DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Tobacco Transition Assessments

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice.

SUMMARY: This notice sets forth the interpretation the Commodity Credit Corporation (CCC) will use in administering the regulations set forth at 7 CFR part 1463 with respect to the Tobacco Transition Assessments. Generally, under these regulations CCC must determine the market share of a tobacco product manufacturer or tobacco product importer as a percentage of six statutorily specified sectors of the tobacco trade. Based upon information provided to CCC in the conduct of administrative hearings held pursuant to 7 CFR 1463.11, CCC has determined that the manner in which it calculates this percentage is subject to more than one interpretation and, based upon the evidence provided at these hearings, has determined that changes to the calculation should be made beginning with assessments collected under 7 CFR part 1463 after January 1, 2006. However, this change will not apply to invoices issued February 1, 2006. These invoices will reflect corrections and other necessary adjustments associated with fiscal year 2005.

FOR FURTHER INFORMATION CONTACT: Misty Jones, Tobacco Division, Farm Service Agency (FSA), United States Department of Agriculture (USDA), Stop 0514, 1400 Independence Avenue, SW., Washington, DC 20250–0514. Phone: (202) 720–7413; e-mail: *Misty.Jones@wdc.usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

Background

Title VI of the American Jobs Creation Act of 2004 (Pub. L. 108–357) (the 2004 Act) repealed the marketing quota and acreage allotment (marketing quota) and price support programs for tobacco that were authorized by the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, effective with the 2005 and subsequent crops of tobacco. Sections 622 and 623 of the 2004 Act establish a 10-year transitional payment program for tobacco producers and owners of tobacco marketing quotas who were affected by the termination of the marketing quota and price support programs. Sections 625 through 627 of the 2004 Act established an assessment regime under which CCC collects assessments to fund the 10-year transitional payment program. Generally, these assessments are to be collected for 40 calendar quarters (2005–2014) and are based upon individual market shares of tobacco product manufacturers and importers within six sectors specified by the 2004 Act. The regulations issued by CCC with respect to these assessments were issued in a final rule published in the **Federal Register** on February 10, 2005 (70 FR 7007–7014). The purpose of this notice to advise tobacco product manufacturers and tobacco product importers that effective with assessment notices issued after January 1, 2006, CCC will determine such entities' market share within a sector as a percentage expressed to the sixth decimal point.

As explained below, section 625(a)(3) of the 2004 Act is ambiguous with respect to its directive in calculating entities' market shares. Section 625(b)(3) defines ''market share'' as follows:

> *Market Share.*—The term ''market share'' means the share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product.

In implementing this provision, CCC construed ''market share'' to mean an entity's percentage of the market determined, for all products except cigars, by dividing the volume of gross taxable removals for the entity by the total removals for the sector for all entities reporting to CCC, and, for cigars, by dividing the excise taxes paid for each entity by the total excise taxes paid for all cigar manufacturers and importers. Accordingly, under CCC's initial interpretation, if there were 10 entities who equally comprised all of the market of a sector, each market share was expressed as 0.1000. CCC recognized that in using its initial method of calculating a market share of an entity that there could be a disproportionate impact on entities with market shares less than .0001 that reach the ''cut-off point'' in that entities with market shares from .00005 to .00009 would, due to rounding, each be deemed to have a .0001 market share. Thus, CCC provided that once this determination had been made as to which entities to include in the assessment, CCC would calculate the actual assessment for an entity to the ninth decimal point.

During the course of administrative hearings in which appellants contested the level of their assessments in the first two quarters, it was brought to CCC's attention that this was not the only interpretation that could be given to the concept of expressing a market share to the ''fourth decimal point''. Appellants argued that a ''market share'' of 10 percent is more properly referred to in this example as 10.0000 percent and not .1000. The following is the written submission in support of this interpretation presented jointly by six of the entities subject to the assessment:

> FETRA (the Fair and Equitable Tobacco Reform Act) assessments should be allocated based on *percentage* market shares expressed as decimals to the fourth place.
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> FETRA defines market share as the ''share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product.'' This language, properly read, means that market share is to be calculated as a *percentage* share expressed to four decimal places. Accordingly, under FETRA, a manufacturer or importer should be required to pay an assessment unless its market share rounds to less than 00.0001% (which can also be written as .000001).
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> The USDA's first three assessment notices did not adopt this approach. Instead, the agency has exempted from assessment liability any company whose market share rounds to less than 00.01% (which can also be written as .0001). Consequently, there is a two-decimal place difference between the two approaches, which means that a company exempted from FETRA assessments under the USDA approach could have a market share as much as 100 times larger than the largest company exempted under the correct percentage share approach.
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> Under the USDA's approach, manufacturers and importers selling substantial quantities of tobacco products would avoid paying assessments—in direct violation of the clear statutory mandate of FETRA. As is explained below, if the data for the most recent quarterly assessment (for the April–June 2005 quarter) are annualized, the portion of the cigarette market, for example, that would be excused from paying any assessment would collectively amount to more than 9.5 million packs of cigarettes, representing sales revenues of more than $33 million.
>
> By contrast, the percentage share approach limits the exemption to companies that legitimately can be viewed as having *de minimis* market shares, thereby effectuating the legislative intent that all manufacturers and importers must pay assessments. As explained below, the percentage share approach is supported by the language of FETRA and by analogous precedents.
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> Defining market share as a percentage expressed to the fourth decimal place is necessary to effectuate the clear purposes of FETRA.
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> FETRA imposes the following clear mandate: ''The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments * * * on *each* tobacco product manufacturer and tobacco products

importer that sells tobacco products in domestic commerce in the United States * * *.'' 7 U.S.C. 518d(b)(1) (emphasis added). This language provides no discretion to exempt any manufacturers or importers.

The approach taken by USDA in the initial assessments violates this statutory mandate because it allows companies with substantial sales of cigarettes to avoid FETRA assessments. This point can be illustrated with the following example:

Assume a manufacturer had revenues of $850,000 in the fourth quarter of 2004. There is no rational basis for defining this company as a *de minimis* seller of cigarettes and exempting it from assessment:

- Revenue—$850,000.
- No. of packs sold (assuming $3.50 per pack) = 242,857.
- Taxes owed (FET at .39 per pack) = $94,714.23.
- Market share: [94,714/1,949,053,653] = 0.00004859486.

Under the approach used in the initial assessments, this company would be exempt from the payment of assessments because its market share is .000049, which rounds to .0000 (00.00%). However, if the percentage share approach is applied, the company would have to pay an assessment, since its market share—00.0049%—exceeds the threshold of 00.0001%.

As noted above, the approach used in the initial assessments will allow a significant portion of the cigarette market to remain exempt from assessment. On a per-company basis, this means that an individual manufacturer or importer could have annual sales of as much as 900,000 packs and revenues in excess of $3 million per year and still escape the payment of assessments. In contrast, under the approach described in this paper, the exemption would apply only to companies with annual sales less than approximately 9,000 packs and revenues less than approximately $32,000 per year—which appropriately can be viewed as de minimis. *Id.*

More importantly, the percentage of the market that USDA is exempting from assessment has more than doubled from the first assessment for the fourth quarter of calendar 2004 (companies selling 1,040,638 packs of cigarettes in this quarter exempted from assessment) to the assessment for April–June 2005 (companies selling 2,376,331 packs of cigarettes in this quarter exempted from assessment). This means that millions of packs of cigarettes per year will not be subject to assessment. For example, if the figures from the second calendar quarter of 2005 are projected on an annual basis, USDA's approach to FETRA will result in over 9.5 million packs of cigarettes, representing more than $33 million in revenue, being exempted from FETRA assessment. This is clearly inconsistent with the congressional mandate that USDA impose quarterly assessments on each tobacco product manufacturer and importer that sells tobacco products domestically in the United States. 7 U.S.C. 518d(b)(1).

Adopting the percentage share approach, and thus limiting any exemption to companies with truly *de minimis* market shares, achieves a number of important objectives by—

- More closely effectuating the statutory mandate to assess all manufacturers and importers;
- Leveling the playing field among competitors since no company with substantial sales would have the unfair advantage of an exemption;
- Substantially reducing the USDA's exposure in the likely event that companies subject to assessment are successful in persuading a court that USDA cannot assess them in excess of their true market shares to cover the shares of companies exempted from assessment liability; and
- Perhaps, by reducing the amount at issue, facilitating a resolution of the current market share cap issue short of litigation.

The percentage share approach is supported by the language of FETRA.

In another section of FETRA, Congress clearly uses the word ''share'' to denote *percentage* share. Thus, in describing how assessments are to be allocated among different classes of tobacco products in subsequent years, FETRA states that:

> The Secretary shall periodically adjust the *percentage* of the total amount required under subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product * * * to reflect changes in the *share of gross domestic volume* held by that class of tobacco product.

7 U.S.C. 518d(c)(2) (emphasis added). In this context, it is explicitly clear that the ''share'' of gross domestic volume is a *percentage share.*

The same section of FETRA uses the same term—''share''—when it defines the term ''market share'' as each manufacturer's ''share * * * of the total volume of domestic sales of the class of tobacco product.'' This use of the same term is significant because ''[i]t is a settled principle of statutory construction that '(w)hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.' '' *United States* v. *Nunez*, 573 F.2d 769, 771 (2d Cir.), *cert denied*, 436 U.S. 930 (1978), *quoting Meyer* v. *United States*, 175 F.2d 45, 47 (2d Cir. 1949), *quoting Lewellyn* v. *Harbison*, 31 F.2d 740, 742 (3d Cir.), *cert. denied*, 280 U.S. 560 (1929); *Arnold* v. *Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983).

Thus, when FETRA is read as a whole, the proper interpretation of ''share'' in section 518d(a)(3)—defining ''market share''—is that it means a *percentage share* of the total market. Nothing in FETRA provides any basis for a different approach. Accordingly, when section 518d(a)(3) states that each manufacturer's or importer's ''share'' is to be expressed as a decimal to four places, it means that it should be expressed as a percentage share expressed to four decimal places.

Other federal agencies have interpreted statutory references to ''market share'' to mean a percentage share of the total market.

The Food, Drug and Cosmetic Act imposes limitations on the types of claims that can appear on food labels. Among other things, the labels on a food product cannot claim that it is low cholesterol unless ''the level of cholesterol is substantially less than the level usually present in the food or in a food which substitutes for the food and which has a significant *market share* * * *.'' 21 U.S.C. § 343(r)(2)(A)(iii)(I) (emphasis added). The statute does not define market share. However, the FDA regulations define that term as a *percentage* of the total market:

> If the product meets these conditions only as a result of special processing, alteration, formulation, or reformulation, the amount of cholesterol is reduced by 25 percent or more from the reference product it replaces as described in § 317.313(j)(1) and for which it substitutes as described in § 317.313(d) that has a *significant (e.g., 5 percent or more of a national or regional market) market share.*

9 CFR 317.362(d)(1)(v) (emphasis added). Clearly, the FDA interpreted the term market share using its ordinary and reasonable meaning of a percent of the total market.

The Federal Insecticide, Fungicide and Rodenticide Act (''FIFRA'') requires EPA to re-register and assess fees for all pesticides initially registered prior to November 1, 1984. If more than one party sought to register the same active ingredient, the EPA would allocate the $150,000 fee based on each registrant's market share for that active ingredient. Specifically, FIFRA stated that:

> [i]f two or more registrants are required to pay [a re-registration fee] with respect to a particular active ingredient, the fees for such an active ingredient shall be apportioned among such registrants on the basis of *market share* in United States sales of the active ingredient for the three calendar years preceding the payment of such fee.

7 U.S.C. 136a–1(i)(7) (emphasis added). The term ''market share'' is not explicitly defined in the statute or in the Agency's regulations. However, when EPA actually assessed each registrant's fee, it did so based upon its percentage share of the total market.

The courts have also interpreted the term ''market share'' to mean a percentage share.

For example, under the ''market share liability'' theory used in mass tort cases, ''causation and damages are apportioned to defendants based on the *percentage of the product sold by each defendant* within the entire production of the product.'' *Wood* v. *Eli Lilly & Co.*, 38 F.3d 510, 513 (10th Cir. 1994) (emphasis added), *citing Sindell* v. *Abbott Labs.*, 607 P.2d 924, 937, *cert. denied*, 449 U.S. 912 (1980); *Martin* v. *Abbott Lab.*, 689 P.2d 368, 380 (Wash. 1984). *See also Bateman* v. *Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986) (''Each defendant that could not make that exculpatory showing would then be held liable for a proportion of the judgment corresponding to its *percentage* share of the DES market'') (emphasis added).

Similarly, in antitrust cases, when courts address market share, they are clearly viewing that term as a *percentage* of the total market at issue. *See, e.g., Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213–14 (1993) (describing market share in terms of percentages); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982) (''Market strength is often indicated by market share. During the relevant period, Hilltop's market

share declined from approximately 40% to approximately 30%'').''

As noted in the submission of the six appellants, the ambiguity in the 2004 Act stems from whether a ''market share'' refers to a ''percentage share'' determined to the fourth decimal point, *e.g.,* is a 10 percent market share to be expressed as 10.000 or .10000?

Accordingly, under this approach the following ''market shares'' would be determined with respect to an entity comprising the following sizes of the sector:

Size of sector	Market share in percent	Market share as fraction
Assessments Levied		
All	100.00000	1.0000000
One tenth	10.00000	0.1000000
One hundredth	1.00000	0.0100000
One thousandth	0.10000	0.0010000
One ten-thousandths	0.01000	0.0001000
One hundred-thousandths	0.00100	0.0000100
One millionth	0.00010	0.0000010
Assessments Not Levied For All Shares Less Than Nine Ten-millionths		
Nine ten-millionths	0.00009	0.0000009

With respect to the assessments levied by CCC in a typical quarter with an assessment of $237.5 million, use of the interpretation set forth by these six appellants would likely produce the following changes for each sector:

ADDITIONAL COMPANIES ASSESSED UNDER THE NEW METHOD FOR A TYPICAL $237.5 MILLION ASSESSMENT

Class	Cigarettes	Cigars	Snuff	Roll-own	Chew	Pipe	Total
Number of Additional Companies Paying an Assessment	20	57	4	4	1	2	88
Assessment Collected from Above Companies	$105,928	$4,752	$45	$48	$3	$9	$110,784

Use of the interpretation set forth by these six appellants would also produce the following changes for two different sized companies:

IMPACT OF CHANGE ON TWO DIFFERENT SIZED TOBACCO PRODUCT MANUFACTURERS

Share	
Typical Quarterly Assessment: All kinds	$237,500,000
Cigarettes' Share	0.96331
Typical Quarterly Assessment: Cigarettes	$228,786,125
Big Company Example	
New Method [1]	
Big Company Share	25.0000%
Big Company Quarterly Assessment	$57,196,653
Previous Method [2]	
Big Company Share	25.00%
Big Company Share recomputed after small companies dropped out)	25.00729%
Big Company Quarterly Assessment	$57,213,210
Big Company Savings	
Big Company savings per quarter	−$16,557
Small Company Example	
New Method [1]	
Small Company Share	0.0040%
Small Company Quarterly Assessment	$9,151
Previous Method [2]	
Small Company Share	0.004%
Small Company Share Rounded Up	0.000%
Small Company Share recomputed after small companies dropped out	—
Small Company Quarterly Assessment	$0
Small Company Cost	
Small Company cost per quarter	$9,151

[1] Shares not recalculated after small companies drop out.

[2] Shares recalculated to 9 decimal places after small companies drop out.

Interpretation

It is CCC's position that either interpretation is possible under section 625(b)(3) of the 2004 Act. But, in construing this section within the overall framework established by Congress, CCC has determined that use of the approach set forth by the six appellants provides a more accurate representation of an individual entity's share in each of the six statutorily-defined tobacco sectors. Accordingly, after January 1, 2006, when making determinations under 7 CFR parts 1463.1 through 1463.11 that relate to ''market share'', CCC will interpret such phrase to mean the percentage share of an entity's market position in one of the six individual tobacco product sectors specified in section 625(c) of the 2004 Act. In expressing this share to the fourth decimal point as provided in section 625(a)(3), for example, a market share of 1/10 of the market will be converted to 10.0000 percent and a market share of 1/10000 will be converted to .0100 percent. In addition, this approach is also consistent with the manner in which Congress has addressed the six sector segments of the tobacco industry. In section 625(c)(3) of the 2004 Act, for example, the share for manufacturers and importers of cigarettes of the overall tobacco industry for Fiscal Year 2005 is expressed as ''96.331 percent'' and not as .96331. As a result of this change, CCC will no longer further modify assessments to the ninth decimal point for individual companies within these six sectors.

Signed at Washington, DC November 30, 2005.

Thomas B. Hofeller,

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