions or which otherwise impede their full implementation. The rule would not have retroactive effect. The rule requires that certain administrative remedies be exhausted before suit may be filed.

The Department of Agriculture is committed to carrying out its statutory and regulatory mandates in a manner that best serves the public interest. Therefore, where legal discretion permits, the Department actively seeks to promulgate regulations that promote economic growth, create jobs, are minimally burdensome and are easy for the public to understand, use or comply with. In short, the Department is committed to issuing regulations that maximize net benefits to society and minimize costs imposed by those regulations.

#### Background

Section 203 of the Agricultural Trade Act of 1978, as amended, directs the CCC to carry out a program to encourage the development, maintenance and expansion of commercial export markets for agricultural commodities through cost-share assistance to eligible trade organizations. Such assistance may be provided in the form of CCC funds or CCC owned commodities.

Since the inception of the MPP, CCC has monitored the program closely, strengthened program controls and implemented changes to improve the effectiveness of the program. In administering the program, CCC is

committed to ensuring efficient and effective use of public funds. In this regard, CCC considers an applicant's need for Federal financial assistance, an applicant's use of rigorous performance measurements in its plans, and increasing contribution levels from participants as important factors in the overall management of the MPP.

#### Summary and Analysis of General Comments

On August 16, 1991 (56 FR 40747), and November 17, 1993 (58 FR 60550), interim rules were published governing the operations of the Market Promotion Program authorized by Section 203 of the Agricultural Trade Act of 1978, as amended by Section 1531 of the Food, Agriculture, Conservation, and Trade Act of 1990 (Pub. L. 101-624) and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66).

Following is a summary of the comments which specifically address the provisions of the interim rules and CCC's responses to these comments. The discussion addresses each interim rule separately and, therefore, may not follow the sequence of the interim rules. General comments relating to the value and success of the program, editorial suggestions, and non-substantive comments have been omitted.

CCC received 46 letters containing nearly 200 comments from nonprofit U.S. trade associations, U.S. companies, state organizations, regional trade associations, cooperatives and consulting firms in response to the interim rule published on August 16, 1991 (56 FR 40747).

#### Definitions

CCC received 42 comments on this section.

*Comment:* Revise the definition of "foreign third party" to include individuals.

*Response:* CCC agrees with the commenter and has expanded the definition to encompass "foreign entity", thereby including individuals.

*Comment:* Include a definition for "foreign third party contribution".

*Response:* CCC defined "contribution" in § 1485.11(i) to refer to costs incurred in support of an approved activity. The rule contains detailed provisions as to the expenditures that may be counted as contributions.

*Comment:* Define the term "allowances" as used in § 1485.20(b).

*Response:* The term "allowances" refers to the cost of housing and educational tuition and cost of living adjustments. Further clarification is provided in § 1485.16(c).

*Comment:* Clarify the term "fiscal year".

*Response:* CCC deleted all references to the term "fiscal year" in the final rule since it had no significant bearing on the administrative operations of the program.

*Comment:* Revise the definition of "trade servicing" to include processors.

*Response:* CCC did not intend to exclude activities directed at processors. Therefore, CCC deleted the definition of "trade servicing" in favor of its ordinary and customary meaning.

*Comment:* CCC's definitions for "brand product or brand commodity" and "brand promotion" restrict or prevent the use of brand names in worthwhile promotional activities. Furthermore, the definitions do not account for the way in which high value products are marketed. These definitions should be amended so that if all brands within an industry sector are included on an advertising copy, then it would be considered a generic promotion.

*Response:* CCC recognizes the merit of this suggestion and amended the definition of "brand promotion" in § 1485.11(g).

*Comment:* Print or media advertising containing the name of a retail outlet should be considered a generic promotion rather than a brand promotion since a retailer's name is not a private label.

*Response:* CCC adopted the concept that print or media advertising containing the name of a retail outlet is a generic promotion rather than a brand promotion.

*Comment:* Include "private label products" in the definition of "brand promotion."

*Response:* The revised definition of brand promotion would encompass promotion of private label products.

*Comment:* Clarify the difference between the terms "U.S. commercial entity" and "U.S. entity".

*Response:* CCC deleted all references to the term "U.S. entity" in the final rule. The term "U.S. commercial entity" is defined at § 1485.11(ff).

*Comment:* Clarify the term "incurred expense". A strict interpretation of this term could pose serious problems for non-refundable deposits. For example, an MPP participant makes a non-refundable deposit in October for an advertisement which will air in January. Is the expense "incurred" on the date the space is reserved and a deposit is made (October) or on the date the advertisement actually airs (January)?

*Response:* CCC defines "incurred" as the date a participant or third party transfers funds to pay for an

expenditure. In this example, the expense is incurred when the deposit is made.

*Comment:* Define the terms "market" and "functions".

*Response:* The term "market" is defined as "a country" in the final rule. CCC also deleted all references to the term "functions".

*Comment:* Define the term "sales expenses".

*Response:* CCC did not define the term "sales expenses" since it has an ordinary and customary meaning. The term "sales expenditures" appears in § 1485.13(c)(3)(x) and § 1485.16(d)(6).

*Comment:* Define the term "permanent display". On what basis is something determined to be "permanent"—time used, material used, level of use?

*Response:* The term "permanent" as used in § 1485.16(d)(7) means enduring or lasting beyond one activity plan year.

*Comment:* Expand the definition of "agricultural commodity or commodity" to include high value items such as beverages, pet foods, vitamin and mineral supplements, flowers, ornamental plants, seeds, and mineral water.

*Response:* CCC revised the definition of "agricultural commodity" at § 1485.11(d) to match the statutory definition applicable to the MPP. This definition includes "products" thereby covering many of the items listed by the commenter. Mineral water, however, does not fall within this statutory definition.

CCC added definitions for "eligible commodity", "exported commodity" and "promoted commodity" in § 1485.11(o), § 1485.11(p) and § 1485.11(x), respectively, because a description of each of these is required for each application. This information is necessary for determining appropriate reimbursement rates and for evaluating MPP and EIP/MPP proposals.

#### *Slotting Fees and Display Space Rental Fees*

CCC received 14 comments on this issue.

*Comment:* The interim rule should clearly distinguish between slotting fees and display space rental fees since they are not one and the same. Slotting fees—the cost of getting a new product into the warehouse or obtaining shelf space in the store—should not be reimbursable under the MPP. Display space fees, on the other hand, are promotional expenses associated with using store space for end-aisle displays, case stack displays, demonstrations, etc., and should be eligible for reimbursement. Temporary off-shelf

display space is one of the most effective promotional tools available because it stimulates impulse purchases and provides high in-store visibility.

*Response:* CCC agrees with the commenters that display space fees are appropriate promotional expenditures. Therefore, CCC amended the final rule to allow participants to seek reimbursement for display space fees. Slotting fees, however, are not eligible for reimbursement.

#### *Contributions*

CCC received ten comments on this issue.

*Comment:* What is meant by the phrase "to be eligible as a participant's contribution, an expense must be directly incurred by the MPP participant. . ."? For example, can contributions made by regional or product associations which are members of an MPP participant count as a participant contribution?

*Response:* Expenses incurred and time spent by employees of state departments of agriculture involved in the design and execution of the MPP should be considered eligible participant contributions.

*Comment:* An MPP participant may count, as part of its participant contribution, time and expenses incurred by member organizations provided the costs incurred are for the overall administration or management of the participant's entire MPP.

*Response:* CCC should not require MPP participants to enter into written agreements with foreign third parties in order to count the expenses incurred as contributions. When pressed on the issue of entering into written agreements, foreign third parties often withdraw their support and participation in promotional activities.

*Comment:* A participant is no longer required to enter into a written agreement with a third party if the expenses incurred by the third party are claimed solely as contributions.

However, to the extent that the U.S. industry or a foreign third party participates in an activity, the expenses incurred by the contributing party must be documented and available for audit. The final rule is adopted in this regard.

*Response:* Expenses incurred by target audiences should be considered eligible contributions. Their willingness to bear costs such as travel expenses and registration fees indicates a strong support for a participant's program.

*Response:* CCC agrees with the commenter and considers costs incurred by a target audience, other than any portion of salary or compensation, as

eligible contributions. This change is reflected in § 1485.13(c)(3)(ii).

*Comment:* Sections 1485.16(a)(7) and (8) of the interim rule should be revised to permit expenditures that are incurred prior to CCC's approval of the activity plan to be eligible contributions.

*Response:* The MPP is a cost-share program designed to develop, maintain and expand commercial export markets for U.S. agricultural commodities. Allowing unauthorized expenditures to be claimed as contributions would eliminate this basic principle of the MPP.

*Comment:* Why does CCC consider all expenditures on brand promotions to be ineligible contributions? In some cases the contributions made by brand participants are considerably higher than the minimum 50 percent and such contributions are essential for achieving overall goals in the target markets.

*Response:* It is not necessary to consider contributions in connection with brand promotion activities since CCC reimburses these activities on a set cost-share basis. However, expenditures incurred by an MPP participant in administering its brand program are eligible contributions. This point is clarified in § 1485.13(c)(3)(i).

#### *Brand Promotion Program Operations*

CCC received 22 comments on this issue.

*Comment:* CCC should not require an applicant to provide plans and budgets for its brand program as part of the application. This requirement is both excessive and redundant since the same information is provided in the activity plan.

*Response:* CCC allocates MPP resources on the basis of several specific criteria, one of which is the adequacy of the applicant's proposed strategic plan. In order to make this determination, CCC evaluates the applicant's proposed program in its entirety which includes plans for both generic and brand promotion activities and corresponding budgets. CCC also establishes budget ceilings (maximum funding levels) by country and program type—generic versus brand—based on the strategic plan. Accordingly, this aspect of the interim rule is adopted.

*Comment:* CCC should not require an MPP participant to reannounce the availability of unexpended brand promotion funds nor should redistribution of such funds require prior CCC approval. These requirements are inefficient, time-consuming and counterproductive since in many cases brand participants are funded at lower than justified levels due to budgetary constraints.

*Response:* CCC agrees with much of this comment. An MPP participant is no longer required to reannounce the availability of unexpended brand promotion funds. However, redistribution of brand promotion funds must be made in accordance with the MPP participant's approved budget ceilings and activity plans. If, for example, a redistribution of brand promotion funds will increase a country budget ceiling or add a new brand participant to the activity plan, then the MPP participant must submit an activity plan amendment request (APAR) to CCC for approval prior to redistribution. CCC omitted the substance of § 1485.14(e)(5) from the final rule.

*Comment:* CCC should allow advance payments under EIP/MPP agreements and MPP brand promotion programs. Advertising agencies and suppliers working on brand promotions should not have to wait longer for payment than similar organizations working on generic promotions. Furthermore, advance billing and payment is standard practice in the broadcast and print media business. Advances allow participants to negotiate lower rates and ensure better positioning and placement of advertising in the media.

*Response:* CCC expects brand participants to have sufficient working capital to cover the total cost of promotional activities since they are expected to directly profit from such activities.

*Comment:* EIP/MPP participants and brand participants should only be required to maintain receipts for expenditures on brand promotions which exceed \$25.00, as is the case with generic promotions.

*Response:* CCC adopted the suggestion to only require receipts for program related expenditures, other than STRE, which exceed \$25.00. This change is reflected in § 1485.20(a)(3)(i) and (ii).

*Comment:* New brand participants should not be limited to a maximum reimbursement rate of 50 percent when former participants in the Targeted Export Assistance program are eligible to receive reimbursement rates that exceed 50 percent. This rule precludes funds from being distributed equitably throughout the agricultural sector. It also violates the Robinson-Patman and Clayton Antitrust acts because it restrains trade by providing an advantage to one company over another.

*Response:* This provision is specifically mandated by Congress in section 203(g)(2) and (3) of the Agricultural Trade Act of 1978, as amended by section 1531 of the Food, Agriculture, Conservation, and Trade

(FACT) Act of 1990. New participants are only eligible for a higher reimbursement rate if, as described in § 1485.16(g)(1) and (2), there has been an affirmative action by the U.S. Trade Representative under section 301 of the Trade Act of 1974 with respect to the unfair trade practice cited and U.S. market share of the agricultural commodity concerned has decreased. In such case, CCC shall determine the appropriate rate of reimbursement.

*Comment:* Are fees charged by a contracted firm eligible expenditures under the MPP brand promotion program? For example, "a contracted firm, either domestic or international, is hired by a MPP brand participant. The contracted firm is hired to make and manage all arrangements for the company's participation in a trade show—order the booth space, rent the tables and A-V equipment, hire the booth attendants —\* \* \* The contracted firm charges a fee for their [sic] services to coordinate the details for the company's participation in the trade show."

*Response:* CCC will reimburse an MPP participant or EIP/MPP participant for fees charged by a contractor to implement a brand promotion activity. This point is clarified in § 1485.16(b)(9).

*Comment:* Why are MPP participants required to announce the availability of the MPP to U.S. commercial entities when the participant chooses to conduct brand promotions solely with foreign firms? CCC should establish different procedures for administering brand programs with U.S. and foreign commercial entities.

*Response:* It appears that § 1485.14(e)(3) of the interim rule has been misinterpreted by the commenter. An MPP participant may request approval to conduct brand promotion activities with either U.S. commercial entities or foreign firms or both. If an MPP participant requests approval to conduct brand promotion activities exclusively with foreign firms, then the MPP participant is not required to announce the program to U.S. commercial entities. CCC is unable to respond to the second comment concerning different procedures for administering brand programs with U.S. commercial entities and foreign firms since the commenter failed to indicate why or how this should be done.

#### **U.S. Origin Identification**

CCC received two similar comments on this issue.

*Comment:* CCC should waive the requirement that "all product labels, promotional material and advertising identify the origin of the agricultural

commodity or products\* \* \* in those instances where U.S. identification would adversely affect the marketability or acceptability of a promotional campaign.

*Response:* The goal of the MPP is to increase U.S. agricultural exports and establish a reputation for the U.S. as a supplier of quality products. The origin identification helps to distinguish U.S. products from other competing foreign products. CCC recognizes the commenters' concern that in some countries the "U.S.A." origin identification may hinder a participant's promotional efforts. Therefore, a participant may request an exemption to the "U.S.A." labelling requirement. The Deputy Administrator will determine, on a case by case basis, whether sufficient justification exists to grant such an exemption. CCC also recognizes that one could interpret the phrase in the interim rule, "the origin of the agricultural \* \* \* products", as the place where a product is processed, packaged or manufactured. This, however, does not emphasize the source of the commodities and, therefore, necessarily further the market development goals of the MPP. CCC clarified this issue in § 1485.23(e)(6) and (f) of the final rule by: 1) Listing those specific terms which are acceptable for U.S. origin identification; 2) allowing other U.S. regional designations if approved in advance by CCC; and 3) adopting a size standard for such origin identification.

#### *Consumer-oriented Shows and Advertising*

CCC received 10 similar comments on this issue.

*Comment:* CCC should reimburse participants for promotional costs associated with consumer shows. Consumer shows are an extremely cost-effective means for reaching a target audience and offer the best opportunity to reach the greatest number of people in a short amount of time with a low per person cost. Consumer shows are also particularly important for introducing new products into a market because they help build brand awareness. Limiting reimbursement to trade-only shows fails to recognize the power of the consumer in the buying decision of retailers and importers.

*Response:* CCC agrees that consumer-oriented shows and consumer advertising can be effective market development activities by stimulating demand for U.S. agricultural commodities. CCC amended § 1485.16(b)(6) to include "consumer exhibits and shows".

#### *Compensation/Allowances for U.S. Citizens and U.S. Contractors*

CCC received six comments on this issue.

*Comment:* Increase the limit on payment of salary and allowances for U.S. citizens stationed overseas.

*Response:* CCC recognizes that compensation levels may need to be adjusted periodically to attract and retain qualified individuals to manage overseas offices. Therefore, CCC will reimburse, in whole or in part, the cost of compensation and allowances for each U.S. citizen stationed overseas not to exceed 125 percent of the level of a GS-15 Step 10 salary for U.S. Government employees. This change is reflected in § 1485.16(c)(1) of the final rule.

*Comment:* Give MPP participants the flexibility to establish a "pool of funds" to pay U.S. citizen salaries and allowances. The maximum amount authorized for this "pool" would be based on the actual number of U.S. citizens stationed overseas multiplied by the GS-15 Step 10 salary. MPP participants should also have the flexibility to pay only salary or allowances or a combination of the two.

*Response:* CCC disagrees with this suggestion. Congress has given CCC discretion to operate and manage the MPP. In doing so, CCC must balance benefits to program participants against limited financial resources. CCC has established maximum compensation levels for which it will reimburse to ensure the efficient use of public funds and to preserve consistency across all commodity programs. An MPP participant may use its own funds to pay compensation and allowance expenses which exceed the prescribed maximum level and count the difference as a contribution, provided that such compensation adjustments are included in the MPP participant's approved activity plan.

#### *Compensation Levels for Foreign Nationals*

CCC received five similar comments on this issue.

*Comment:* The limitation on salary levels for foreign national employees is too restrictive, particularly in those countries where there is a shortage of qualified personnel. In those cases where the Foreign Service National (FSN) compensation schedule is too low, MPP participants should be allowed to establish salary ranges or alternative compensation systems for foreign nationals based on in-country surveys.

*Response:* Congress has given CCC discretion to operate and manage the

MPP. In doing so, CCC must balance benefits to program participants against limited financial resources. CCC has established a maximum level for compensation of a non-U.S. employee or non-U.S. contractor for which it will reimburse to ensure the efficient use of public funds and to preserve consistency across all commodity programs. An MPP participant may use its own funds to pay compensation that exceeds the prescribed maximum level and count the difference as a contribution, provided that such salary adjustment is included in the MPP participant's approved activity plan.

*Comment:* The rule does not provide guidance for those instances where there is no FSN salary plan in the local embassy.

*Response:* In countries where an FSN salary plan does not exist, CCC will not reimburse any portion of compensation that exceeds locally prevailing levels. The MPP participant is responsible for documenting such compensation levels by a salary survey or other means. A justification for the compensation levels must be presented in the MPP participant's activity plan. This point is clarified in § 1485.16(c)(3)(ii).

*Comment:* Once established, salary levels of supergrades should not be reduced unless the top grade of the local FSN salary plan is reduced.

*Response:* An MPP participant is only required to reduce the compensation levels for supergrades when the FSN salary plan is reduced. However, an MPP participant may reduce the compensation levels for supergrades at other times if deemed appropriate by the MPP participant.

#### *Fees Paid to Consultants and Contractors*

CCC received three similar comments on this issue.

*Comment:* Define the terms "consultant" and "contractor".

*Comment:* The limitation on fees paid to consultants is too restrictive. The final rule should permit participants to pay prevailing local rates.

*Response:* CCC recognizes that the terms "consultant" and "contractor" are not clearly defined and in some instances may not be discernibly different. Therefore, to eliminate this ambiguity, CCC has deleted all references to the term "consultant" and replaced it with the term "contractor". CCC has established a maximum level for contractor fees for which it will reimburse to ensure the efficient use of public funds and to preserve consistency across all commodity programs. CCC will not reimburse any portion of a daily contractor fee that

exceeds the daily gross salary of a GS-15 Step 10 for U.S. Government employees in effect on the date the fee is earned. A participant may use its own funds to pay contractor fees which exceed the prescribed maximum level and count the difference as a contribution, provided that the fee adjustment is included in the participant's approved activity plan.

#### *Contracting Standards*

CCC received two similar comments on this issue.

*Comment:* The final rule should contain additional guidance in the area of contracting. Specifically, CCC should provide language relating to contracting standards.

*Response:* CCC requires all participating organizations to have the resources and ability to effectively manage the program. CCC also expects participants to have either a solid understanding of contracting principles and practices or the resources to obtain this expertise. In general, participants must ensure that all fees for goods and services reimbursed in any part by CCC are adequately documented by a purchase order, invoice or contract. Participants must also maintain records with regard to the competitive bidding process used to acquire the goods or services. To assist participants, CCC has included contracting procedures in § 1485.23(c).

#### *Payment of Foreign National Salaries in Local Currencies*

CCC received six similar comments on this section.

*Comment:* Why are MPP participants required to pay salaries of foreign nationals in the local currency and salaries of U.S. citizens stationed overseas in U.S. dollars? MPP participants should be permitted to pay FSN salaries in any currency so long as it does not violate local laws. This would alleviate problems arising from foreign nationals employed in countries other than their country of origin.

*Response:* CCC agrees with the commenters and amended § 1485.19(c) to allow participants to pay salaries and fees in any currency if approved by the Attache/Counselor. However, participants are cautioned to consult local laws and ordinances governing this issue.

#### *Use of Part-time Contractors for Services*

CCC received one comment on this issue.

*Comment:* Can fees paid to translators or demonstrators for promotional activities be reimbursed by CCC?

*Response:* CCC will reimburse a participant for the cost of part-time contractors such as translators and demonstrators if such costs are included in a participant's approved activity plan.

#### *Overseas Administrative Expenses*

CCC received three comments on this issue.

*Comment:* Participants should not be solely liable for all forward financial obligations, i.e., severance payments, rental agreements and contracts, as stipulated in § 1485.19(c)(2) and § 1485.21(d)(6) of the interim rule.

*Response:* CCC disagrees with this comment. The availability of new MPP resources may be limited annually by Congress. Therefore, CCC is unable to prepare for forward year obligations beyond the period of availability of funds specified in a participant's program agreement. CCC funding of forward year obligations would unduly hinder promotional efforts by tying up MPP resources that may otherwise be used for actual activities. Accordingly, the substance of the interim rule is adopted.

*Comment:* Are EIP/MPP participants prohibited from sharing administrative expenses, i.e., salaries, utilities and travel, with foreign third parties to conduct joint promotional activities?

*Response:* An EIP/MPP participant may share administrative expenses with a foreign third party to conduct a joint promotion. However, such expenses will not be reimbursed by CCC under an EIP/MPP agreement.

#### *Application Process and Strategic Plan*

CCC received four comments on this issue.

*Comment:* The initial EIP/MPP participant should not be required to include a strategic plan in its application for program funding, but rather the strategic plan should be included in the activity plan. The initial application for program funding should be a "generic" application which describes the worldwide marketing situation for the U.S. industry as a whole.

*Response:* CCC disagrees with this comment. The strategic plan describes the overall situation for the agricultural commodity and the applicant's plans, projections, targeted markets and budget for the activity plan year. The strategic plan is essential for determining appropriate funding levels and program activities. Accordingly, the substance of the interim rule is adopted.

*Comment:* The final rule should contain provisions which protect proprietary and confidential

information of individual companies from public disclosure.

*Response:* CCC's policy is to treat all program documents with the utmost respect for any proprietary information. CCC does not release information which could cause substantial competitive harm to the submitter of the information. If the information submitted is not readily identifiable as privileged or business confidential, CCC will obtain and consider the views of the submitter of the information. If CCC disagrees with the arguments presented by the submitter, CCC will give the submitter sufficient time to pursue legal action to prevent the release of the information.

#### *Activity Plans*

CCC received 10 comments on this section.

*Comment:* Activity plans should not be required for each year within a multiyear program, particularly when there are no changes to the original proposal. The time it takes to submit annual activity plans and receive approval from CCC causes undue delays in the construction of demonstration structures and risks continued third party participation.

*Response:* CCC agrees that timing for large-scale, multiyear projects is extremely important. However, CCC requires separate activity plans for each year covered by a multiyear agreement to ensure proper management of limited CCC resources. The annual activity plans also assist CCC in determining whether program design requires modification to improve cost effectiveness or impact. The final rule is adopted as written.

*Comment:* The final rule should contain a provision which accommodates immediate or unanticipated changes to activity plans. This could be accomplished by: (1) allowing retroactive approval of APARs, (2) establishing a same-day or immediate approval process for APARs, (3) allowing a 10 percent budget overrun for each activity, (4) allowing a 10 percent budget shift at the end of the plan year, or (5) allowing a participant to verbally notify the Division Director prior to implementation of the activity.

*Response:* Past experience has proven that retroactive approval authority creates unnecessary administrative burdens and that "after-the-fact" change becomes the norm rather than the exception. Adjustments to activity plans can be made with CCC approval in an expeditious manner using existing policies and procedures. Accordingly, the final rule is adopted in this regard.

*Comment:* Activity plan years should correspond to the U.S. Government's fiscal year.

*Response:* CCC would prefer to have a single activity plan year for all participants. However, CCC recognizes that factors such as varying crop seasons and the Federal budget process make this illogical.

*Comment:* Will CCC consider approval of individual activities prior to the approval of an entire activity plan?

*Response:* Program planning is a primary tool used to guide the implementation and successful completion of market development activities. CCC will not grant approval for activities prior to the announcement of program allocations nor prior to the start of a participant's activity plan. However, CCC may grant approval for individual activities on a case-by-case basis before approving a participant's entire activity plan.

*Comment:* CCC should provide more detailed information about deadlines for submission of activity plans.

*Response:* The rule does not contain a deadline for the submission of activity plans; however, MPP participants should submit activity plans at least 45 business days prior to the start of the proposed activities in order to ensure adequate time for review and approval by CCC.

*Comment:* CCC should be required to approve or disapprove APARs within two weeks of receipt.

*Response:* CCC's policy is to review activity plans and APARs in an expeditious manner. A specific time period is not practical. However, participants should allow adequate time for review and approval of APARs.

#### *Allocation of CCC Resources*

CCC received one comment on this issue.

*Comment:* CCC should not consider, as one criterion for allocating resources, the applicant's ability to monitor and evaluate the activities proposed in the strategic plan since this information was not specifically solicited as part of the application.

*Response:* The rule explicitly states that CCC takes into account the applicant's provisions for monitoring and evaluating activities proposed in the strategic plan when reviewing applications for program funding. Evaluation is an integral part of the MPP and serves as a basis for continuing, altering or eliminating activities proposed in the strategic plan. The application approval criteria and allocation factors are provided in § 1485.14(b) and (c) of the final rule.

#### *Product Samples, Product Development, Packaging and Labeling*

CCC received nine comments on these issues.

*Comment:* Packaging and design expenses should be eligible for reimbursement by CCC.

*Comment:* CCC should amend § 1485.17(d)(14) of the interim rule to read "Labeling, packaging and associated design expenses, except when the MPP participant's logo or generic symbol is made part of the packaging for the branded promotion activity. In that case, a pro-rated expense based on the size of the logo or symbol in relation to the entire package surface area will be reimbursed."

*Response:* Congress has given CCC discretion to operate and manage the MPP. In doing so, CCC must balance benefits to program participants against limited financial resources. CCC will not provide reimbursement for packaging, labeling and other design expenditures because these costs are associated with the production of the final product rather than the promotion. CCC also considers origin identification stickers to be a type of label and, therefore, not reimbursable by CCC. This change is reflected in § 1485.16(d)(3). The suggestion that CCC calculate a pro-rata reimbursement is not practical to administer.

*Comment:* The Deputy Administrator should have the authority to approve the use of MPP funds for the purchase of commodity samples, particularly in those instances where the participant does not own the commodity or product.

*Response:* Congress has given CCC discretion to operate and manage the MPP. In doing so, CCC must balance benefits to program participants against limited financial resources. CCC will not provide reimbursement for product samples because products samples are of minimal cost to the industry involved and could easily be contributed towards the program.

*Comment:* Does the exclusion of product development expenses from reimbursement by CCC pertain only to new products? In other words, can participants be reimbursed by CCC for expenses related to the modification of an existing product?

*Response:* CCC will not reimburse participants for the cost of product development, product modification or product research. This prohibition applies to all products for the reasons identified in previous responses.

*Comment:* Product development and design expenses should be eligible for reimbursement by CCC because such

expenses are included in the example in the MPP handbook.

*Response:* The particular example cited by the commenter refers to a consultant's work in introducing a new product to the market (a promotional activity), not in the actual development or design of the product. The substance of the interim rule is adopted.

#### *Financial Policies and Procedures, Reimbursement Claims and Advances*

CCC received 24 comments on these issues.

*Comment:* Why are reimbursement claims limited to no less than \$10,000?

*Response:* CCC requires participants to consolidate their reimbursement claims to ensure a more effective use of resources and to accelerate the reimbursement process. Accordingly, the final rule is adopted in this regard.

*Comment:* Why does CCC charge reimbursement claims against the oldest unexpended program agreement balance?

*Response:* This is simply a procedure used by CCC to ensure efficient use and accurate accounting of MPP funds. Since § 1485.17(h) of the interim rule had no significant bearing on a participant, CCC omitted this subsection from the final rule.

*Comment:* Why do the regulations make reference to reimbursement with CCC commodity certificates?

*Response:* Although all MPP claims are currently reimbursed by CCC in cash, circumstances could change where it might become necessary to return to the use of certificates.

*Comment:* CCC should revise § 1485.17(k)(2) of the interim rule so that participants are not precluded from claiming previously billed amounts which had been erroneously disallowed by CCC.

*Response:* CCC agrees with the commenter and amended the final rule in § 1485.17(a)(8) to include any amount previously claimed that has not been reimbursed.

*Comment:* CCC should extend the deadline for submitting reimbursement claims to CCC.

*Response:* The 180-day period is reasonable based upon the standard business practice for submitting reports and expense claims. For administrative ease, CCC replaced the phrase "180 calendar days" with "6 months". This change is reflected in § 1485.17(d).

*Comment:* Participants operating brand programs should be allowed to receive advances.

*Comment:* Brand participants should be allowed to receive advances for electronic media advertising since this

type of advertising is normally contracted one year in advance.

*Response:* CCC expects participating firms to have sufficient working capital to cover the total cost of promotional activities since they are expected to directly profit from the activities. Furthermore, CCC has determined that reimbursement, rather than advance payment, ensures the most efficient use of MPP funds. The substance of the interim rule is adopted.

*Comment:* CCC should amend § 1485.18(b)(1) of the interim rule which limits advances to no more than 40 percent of a participant's annual generic budget approved by CCC. For example, CCC could: (1) provide a "working advance" of up to 15 percent of a participant's annual budget with additional special advances for large expenditures, (2) calculate the 40 percent advance on the basis of the total approved budget and eliminate the 90-day expenditure rule, (3) increase the percentage, or (4) replace the 40 percent advance limit with the special advance payment request system used in the Cooperator program.

*Response:* Since CCC is given limited resources by Congress to administer the MPP, CCC must balance benefits to program participants with efforts to reduce operating costs of the program. The limitation on authorized advance payments reduces the amount of money CCC borrows from the U.S. Treasury. CCC's policy is to reimburse participants for expenditures incurred rather than finance initial costs. Accordingly, the final rule is adopted in this regard.

*Comment:* Extend the time period that MPP participants have to fully expend their advances from 90 to 180 days.

*Response:* The 90-day period is sufficient time to expend any advance. The final rule is adopted in this regard.

*Comment:* Does § 1485.17(l)(3) of the interim rule which provides that "activity expenses incurred up to 30 days beyond the end of an activity plan year may be charged back to the budget for that activity plan year" apply to MPP participants?

*Response:* This provision applies to MPP and EIP/MPP participants. CCC has provided additional clarification in § 1485.16(h) of the final rule.

#### Travel Expenses

CCC received 18 comments on this issue.

*Comment:* CCC should amend the regulations to permit reimbursement for "business class" travel.

*Response:* CCC recognizes that participants may be able to obtain a particular class of air travel at a lower

rate than full fare economy. Since CCC's policy is to ensure the efficient use of public funds, CCC will not preclude business class travel, but will not reimburse any portion of air travel in excess of the full fare economy rate. This change is reflected in § 1485.16(c)(8) of the final rule.

*Comment:* Travel expenditures should be reimbursable under an EIP/MPP agreement.

*Response:* Congress has given CCC discretion to operate and manage the MPP. In doing so, CCC must balance benefits to program participants against limited financial resources. Private entities engaged in brand promotion activities should bear their own travel expenses. The substance of the interim rule is adopted.

*Comment:* Participants should be permitted to develop their own in-house travel guidelines.

*Response:* Congress has given CCC discretion to operate and manage the MPP. CCC has established limits on the amount and type of travel expenditures that will be reimbursed by CCC to ensure the efficient use of public funds and to preserve consistency across all commodity programs. Accordingly, the final rule is adopted in this regard.

*Comment:* Are participants allowed to calculate per diem at a rate lower than that permitted under the U.S. Federal Travel Regulations (USFTR)?

*Response:* CCC established a maximum reimbursement rate for per diem which is no more than the rate specified under the USFTR. Consequently, a lower rate of reimbursement is permissible.

*Comment:* Eliminate § 1485.22(b) of the interim rule which requires participants to notify the Attache/Counselor in writing in advance of proposed travel to that country. This provision is more restrictive than the former Targeted Export Assistance program guidelines and is inconsistent with the Paperwork Reduction Act.

*Response:* The Attache/Counselor must be notified prior to any travel in order to effectively supervise and support program activities in his or her country of responsibility. Accordingly, the final rule is adopted in this regard.

*Comment:* Participants should be permitted to choose one of two reimbursement options for travel expenses—either per diem or living expenses.

*Response:* Congress has given CCC discretion to operate and manage the MPP. CCC has adopted the USFTR to ensure uniformity in administering the program and accounting for travel expenditures. Accordingly, the final rule is adopted in this regard.

*Comment:* Participants should be permitted to use MPP funds to lease vehicles when it can be shown that the lease cost would be lower than the cost associated with the use of a privately owned vehicle.

*Response:* CCC's policy is to ensure the most efficient use of limited resources. It would be virtually impossible for a participant to provide an accurate number of miles to be travelled for project business during the term of a leasing agreement. Consequently, CCC would not be able to compare the cost of leasing a vehicle for an extended time period to the cost of using a privately owned vehicle. Accordingly, the substance of the interim rule is adopted.

*Comment:* CCC should amend § 1485.22(d) of the interim rule which states that reimbursement for the use of privately owned automobiles will be calculated on the basis of the local U.S. Embassy's fixed rate per mile. Participants should be reimbursed by CCC for costs based on prevailing local practices rather than the Embassy rate, particularly in those instances where the U.S. Embassy does not have a fixed rate per mile or where U.S. Embassy personnel can buy gas from a Post Exchange.

*Response:* Congress has given CCC discretion to operate and manage the MPP. CCC's policy is to ensure the efficient use of limited resources and to preserve consistency across all commodity programs. In support of this policy, CCC has established a maximum reimbursement rate for the authorized use of a privately owned automobile equal to the U.S. Embassy's fixed rate per mile. This uniform policy also simplifies administration and program compliance requirements. A participant may expend an amount in excess of the amount reimbursed by CCC and count the difference as a contribution, provided that the adjustment is included in the participant's approved activity plan. Accordingly, the final rule is adopted in this regard.

#### Promotional Items and Token Gifts

CCC received nine similar comments on this issue.

*Comment:* CCC should either reimburse participants for the total cost of giveaways, awards and prizes or establish a maximum allowable amount for these items.

*Response:* CCC agrees that inexpensive promotional items such as giveaways, awards and prizes can be useful market development tools. CCC will reimburse the cost of giveaways, awards, prizes, gifts and other similar promotional materials up to \$1.00 per

promotional item This change is reflected in § 1485.16(b)(10) and (d)(11) of the final rule.

*Comment:* The term "token gift" is not defined and, therefore, should be deleted from the rule.

*Comment:* CCC should define "token gift" as "any promotional item costing under \$5.00".

*Response:* CCC deleted the word "token" from the final rule. The term "gift" has ordinary and customary meaning and does not require further definition. CCC will reimburse a participant for the cost of gifts subject to the limitation that CCC will not reimburse more than \$1.00 per item.

#### Activities in the United States

CCC received one comment on this issue.

*Comment:* All MPP participants should be permitted to claim reimbursement for market development activities conducted in the United States. Foreign market development programs have typically allowed travel expenditures in the United States for foreign trade teams when part of an international trip and participation fees for foreign participants in grain grading seminars in the United States.

*Response:* CCC agrees that certain activities conducted in the United States may be valuable and appropriate for specific foreign market development programs. Consequently, CCC will reimburse an MPP participant for the cost of trade shows, seminars and educational training conducted in the United States. This change is reflected in § 1485.16(c)(25).

#### Participation Fees

CCC received one comment on this issue.

*Comment:* Clarify § 1485.17(d)(7) of the interim rule which states that participation fees for United States Government-sponsored activities will not be reimbursed by CCC.

*Response:* CCC will not reimburse the cost of fees for participating in United States Government sponsored activities, other than trade fairs and exhibits, because in these instances the United States Government finances most of the activity expenses. Although participation fees for United States government-sponsored activities, other than trade fairs and exhibits, are not reimbursable by CCC, they may be counted as a contribution.

#### Export Availability

CCC received one comment on this issue.

*Comment:* Why are MPP applicants required to describe the export

availability of the agricultural commodity, product, or brand product over the duration of the proposed agreement? Some agricultural products are always in sufficient supply.

*Response:* The primary objective of the MPP is to increase U.S. agricultural exports by stimulating demand in foreign markets. The development and maintenance of new export markets for U.S. agricultural commodities are dependent, in part, upon knowledge of the U.S. supply situation. Accordingly, the final rule is adopted in this regard.

#### Reimbursement for Demonstration or Training Activities

CCC received four comments on this section.

*Comment:* What is meant by the phrase "training activities" in § 1485.17(c) of the interim rule? Does this refer to the construction of training facilities or technical training activities in general?

*Response:* CCC recognizes that the term "training activities" is ambiguous. To clarify this issue, CCC replaced the phrase "demonstration and training activities" with "demonstration projects" in the final rule.

"Demonstration projects" is defined in § 1485.11(j) and does not include technical training activities.

*Comment:* CCC should not impose a limit of no more than one demonstration or training activity under each MPP agreement for each market.

*Comment:* Does the limitation on demonstration and training activities apply to the annual activity plan or any successive year in the market?

*Response:* CCC recognizes that more than one demonstration project may be appropriate to overcome different constraints within a particular market. Therefore, CCC will consider proposals for demonstration projects provided that: (1) no more than one such demonstration project per constraint is undertaken in a market; (2) the constraint to be addressed in the market is a lack of technical knowledge or expertise; (3) the demonstration project is a practical and cost effective method of overcoming the constraint; and (4) a foreign third party participates in the demonstration project through a written agreement.

#### Significant Program Provisions

CCC received one comment on this section.

*Comment:* How will CCC apply the 50 percent reimbursement rule when a brand product is not entirely 100 percent U.S. origin?

*Response:* Each MPP or EIP/MPP applicant must declare, in its

application, the percentage of U.S. origin of the promoted agricultural commodity by weight, exclusive of added water. For any promoted brand product, the reimbursement rate generally equals the lesser of the percentage of U.S. origin in the brand product or 50 percent. Each participant must be able to prove the percentage of U.S. origin it declares. Failure to document this percentage will result in repayment to CCC.

#### Business Confidentiality

CCC received seven similar comments on this issue.

*Comment:* The final regulation should contain language which protects the contents of a participant's application and activity plans.

*Response:* CCC's policy is to treat all program documents with the utmost respect for proprietary information. CCC does not release information which could cause substantial competitive harm to the submitter of the information. If the information submitted is not readily identifiable as privileged or business confidential, CCC will obtain and consider the views of the submitter of the information. If CCC disagrees with the arguments presented by the submitter, CCC will give the submitter sufficient time to pursue legal action to prevent the release of the information. The release of information is governed by the Freedom of Information Act (FOIA), 5 U.S.C. 552, and 7 CFR Part 1, Subpart A—Official Records, specifically 7 CFR 1.11, Handling Information from a Private Business. CCC added § 1485.23(a) to the final rule relating to this issue.

#### Appeals

CCC received one comment on this issue.

*Comment:* Amend § 1485.27(b) of the interim rule to include procedures for appealing compliance findings.

*Response:* CCC has included specific provisions and procedures in the final rule for the resolution of disputes that involve the remittance of resources to CCC. The appeal procedure is designed to ensure prompt and reasonable evaluation and resolution of program disputes. Most compliance findings are minor infractions of program rules which, when brought to the attention of participants, are routinely resolved. Participants will be notified promptly when program discrepancies are found and given an opportunity to remit resources to CCC or, where there is a disagreement, present additional information in support of the participant's position. See § 1485.20(d) of the final rule.

*Export Incentive Program*

CCC received three comments on this section.

*Comment:* CCC should not differentiate MPP participants from EIP/MPP participants because generic promotions simply create demand for foreign products.

*Response:* Congress has directed CCC to make certain distinctions between brand and generic promotions in recognition of the benefit that private companies receive from brand promotion. For example, the FACT Act of 1990 provides that assistance for brand activities shall not exceed 50 percent of the cost of implementing the plans. CCC also makes minor distinctions between brand and generic promotions to ensure the efficient use of limited resources.

CCC received 38 letters containing nearly 200 comments from nonprofit trade associations, U.S. companies, state organizations, state regional trade groups, cooperatives, professional associations and consulting firms in response to the interim rule published on November 17, 1993, (58 FR 60550).

*Independent Audits*

CCC received 14 comments on this issue.

*Comment:* CCC should not have the authority to require independent audits of program activities.

*Comment:* If the provision for independent audits is necessary, then CCC should develop specific criteria to avoid arbitrary implementation and to keep costs reasonable for MPP participants.

*Comment:* The Compliance Review Staff and the General Accounting Office are in the best position to conduct audits of the MPP because of their familiarity with federal regulations.

*Comment:* The current system used for compliance reviews is thorough, rigorous, professional and nonpartisan, and fulfills the audit needs of the program.

*Comment:* This provision should be clarified so as not to preclude the use of CCC resources for other types of program evaluations.

*Comment:* CCC should only require independent audits in extreme cases of mismanagement or fraud.

*Comment:* CCC's sole discretion to require independent audits poses a jeopardy.

*Comment:* In the absence of confirmed non-compliance with program regulations, CCC should pay for any independent audits it requires.

*Comment:* CCC should amend the final rule to allow a participant to

document its compliance with program requirements.

*Comment:* Independent audits could be beneficial in those instances where compliance reviews reveal the need for such audits.

*Comment:* Each participant in the program should be required to have an annual independent audit of its own accounting system.

*Response:* CCC's authority to require independent audits was legislated by Congress in section 1302(b)(2)(E) of the Omnibus Budget Reconciliation Act of 1993. CCC will only use this authority when it determines that further review is necessary in order to ensure compliance with program requirements. This provision is contained in § 1485.20(c)(5).

*Definitions*

CCC received 63 comments on this section.

*Comment:* CCC should clearly define the term "U.S. entities" and limit participation in the MPP to U.S. entities.

*Response:* CCC limits direct participation in the MPP to U.S. agricultural trade organizations, nonprofit state regional trade groups, agricultural cooperatives and State agencies. Participation by foreign entities only occurs through third party arrangements. The term "U.S. commercial entity" is defined at § 1485.11(ff) of the final rule.

*Comment:* The definition of "market" as "a single country" is too narrow and rigid. The definition should be modified to take into account the different types of market segments within a country such as discrete geographic regions, audiences and distribution outlets.

*Comment:* Defining "market" as anything other than "a single country" would create more uncertainty.

*Comment:* If participants defined markets in terms of geographic regions, it would likely be perceived by the public as an attempt to circumvent the graduation requirement.

*Response:* CCC recognizes that many market segments can exist within a single country. Depending on the particular agricultural commodity promoted, a market could be defined by a geographic region, target audience or demographic group. Because numerous market segments could exist within a country, CCC decided to define "market" as "a single country". This eliminates the need for interpretation and reduces the administrative burden on both the participant and CCC. Accordingly, the final rule is adopted in this regard.

*Comment:* The term "U.S. firm" should be defined as "any firm that is

incorporated in the U.S. and has a physical entity located within the U.S."

*Response:* CCC did not define the term "U.S. firm" in the final rule because a definition is not necessary in the context of the final regulation.

*Comment:* CCC should define the terms "supplement" and "supplant".

*Response:* "Supplement" and "supplant" are statutory terms for which Congress did not assign any special meaning. CCC has determined that these terms have ordinary and customary meanings and, therefore, do not require further definitions in the final rule.

*Unfair Trade Practices*

CCC received comments regarding the requirement that assistance under the MPP only address unfair trade practices. Recent legislation implementing the Uruguay Round negotiations of the General Agreement on Tariffs and Trade deleted this requirement. Accordingly, CCC has revised the final rule to delete this requirement from the regulation. However, an unfair trade practice is still relevant in determining reimbursement rates for brand promotions. See § 1485.16(g).

*Graduation*

CCC received 31 comments on this issue.

*Comment:* CCC should retain the provision which limits promotional assistance for brand products to no more than five years in a single market.

*Comment:* Does the five-year limit on promotional assistance apply to individual products or product lines?

*Comment:* CCC should retain the provision which allows for continued promotional assistance beyond the five-year limit based on the continued existence of an unfair trade practice or identification of a new unfair trade practice.

*Comment:* The final rule should contain a provision which allows for exceptions to the five-year limit in unusual or unexpected circumstances. For example, in the event of market disruptions or new trade barriers which restrict market access, the affected years should not count toward the five-year limit.

*Comment:* CCC should consider providing assistance for more than five years in a market when there is "the obvious threat of unfair foreign trade practices" or when industries have successfully expanded exports to that market.

*Comment:* "When significant changes in restrictive laws or in distribution channels effectively create a new market, these countries should be

considered for funding beyond five years."

*Comment:* The five-year limitation on promotional assistance for a specific brand product in a single market does not take into account the dynamic nature of the international marketplace and diminishes the flexibility and impact of the program. The limitation on promotional assistance should be based on factors such as return on investment, product life cycle and market share.

*Comment:* CCC should continue to provide assistance to all commercial entities in a market until the unfair trade practice is eliminated.

*Comment:* "The interim regulations unnecessarily limit the Secretary's authority to waive the five-year limit."

*Response:* CCC recognizes that circumstances other than the continued existence of an unfair trade practice or identification of a new unfair trade practice may warrant consideration for assistance to promote a specific brand product in a single market for more than five years. Therefore, CCC eliminated this requirement from the final rule. CCC may provide assistance to promote a specific product in a single market for more than five years when CCC determines that further assistance is necessary to meet the objectives of the program. CCC will apply the five-year limitation to single brand products in a market, not to product lines. However, the Deputy Administrator shall determine, at the Deputy Administrator's discretion, whether two or more brand products in any given country are substantially the same product. These changes are reflected in § 1485.14(d) (2) and (3).

*Comment:* Generic programs should not be subject to the five-year limit on promotional assistance.

*Response:* Section 1302(b)(2)(B) of the Omnibus Budget Reconciliation Act of 1993 and, therefore, this final rule, establish a five-year limit on promotional assistance for brand products, not generic products or programs.

#### Contributions

CCC received four comments on this issue.

*Comment:* Although it is extremely important for MPP participants to commit their own resources to the program, a strict 10 percent minimum contribution for nonbrand promotion may be a burden to some participants. The regulations should contain a provision which allows CCC to grant exceptions to the 10 percent contribution level.

*Response:* This contribution requirement is statutorily mandated by section 1302(b)(2)(C) of the Omnibus Budget Reconciliation Act of 1993. CCC cannot change the language of this statute through regulations. Accordingly, the final rule is adopted in this regard.

*Comment:* State groups should be allowed to count "in-kind expenses", i.e., staff time of member State Departments of Agriculture, toward their MPP participant contribution.

*Response:* Any MPP participant may count, as part of its contribution, time and expenses incurred by member organizations provided such contributions are for the overall administration or management of the participant's entire MPP.

*Comment:* Clarify the sentence "CCC may increase the required contribution level in any subsequent year that an eligible trade organization receives assistance for nonbrand promotion." What criteria or standards will be used for increasing a participant's contribution level?

*Response:* This provision is statutorily mandated by section 1302(b)(2)(C) of the Omnibus Budget Reconciliation Act of 1993. Therefore, in deciding whether to increase the required contribution, CCC will consider the participant's ability to increase its contribution above the minimum level. This is explicitly stated in the rule and requires no further clarification.

*Comment:* Is the 10 percent minimum contribution level calculated on an individual activity basis or on an aggregate basis?

*Response:* An MPP participant is required to contribute an amount which is not less than 10 percent of total CCC resources expended for nonbrand promotions during the approved activity plan year.

*Comment:* Does the minimum 10 percent contribution requirement apply to multiyear proposals?

*Response:* Yes. This requirement applies to single and multiyear funded proposals.

#### Size Standards and Size Determinations

CCC received 13 comments on this issue.

*Comment:* CCC should retain the definitions and criteria established by the Small Business Administration (SBA) for size determinations.

*Comment:* Does the term "small-sized entity" apply to both U.S. and foreign entities?

*Comment:* "Small" should be defined as any non-multinational corporation.

*Comment:* Personnel and sales are not accurate measurements of a company's size.

*Comment:* What are the criteria for determining the number of employees of an entity?

*Comment:* CCC should not use SBA's criteria and size standards because the issue of affiliation is complex, difficult to understand, and time-consuming. "Small-sized entity" should be defined as "a business which has less than 500 full-time employees, excluding employees of subsidiaries and affiliates".

*Comment:* CCC should not consider a business' affiliation when determining company size. Combining affiliated corporate entities would frustrate the intent of the legislation.

*Comment:* The regulations should provide flexibility "to accommodate industries that are 'small' in terms of revenues and total employees [as compared with] their direct industry competitors."

*Comment:* Application of the SBA criteria would "require an inordinate amount of investigation which when completed, [would] still be largely inaccurate in many cases." Therefore, CCC should establish standard definitions for "large" and "small" entities.

*Response:* The term "small-sized entity" applies only to U.S. entities. Use of SBA size standards is an efficient and effective method to resolve business size issues since it relies upon a set of existing standards promulgated by the agency with expertise in this area.

*Comment:* CCC should not use the size standards and criteria established by the SBA to define "small-sized entity" because they do not account for the unique characteristics of farmer cooperatives.

*Comment:* Member-growers of cooperatives should not be considered affiliates for purposes of size determination unless a member-grower owns a majority share of the cooperative or has a majority voting right in the cooperative.

*Comment:* Member-growers of cooperatives should not be included in the employee count for purposes of size determination.

*Response:* The SBA is solely responsible for establishing size standards and determining which concerns qualify as "small". However, SBA size standards may not always be appropriate for programs. If a Federal agency decides that the SBA size standard is not appropriate for the program involved, the agency may request SBA approval to establish a more appropriate size standard. CCC

submitted a proposal to the SBA requesting that all agricultural cooperatives be considered "small-sized entities" for purposes of the MPP. However, the SBA did not accept this proposal. Consequently, existing SBA rules govern whether a particular cooperative will be considered a small-sized entity. In this regard, SBA considers a cooperative as a single entity.

#### *Priority Assistance*

CCC received 22 comments on this issue.

*Comment:* How will CCC establish "priorities" among small-sized entities?

*Comment:* When establishing priorities, CCC should not penalize industries or sectors that either have no small entities or that have only generic programs.

*Comment:* The allocation of MPP funds solely on the basis of size is not consistent with normal business practice and discriminates against larger entities. Resources should be allocated to companies based on several criteria including performance, viability of marketing plans and proposals, the ability of applicants to execute plans, and past performance in MPP activities.

*Comment:* CCC should give priority to small-sized entities based on factors such as the entity's level of production, its level of export resources, its compliance record, and the expected impact of its strategic and activity plan.

*Comment:* Small-sized entities should be given priority through the reimbursement process.

*Comment:* CCC should allocate funds to deserving small-sized entities first, with any remaining funds going to "large" entities.

*Comment:* "Priority" should not mean a fixed percentage or amount given to small-sized entities, but rather a goal within the industry.

*Comment:* CCC should not interpret "priority" in a way that would set aside a portion of funds for small-sized entities because there may not be a sufficient number of these companies to use the funds.

*Comment:* CCC should set "a maximum brand allocation" per company, irrespective of company size. Evaluations of brand proposals should be based on the merits of the proposal, not on the size of the company seeking funds. Furthermore, funds should not be used for large advertising campaigns due to the limited amount of resources available.

*Response:* Priority for small-sized entities conducting brand promotions is statutorily mandated by section 1302(b)(2)(A) of the Omnibus Budget

Reconciliation Act of 1993. Congress does not define "priority" in the law and, therefore, leaves this interpretation to the discretion of CCC. The legislation also does not specifically prohibit participation by medium- and large-sized companies, nor does it preclude the use of criteria, other than size, for allocating resources to private entities. CCC gives priority to small-sized entities by setting aside funds for such entities in the allocation process. An MPP participant who administers a brand program may also establish criteria for recommending priority funding to small-sized entities.

*Comment:* The regulations should clearly state that "foreign entities with no U.S. place of business are not eligible for priority funding."

*Response:* This is the way in which CCC has interpreted the rule. This operating practice is expressly set forth in the final rule.

*Comment:* Participants should not be held to the "anticipated percentage of CCC resources to be made available to small-sized entities for brand promotion" cited in their MPP applications.

*Response:* The percentage estimated by an organization in its MPP application is an important factor because, without this information, CCC would not be able to comply with the requirements of the legislation.

#### *Additionality*

CCC received 26 comments on this issue.

*Comment:* CCC should retain the provision requiring MPP participants to certify that MPP funds will supplement but not supplant any private or third party funds or other contributions. However, because of market dynamics and the need to adjust marketing activities, participants should not be held to a rigid standard based on prior-year expenditures.

*Comment:* The rule does not enumerate specific criteria or documentation requirements that would substantiate a participant's certification of additionality. How will CCC audit this provision?

*Comment:* In order to determine whether CCC resources received actually supplement or supplant private or third party funds or other contributions to program activities, specific objective criteria must be established and the applicable professional standards must be specified. "Under professional standards independent accountants may not certify the accuracy of management's representation."

*Comment:* Current and continuing participants in the MPP should be required to provide evidence of increased competitiveness of U.S. exporters.

*Comment:* The regulations should allow brand participants to demonstrate success by showing increases in sales after participating in the program over a finite period.

*Comment:* Brand participants should be required to demonstrate an increase in the ratio between their total expenditures and government funding in each successive year of the program's life. The ratio should be applied on a market and individual product line basis.

*Comment:* The additionality requirement ". . . could hinder [smaller companies in] their effectiveness as they rely on the program for cost sharing (50/50) to further their own marketing budgets."

*Comment:* The additionality requirement, although good in its intent, poses major challenges and difficulties in the area of compliance.

*Response:* The additionality provision is statutorily mandated by section 1302(b)(2)(D) of the Omnibus Budget Reconciliation Act of 1993. CCC cannot eliminate this requirement from the rule. In determining whether federal funds received supplement or supplant private or third party funds or contributions, CCC will consider the participant's overall marketing budget from year to year, variations in promotional strategies within a country and new markets. It will be each participant's responsibility to maintain appropriate records or documentation which substantiate its certification that any CCC resources received supplement, but do not supplant, any private or third party funds or other contributions to program activities.

*Comment:* When will the additionality provision be audited.

*Response:* The audit will occur during the normal compliance review process.

#### *Applicability Date*

This rule is effective February 1, 1995, but it applies no sooner than the beginning of each participant's 1995 program and corresponding activity plan year. Therefore, present participants will not be required to revise previously approved activity plans in order to comply with the new rules and should have sufficient time to take the new rules into consideration in the planning of future activities.

#### **List of Subjects in 7 CFR Part 1485**

Agricultural commodities, Exports.

Accordingly, Part 1485 of Title 7 of the Code of Federal Regulations is revised to read as follows:

**PART 1485—COOPERATIVE AGREEMENTS FOR THE DEVELOPMENT OF FOREIGN MARKETS FOR AGRICULTURAL COMMODITIES**

**Subpart A—[Reserved]**

**Subpart B—Market Promotion Program**

- Sec.  
1485.10 General purpose and scope.  
1485.11 Definitions.  
1485.12 Participation eligibility.  
1485.13 Application process and strategic plan.  
1485.14 Application approval and formation of agreements.  
1485.15 Activity plan.  
1485.16 Reimbursement rules.  
1485.17 Reimbursement procedures.  
1485.18 Advances.  
1485.19 Employment practices.  
1485.20 Financial management, reports, evaluations and appeals.  
1485.21 Failure to make required contribution.  
1485.22 Submissions.  
1485.23 Miscellaneous provisions.  
1485.24 Applicability date.  
1485.25 Paperwork reduction requirement.

**Authority:** 7 U.S.C. 5623, 5662–5664 and sec. 1302, Pub. L. 103–66, 107 Stat. 330.

**Subpart A—[Reserved]**

**Subpart B—Market Promotion Program**

**§ 1485.10 General purpose and scope.**

(a) This Subpart sets forth the policies underlying the Commodity Credit Corporation's (CCC) operation of the Market Promotion Program (MPP), and a subcomponent of that program, the Export Incentive Program/Market Promotion Program (EIP/MPP). It also establishes the general terms and conditions applicable to MPP and EIP/MPP agreements.

(b) Under the MPP, CCC enters into agreements with nonprofit trade organizations to share the costs of certain overseas marketing and promotion activities that are intended to develop, maintain or expand commercial export markets for U.S. agricultural commodities and products. MPP participants may receive assistance for either generic or brand promotion activities. EIP/MPP participants are U.S. commercial entities that receive assistance for brand promotion activities.

(c) The MPP and EIP/MPP generally operate on a reimbursement basis, and CCC may, at its option, provide such reimbursement either in cash or in CCC commodity certificates.

(d) CCC's policy is to ensure that benefits generated by MPP and EIP/MPP agreements are broadly available throughout the relevant agricultural sector and no one entity gains an undue advantage. The MPP and EIP/MPP are administered by personnel of the Foreign Agricultural Service.

**§ 1485.11 Definitions.**

For purposes of this Subpart the following definitions apply:

- (a) *Activity*—a specific market development effort undertaken by a participant.  
(b) *Activity plan*—a document which details a participant's proposed activities and budget. ("Activity Plan" is used in lieu of the term "Marketing Plan" to avoid administrative confusion with plans submitted under the Cooperator Foreign Market Development Program.)  
(c) *Administrator*—the Administrator, FAS, USDA, or designee.  
(d) *Agricultural commodity*—an agricultural commodity, food, feed, fiber, wood, livestock or insect, and any product thereof; and fish harvested from a U.S. aquaculture farm, or harvested by a vessel as defined in title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

(e) *APAR*—activity plan amendment request.

(f) *Attache/Counselor*—the FAS employee representing USDA interests in the foreign country in which promotional activities are conducted.

(g) *Brand promotion*—an activity that involves the exclusive or predominant use of a single company name or logo(s) or brand name(s) of a single company.

(h) *CCC*—the Commodity Credit Corporation.

(i) *Contribution*—the cost-share incurred in support of an approved activity.

(j) *Demonstration projects*—activities involving the erection or construction of a structure or facility or the installation of equipment.

(k) *Deputy Administrator*—the Deputy Administrator, Commodity and Marketing Programs, FAS, USDA, or designee.

(l) *Division Director*—the director of a commodity division, Commodity and Marketing Programs, FAS, USDA.

(m) *EIP/MPP*—the Export Incentive Program/Market Promotion Program.

(n) *EIP/MPP participant*—a U.S. commercial entity which has entered into an EIP/MPP agreement with CCC.

(o) *Eligible commodity*—the agricultural commodity that is represented by an applicant.

(p) *Exported commodity*—an agricultural commodity that is sold to

buyers in, or is donated to, a foreign country.

(q) *FAS*—Foreign Agricultural Service, USDA.

(r) *Foreign third party*—a foreign entity that assists, in accordance with an approved activity plan, in promoting the export of a U.S. agricultural commodity.

(s) *Generic promotion*—a promotion that is not a brand promotion.

(t) *Market*—a country in which an activity is conducted.

(u) *MPP*—the Market Promotion Program.

(v) *MPP participant*—an entity which has entered into an MPP agreement with CCC.

(w) *Participant*—a entity which has entered into an agreement with CCC.

(x) *Promoted commodity*—an agricultural commodity whose sale is the intended result of a promotion activity.

(y) *Sales team*—a group of individuals engaged in an approved activity intended to result in specific sales.

(z) *Small-sized entity*—a U.S. commercial entity which meets the small business size standards published at 13 CFR part 121, Small Business Size Regulations.

(aa) *SRTG*—an association of State Departments of Agriculture referred to as State Regional Trade Group(s).

(bb) *STRE*—sales and trade relations expenditures.

(cc) *Supergrade*—a salary level designation that is applicable to certain non-U.S. employees who direct participants' overseas offices.

(dd) *Trade team*—a group of individuals engaged in an approved activity intended to promote the interests of an entire agricultural sector rather than to result in specific sales by any of its members.

(ee) *Unfair trade practice*—an act, policy, or practice of a foreign government that:

- (1) violates, is inconsistent with, or otherwise denies benefits to the United States under, any trade agreement to which the United States is a party; or
- (2) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.

(ff) *U.S. commercial entity*—an agricultural cooperative or for-profit firm located and doing business in the United States, and engaged in the export or sale of an agricultural commodity.

(gg) *U.S. industry contribution*—the cost incurred by the U.S. industry in support of an approved activity.

(hh) *USDA*—the United States Department of Agriculture.

**§ 1485.12 Participation Eligibility.**

(a) To participate in the MPP, an entity:

(1) Shall be:  
(i) A nonprofit U.S. agricultural trade organization;

(ii) A nonprofit state regional trade group;

(iii) A U.S. agricultural cooperative; or

(iv) A State agency; and

(2) Shall contribute:

(i) In the case of generic promotion, at least 10 percent of the value of resources provided by CCC for such generic promotion; or

(ii) In the case of brand promotion, at least 50 percent of the total cost of such brand promotions.

(b) To participate in the EIP/MPP, an entity:

(1) Shall be a U.S. commercial entity that either owns the brand(s) of the agricultural commodity(s) to be promoted or has the exclusive rights to use such brand(s); and

(2) Shall contribute at least 50 percent of the total cost of the brand promotion.

(c) CCC may require a contribution level greater than that specified in paragraphs (a) and (b) of this section. In requiring a higher contribution level, CCC will take into account such factors as past participant contributions, previous MPP funding levels, the length of time an entity participates in the program and the entity's ability to increase its contribution.

(d) CCC may require an EIP/MPP applicant to participate through an MPP participant.

(e) CCC will enter into MPP or EIP/MPP agreements only where the eligible agricultural commodity is comprised of at least 50 percent U.S. origin content by weight, exclusive of added water.

(f) CCC will not enter into an MPP or EIP/MPP agreement for the promotion of tobacco or tobacco products.

#### § 1485.13 Application process and strategic plan.

(a) General application requirements.

CCC will periodically publish a Notice in the **Federal Register** that it is accepting applications for participation in MPP and EIP/MPP. Applications shall be submitted in accordance with the terms and requirements specified in the Notice. An application shall contain basic information about the applicant and the proposed program, a program justification and a strategic plan.

(1) Basic applicant and program information.

(i) All MPP and EIP/MPP applications shall contain:

(A) The name and address of the applicant;

(B) The name of the Chief Executive Officer;

(C) The name and telephone number of the applicant's primary contact person;

(D) The name(s) of the person(s) responsible for managing the program;

(E) Type of organization—see § 1485.12(a)(1);

(F) Tax exempt identification number, if applicable;

(G) Activity plan year (mm/dd/yy-mm/dd/yy);

(H) Dollar amount of CCC resources requested for generic activities;

(I) Dollar amount of CCC resources requested for brand activities;

(J) Percentage of CCC resources requested for brand activities that will be made available to small-sized entities;

(K) Total dollar amount of CCC resources requested;

(L) Percentage of CCC resources requested for general administrative costs and overhead; and

(M) Estimated cumulative carryover—i.e., the estimated amount of unexpended funds allocated to the applicant in any prior year;

(ii) Applications submitted by nonprofit entities shall also contain:

(A) A description of the organization;

(B) A description of the organization's membership and membership criteria;

(C) A list of affiliated organizations;

(D) A description of management and administrative capability;

(E) A description of prior export promotion experience;

(F) Value, in dollars, that the applicant will contribute;

(G) Applicant's contribution stated as a percent of 1(i)(K) above;

(H) Value, in dollar, of contributions from other sources;

(2) Program justification.

(i) All MPP and EIP/MPP applications shall contain:

(A) A description of the eligible agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(B) A description of the exported agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(C) A description of the promoted agricultural commodity(s), its harmonized system code, the commodity aggregate code and the percentage of U.S. origin content by weight, exclusive of added water;

(D) A description of the anticipated supply and demand situation for the exported agricultural commodity(s);

(E) The volume and value of the exported agricultural commodity(s) for the most recent 3-year period;

(F) If the proposal is for two or more years, an explanation why the proposal

should be funded on a multiyear basis; and

(G) A certification and, if requested by the Deputy Administrator, a written explanation supporting the certification, that any funds received will supplement, but not supplant, any private or third party funds or other contributions to program activities. The justification shall indicate why the participant is unlikely to carry out the activities without Federal financial assistance. In determining whether federal funds received supplemented or supplanted private or third party funds or contributions, CCC will consider the participant's overall marketing budget from year to year, variations in promotional strategies within a country and new markets.

(ii) Applications submitted by a small-sized entity seeking funds under an EIP/MPP agreement shall contain a certification that it is a small business within the standards established by 13 CFR part 121. For purposes of determining size, a cooperative will be considered a single entity.

(iii) Applicants seeking funds for brand promotion shall contain the information required by § 1485.16(g)(1) and (2) in order to justify a rate of reimbursement higher than specified therein.

(3) Strategic plan.

(i) All MPP and EIP/MPP applications shall contain:

(A) A summary of proposed budgets by country and commodity aggregate code;

(B) A description of the world market situation for the exported agricultural commodity;

(C) A description of competition from other exporters, including U.S. firms, where applicable;

(D) A statement of goals and the applicant's plans for monitoring and evaluating performance towards achieving these goals.

(E) For each country, if applicable, five years of:

(1) historical U.S. export data;

(2) U.S. market share; and

(3) MPP funds received;

(F) For each country, three years of projected U.S. export data and U.S. market share;

(G) Country strategy, including constraint(s) impeding U.S. exports, strategy to overcome constraints, previous activities in the country, the projected impact of the proposed program on U.S. exports;

(H) A justification for any new overseas office;

(I) A description of any demonstration projects, if applicable (see § 1485.13(d)(1) through (4));

(J) Data summarizing historical and projected exports, market share and MPP budgets for the world; and

(K) A description of overall program goals for the ensuing 3–5 years; (ii) MPP applications for brand promotion assistance shall also contain:

(A) A description of how the brand promotion program will be publicized to U.S. and foreign commercial entities;

(B) The criteria that will be used to allocate funds to U.S. and foreign commercial entities; and

(C) A justification for conducting a brand promotion program with foreign commercial entities, if applicable.

(b) CCC may request any additional information which it deems necessary to evaluate an MPP or EIP/MPP application. In particular, CCC may require additional performance measurement, as required by the Government Performance and Results Act of 1993.

(c) Eligible contributions.

(1) In calculating the amount of contributions that it will make, and the contributions it will receive from a U.S. industry, a foreign third party or a State agency, the MPP applicant may include the costs (or such prorated costs) listed under paragraph (c)(2) of this section if:

(i) Such costs will be incurred as part of an approved activity, and

(ii) The contributor has not been or will not be reimbursed by any other source for such costs.

(2) Subject to paragraph (c)(1) of this section, eligible contributions are:

- (i) Cash;
- (ii) Compensation paid to personnel;
- (iii) The cost of acquiring materials, supplies or services;
- (iv) The cost of office space;
- (v) A reasonable and justifiable proportion of general administrative costs and overhead;
- (vi) Payments for indemnity and fidelity bond expenses;
- (vii) The cost of business cards;
- (viii) The cost of seasonal greeting cards;
- (ix) Fees for office parking;
- (x) The cost of subscriptions to publications;
- (xi) The cost of activities conducted overseas;
- (xii) Credit card fees;
- (xiii) The cost of any independent evaluation or audit that is not required by CCC to ensure compliance with program requirements;
- (xiv) The cost of giveaways, awards, prizes and gifts;
- (xv) The cost of product samples;
- (xvi) Fees for participating in U.S. government activities;
- (xvii) The cost of air and local travel in the United States;

(xviii) Payment of employee's or contractor's share of personal taxes; and

(xix) The cost associated with trade shows, seminars, entertainment and STRE conducted in the United States.

(3) The following are not eligible contributions:

(i) Any expenditure on brand promotion, except for expenditures incurred by the MPP participant in administering its brand promotion program;

(ii) Any portion of salary or compensation of an individual who is the target of an approved promotional activity;

(iii) Any expenditure, including that portion of salary and time spent in promoting membership in the participant organization or in promoting the MPP among its members (sometimes referred to in the industry as "backsell");

(iv) Any land costs other than allowable costs for office space;

(v) Depreciation;

(vi) The cost of refreshments and related equipment provided to office staff;

(vii) The cost of insuring articles owned by private individuals;

(viii) The cost of any arrangement which has the effect of reducing the selling price of an agricultural commodity;

(ix) The cost of product development, product modifications, or product research;

(x) Slotting fees or similar sales expenditures;

(xi) Membership fees in clubs and social organizations; and

(xii) Any expenditure for an activity prior to CCC's approval of that activity or amendment.

(4) The Deputy Administrator shall determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section may be included by the participant as an eligible contribution.

(d) Special rules governing demonstration projects funded with CCC resources. CCC will consider proposals for demonstration projects provided:

(1) No more than one such demonstration project per constraint is undertaken within a market;

(2) The constraint to be addressed in the market is a lack of technical knowledge or expertise;

(3) The demonstration project is a practical and cost effective method of overcoming the constraint;

(4) A third party participates in such project through a written agreement which provides that title to the structure, facility or equipment may

transfer to the third party and that the MPP participant may use the structure, facility or equipment for a period specified in the agreement for the purpose of removing the constraint.

#### § 1485.14 Application approval and formation of agreements.

(a) General. CCC will, consistent with available resources, approve those applications which it considers to present the best opportunity for developing or expanding export markets for U.S. agricultural commodities. The selection process, by its nature, involves the exercise of judgment. CCC's choice of participants and proposed promotion projects requires that it consider and weigh a number of factors that cannot be mathematically measured—i.e., market opportunity, market strategy and management capability.

(b) Approval criteria.

In assessing the applications it receives and determining which it will approve, CCC considers the following criteria:

(1) The effectiveness of program management;

(2) Soundness of accounting procedures;

(3) The nature of the applicant organization, with greater weight given to those organizations with the broadest base of producer representation;

(4) Prior export promotion or direct export experience;

(5) Previous MPP funding;

(6) Adequacy of the applicant's strategic plan in the following categories:

(i) Description of market conditions;

(ii) Description of, and plan for addressing, market constraints;

(iii) Reasonable likelihood of plan success;

(iv) Export volume and value and market share goals in each country;

(v) Description of evaluation plan and suitability of the plan for performance measurement; and

(vi) Past program results and evaluations, if applicable.

(c) Allocation factors.

After determining which applications to approve, CCC determines how it will allocate resources among participants based on the following factors, in addition to those in paragraph (b) of this section:

(1) Size of the budget request in relation to projected value of exports;

(2) Where applicable, size of the budget request in relation to actual value of exports in prior years;

(3) Where applicable, participant's past projections of exports compared with actual exports;

(4) Level of participant's contribution;

(5) Market share goals in target country(ies);

(6) The degree to which the product to be exported consists of U.S. grown agricultural commodities;

(7) The degree of value-added processing in the U.S.; and

(8) General administrative and overhead costs compared to direct promotional costs.

(9) In the case of a brand promotion program, the percentage of the budget that will be made available to small-sized entities as a means of providing priority assistance to such entities.

(d) Approval decision.

(1) CCC will approve those applications which it determines best satisfy the criteria and factors specified above. In addition, CCC will only approve applications for EIP/MPP when there is sufficient U.S. industry need for a brand promotion and there is no eligible MPP participant interested in or capable of undertaking the brand promotion.

(2) CCC will not provide assistance to promote a specific brand product in a single country for more than five years. This five year period shall not begin prior to the 1994 program or the participant's first activity plan year, whichever is later. In limited circumstances, the five year limitation may be waived if the Deputy Administrator determines that further assistance is necessary in order to meet the objectives of the program.

(3) The Deputy Administrator shall determine, at the Deputy Administrator's discretion, whether two or more brand products in any given country are substantially the same product.

(e) Formation of agreements.

CCC will notify each applicant in writing of the final disposition of its application. CCC will send a program agreement, allocation approval letter and a signature card to each approved applicant. The allocation approval letter will specify any special terms and conditions applicable to a participant's program, including the required level of participant contribution. An applicant that decides to accept the terms and conditions contained in the program agreement and allocation approval letter should so indicate by having its Chief Executive Officer sign the program agreement and by submitting the signed agreement to the Director, Marketing Operations Staff, FAS, USDA. Final agreement shall occur when the Administrator signs the agreement on behalf of CCC. The application, the program agreement, the allocation approval letter and these regulations shall establish the terms and conditions

of an MPP or EIP/MPP agreement between CCC and the approved applicant.

(f) Signature cards.

The participant shall designate at least two individuals in its organization to sign program agreements, reimbursement claims and advance requests. The participant shall submit the signature card signed by those designated individuals and by the participant's Chief Executive Officer to the Director, Marketing Operations Staff, FAS, USDA, and shall immediately notify the Director of any changes in signatories and shall submit a revised signature card accordingly.

#### § 1485.15 Activity plan.

(a) General.

A participant shall develop a specific activity plan(s) based on its strategic plan and the allocation approval letter and shall submit an activity plan for each year in which it engages in program activities. An activity plan handbook, available from the Division Director, provides suggested formats and codes for activity plans and amendments.

(b) An activity plan shall contain:

(1) A written presentation of all proposed activities including:

(i) A short description of the relevant constraint;

(ii) A description of any changes in strategy from the strategic plan;

(iii) A budget for each proposed activity, identifying the source of funds;

(iv) Specific goals and benchmarks to be used to measure the effectiveness of each activity. This will assist CCC in carrying out its responsibilities under the Government Performance and Results Act of 1993 that requires performance measurement of Federal programs, including the MPP. Evaluation of MPP's effectiveness will depend on a clear statement by participants of goals, method of achievement, and results of activities at regular intervals. The overall goal of the MPP and of individual participants' activities is to achieve additional exports of U.S. agricultural products, that is, sales that would not have occurred in the absence of MPP funding.

(2) A staffing plan for any overseas office, including a listing of job titles, position descriptions, salary ranges and any request for approval of supergrade salaries; and

(3) An itemized administrative budget for any overseas office.

(c) Activity plans for small-sized entities operating through an SRTG shall contain a certification that it is a small-sized entity within the standards established by 13 CFR Part 121.

(d) Requests for approval of "supergrades".

(1) Ordinarily, CCC will not reimburse any portion of a non-U.S. citizen employees compensation that exceeds the highest salary level in the Foreign Service National (FSN) salary plan applicable to the country in which the employee works. However, a participant may seek a higher level of reimbursement for a non-U.S. citizen who will be employed as a country director or regional director by requesting that CCC approve that employee as a "supergrade".

(2) To request approval of a "supergrade", the participant shall include in its activity plan a detailed description of both the duties and responsibilities of the position, and of the qualifications and background of the employee concerned. The participant shall also justify why the highest FSN salary level is insufficient.

(3) Where a non-U.S. citizen will be employed as a country director, the MPP participant may request approval for a "Supergrade I" salary level, equivalent to a grade increase over the existing top grade of the FSN salary plan. The "supergrade" and its step increases are calculated as the percentage difference between the second highest and the highest grade in the FSN salary plan with that percentage applied to each of the steps in the top grade. Where the non-U.S. citizen will be employed as a regional director, with responsibility for activities and/or offices in more than one country, the MPP participant may request approval for a "Supergrade II" salary level which is calculated relative to a "Supergrade I" in the same way the latter is calculated relative to the highest grade in the FSN salary plan.

(e) Submission of the activity plan.

A participant shall submit three copies of an activity plan to the Division Director and a copy of the relevant country section(s) to the Attaché/Counselor(s) concerned.

(f) Activity plan approval.

CCC shall indicate in an activity plan approval letter which activities and budgets are approved or disapproved, and shall indicate any special terms and conditions that apply to the participant including any requirements with respect to contributions and program evaluations. A participant may undertake promotional activities directly or through a foreign third party; however, the participant shall be responsible and accountable to CCC for all such promotional activities and related expenditures.

(g) Activity plan changes.

(1) A participant may request changes to an activity plan by submitting one copy of an APAR to each of the Division Director and the Attaché/Counselor(s) concerned.

(2) An APAR for a new activity shall contain the information required in paragraph (b) of this section. All other APAR's shall contain the activity description, the proposed budget and a justification for transfer of funds, if applicable.

**§ 1485.16 Reimbursement rules.**

(a) A participant may seek reimbursement for an expenditure if:

- (1) An expenditure has been made in furtherance of an approved activity;
- (2) The participant has transferred funds to pay for the expenditure; and
- (3) The participant has not been or will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, CCC will reimburse, in whole or in part, the cost of:

- (1) Production and placement of advertising in print or electronic media or on billboards or posters;
  - (2) Production and distribution of banners, recipe cards, table tents, shelf talkers and other similar point of sale materials;
  - (3) Direct mail advertising;
  - (4) In-store and food service promotions, product demonstrations to the trade and to consumers, and distribution of promotional samples;
  - (5) Temporary displays and rental of space for temporary displays;
  - (6) Fees for participation in retail, trade, and consumer exhibits and shows and booth construction and transportation of related materials to such shows;
  - (7) Trade seminars including space, equipment rental and duplication of seminar materials;
  - (8) Publications;
  - (9) Part-time contractors such as demonstrators, interpreters, translators and receptionists to help with the implementation of promotional activities such as trade shows, in-store promotions, food service promotions, and trade seminars; and
  - (10) Giveaways, awards, prizes, gifts and other similar promotional materials subject to the limitation that CCC will not reimburse more than \$1.00 per item;
- (c) Subject to paragraph (a) of this section, but for generic promotion activities only, CCC will also reimburse, in whole or in part, the cost of:
- (1) Compensation and allowances for housing, educational tuition, and cost of living adjustments paid to a U.S. citizen employee or a U.S. citizen contractor stationed overseas subject to the

limitation that CCC shall not reimburse that portion of:

- (i) The total of compensation and allowances that exceed 125 percent of the level of a GS-15 Step 10 salary for U.S. Government employees, and
  - (ii) Allowances that exceed the rate authorized for U.S. Embassy personnel;
- (2) Approved "supergrade" salaries for non-U.S. citizens and non-U.S. contractors;
- (3) Compensation of a non-U.S. citizen staff employee or non-U.S. contractor subject to the following limitations:
- (i) Where there is a local U.S. Embassy Foreign Service National (FSN) salary plan, CCC shall not reimburse any portion of such compensation that exceeds the compensation prescribed for the most comparable position in the FSN salary plan, or
  - (ii) Where an FSN salary plan does not exist, CCC will not reimburse any portion of such compensation that exceeds locally prevailing levels which the MPP participant shall document by a salary survey or other means.
- (4) A retroactive salary adjustment that conforms to a change in FSN salary plans, effective as of the date of such change;
- (5) Accrued annual leave at such time when employment is terminated or when required by local law;
- (6) Overtime paid to clerical staff;
- (7) Daily contractor fees subject to the limitation that CCC will not reimburse any portion of such fee that exceeds the daily gross salary of a GS-15, Step 10 for U.S. Government employees in effect on the date the fee is earned;
- (8) Air travel plus passports, visas and inoculations subject to the limitation that CCC will not reimburse any portion of air travel in excess of the full fare economy rate or when the participant fails to notify the Attaché/Counselor in the destination country in advance of the travel unless the Deputy Administrator determines it was impractical to provide such notification;
- (9) Per diem subject to the limitation that CCC will not reimburse per diem in excess of the rates allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304);
- (10) Automobile mileage at the local U.S. Embassy rate or rental cars while in travel status;
- (11) Other allowable expenditures while in travel status as authorized by the U.S. Federal Travel Regulations (41 CFR parts 301 through 304);
- (12) An overseas office, including rent, utilities, communications originating overseas, office supplies, accident liability insurance premiums and legal and accounting services;

(13) The purchase, lease, or repair of, or insurance premiums for, capital goods that have an expected useful life of at least one year such as furniture, equipment, machinery, removable fixtures, draperies, blinds, floor coverings, computer hardware and software;

(14) Premiums for health or accident insurance or other benefits for foreign national employees that the employer is required by law to pay;

(15) Accident liability insurance premiums for facilities used jointly with third party participants for MPP activities or for travel of non-MPP participant personnel;

(16) Market research;

(17) Evaluations, if not required by CCC to ensure compliance with program requirements;

(18) Legal fees to obtain advice on the host country's labor laws;

(19) Employment agency fees;

(20) STRE including breakfast, lunch, dinner, receptions and refreshments at approved activities; miscellaneous courtesies such as checkroom fees, taxi fares and tips; and decorations for a special promotional occasion;

(21) Educational travel of dependent children, visitation travel, rest and recuperation travel, home leave travel, emergency visitation travel for U.S. overseas employees allowed under the Foreign Affairs Manual, Foreign Affairs Manual, OIS/RA/PSG, Room B-264 Main State, Washington, D.C. 20520, Telephone: 202-736-4881, FAX: 202-736-7214.

(22) Evacuation payments (safe haven), shipment and storage of household goods and motor vehicles;

(23) Domestic administrative support expenses for the National Association of State Departments of Agriculture and the SRTGs;

(24) Generic commodity promotions (see § 1485.13(e));

(25) Expenditures associated with trade shows, seminars, and educational training conducted in the United States; and

(26) Demonstration projects.

(d) CCC will not reimburse any cost of:

(1) Forward year financial obligations, such as severance pay, attributable to employment of foreign nationals;

(2) Expenses, fines, settlements or claims resulting from suits, challenges or disputes emanating from employment terms, conditions, contract provisions and related formalities;

(3) The design and production of packaging, labeling or origin identification stickers;

(4) Product development, product modification or product research;

- (5) Product samples;
- (6) Slotting fees or similar sales expenditures;
- (7) The purchase, construction or lease of space for permanent displays, i.e., displays lasting beyond one activity plan year;
- (8) Rental, lease or purchase of warehouse space;
- (9) Coupon redemption or price discounts;
- (10) Refundable deposits or advances;
- (11) Giveaways, awards, prizes, gifts and other similar promotional materials in excess of \$1.00 per item;
- (12) Alcoholic beverages that are not an integral part of an approved promotional activity;
- (13) The purchase, lease (except for use in authorized travel status) or repair of motor vehicles;
- (14) Travel of applicants for employment interviews;
- (15) Unused non-refundable airline tickets or associated penalty fees except where travel is restricted by U.S. government action or advisory;
- (16) Independent evaluation or audit, including activities of the subcontractor if CCC determines that such a review is needed in order to ensure program compliance;
- (17) Any arrangement which has the effect of reducing the selling price of an agricultural commodity;
- (18) Goods and services and salaries of personnel provided by U.S. industry or foreign third party;
- (19) Membership fees in clubs and social organizations;
- (20) Indemnity and fidelity bonds;
- (21) Fees for participating in U.S. Government sponsored activities, other than trade fairs and exhibits;
- (22) Business cards;
- (23) Seasonal greeting cards;
- (24) Office parking fees;
- (25) Subscriptions to publications;
- (26) Home office domestic administrative expenses, including communication costs;
- (27) Travel in the United States unless in transit to or from a foreign country in which travel is not restricted;
- (28) Payment of U.S. and foreign employees or contractors share of personal taxes, except as legally required in a foreign country, and;
- (29) Any expenditure incurred for an activity prior to CCC's approval of that activity or amendment.

(e) The Deputy Administrator may determine, at the Deputy Administrator's discretion, whether any cost not expressly listed in this section will be reimbursed.

(f) For a generic promotion activity involving the use of company names, logos or brand names, the MPP

participant must ensure that all companies seeking to promote U.S. agricultural commodities have an equal opportunity to participate in the activity.

(g) For a brand promotion activity, CCC will reimburse at a rate equal to the percentage of U.S. origin content of the promoted agricultural commodity or at a rate of 50 percent, whichever is the lesser, except that CCC may reimburse for a higher rate if:

(1) There has been an affirmative action by the U.S. Trade Representative under Section 301 of the Trade Act of 1974 with respect to the unfair trade practice cited and there has been no final resolution of the case; and

(2) The participant shows, in comparison to the year such Section 301 case was initiated, that U.S. market share of the agricultural commodity concerned has decreased; and

(3) In such case, CCC shall determine the appropriate rate of reimbursement.

(h) CCC will reimburse for expenditures, other than administrative expenditures, made after the conclusion of participant's activity plan year provided:

(1) The activity was approved prior to the end of the activity plan year;

(2) Funds were transferred to pay for a portion of the expenditure(s) prior to the end of the activity plan year; and

(3) Expenditures were incurred not more than 30 calendar days beyond the end of an activity plan year.

#### **§ 1485.17 Reimbursement procedures.**

(a) A format for reimbursement claims is available from the Division Director. Claims for reimbursement shall contain the following information:

(1) Activity type—brand or generic;

(2) Activity number;

(3) Commodity aggregate code;

(4) Country code;

(5) Cost category;

(6) Amount to be reimbursed;

(7) If applicable, any reduction in the amount of reimbursement claimed to offset CCC demand for refund of amounts previously reimbursed, and reference to the relevant Compliance Report; and

(8) If applicable, any amount previously claimed that has not been reimbursed.

(b) All claims for reimbursement shall be submitted by the participant's U.S. office to the Director, Marketing Operations Staff, FAS, USDA.

(c) In general, CCC will not reimburse a claim for less than \$10,000 except that CCC will reimburse a final claim for a participant's activity plan year for a lesser amount.

(d) CCC will not reimburse claims submitted later than 6 months after the end of a participant's activity plan year.

(e) If CCC reimburses a claim with commodity certificates, CCC will issue commodity certificates with a face value equivalent to the amount of the claim which shall be in full accord and satisfaction of such claim.

(f) If CCC overpays a reimbursement claim, the participant shall repay CCC within 30 days the amount of the overpayment either by submitting a check payable to CCC or by offsetting its next reimbursement claim.

(g) If a participant receives a reimbursement or offsets an advanced payment which is later disallowed, the participant shall within 30 days of such disallowance repay CCC the amount owed either by submitting a check payable to CCC or by offsetting its next reimbursement claim.

(h) The participant shall report any actions having a bearing on the propriety of any claims for reimbursement to the Attache/Counselor and its U.S. office shall report such actions in writing to the Division Director(s).

#### **§ 1485.18 Advances.**

(a) Policy.

In general, CCC operates MPP and EIP/MPP on a reimbursable basis. CCC will not advance funds to an EIP/MPP participant or to an MPP participant for brand promotion activities.

(b) Exception.

Upon request, CCC may advance payments to an MPP participant for generic promotion activities. Prior to making an advance, CCC may require the participant to submit security in a form and amount acceptable to CCC to protect CCC's financial interests. Total payments advanced shall not exceed 40 percent of a participant's approved annual generic activity budget. However, CCC will not make any advance to an MPP participant where an advance is outstanding from a prior activity plan year.

(c) Refunds due CCC.

A participant shall expend the advance on approved generic promotion activities within 90 calendar days after the date of disbursement by CCC. A participant shall return any unexpended portion of the advance, plus a prorated share of all proceeds generated (i.e., premiums generated from certificate sales and interest earned), either by submitting a check payable to CCC or by offsetting its next reimbursement claim. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

**§ 1485.19 Employment practices.**

(a) An MPP participant shall enter into written contracts with all employees and shall ensure that all terms, conditions, and related formalities of such contracts conform to governing local law.

(b) An MPP participant shall, in its overseas office, conform its office hours, work week and holidays to local law and to the custom generally observed by U.S. commercial entities in the local business community.

(c) An MPP participant may pay salaries or fees in any currency (U.S. or foreign) if approved by the Attache/Counselor. However, participants are cautioned to consult local laws regarding currency restrictions.

**1485.20 Financial management, reports, evaluations and appeals.**

(a) Financial Management.

(1) An MPP participant shall implement and maintain a financial management system that conforms to generally accepted principles and standards of accounting.

(2) An MPP participant shall institute internal controls and provide written guidance to commercial entities participating in its activities to ensure their compliance with these provisions. Each participant shall maintain all original records and documents relating to program activities for five calendar years following the end of the applicable activity plan year and shall make such records and documents available upon request to authorized officials of the U.S. Government. An MPP participant shall also maintain all documents related to employment such as employment applications, contracts, position descriptions, leave records and salary changes, and all records pertaining to contractors.

(3) A participant shall maintain its records of expenditures and contributions in a manner that allows it to provide information by activity plan, country, activity number and cost category. Such records shall include:

- (i) Receipts for all STRE (actual vendor invoices or restaurant checks, rather than credit card receipts);
- (ii) Original receipts for any other program related expenditure in excess of \$25.00;
- (iii) The exchange rate used to calculate the dollar equivalent of expenditures incurred in a foreign currency and the basis for such calculation;
- (iv) Copies of reimbursement claims;
- (v) An itemized list of claims charged to each of the participant's CCC resources accounts;
- (vi) Documentation with accompanying English translation

supporting each reimbursement claim, including original evidence to support the financial transactions such as canceled checks, receipted paid bills, contracts or purchase orders, per diem calculations and travel vouchers. (Credit memos are not acceptable types of documentation for participant reimbursement claims); and

(vii) Documentation supporting contributions must include: the dates, purpose and location of the activity for which the cash or in-kind items were claimed as a contribution; who conducted the activity; the participating groups or individuals; and, the method of computing the claimed contributions. MPP participants must retain and make available for audit documentation related to claimed contributions.

(4) Upon request, a participant shall provide to CCC originals of documents supporting reimbursement claims.

(b) Reports.

(1) End-of-Year Contribution Report.

Not later than 6 months after the end of its activity plan year, a participant shall submit two copies of a report which identifies, by activity and cost category and in U.S. dollar equivalent, contributions made by the participant, the U.S. industry and foreign third parties during that activity plan year. A suggested format of a contribution report is available from the Division Director.

(2) Trip Reports.

Not later than 45 days after completion of travel (other than local travel), an MPP participant shall submit a trip report. The report must include the name(s) of the traveler(s), purpose of travel, itinerary, names and affiliations of contacts, and a brief summary of findings, conclusions, recommendations or specific accomplishments.

(3) Research Reports.

Not later than 6 months after the end of its activity plan year, an MPP participant shall submit a report on any research conducted in accordance with the activity plan.

(4) A participant shall submit the reports required by this subsection to the appropriate Division Director. Trip reports and research reports shall also be submitted to the Attache/Counselor concerned. All reports shall be in English and include the participant's agreement number, the countries covered, date of the report and the period covered in the report.

(5) CCC may require the submission of additional reports.

(6) A participant shall provide to the FAS Compliance Review Staff upon request any audit reports by independent public accountants.

(c) Evaluation.

(1) Policy.

(i) The Government Performance and Results Act (GPRA) of 1993 (5 U.S.C. 306; 31 U.S.C. 1105, 1115-1119, 3515, 9703-9704) requires performance measurement of Federal programs, including MPP. Evaluation of MPP's effectiveness will depend on a clear statement by participants of goals to be met within a specified time, schedule of measurable milestones for gauging success, plan for achievement, and results of activities at regular intervals. The overall goal of the MPP and of individual participants' activities is to achieve additional exports of U.S. agricultural products, that is, sales that would not have occurred in the absence of MPP funding. A participant that can demonstrate additional sales compared to a representative base period, taking into account extenuating factors beyond the participant's control, will have met the overall objective of the GPRA and the need for evaluation.

(ii) Evaluation is an integral element of program planning and implementation, providing the basis for the strategic plan and activity plan. The evaluation results guide the development and scope of a participant's program, contributing to program accountability and providing evidence of program effectiveness.

(iii) An MPP participant shall conduct periodic evaluations of its program and activities and may contract with an independent evaluator to satisfy this requirement. CCC reserves the right to have direct input and control over design, scope and methodology of any such evaluation, including direct contact with and provision of guidance to the independent evaluator.

(2) Types of evaluation.

(i) An activity evaluation is a review of an activity to determine whether such activity achieved the goals specified in the activity plan. Unless specifically exempted in the activity plan, all activity evaluations shall be completed within 90 days following the end of the MPP participant's activity plan year.

(ii) A brand promotion evaluation is a review of the U.S. and foreign commercial entities' export sales to determine whether the activity achieved the goals specified in the activity plan. These evaluations shall be completed within 90 days following the end of the participant's activity plan year.

(iii) A program evaluation is a review of the MPP participant's entire program or any appropriate portion of the program to determine the effectiveness of the participant's strategy in meeting specified goals. An MPP participant shall complete at least one program evaluation each year. Actual scope and

timing of the program evaluation shall be determined by the MPP participant and the Division Director and specified in the MPP participant's activity plan approval letter.

(3) Contents of program evaluation.

A program evaluation shall contain:

(i) The name of the party conducting the evaluation;

(ii) The activities covered by the evaluation (including the activity numbers);

(iii) A concise statement of the constraint(s) and the goals specified in the activity plan;

(iv) A description of the evaluation methodology;

(v) A description of additional export sales achieved, including the ratio of additional export sales in relation to MPP funding received;

(vi) A summary of the findings, including an analysis of the strengths and weaknesses of the program(s); and

(vii) Recommendations for future programs.

(4) An MPP participant shall submit via a cover letter to the Division Director, an executive summary which provides assessment of the program evaluation's findings and recommendations and proposed changes in program strategy or design as a result of the evaluation.

(5) If as a result of an evaluation or audit of activities of a participant under the program, CCC determines that further review is needed in order to ensure compliance with the requirements of the program, CCC may require the participant to contract for an independent audit of the program activities,

(d) Appeals.

(1) The Director, Compliance Review Staff (Director, CRS) will notify a participant through a compliance report when it appears that CCC may be entitled to recover funds from that participant. The compliance report will state the basis for this action.

(2) A participant may, within 60 days of the date of the compliance report, submit a response to the Director, CRS. The Director, CRS, at the Director's discretion, may extend the period for response up to an additional 30 days. If the participant does not respond to the compliance report within the required time period or, if after review of the participant's response, the Director, CRS, determines that CCC may be entitled to recover funds from the participant, the Director, CRS, will refer the compliance report to the Deputy Administrator.

(3) If after review of the compliance report and response, the Deputy Administrator determines that the

participant owes any money to CCC he will so inform the participant and provide the basis for the decision. The Deputy Administrator may initiate action to collect such amount pursuant to 7 C.F.R. Part 1403, Debt Settlement Policies and Procedures. Determinations of the Deputy Administrator will be in writing and in sufficient detail to inform the participant of the basis for the determination. The participant may request reconsideration within 30 days of the date of the Deputy Administrator's initial determination.

(4) The Participant may appeal determinations of the Deputy Administrator to the Administrator. An appeal must be in writing and be submitted to the office of the Deputy Administrator within 30 days following the date of the initial determination by the Deputy Administrator or the determination on reconsideration. The participant may request a hearing.

(5) If the participant submits its appeal and requests a hearing, the Administrator, or the Administrator's designee, will set a date and time, generally within 60 days. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the participant bears the cost of a transcript; however, the Administrator may have a transcript prepared at CCC's expense.

(6) The Administrator will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after submission of the appeal, hearing or receipt of any transcript, whichever is later. The determination of the Administrator will be the final determination of CCC. The participant must exhaust all administrative remedies contained in this subsection before pursuing judicial review of a determination by the Administrator.

**§ 1485.21 Failure to make required contribution.**

An MPP participant's contribution requirement will be specified in the MPP allocation letter and the activity plan approval letter. If an MPP participant fails to contribute the amount specified in its allocation approval letter, the MPP participant shall pay to CCC in U.S. dollars the difference between the amount it has contributed and the amount specified in the allocation approval letter. An MPP participant shall remit such payment within 90 days after the end of its activity plan year.

**§ 1485.22 Submissions.**

The participant may make any submissions required by this regulation either by hand delivery to the Director, Marketing Operations Staff, FAS, USDA or by commercial service delivery or U.S. mail. If delivery occurs by commercial "next-day" mail service or U.S. regular mail, first class prepaid, the material shall be deemed submitted as of the date of the commercial service or U.S. registered mail receipt. For all other permissible methods of delivery, the material shall be deemed submitted as of the date received by the Director, Marketing Operations Staff, FAS, USDA.

**§ 1485.23 Miscellaneous provisions.**

(a) Disclosure of Program Information.

(1) Documents submitted to CCC by participants are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, 7 CFR Part 1, Subpart A—Official Records, and specifically 7 C.F.R. 1.11, Handling Information from a Private Business.

(2) If requested by a person located in the United States, a participant shall provide a copy of any document in its possession or control containing market information developed and produced under the terms of its agreement. The participant may charge a fee not to exceed the costs incurred in assembling, duplicating and distributing the materials.

(3) The results of any research conducted by a participant under an agreement, shall be the property of the U.S. Government.

(b) Ethical Conduct.

(1) A participant shall conduct its business in accordance with the laws and regulations of the country in which an activity is carried out.

(2) Neither an MPP participant nor its affiliates shall make export sales of agricultural commodities and products covered under the terms of the agreement. Neither an MPP participant nor its affiliates shall charge a fee for facilitating an export sale. A participant may, however, collect check-off funds and membership fees that are required for membership in the participating organization. For the purposes of this paragraph, "affiliate" means any partnership, association, company, corporation, trust, or any other such party in which the participant has an investment other than in a mutual fund.

(3) An MPP participant shall not limit participation to members of its organization. The MPP participant shall publicize its program and make participation possible for commercial entities throughout the participant's industry or, in the case of SRTGs, throughout the corresponding region.

(4) A participant shall select U.S. agricultural industry representatives to participate in activities such as trade teams, sales teams, and trade fairs based on criteria that ensure participation on an equitable basis by a broad cross section of the U.S. industry. If requested, a participant shall submit such selection criteria to CCC for approval.

(5) All participants should endeavor to ensure fair and accurate fact-based advertising. Deceptive or misleading promotions may result in cancellation or termination of an agreement.

(6) The participant must report any actions or circumstances that have a bearing on the propriety of the program to the Attache/Counselor and its U.S. office shall report such actions in writing to the Division Director.

(c) Contracting Procedures.

(1) Neither the Commodity Credit Corporation (CCC) nor any other agency of the United States Government or any official or employee of the CCC or the United States Government has any obligation or responsibility with respect to participant contracts with third parties.

(2) A participant shall:

(i) Ensure that all expenditures for goods and services reimbursed, in excess of \$25.00, by CCC are documented by a purchase order, invoice, or contract and that such documentation demonstrates competition in acquiring the goods or services;

(ii) Ensure that no employee or officer participates in the selection or award of a contract in which such employee or official, or the employee's or officer's family or partners has a financial interest;

(iii) Conduct all contracting in an openly competitive manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids and requests for proposals for procurement of any goods or services shall be excluded from competition for such procurement;

(iv) Base solicitations for professional and technical services on a clear and accurate description of the requirements for the services to be procured;

(v) Perform a price or cost analysis for each contract;

(vi) Maintain the following procurement records:

(A) A written justification for each contractor selection or procurement award;

(B) Documentation to demonstrate:

(1) If the procurement is for less than \$2,500, that the participant has solicited two or more quotations via telephone or advertised to obtain competitive bids;

(2) If the procurement is for more than \$2,500 but less than \$25,000, that the participant has actively solicited competitive bids through normal commercial channels and has received at least three bids or advertised to obtain competitive bids;

(3) If the procurement is for more than \$25,000, that the participant has advertised to obtain competitive bids. Procurement for goods and services shall not be split in an effort to avoid specified advertising requirements.

(d) Disposable Capital Goods.

(1) Capital goods purchased by the MPP participant and reimbursed by CCC that are unusable, unserviceable, or no longer needed for project purposes shall be disposed of in one of the following ways:

(i) The participant may exchange or sell the goods provided that it applies any exchange allowance, insurance proceeds or sales proceeds toward the purchase of other property needed in the project;

(ii) The participant may, with CCC approval, transfer the goods to other MPP participants and activities, or to a foreign third party; or

(iii) The participant may, upon Attache/Counselor approval, donate the goods to a local charity, or convey the goods to the Attache/Counselor, along with an itemized inventory list and any documents of title.

(2) A participant shall maintain an inventory of all capital goods with a value of \$100 acquired in furtherance of program activities. The inventory shall list and number each item and include the date of purchase or acquisition, cost of purchase, replacement value, serial number, make, model, and electrical requirements.

(3) The participant shall insure all capital goods acquired in furtherance of program activities and safeguard such goods against theft, damage and unauthorized use. The participant shall promptly report any loss, theft, or damage of property to the insurance company.

(e) Contracts between MPP participants and brand participants.

Where CCC approves an application for brand promotion, the MPP participant shall enter into an agreement with each approved brand participant which shall:

(1) Specify a time period for such brand promotion, and require that all brand promotion expenditures be made within the MPP participant's approved activity plan period;

(2) Make no allowance for extension or renewal;

(3) Limit reimbursable expenditures to those made in countries and for activities approved in the activity plan;

(4) Specify the percentage of promotion expenditures that will be reimbursed, reimbursement procedures and documentation requirements;

(5) Include a written certification that the brand participant either owns the brand of the product it will promote or has exclusive rights to promote the brand in each of the countries in which promotion activities will occur;

(6) Require that all product labels, promotional material and advertising will identify the origin of the agricultural commodity as "Product of the U.S.", "Product of the U.S.A.", "Grown in the U.S.", "Grown in the U.S.A.", "Made in America" or other U.S. regional designation if approved in advance by CCC; that such origin identification will be conspicuously displayed, in a manner that is easily observed; and that such origin identification will conform, to the extent possible, to the U.S. standard of 1/6" (.42 centimeters) in height based on the lower case letter "o". A participant may request an exemption from this requirement. All such requests shall be in writing and include justification satisfactory to the Deputy Administrator that this labelling requirement would hinder a participant's promotional efforts. The Deputy Administrator will determine, on a case by case basis, whether sufficient justification exists to grant an exemption from the labelling requirement;

(7) Specify documentation requirements for a U.S. brand applicant seeking priority consideration for assistance based on eligibility as a small-sized entity;

(8) Require that the U.S. brand participant submit to the MPP participant a statement certifying that any Federal funds received will supplement, but not supplant, any private or third party funds or other contributions to program activities; and

(9) The participant shall require the brand participant to maintain all original records and documents relating to program activities for five calendar years following the end of the applicable activity plan year and shall make such records and documents available upon request to authorized officials of the U.S. Government.

(f) EIP/MPP participants shall ensure that all product labels, promotional material and advertising will identify the origin of the agricultural commodity as "Product of the U.S.", "Product of the U.S.A.", "Grown in the U.S.", "Grown in the U.S.A.", "Made in America" or other U.S. regional designation if

approved in advance by CCC; such origin identification is conspicuously displayed in a manner that is easily observed, and that, to the fullest extent possible, the origin identification conforms to the U.S. standard of 1/6" (.42 centimeters) in height based on the lower case letter "o". An EIP/MPP participant may request an exemption from this requirement. All such requests shall be in writing and include justification satisfactory to the Deputy Administrator that this labelling requirement would hinder a participant's promotional efforts. The Deputy Administrator will determine, on a case by case basis, whether sufficient justification exists to grant an exemption from the labelling requirement;

(g) Travel shall conform to U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and air travel

shall conform to the requirements of the "Fly America Act (49 U.S.C. 1517)." The MPP participant shall notify the Attaché/Counselor in the destination countries in writing in advance of any proposed travel.

(h) Proceeds.

Any income or refunds generated from an activity, i.e., participation fees, proceeds of sales, refunds of value added taxes (VAT), the expenditures for which have been wholly or partially reimbursed, shall be repaid by submitting a check payable to CCC or offsetting the participant's next reimbursement claim. However, where CCC reimburses a participant with CCC commodity certificates, such participant may retain any income generated by the sale of such certificates.

**§ 1485.24 Applicability date.**

This Subpart applies to activities that are approved in accordance with the participant's 1995 program and corresponding activity plan year.

**§ 1485.25 Paperwork reduction requirements.**

The paperwork and record keeping requirements imposed by this final rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980. OMB has assigned control number 05510027 for this information collection.

Signed at Washington, D.C. on January 27, 1995.

**Christopher E. Goldthwait,**

*General Sales Manager and Vice President,  
Commodity Credit Corporation.*

[FR Doc. 95-2477 Filed 1-30-95; 10:09 am]

BILLING CODE 3410-10-P