

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### 7 CFR Part 785

#### Farm Service Agency, Rural Housing Service, Rural Utilities Service, Rural Business-Cooperative Service

#### 7 CFR Part 1946

RIN 0560-AE02

#### Certified Mediation Program

**AGENCY:** Farm Service Agency, Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Farm Service Agency (FSA) is amending its agricultural loan mediation regulations to implement the requirements of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (the 1994 Act) and the United States Grain Standards Act of 2000 (the Grain Standards Act). This rule establishes and modifies requirements and procedures for certification and funding of State mediation programs. This rule also moves the mediation provisions, as amended, from the Rural Development chapter of title 7 of the Code of Federal Regulations (CFR) to the FSA chapter of the same title.

**EFFECTIVE DATE:** September 10, 2002.

**FOR FURTHER INFORMATION CONTACT:** Chester A. Bailey, Mediation Program Manager, FSA, telephone 202-720-1471.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 12866

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

#### Federal Assistance Program

The title and number of the Federal assistance program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies, are Certified Mediation Program—10.435.

#### Executive Order 12372

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

#### Environmental Evaluation

It has been determined that this action will not have a significant impact on the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed under the National Environmental Policy Act of 1969.

#### Executive Order 12612

This document has been reviewed in accordance with Executive Order 12612, Federalism. The agency has determined that this action does not have significant Federalism implications.

#### Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule will be preempted, no retroactive effect will be given to this rule, and administrative proceedings published at 7 CFR part 11 must be exhausted before action for judicial review may be brought.

#### Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this program. The administration certifies that this program will not have a significant impact on a substantial number of small entities. By statute, this grant program applies only to States. These grants cannot be made to small entities or individuals. Small entities may participate in mediation, however, to the same extent as individuals and other entities affected by adverse decisions covered by certified mediation programs.

#### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, tribal governments, and the private sector. Under section 202 of the UMRA, the Agency generally must prepare a written Statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. When such a Statement is needed for a rule, section 205 of the UMRA generally requires the Agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objective of the rule.

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

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, FSA submitted a request to OMB for the approval of the certified mediation program information collection package (0560-0165). OMB control number 0560-0165 was approved for use through February 29, 2004.

#### Background

On November 9, 1999, FSA published a proposed rule (64 FR 61034) to amend its agricultural loan mediation program regulations to implement the requirements of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (the 1994 Act) (Pub. L. 103-354). The 1994 Act expanded the scope of issues that may be mediated in State mediation programs certified by FSA. The proposed rule modified previously established requirements and procedures for certification and funding of State mediation programs under the Agricultural Credit Act of 1987 (the 1987 Act) (7 U.S.C. 5101 *et seq.*).

On November 9, 2000, the Grain Standards and Warehouse Improvement

Act of 2000 (the Grain Standards Act) (Pub. L. 106-472) was enacted, making a number of additional amendments to the 1987 Act. Section 306 of the Grain Standards Act reauthorizes the mediation program through fiscal year 2005, and provides that funds appropriated by Congress to the state agricultural mediation program must be used for farm credit disputes and may be used, if available, for other specified U.S. Department of Agriculture (USDA) program disputes. This section also clarifies that the term "mediation services," with respect to mediation or a request for mediation, may include all activities related to the intake and scheduling of cases, the provision of background and selected information regarding the mediation process, appropriate financial advisory and counseling services performed by a person other than a State mediation program mediator, and the mediation session. The Grain Standards Act also clarifies that the persons eligible for mediation include: agricultural producers, creditors of producers (as applicable), and persons directly affected by actions of the USDA. The Grain Standards Act further provides that mediation is voluntary and that a person may not be compelled to participate in such mediation, but that the statute does not affect any law requiring mediation before foreclosure on agricultural land or property.

FSA has incorporated these statutory provisions in the final rule. Section 785.1(d) of the final rule provides that mediation is voluntary and that a person may not be compelled to participate in a mediation, but that the statute does not affect any law requiring mediation before foreclosure on agricultural land or property. A conforming definition of mediation services has been added in § 785.2, and a new definition of "covered persons" in § 785.2 specifies who may request mediation and issues that may be mediated.

This rule also removes the mediation provisions from the Rural Development chapter of Title 7 of the CFR (Chapter 18) and incorporates those provisions into a new part 785 in the FSA chapter (Chapter 7) of Title 7.

#### *Public Comment*

The comment period for the proposed rule ended on January 10, 2000. FSA solicited comments on the proposed rule in general, and particularly on certain specific matters addressed or considered during development of the proposed rule, specifically: Training programs implemented by States, the requirement for quarterly reporting by

certified State mediation programs, the experience of States in mediating the additional issues authorized for mediation in the 1994 Act, mediation not involving USDA agencies and programs, the proposed changes in procedures for determining grant awards and managing an administrative reserve, and the appropriateness of requiring mediation program participants to satisfy a needs test as a condition for use of grant funds to pay for financial advisory and counseling services in preparing participants for mediation.

#### **Summary of Comments**

Comments were received from the Coalition of Agricultural Mediation Programs (CAMP) representing 25 USDA-certified State mediation programs, 12 USDA-certified State mediation programs, the American Bar Association, the Nebraska Legal Aid Society, the Oklahoma Farmers Union, and two mediators. The comments addressed a number of issues relating to the proposed rule in addition to those for which we had specifically solicited comment. FSA considered the comments and incorporates many of the recommendations and suggestions in this rule. The following is a review of the general subjects of comments and of the changes made in the final rule in response.

#### *Training Programs Implemented by States*

The proposed rule required a state requesting certification to describe the State mediation program education and training requirements for mediators. One commentator stated that the request for information concerning State programs for training mediators is appropriate provided that FSA understands that each program will employ different models of mediation, and that the training curricula will vary from one program to another. The commentator also stated that it is necessary for the various USDA agencies to work with the State agricultural mediation programs to provide training so that mediators are adequately trained on issues relating to USDA programs.

The commentator observed that USDA personnel need additional training regarding the objectives of mediation and its potential benefits. The commentator recommended that as part of a cooperative training effort, USDA personnel who will be involved in the mediation process receive training on mediation. Another comment proposed that the USDA conduct routine mediation training and orientation

workshops for USDA staff and other consumer populations on the use and processes associated with mediation services.

Several other comments came from certified State mediation programs pointing out that their State laws set standards for training, qualifications, ethics and continuing education requirements for approved mediation programs and mediators. Other comments encouraged FSA to work with CAMP and States with certified mediation programs to develop criteria for those training requirements if there are specific areas that FSA believes it needs to monitor considering that training requirements are generally approved under individual State laws as well. Other commentators suggested that the USDA work with certified States to develop curriculum and materials that comport with USDA standards, for example, in a joint project with special funding. In contrast, other comments suggested that because of the diversity of State laws and the specific needs of the individual State programs, mediator qualifications and training requirements generally should be left to the respective certified mediation programs.

FSA agrees that both USDA employees and mediators must be adequately trained for the mediation process to function effectively. In response to the comments, FSA has added minimum Federal standards of mediator training to this rule to ensure a threshold level of mediator qualifications in all certified State mediation programs. For clarity, "mediator" and "qualified mediator" are separately defined in § 785.2. The definition of "qualified mediator" establishes a minimum training requirement that will apply in any State without a law prescribing mediator qualifications. The minimum training requirements in the final rule correspond to the minimums among States that prescribe mediator qualifications by law. As one condition of USDA certification under § 501 of the 1987 Act, a State mediation program must train its mediators. FSA also intends to work with certified States on an on-going basis to schedule joint training programs from time to time as funding is available.

#### *Quarterly Reporting by Certified State Mediation Programs*

One commentator stated that reporting requirements need to stay proportional to the level of funding that is received by the States. Because of the relatively small size of the maximum grants to certified State mediation programs, annual rather than quarterly reporting is

appropriate. Comments from certified State mediation programs concurred that quarterly reporting beyond financial reporting would greatly increase the reporting burden on States and that quarterly reporting would be excessively burdensome, especially on smaller programs where administrative staff and time are limited. All comments concurred that, with the exception of financial reporting, reporting by certified State mediation programs should be on an annual basis. One commentator suggests that programs receiving grants of less than \$100,000 should report under a simplified system. Another commented that as a general matter the collection of information from the certified programs is necessary and that the commentator would like to work with FSA to develop a uniform reporting system that minimizes the burden of collecting information and provides a better measure of program performance.

In light of these comments, the final rule does not modify reporting requirements in § 785.8 to require quarterly reporting on program performance except as required under the Uniform Federal Assistance Regulations, 7 CFR part 3015, and the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 7 CFR part 3016. FSA will continue to work with certified State mediation programs to determine how best to minimize the paperwork burden on certified States and, at the same time, provide a better method of measuring annual performance of the States' mediation programs.

#### *Funding and Administrative Reserve*

The procedure for determining grant awards to certified State mediation programs in the proposed rule represented an important change from the existing regulations. Under current regulations, certified States are awarded grants based on their requests, subject to the statutory limitations. Where States' total grant requests exceeded the funds appropriated, funds are allocated to States *pro-rata*. The proposed rule set forth a series of criteria as factors that would be considered in making awards to States.

In addition, the proposed rule provided for an administrative reserve that would be funded by withholding 10 percent of the total funds so that funds from the reserve could be obligated later in the fiscal year to newly qualified States or reallocated to States to meet demand for mediation services exceeding States' initial projections, and then, subsequently, to requesting States.

In addition, to provide for flexibility in allocation of the program's limited funding, the reserve mechanism is intended to provide a means for the program to award funding at the beginning of the second half of a fiscal year for a mediation program in a State that newly qualifies in the first half of a fiscal year. Under the current regulation, a newly certified State program is required to wait for an award of grant funds until the following fiscal year.

#### *Administrative Reserve*

Several State mediation programs suggested that 5 percent of the total grant funds should be held in reserve rather than 10 percent because the sum withheld would be excessive when total funds appropriated are not sufficient to meet all eligible State matching grant needs. These commentators also suggested that making the reserve a bit smaller rather than larger should encourage States to submit applications for new certification or re-certification by the August 1 deadline. The commentators further suggested that meeting excess demand for mediation in existing certified States should be a priority over making grants to States newly certified in the current fiscal year or to previously certified States missing the August 1 deadline for recertification. FSA agrees with these comments, and the final rule provides in § 785.7(d) for a reserve of 5 percent of the total grant funds appropriated for the fiscal year. The final rule also revises priorities for disbursements from the administrative reserve fund to provide in § 785.7(d)(1) that additional unbudgeted demands for mediation services in qualifying States submitting certifications or recertifications on or before August 1 in a calendar year that are received on or before March 1 of the fiscal year will be given priority over requests for certification received between August 2 and March 1. As suggested by commentators, this change will provide additional incentive for States to submit timely requests for certification and recertification.

One commentator questioned why FSA will accept requests for certification after the annual August 1 deadline, objecting because the policy reduces funding available to States that submit timely grant requests. To clarify the purpose of the reserve, the reserve is relabeled an "administrative reserve" in the final rule to reflect its administrative utility more clearly. FSA policy to receive and consider requests for certification and recertification submitted after the August 1 deadline reflects its belief that FSA should

accommodate the varying schedules on which States may be able to meet certification requirements, particularly those requiring legislative action by the respective State governments. In response to other comments, the final rule provides in § 785.7(d)(1)(i)—(ii) that grant requests received between August 2 and March 1 will not be considered for funding in a fiscal year until the Administrator has determined what additional funding from the administrative reserve should be allocated to qualifying States that submitted timely requests.

The final rule also provides in § 785.7(d)(1)(ii) that funding granted in response to a late-submitted request for a grant by a State requesting re-certification may be made effective as of the beginning of the fiscal year. To accommodate the differences in designations of fiscal years by the Federal Government and the States, the final rule expressly provides in § 785.7(e), pursuant to 7 CFR 3016.23, that any State receiving a grant may carry forward funds unobligated at the end of the Federal fiscal year into the next fiscal year.

In combination, these provisions in the final rule are intended to provide a measure of administrative flexibility to support USDA policy favoring increased use of mediation as a means for resolution of administrative disputes, to assist efficient allocations of limited funds in response to unanticipated demands, and to accelerate start-up of newly certified State mediation programs.

#### *Funding Criteria*

Several commentators expressed concern about the criteria that are to be used to determine funding. There were concerns that using both objective criteria and criteria providing for discretion could operate unfairly. States with mandatory mediation programs would clearly serve more clients while States without mandatory agricultural mediation programs would need to commit resources for outreach that would be unnecessary in States with mandatory agricultural mediation requirements. The existence of these competing concerns is a reason why the final rule must provide for discretion in allocating grant funds. The criteria in the final rule accordingly identify considerations that will affect determinations of grant awards but do not specify a formula. No substantive changes were made in response to these comments.

### *Certification Requests*

One commentator stated that it appreciates the need for USDA to receive sufficient information and documentation to adequately evaluate whether a State's request for certification meets the eligibility criteria to become a certified mediation program. However, it maintains that the existing certification process provides USDA with adequate information to make this decision. The commentator requested that the certification process be kept as simple as possible so as not to discourage new or existing States from participating.

FSA agrees that the procedures for requesting certification of a State mediation program and for requesting grant assistance should be manageable for States participating in the certified State mediation program. The final rule is reorganized to reflect more clearly the differing requirements for certification of a State mediation program (§ 785.3) and submission of a request to obtain grant funds for a certified program (§ 785.4). For purposes of certification, FSA will rely on the certification required of a governor or the head of a State agency designated by the governor. The changes from the proposed rule requiring submission by States of information concerning training of mediators and the State's experience in delivery of mediation services are adopted to achieve a better allocation of grant funds relative to needs while preserving some administrative flexibility to make grants to support mediation programs in newly qualifying States.

Also, while, pursuant to 7 U.S.C. 5101(c)(3)(E)–(F), the governor of a State must certify that lenders and borrowers of agricultural loans received adequate notification of the mediation program (§ 785.3(a)(2)(v)) and that, in the case of other issues covered by the mediation program, persons directly affected by actions of the USDA received adequate notification of the mediation program (§ 785.3(a)(2)(vi)), these requirements are effectively met by USDA agencies. As required by 7 U.S.C. 6995, covered agencies must offer mediation when a certified mediation program is available as part of their informal appeals process.

Several commentators recommended that regulations be modified to identify what specific information must be included in a grant request in compliance with 7 CFR parts 3015 and 3016. FSA believes that modifying the rule as suggested would introduce either redundancy or inconsistency, so no changes have been made in response to these comments. Parts 3015 and 3016

contain uniform rules that apply to USDA grants and cooperative agreements to State and local governments, universities, non-profit and for-profit organizations. The State mediation programs qualifying to date are operated primarily by State universities or State departments of agriculture, but other State agencies can be certified as State mediation programs. As a general matter, States are familiar with the uniform requirements set forth in parts 3015 and 3016. It is the responsibility of the State to know and comply with the applicable sections of parts 3015 and 3016 when applying for and receiving USDA grants.

### *Use of Grant Funds To Support Mediation in Other Programs of the USDA*

Several commentators stated that the allowable costs provision in the proposed rule appears to authorize mediation programs to use grant funds to mediate disputes for persons directly affected by actions of any USDA agency, but that the USDA has required that the Secretary make a specific designation for grant funds to be used to mediate disputes in other programs of the USDA. The final rule removes this inconsistency and provides in § 785.2, in the definition of "covered persons," that the Secretary may designate issues for mediation where other persons are directly affected by actions of the USDA and that State mediation programs may certify that they provide mediation services to such persons (§ 785.3(a)(2)). Within the general scope of the discretion of the Secretary authorized by section 501(c)(1) of the 1987 Act, the final rule contemplates that the specific authorizations for uses of grant funds to mediate such disputes will vary with particular circumstances and should not be specified in the final rule.

The final rule also provides that a certified State mediation program may require non-USDA participants in mediations to pay a fee for mediation services (§ 785.5), but that no such fee may be required of any USDA agency that is mandated to participate in mediation. The restriction against imposition of fees on USDA agencies mandated to participate in mediations reflects that the USDA is already funding the mediation program through grants and cannot reasonably be expected to pay twice. In addition, one of the primary reasons to charge a fee for mediation is to ensure good-faith participation. By law, USDA agencies must participate in good faith in mediation. As a result, there is no reason to charge USDA agencies a fee to

participate in mediation to ensure their good faith.

### *Experience in Mediating the Additional Issues Authorized for Mediation in the 1994 Act*

Both the 1994 Act and the Grain Standards Act expanded the statutory coverage of issues that may be mediated by a State mediation program and the categories of persons that may be eligible for mediation services through a certified program. The proposed rule reflected the specific expansions of coverage under the 1994 Act and also its authorization for the Secretary to identify other issues appropriate for mediation.

The Secretary's Memorandum 4710–1, dated March 23, 2000, entitled "USDA Alternative Dispute Resolution Policy," authorized expansion of the issues handled by USDA-certified State mediation programs in accordance with the 1994 Act to include rural housing loans; rural business loans; crop insurance; and other issues the Secretary may subsequently consider appropriate. The final rule also reflects further expansions of coverage of issues and of persons eligible for mediation services under the Grain Standards Act to include mediations of disputes between producers and their creditors involving agricultural loans, regardless of whether the loans are made or guaranteed by the USDA or are made by a third party (§§ 785.2 ("Covered persons") and 785.3(b)(2)). Significantly, the final rule does not refer to "agricultural loan mediation," but instead refers to mediation services delivered by certified State mediation programs. Pursuant to the Secretary's alternative dispute resolution policy, the final rule also supports greater utilization of the certified State mediation programs to resolve both credit and non-credit issues in rural communities.

In light of this policy, the USDA solicited specific comments regarding program experience to date in mediating the broader range of issues covered by the 1994 Act. Comments from the certified State programs were generally supportive that the coverage of issues for mediation under their programs could be expanded. With respect to mediation of non-credit issues, one mediator commented that the opportunities for resolution of such issues in mediation has been constrained by rigidity in the program regulations governing many such disputes. For mediation to be effective, participants must have confidence that there are options that can be explored with the assistance of a mediator. The

commentor observed that many of the regulations implicated in mediations of non-credit issues were published prior to 1994 and the regulations may need modification to create more opportunity for mediated resolutions of disputes.

Other commentors suggest that the differing opportunities for developing options are a consideration that States are taking into account in management of their mediation intake processes. These States are determining at an early stage whether an issue in dispute may be amenable to mediation, so that their clients may be soundly advised whether mediation is a good option for resolution of the dispute.

FSA agrees that mediation programs should take appropriate steps to determine at an early stage whether the issues in a dispute are subject to statutory or regulatory requirements that must apply uniformly that diminish or eliminate opportunities for effective mediation of a dispute. FSA likewise agrees that in situations where there is a sense that nothing can be accomplished, the mediation program as a whole is adversely affected. In a number of situations, however, mediations involving disputes under uniformly applicable regulatory standards may focus on strategies for resolution of a dispute with options, e.g., in wetlands disputes, options for mitigation or restoration of wetlands, or in claims disputes, options for repayment of debts.

#### *Mediation Not Involving USDA Agencies and Programs*

One commentor noted that agriculture disputes not involving USDA or agricultural credit may be mediated by certified programs, but that USDA funds may not cover such costs. FSA agrees that with regard to the costs of non-USDA non-agricultural credit mediation, grant funds are not allowed to assist producers who have disputes with other producers. The Grain Standards Act clarified that persons eligible for mediation services include agricultural producers, creditors of producers (as appropriate), and persons directly affected by actions of the USDA. It is intended that grant funds will be used by certified States to assist producers resolve agriculture-related disputes with the USDA that, if not timely resolved, would discourage lenders from financing their operations. FSA has clarified this issue in the final rule in § 785.4(c)(1) by providing that grant funds can be used to pay eligible costs that are reasonable and necessary to carry out the State's certified mediation program in providing mediation services to covered persons,

i.e., agriculture producers and their creditors, and other persons directly affected by actions of the USDA.

#### *Use of a Financial Needs Test as a Condition for Use of Grant Funds To Pay for Financial Advisory and Counseling Services in Preparing Clients for Mediation*

The proposed rule provided that costs of providing financial advisory and counseling services to mediation clients would be allowed if: the services were incidental to a mediation case, a financial need was demonstrated under guidelines established by the program and reported to FSA, the work product was made available to all parties to a mediation, the services were provided under the control of a mediator, and were determined in advance to be reasonable, necessary, and consistent with the goal of mediation in the particular case. Comments were solicited particularly regarding this financial needs test.

One commentor stated that the requirement that preparatory financial advisory and counseling services should be provided under the control of the mediator should be deleted, or at least modified to provide for control by staff of the mediation program rather than by the mediator. The commentor believed that mediators would be exposed to *ex parte* communications from assisted parties prior to mediation, which would appear to compromise their neutrality and interfere with their ability to get a balanced understanding of the facts implicated in a mediation. These concerns are also reflected in other comments on the proposed rule. The commentor suggested, and FSA agrees, that costs of financial advisory services provided by a person other than a mediator are allowable when approved under guidelines established by the certified State mediation program and are reported to FSA.

Several commentors stated that the requirement in the proposed rule that the results of financial analysis be made available to all parties as a condition for allowing the cost should be deleted. One commentor observed that, as a practical matter, participants are going to provide all relevant information to an analyst only if participants are reasonably certain to retain some control over the information that they provide. This suggested change is reflected in § 785.4 of the final rule, however, which provides that such services may be provided under guidelines established by the certified State mediation program. To ensure accountability in delivery of such services under guidelines established by

certified State mediation programs, the final rule also provides, in § 785.9(a), that records of delivery of financial advisory and counseling services are pertinent records for review that must be maintained by the program and that the USDA or other Federal Departments must be granted access to these records for purposes of evaluation, audit, and monitoring of the certified State mediation program.

As a general matter, commentors supported providing financial and counseling services by certified mediation programs, but did not support the requirement of a financial needs test. The commentors stated that requiring a financial needs test would be a burden on both mediation programs and producers seeking assistance. In cases where a mediation client might be desperately in need of assistance simply to sort out financial documents prior to a mediation, requiring the mediation client to complete a financial needs assessment could impede the client from actually requesting financial advice because the process to qualify for assistance would appear too complicated.

Other commentors pointed out that in an overwhelming majority of the credit cases handled, producers will have financial need; otherwise, they would not be seeking mediation in the first place. Given these general circumstances, the commentors suggested that administering the financial needs test would delay and interfere with time better spent assisting mediation clients with preparations for productive mediation sessions. FSA agrees and has revised § 785.4 accordingly.

#### *Comments on Other Matters*

##### *Notice of Mediation Services*

One comment was received suggesting that the proposed rule should clarify how potential mediation clients receiving adverse decisions in USDA programs are to be notified of mediation services. The final rule clarifies in § 785.1(b) that, where a certified State mediation program is available, USDA agency notices of decisions will offer as part of the agency's informal appeal process the opportunity to mediate the decision under the certified State mediation program, in accordance with the agency regulations applicable to its informal appeals process. The USDA adverse decision notice will satisfy the grantee's notice requirement.

Because section 274 of the 1994 Act requires that notices of decisions by covered agencies must offer the opportunity to mediate in States with

certified State mediation program as part of their informal appeals processes, State mediation programs need only ensure that appropriate procedures are in place to schedule mediations and to notify parties when a mediation closes. In addition, State mediation programs shall also ensure that procedures in place publicize the availability of mediation so as to ensure that persons involved in agricultural loans, regardless of whether the loans are made or guaranteed by the Secretary or made by a third party, also receive adequate notification of the mediation program.

#### *Guidance for Agency Participation in Mediations*

One commentator suggested that FSA should clarify the manner in which USDA agencies are to participate in mediations, specifically, that FSA should "clearly delineate both the format and the level of participation the Department and its sub-agencies will follow." The commentator observed that the proposed rule does not adequately establish how the assistance to mediation programs provided for in the rule is to culminate in delivery of mediation services.

FSA agrees that its guidance regarding the duties of agency participants in mediations should be clarified. For example, FSA is currently streamlining its farm loan program regulations and expects to resolve the apparent inconsistencies and update many obsolete provisions in current regulations during this process. As to a need for more general guidance regarding the duties of agency participants in mediation programs, FSA agrees that guidance regarding the contours and constraints on agency participation in mediation processes should be addressed in the rules governing informal agency appeals processes, *e.g.*, 7 CFR parts 614 and 780. While agreeing in principle with this comment, FSA believes that agencies must adopt rules tailored to their respective programs and is more generally concerned that any such regulations provide sufficient flexibility to permit States latitude to experiment with different mediation strategies within the guidelines that agencies may establish. Section 785.1(b) has been revised accordingly.

#### *Access to Records and Confidentiality*

The proposed rule expressly provided that pertinent records of certified State mediation programs must be made available to the Government in accordance with 7 CFR 3015.24. It further provided that parties in a

mediation should sign an acknowledgment that the Government would have access to mediation records to conduct an audit or evaluation of mediation services funded in whole or part by the USDA.

One commentator stated that "records" should be defined and that the rule should expressly identify what records will be considered pertinent that must be made available for an audit. Section 785.9 of the final rule identifies specific "pertinent records" of mediations to be maintained and made available for purposes of audit, evaluation, or monitoring. "Pertinent records" include the following: (i) Names and addresses of applicants for mediation services; (ii) dates mediations are opened and closed; (iii) issues mediated; (iv) records of financial advisory and counseling services furnished to parties in mediation; (v) dates of sessions with mediators; (vi) names of mediators; (vii) other mediation services furnished to participants by the program; (viii) sums charged for each mediation service; and (ix) outcomes of mediation services including formal settlement results and supporting documentation. These are the minimum records needed for FSA and the Office of Inspector General to monitor the use of Federal grants for certified mediation programs and ensure the integrity of the grant program. Most of these items would not be protected as "dispute resolution communications" under sections 571 and 574 of the Administrative Dispute Resolution Act of 1996 (ADR Act) (5 U.S.C. 571 *et seq.*) because the basic information would be included in any written agreement to mediate or any final mediation resolution agreement. Section 574 prohibitions also do not apply to information necessary to document such mediation resolutions according to paragraph (g) of that section. To the extent that "pertinent records" are normally protected by the ADR Act, the parties will acknowledge and consent to their release for the limited purposes of 7 CFR 785.9. FSA has adopted a reasonable maintenance requirement of 5 years for these acknowledgments.

The final rule also clarifies in § 785.9 that, notwithstanding 7 CFR 3015.24, pertinent records must be disclosed to the USDA, the Comptroller General of the United States, the Administrator, and their representatives only as necessary to monitor, audit or evaluate mediation services funded in whole or in part by the USDA. This access provision is not intended to be used to seek information to use against the participant in an unrelated administrative decision. FSA recognizes that not all communications made to a

mediator in confidence or all mediator work product, including records of mental impressions, will be maintained indefinitely. The final rule is intended to clarify that mediators' notes, other highly sensitive documents prepared for mediation, and other records of mediators' impressions will not be the "pertinent records" that mediators will be expected to produce to substantiate services delivered during a mediation. The purpose of the access requirement is to ensure that there is adequate documentation for the Government to review to verify that only authorized mediation services have in fact been furnished by a certified State mediation program in connection with a mediation.

Two State mediation programs commented that the requirement for execution of an acknowledgment of Government access to records by parties in a mediation was "an extreme example of overkill" that would encourage disputing parties simply to go through motions and not help mediation programs in their effort to solve problems. FSA believes that clarification of the limited purposes for which Government access may be required should minimize this potential obstacle. Credible mediators should be able to explain that as recipients of Federal grant funds their mediation programs have a responsibility to be accountable to the Government. No changes were made in response to these comments.

Several commentators suggested that the definition of confidentiality be changed to make divulging of mediation records subject to section 574 of the ADR Act. Some suggested that the rule expressly provide that to the extent that 7 CFR 3015.24 conflicts with statutory provisions for confidentiality in the ADR Act or section 501 of the Agricultural Credit Act of 1987, as amended, 7 U.S.C. 5101(c)(3), the statutory provisions would take precedence. FSA agrees that the definition of "confidential mediation" should be consistent with the ADR Act to the extent possible in carrying out the Federally funded certified mediation programs in accordance with authorizing legislation and regulations. FSA, therefore, has revised the proposed definition of the term to mean a mediation in which the mediator will not disclose to any person oral or written communications provided in confidence to the mediator except as allowed by section 574 of the ADR Act or the record access provisions in 7 CFR 785.9.

### Annual Reporting and Program Evaluation

Several commentors suggested that the USDA should continue to use an annual reporting system for monitoring the effectiveness and productivity of all State mediation services, inclusive of all affiliated services incidental to caseload. These commentors encouraged the USDA to clearly delineate the categories, methodologies, measurement criteria, forms, and other equations for those purposes. The final rule is responsive to these suggestions and includes in section 785.8 more specific guidance regarding matters to be contained in the annual report than was set forth in the proposed rule. The emphasis of the revisions is to afford certified State mediation programs better means to report uniformly on the costs and benefits of their services and on areas where delivery of mediation services to covered persons can be improved. Because the final rule furnishes additional detail regarding the organization and coverage expected in the annual report, FSA believes that the revisions will simplify reporting for certified State mediation programs and will reduce the burden on the grantee.

Several commentors observed that FSA and other USDA agencies are in a better position than the mediation programs to track which cases go from mediation to appeals. They stated that it is the responsibility of the USDA to articulate a standard for data comparisons and recommended that data on administrative appeal costs should be furnished to certified States by the USDA. The final rule adopts this suggestion in section 785.8(a)(2) and provides that the mediation program will project costs of avoided administrative appeals based on data furnished by FSA.

One commentor observed that the proposed rule was unclear regarding who should receive annual reports from mediation programs, the Administrator of FSA, or the FSA State Executive Directors. The final rule clarifies that annual reports must be submitted to the Administrator.

Other significant changes are as follows:

#### Section 785.5 Fees for Mediation Services

This new section expressly provides that non-USDA parties who elect to participate in mediation may be required to pay a fee for mediation services, but that a State certified mediation program may not require a USDA agency to pay a fee to participate in a mediation. Because of the grant

funding made available by the USDA for certified State mediation programs, the restriction against imposition of fees on USDA agencies protects against double charging of the Government. Further, charging fees ensures good faith participation by the parties. By law USDA agencies must participate in mediation in good faith. Charging a fee to USDA agencies under such circumstances is, therefore, not warranted.

#### Section 785.11 Reconsideration by the Administrator

This new section provides for reconsideration by the Administrator of any determination that a State is not a qualifying State or of penalties imposed pursuant to section 785.10. The decision of the Administrator following reconsideration is the final administrative decision of FSA.

#### List of Subjects in 7 CFR Parts 785 and 1946

Agriculture, Federal-State relations, Grant programs—Intergovernmental relations, Mediation.

Accordingly, 7 CFR chapters VII and XVIII are amended as follows:

1. Part 785 is added to read as follows:

#### PART 785—CERTIFIED STATE MEDIATION PROGRAM

- Sec.
- 785.1 General.
  - 785.2 Definitions.
  - 785.3 Annual certification of State mediation programs.
  - 785.4 Grants to certified State mediation programs.
  - 785.5 Deadlines and address.
  - 785.6 Fees for mediation services.
  - 785.7 Distribution of Federal grant funds.
  - 785.8 Reports by qualifying States receiving mediation grant funds.
  - 785.9 Access to program records.
  - 785.10 Penalties for noncompliance.
  - 785.11 Reconsideration by the Administrator.
  - 785.12 Nondiscrimination.
  - 785.13 OMB control number.

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; and 7 U.S.C. 5101–5104.

##### § 785.1 General.

(a) States meeting conditions specified in this part may have their mediation programs certified by the Farm Service Agency (FSA) and receive Federal grant funds for the operation and administration of agricultural mediation programs.

(b) USDA agencies participate in mediations pursuant to agency rules governing their informal appeals processes. Where mediation of an agency decision by a certified State

mediation program is available to participants in an agency program as part of the agency's informal appeal process, the agency will offer a participant receiving notice of an agency decision the opportunity to mediate the decision under the State's certified mediation program, in accordance with the agency's informal appeals regulations.

(c) USDA agencies making mediation available as part of the agency informal appeals process may execute memoranda of understanding with a certified mediation program concerning procedures and policies for mediations during agency informal appeals that are not inconsistent with this part or other applicable regulations. Each such memorandum of understanding will be deemed part of the grant agreement governing the operation and administration of a State certified mediation program receiving Federal grant funds under this part.

(d) A mediator in a program certified under this part has no authority to make decisions that are binding on parties to a dispute.

(e) No person may be compelled to participate in mediation provided through a mediation program certified under this part. This provision shall not affect a State law requiring mediation before foreclosure on agricultural land or property.

##### § 785.2 Definitions.

*Administrator* means the Administrator, FSA, or authorized designee.

*Certified State mediation program* means a program providing mediation services that has been certified in accordance with section 785.3.

*Confidential mediation* means a mediation process in which the mediator will not disclose to any person oral or written communications provided to the mediator in confidence, except as allowed by 5 U.S.C. 574 or section 785.9.

*Covered persons* means producers, their creditors (as applicable), and other persons directly affected by actions of the USDA involving one or more of the following issues:

- (1) Wetlands determinations;
- (2) Compliance with farm programs, including conservation programs;
- (3) Agricultural loans (regardless of whether the loans are made or guaranteed by the USDA or are made by a third party);
- (4) Rural water loan programs;
- (5) Grazing on National Forest System lands;
- (6) Pesticides; or
- (7) Such other issues as the Secretary may consider appropriate.

*Fiscal year* means the period of time beginning October 1 of one year and ending September 30 of the next year and designated by the year in which it ends.

*FSA* means the Farm Service Agency of the U.S. Department of Agriculture, or a successor agency.

*Mediation services* means all activities relating to the intake and scheduling of mediations; the provision of background and selected information regarding the mediation process; financial advisory and counseling services (as reasonable and necessary to prepare parties for mediation) performed by a person other than a State mediation program mediator; and mediation sessions in which a mediator assists disputing parties in voluntarily reaching mutually agreeable settlement of issues within the laws, regulations, and the agency's generally applicable program policies and procedures, but has no authoritative decision making power.

*Mediator* means a neutral individual who functions specifically to aid the parties in a dispute during a mediation process.

*Qualified mediator* means a mediator who meets the training requirements established by State law in the State in which mediation services will be provided or, where a State has no law prescribing mediator qualifications, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by the USDA, by an accredited college or university, or by one of the following organizations: State Bar of a qualifying State, a State mediation association, a State approved mediation program, or a society of professionals in dispute resolution.

*Qualifying State* means a State with a State mediation program currently certified by FSA.

#### **§ 785.3 Annual certification of State mediation programs.**

To obtain FSA certification of the State's mediation program, the State must meet the requirements of this section.

(a) *New request for certification.* A new request for certification of a State mediation program must include descriptive and supporting information regarding the mediation program and a certification that the mediation program meets certain requirements as prescribed in this subsection. If a State is also qualifying its mediation program

to request a grant of Federal funds under the certified State mediation program, the State must submit with its request for certification additional information in accordance with § 785.4.

##### (1) *Description of mediation program.*

The State must submit a narrative describing the following with supporting documentation:

- (i) A summary of the program;
- (ii) An identification of issues available for mediation under the program;
- (iii) Management of the program;
- (iv) Mediation services offered by the program;
- (v) Program staffing and staffing levels;
- (vi) Uses of contract mediation services in the program describing both services provided by contractors and costs of such services;
- (vii) State statutes and regulations in effect that are applicable to the State's mediation program; and
- (viii) A description of the State program's education and training requirements for mediators including:
  - (A) Training in mediation skills and in USDA programs;
  - (B) Identification and compliance with any State law requirements; and
  - (C) Other steps by the State's program to recruit and deploy qualified mediators.

(ix) Any other information requested by FSA;

(2) *Certification.* The Governor, or head of a State agency designated by the Governor, must certify in writing to the Administrator that the State's mediation program meets the following program requirements:

- (i) That the State's mediation program provides mediation services to covered persons with the aim of reaching mutually agreeable decisions between the parties under the program;
- (ii) That the State's mediation program is authorized or administered by an agency of the State government or by the Governor of the State;
- (iii) That the State's mediation program provides for training of mediators in mediation skills and in all issues covered by the State's mediation program;
- (iv) That the State's mediation program shall provide confidential mediation as defined in § 785.2;
- (v) That the State's mediation program ensures, in the case of agricultural loans, that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program;
- (vi) That the State's mediation program ensures, in the case of other issues covered by the mediation program, that persons directly affected

by actions of the USDA receive adequate notification of the mediation program; and

(vii) That the State's mediation program prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, and marital or familial status.

(b) *Request for re-certification by qualifying State.* If a State is a qualifying State at the time its request is made, the written request need only describe the changes made in the program since the previous year's request, together with such documents and information as are necessary concerning such changes, and a written certification that the remaining elements of the program will continue as described in the previous request.

#### **§ 785.4 Grants to certified State mediation programs.**

(a) *Eligibility.* To be eligible to receive a grant, a State mediation program must:

- (1) Be certified as described in § 785.3; and
- (2) Submit an application for a grant with its certification or re-certification request as set forth in this section.

(b) *Application for grant.* A State requesting a grant will submit the following to the Administrator:

- (1) Application for Federal Assistance, Standard Form 424 (available in any FSA office and on the Internet, <http://www.whitehouse.gov/omb/grants/>);
- (2) A budget with supporting details providing estimates of the cost of operation and administration of the program. Proposed direct expenditures will be grouped in the categories of allowable direct costs under the program as set forth in paragraph (c)(1) of this section;
- (3) Other information pertinent to the funding criteria specified in § 785.7(b); and
- (4) Any additional supporting information requested by FSA in connection with its review of the grant request.

(c) *Grant purposes.* Grants made under this part will be used only to pay the allowable costs of operation and administration of the components of a qualifying State's mediation program that have been certified as set forth in § 785.3(b)(2). Costs of services other than mediation services to covered persons within the State are not considered part of the cost of operation and administration of the mediation program for the purpose of determining the amount of a grant award.

(1) *Allowable costs.* Subject to applicable cost principles as set forth or referenced in § 3016.22 of this title,



allowable costs for operations and administration are limited to those that are reasonable and necessary to carry out the State's certified mediation program in providing mediation services for covered persons within the State. Specific categories of costs allowable under the certified State mediation program include, and are limited to:

- (i) Staff salaries and fringe benefits;
- (ii) Reasonable fees and costs of mediators;
- (iii) Office rent and expenses, such as utilities and equipment rental;
- (iv) Office supplies;
- (v) Administrative costs, such as workers' compensation, liability insurance, employer's share of Social Security, and travel that is necessary to provide mediation services;
- (vi) Education and training of participants and mediators involved in mediation;
- (vii) Security systems necessary to assure confidentiality of mediation sessions and records of mediation sessions;
- (viii) Costs associated with publicity and promotion of the program; and
- (ix) Financial advisory and counseling services for parties requesting mediation (as reasonable and necessary to prepare parties for mediation) that are performed by a person other than a state mediation program mediator and as approved under guidelines established by the state mediation program and reported to FSA.

(2) *Prohibited expenditures.* Expenditures of grant funds are not allowed for:

- (i) Purchase of capital assets, real estate, or vehicles and repair, or maintenance of privately-owned property;
- (ii) Political activities;
- (iii) Routine administrative activities not allowable under OMB Cost Principles found in part 3015, subpart T, of this title and OMB Circular No. A-87; and
- (iv) Services provided by a State mediation program that are not consistent with the features of the mediation program certified by the State, including advocacy services on behalf of a mediation participant, such as representation of a mediation client before an administrative appeals entity of the USDA or other Federal Government department or Federal or State Court proceeding.

#### **§ 785.5 Fees for mediation services.**

A requirement that non-USDA parties who elect to participate in mediation pay a fee for mediation services will not preclude certification of a certified State

mediation program or its eligibility for a grant; however, if participation in mediation is mandatory for a USDA agency, a certified State mediation program may not require the USDA agency to pay a fee to participate in a mediation.

#### **§ 785.6 Deadlines and address.**

(a) *Deadlines.* (1) To be a qualifying State as of the beginning of a fiscal year and to be eligible for grant funding as of the beginning of the fiscal year, the Governor of a State or head of a State agency designated by the Governor of a State must submit a request for certification and application for grant on or before August 1 of the calendar year in which the fiscal year begins.

(2) *Requests received after August 1.* FSA will accept requests for re-certifications and for new certifications of State mediation programs after August 1 in each calendar year; however, such requests will not be considered for grant funding under § 785.7(c) until after March 1.

(3) *Requests for additional grant funds during a fiscal year.* Any request by a State mediation program that is eligible for grant funding as of the beginning of the fiscal year for additional, unbudgeted demands for mediation services must be submitted on or before March 1 of the fiscal year.

(b) *Address.* The request for certification or re-certification and any grant request must be mailed or delivered to: Administrator, Farm Service Agency, U.S. Department of Agriculture, Stop 0501, 1400 Independence Avenue, SW., Washington, DC 20250-0501.

#### **§ 785.7 Distribution of Federal grant funds.**

(a) *Maximum grant award.* A grant award shall not exceed 70 percent of the budgeted allowable costs of operation and administration of the certified State mediation program. In no case will the sum granted to a State exceed \$500,000 per fiscal year.

(b) *Funding criteria.* FSA will consider the following in determining the grant award to a qualifying State:

- (1) Demand for and use of mediation services (historical and projected);
- (2) Scope of mediation services;
- (3) Service record of the State program, as evidenced by:
  - (i) Number of inquiries;
  - (ii) Number of requests for and use of mediation services, historical and projected, as applicable;
  - (iii) Number of mediations resulting in signed mediation agreements;
  - (iv) Timeliness of mediation services; and

(v) Activities promoting awareness and use of mediation;

(4) Historic use of program funds (budgeted versus actual); and

(5) Material changes in the State program.

(c) *Disbursements of grant funds.* (1) Grant funds will be paid in advance, in installments throughout the Federal fiscal year as requested by a certified State mediation program and approved by FSA. The initial payment to a program in a qualifying State eligible for grant funding as of the beginning of a fiscal year shall represent at least one-fourth of the State's annual grant award. The initial payment will be made as soon as practicable after certification, or re-certification, after grant funds are appropriated and available.

(2) Payment of grant funds will be by electronic funds transfer to the designated account of each certified State mediation program, as approved by FSA.

(d) *Administrative reserve fund.* After funds are appropriated, FSA will set aside 5 percent of the annual appropriation for use as an administrative reserve.

(1) Subject to paragraph (a) of this section and the availability of funds, the Administrator will allocate and disburse sums from the administrative reserve in the following priority order:

(i) Disbursements to cover additional, unbudgeted demands for mediation services in qualifying States eligible for grant funding as of the beginning of the fiscal year;

(ii) Grants to qualifying States whose requests for new certification or re-certification were received between August 2 and March 1. A previously qualifying State that submits a request for re-certification received after August 1 may receive a grant award effective as of the beginning of the fiscal year. A newly qualifying State that submits a request for certification received after August 1 may receive a grant award effective March 31 of the fiscal year.

(iii) Any balance remaining in the administrative reserve will be allocated pro rata to certified State mediation programs based on their initial fiscal year grant awards.

(2) All funds from the administrative reserve will be made available on or before March 31 of the fiscal year.

(e) *Period of availability of funds.* (1) Certified State mediation programs receiving grant funds are encouraged to obligate award funds within the Federal fiscal year of the award. A State may, however, carry forward any funds disbursed to its certified State mediation program that remain unobligated at the end of the fiscal year of award for use

in the next fiscal year for costs resulting from obligations in the subsequent funding period. Any carryover balances plus any additional obligated fiscal year grant will not exceed the lesser of 70 percent of the State's budgeted allowable costs of operation and administration of the certified State mediation program for the subsequent fiscal year, or \$500,000.

(2) Grant funds not spent in accordance with this part will be subject to de-obligation and must be returned to the USDA.

**§ 785.8 Reports by qualifying States receiving mediation grant funds.**

(a) *Annual report by certified State mediation program.* No later than 30 days following the end of a fiscal year during which a qualifying State received a grant award under this part, the State must submit to the Administrator an annual report on its certified State mediation program. The annual report must include the following:

(1) A review of mediation services provided by the certified State mediation program during the preceding Federal fiscal year providing information concerning the following matters:

(i) A narrative review of the goals and accomplishments of the certified State mediation program in providing intake and scheduling of cases; the provision of background and selected information regarding the mediation process; financial advisory and counseling services, training, notification, public education, increasing resolution rates, and obtaining program funding from sources other than the grant under this part.

(ii) A quantitative summary for the preceding fiscal year, and for prior fiscal years, as appropriate, for comparisons of program activities and outcomes of the cases opened and closed during the reporting period; mediation services provided to clients grouped by program and subdivided by issue, USDA agency, types of covered persons and other participants; and the resolution rate for each category of issue reported for cases closed during the year;

(2) An assessment of the performance and effectiveness of the State's certified mediation program considering:

(i) Estimated average costs of mediation services per client with estimates furnished in terms of the allowable costs set forth in § 785.4(b)(1).

(ii) Estimated savings to the State as a result of having the State mediation program certified including:

(A) Projected costs of avoided USDA administrative appeals based on projections of the average costs of such

appeals furnished to the State by FSA, with the assistance of the USDA National Appeals Division and other agencies as appropriate;

(B) In agricultural credit mediations that do not result from a USDA adverse program decision, projected cost savings to the various parties as a result of resolution of their dispute in mediation. Projected cost savings will be based on such reliable statistical data as may be obtained from State statistical sources including the certified State's bar association, State Department of Agriculture, State court system or Better Business Bureau, or other reliable State or Federal sources;

(iii) Recommendations for improving the delivery of mediation services to covered persons, including:

(A) Increasing responsiveness to needs for mediation services.

(B) Promoting increases in dispute resolution rates.

(C) Improving assessments of training needs.

(D) Improving delivery of training.

(E) Reducing costs per mediation.

(3) Such other matters relating to the program as the State may elect to include, or as the Administrator may require.

(b) *Audit report.* In addition to the auditing requirements of part 3015, subpart I and § 3016.26 of this title, any qualifying State receiving a grant under this part must submit an audit report to the Administrator in compliance with OMB Circular A-133.

**§ 785.9 Access to program records.**

Notwithstanding § 3015.24 of this title, the State must maintain and provide the Government access to pertinent records regarding services delivered by the certified State mediation program for purposes of evaluation, audit and monitoring of the certified State mediation program as follows:

(a) For purposes of this section, pertinent records consist of: the names and addresses of applicants for mediation services; dates mediations opened and closed; issues mediated; dates of sessions with mediators; names of mediators; mediation services furnished to participants by the program; the sums charged to parties for each mediation service; records of delivery of services to prepare parties for mediation (including financial advisory and counseling services); and the outcome of the mediation services including formal settlement results and supporting documentation.

(b) State mediators will notify all participants in writing at the beginning of the mediation session that the USDA,

including the USDA Inspector General, the Comptroller General of the United States, the Administrator, and any of their representatives will have access to pertinent records as necessary to monitor and to conduct audits, investigations, or evaluations of mediation services funded in whole or in part by the USDA.

(c) All participants in a mediation must sign and date an acknowledgment of receipt of such notice from the mediator. The certified State mediation program shall maintain originals of such acknowledgments in its mediation files for at least 5 years.

**§ 785.10 Penalty for non-compliance.**

(a) The Administrator is authorized to withdraw certification of a State mediation program, terminate or suspend the grant to such program, require a return of unspent grant funds, a reimbursement of grant funds on account of expenditures that are not allowed, and may impose any other penalties or sanctions authorized by law if the Administrator determines that:

(1) The State's mediation program, at any time, does not meet the requirements for certification;

(2) The mediation program is not being operated in a manner consistent with the features of the program certified by the State, with applicable regulations, or the grant agreement;

(3) Costs that are not allowed under § 785.4(b) are being paid out of grant funds;

(4) The mediation program fails to grant access to mediation records for purposes specified in § 785.8; or

(5) Reports submitted by the State pursuant to § 785.7 are false, contain misrepresentations or material omissions, or are otherwise misleading.

(b) In the event that FSA gives notice to the State of its intent to enforce any withdrawal of certification or other penalty for non-compliance, USDA agencies will cease to participate in any mediation conducted by the State's mediation program immediately upon delivery of such notice to the State.

**§ 785.11 Reconsideration by the Administrator.**

(a) A State mediation program may request that the Administrator reconsider any determination that a State is not a qualifying State under § 785.3 and any penalty decision made under § 785.10. The decision of the Administrator upon reconsideration shall be the final administrative decision of FSA.

(b) Nothing in this part shall preclude action to suspend or debar a State mediation program or administering

entity under part 3017 of this title following a withdrawal of certification of the State mediation program.

#### § 785.12 Nondiscrimination.

The provisions of parts 15, 15b and 1901, subpart E, of this title and part 90 of title 45 apply to activities financed by grants made under this part.

#### § 785.13 OMB Control Number.

The information collection requirements in this regulation have been approved by the Office of Management and Budget and assigned OMB control number 0560-0165.

#### PART 1946—[Removed and Reserved]

2. Part 1946 is removed and reserved.

Signed in Washington, DC, on September 3, 2002.

J.B. Penn,

*Under Secretary for Farm and Foreign Agricultural Services.*

[FR Doc. 02-22800 Filed 9-9-02; 8:45 am]

BILLING CODE 3410-05-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 905

[Docket No. FV02-905-5 IFR]

#### Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Limiting the Volume of Small Red Seedless Grapefruit

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule limits the volume of small red seedless grapefruit entering the fresh market under the marketing order covering oranges, grapefruit, tangerines, and tangelos grown in Florida (order). The Citrus Administrative Committee (Committee) administers the order locally and recommended this action. This rule limits the volume of sizes 48 and 56 red seedless grapefruit shipped during the first 22 weeks of the 2002-03 season by establishing weekly percentages for each of the 22 weeks, beginning September 16, 2002. This action supplies enough small red seedless grapefruit, without saturating all markets with these small sizes. This rule should help stabilize the market and improve grower returns.

**DATES:** Effective September 11, 2002; comments received by October 10, 2002 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or E-mail:

*moab.docketclerk@usda.gov*. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

#### FOR FURTHER INFORMATION CONTACT:

William G. Pimental, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 799 Overlook Drive, Suite A, Winter Haven, Florida 33884-1671; telephone: (863) 324-3375, Fax: (863) 325-8793; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; telephone (202) 720-2491, Fax: (202) 720-8938, or E-mail: *Jay.Guerber@usda.gov*.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 84 and Marketing Order No. 905, both as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule limits the volume of small red seedless grapefruit entering the fresh market under the order. This rule limits the volume of sizes 48 and 56 fresh red seedless grapefruit shipped during the first 22 weeks of the 2002-03 season by establishing a weekly percentage for each of the 22 weeks, beginning September 16, 2002. This rule supplies enough small red seedless grapefruit, without saturating all markets with these small sizes. This action should help stabilize the market and improve grower returns.

Section 905.52 of the order provides authority to limit shipments of any grade or size, or both, of any variety of Florida citrus. Such limitations may restrict the shipment of a portion of a specified grade or size of a variety. Under such a limitation, the quantity of such grade or size a handler may ship during a particular week is established as a percentage of the total shipments of such variety shipped by that handler during a prior period, established by the Committee and approved by USDA.

Section 905.153 of the regulations provides procedures for limiting the volume of small red seedless grapefruit entering the fresh market. The procedures specify that the Committee may recommend that only a certain percentage of sizes 48 and 56 red seedless grapefruit be made available for shipment into fresh market channels for any week or weeks during the regulatory period. The regulation period is 22 weeks long and begins the third Monday in September. Under such a limitation, the quantity of sizes 48 and 56 red seedless grapefruit that may be shipped by a handler during a regulated week is calculated using the recommended percentage. By taking the recommended weekly percentage times the average weekly volume of red seedless