

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## GENERAL SERVICES ADMINISTRATION

### 5 CFR Chapter VII

#### 41 CFR Chapters 101, 102, and 105, and Subtitle F

#### 48 CFR Chapters 5 and 61

[EO 013563–OGP–1; Docket 2011–0010; Sequence 1]

#### Reducing Regulatory Burden; Retrospective Review under E.O. 13563

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Request for information.

**SUMMARY:** The General Services Administration (GSA) is requesting public input on how it can best implement the goals of Executive Order (EO) 13563, “Improving Regulation and Regulatory Review.” E.O. 13563 was signed by President Obama on January 18, 2011, calls for an improvement in the creation and review of regulations and the better opportunities for the public to be part of this process. GSA will solicit public input through April 15, 2011, via comments received on a blog located at <http://www.gsa.gov/improvingregulations>. Later this year, GSA expects to release its retrospective review plan.

**DATES:** Comments will be accepted through April 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact General Services Administration, Office of Governmentwide Policy, Office of Travel, Transportation and Asset Management, at (202) 501–1777.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Executive Order 13563 directs each federal agency to consider “how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively

burdensome.” The EO calls on every agency to develop “a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded or repealed to make the agency’s regulatory program more effective and or less burdensome in achieving its regulatory objectives.”

##### B. Procedures

Comments on Executive Order 13563 can be posted on a blog located on the Internet at <http://www.gsa.gov/improvingregulations>. To view Executive Order 13563 got to <http://www.gpo.gov/fdsys> and enter “executive order 13563” in the search box.

Dated: March 17, 2011.

**Janet Dobbs,**

*Director, Office of Travel, Transportation and Asset Management.*

[FR Doc. 2011–6657 Filed 3–21–11; 8:45 am]

**BILLING CODE 6820–14–P**

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1463

RIN 0560–AI12

#### Tobacco Transition Payment Program; Cigar and Cigarette Per Unit Assessments

**AGENCY:** Commodity Credit Corporation and Farm Service Agency, USDA.

**ACTION:** Request for comments.

**SUMMARY:** The Commodity Credit Corporation (CCC) is requesting comments about the calculation of assessments to fund the Tobacco Transition Payment Program (TTPP). Currently the cigar portion of the assessment uses a per unit calculation that treats all cigars, large and small, the same. That policy is under review as the result of a court decision. This review could also affect cigarettes, which are subject to similar provisions.

**DATES:** We will consider comments that we receive by May 23, 2011.

**ADDRESSES:** We invite you to submit comments on this notice. In your comment, please specify RIN 0560–AI12 and include the volume, date, and page

number of this issue of the **Federal Register**. You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Mail:** Jane Reed, Economic and Policy Analysis Staff, Farm Service Agency, USDA, 1400 Independence Ave., SW., Mail Stop 0515, Washington, DC 20250–0514.

Comments may be inspected at the above address, in room 3722, between 8 a.m. and 4:30 p.m. Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Jane Reed; phone: (202) 720–6782. Persons with disabilities or 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).

#### SUPPLEMENTARY INFORMATION:

##### Background—TTPP Authority and Existing Regulations

TTPP was enacted in the Fair and Equitable Tobacco Reform Act of 2004 (FETRA) (7 U.S.C. 518–519a). FETRA was enacted as Title VI of Public Law 108–357. FETRA ended the former tobacco quota program and price supports, and created the 10-year (2005 through 2014) roughly \$10 billion total TTPP. TTPP provides transition payments to certain tobacco producers and farm owners. TTPP is funded by assessments on manufacturers and importers of tobacco products. TTPP is sometimes called the “tobacco buyout” program. It is run by the Farm Service Agency (FSA) of the U.S. Department of Agriculture (USDA) on behalf of CCC. TTPP regulations are in 7 CFR part 1463.

##### Scope of This Request for Comments

This notice involves the collection of TTPP assessments, which are authorized in section 625 of FETRA (*see* 7 U.S.C. 518d). This notice focuses on the “Step B” cigar assessment, explained in greater detail below and addressed in § 1463.7 of the regulations. More specifically, this notice focuses on how those assessments are calculated for cigars, given that cigars vary widely in size, weight, and value but are assessed using a method based on the number of cigars handled.

The relevant FETRA provisions are the same for cigarettes as for cigars. Cigarettes are, therefore, in theory subject to the same issue of interpretation that led to this notice, however, as a practical matter may not be substantially affected by its resolution because cigarettes, unlike cigars, are taxed at a constant rate and are generally uniform in size, or more uniform in size than cigars.

Each year, FETRA assessments amount to about \$1 billion for all tobacco product categories together. The assessments are collected quarterly.

#### Current TTPP Assessment Methodology

Calculation by USDA of the amount due from an individual manufacturer or importer currently involves two steps. "Step A" allots a percentage of the total program assessment to six product categories specifically identified in FETRA (subsection 518d(c)) by Congress. Those six categories are cigarettes, cigars, snuff, roll-your-own, pipe, and chewing tobacco.<sup>1</sup> The initial "Step A" percentage allotments have been over time adjusted for changes in relative volume in the categories, as required by subsection 518d(c). The cigar and cigarette categories combined generate about 98% of the total TTPP assessments, and have since FETRA was enacted. The cigar "Step A" allotment started at about 3 percent of the total allotments in fiscal year 2004, was up to 4 percent in 2009, and is now 7 percent. Cigarettes started at 96 percent and are now at 91 percent. Recent changes in volume may be in response to 2009 tax changes noted below.

Step B divides the category's assessment liability among the manufacturers and importers in that category. Currently, this is done by unit ("sticks") for cigars under the USDA regulations. That unit method of calculating assessments is the heart of the controversy (the subject of a recent court case). All "sticks" are treated as equal. A very small cigar generates the same FETRA assessment as a very large cigar, irrespective of the difference in weight, size, and value. USDA specified the calculation that way in the regulations because of the provisions of subsection 518d(g). At issue in this request for comments is whether the "unit" provisions of subsection 518d(g) are required to be considered to interpret FETRA, which as interpreted by USDA calls for "unit" volume calculations for cigarettes and cigars and weight volume calculations for the other

four categories of tobacco. This follows, generally, the way the products are taxed.

#### Tobacco Taxing Rates and Methods

USDA does not have the authority to set tobacco product excise taxes. Excise tax rates and methods are outside the scope of this notice, however, taxing rates and methods are relevant to how TTPP assessments are calculated, or could be calculated, so some background on tobacco taxes is provided in this section to provide context.

"Small cigars" (for taxing purposes under other statutory, non-FETRA provisions) are those that weigh less than three pounds per 1,000 units. They are taxed, by agencies other than USDA, per unit (a certain dollar amount per 1,000 units). "Large cigars" (literally those that are not "small cigars") are taxed at a percentage of their value up to a certain maximum amount per 1,000 units. Thus the maximum tax rate for large cigars is a unit tax, but not all large cigars are taxed at a unit rate, if the value generates a unit amount that is below the maximum. The tax rates changed in 2009. Cigarettes are taxed by unit—a certain amount per 1,000 units. There are two tax categories for cigarettes, large and small, but there are no actual marketings in the "large" category. The other four categories of tobacco are taxed by weight.

#### Step A Percentage Allotment Calculation Method

Step A percentage allotments to the tobacco product categories were initially set in FETRA. USDA adjusts those periodically for changes in volume under subsection 518d(c).

USDA analyzed the Congressional Step A allotments and determined that the initial percentages were calculated by taking historical data for the six categories and then multiplying the weights or units in each category by the maximum tax rate (units for cigars and cigarettes—computed separately for large and small cigars—and weight for the others). This puts all product categories on a dollar basis.

Although the calculation was done separately for small and large cigars, Congress assigned one Step A percentage to cigars as a single category. As a result, there are only six categories in subsection 518d(c), not seven. There is one cigar category. There is not a separate "small cigar" category and a separate "large cigar" category.

Each year USDA uses data from the U.S. Department of the Treasury (Treasury) and the U.S. Department of Homeland Security Bureau of Customs

and Border Security (Customs)—the new volume figures (units for cigars and cigarettes)—and multiplies them by the 2004 tax rates to adjust the Step A allotments using the calculation Congress was determined to have used for the initial Step A allotments. Those former tax rates (not the 2009 revised rates) are used so that the adjustments to the Step A category allotments are for changes in volume (units and weights) only, not changes in tax rates.

USDA issued a technical amendment in the **Federal Register** published December 10, 2010 (75 FR 76921–76923), explaining this policy regarding Step A and clarifying the rules. The Step A calculation is being challenged in a lawsuit different than the one that resulted in this notice. There it is argued against the USDA position that the new 2009 tax rates should be used for the computation.

#### Step B Calculation

This immediate controversy, however, involves, as noted, Step B. Step B is where a category's percentage allotment is divided among the manufacturers and importers in that category. As indicated, subsection 518d(g) has been implemented by USDA to divide the single cigar Step A category allotment among all cigars by unit. Subsection 518d(e) provides that no manufacturer or importer should have to pay more than the "pro rata" share of the volume in their category.

Small cigar manufacturers and importers have argued that calculating Step B by units makes them pay more than their "pro rata" share. They argue that "volume" under subsection 518d(e) cannot be measured by units in the manner currently undertaken by USDA despite subsection 518d(g).

USDA's method treats all cigar units, large and small, the same for purposes of dividing up the single Step A cigar percentage allotment. USDA does not break out the cigar category first into small and large cigars and then apply the unit division of subsection 518d(g).

#### United States Code and Code of Federal Regulations (CFR) References

The discussion of cigar assessments in this notice references both FETRA (as it appears in the United States Code) and the current regulations (as they appear in the CFR). To help commenters understand the context of this notice, the full text of section 518d is available at: <http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+2465+11++%28%29%20%20>.

FETRA was enacted October 22, 2004. The final rule implementing TTPP was published on February 10, 2005 (70 FR

<sup>1</sup> Throughout this document, we refer to "snuff, roll-your-own, pipe, and chewing tobacco" as the "other" four categories of tobacco.

7007–7014). There is a rulemaking exception in section 519a and the final rule was published without prior comment. The regulation was amended by a final rule published in the **Federal Register** on April 4, 2005 (70 FR 17150–17166). The regulation specifies a stick-based Step B cigar calculation and treats cigars as one category not two. The relevant regulation (for Step B calculations) is in 7 CFR 1463.7.

### Step B as Specified in FETRA

The Step B controversy arises out of *Prime Time International, Inc., v. Vilsack* (599 F.3d 678). There were several issues raised in the lawsuit. (The others will be addressed separately once the rulemaking issue is resolved.) The district court ruled for USDA on the Step B issue. The case then went to the Court of Appeals (the Court). The Court described the Step B unit disagreement this way:

Prime Time contends that USDA's interpretation of the Fair and Equitable Tobacco Reform Act is contrary to ordinary construction and plain meaning of the word "volume" in the phrase "gross domestic volume," which is defined in section 518d(a)(2) as the "volume of tobacco products-removed (as defined by section 5702 of Title 26)" and "not exempt from tax" pursuant to provisions not relevant to this appeal, *supra* note 1. It observes that where statutory terms, such as "volume" here, are not defined in a statute, courts give them their ordinary meaning, citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). USDA responds that "volume" is "clearly explained" in FETRA to mean the number of cigars because section 518d(g)(3) provides that the number of cigars determines the "volume of domestic sales" and thus "market share" under section 518d(f).

The Court described the suggested alternative to USDA's Step B calculation as dividing the Step A percentage into small and large cigar subclasses and then applying the unit division to each category separately. The Court said:

Prime Time maintains, because FETRA requires that the allocation within a tobacco class be "on a pro rata basis" with "[n]o manufacturer or importer \* \* \* required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume." 7 U.S.C. 518d(e). Therefore, it argues, after allocating the assessment by class of tobacco products, USDA should divide the cigar class assessment into sub-classes of large and small cigars, with the relative allocation determined by total weight, and then divide the assessments among individual large and small cigar manufacturers and importers on a per-stick basis from the subdivided assessments, satisfying subsection (g)(3)(A). Prime Time contends such a method is required by the plain text of subsection (e) as well as subsection (i)(4)(B), which, upon

administrative appeal, requires the Secretary to "make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources."

As to the government's position that subsection 518d(g)(3) unambiguously required that all cigars be divided by unit (without a breakout of cigars into subclasses before the division by units), the Court said it did not see FETRA as being unambiguous:

The plain text of FETRA does not self-evidently vindicate USDA's two step assessment method. Under FETRA, the "volume of domestic sales" and "market share" are not synonymous with "gross domestic volume." FETRA provides, for example, that "[t]he volume of domestic sales shall be calculated based on gross domestic volume," 7 U.S.C. 518d(g)(2) (emphasis added), indicating two different meanings for the terms. And section 518d(g)(3)(A) does not, on its face, require that a compound number of large and small cigars serve as the denominator when calculating a manufacturer's or importer's volume of domestic sales on a per-stick basis. Most critically, USDA's interpretation appears to ignore the pro-rata-basis limitation Congress imposed on assessments within a tobacco class in subsection (e). As interpreted by USDA, it is irrelevant that one large cigar consumes far more tobacco than a small cigar, and so accounts for a far larger segment of the market than its per-stick contribution would indicate. Yet the text and structure of the statute titled the Fair and Equitable Tobacco Reform Act suggests an easy counting metric for cigarettes and cigars may not override a statutory mandate that assessments be "allocated on a pro rata basis" within each class of tobacco product, *id.* § 518d(e)(1). Prime Time's interpretation suggests that there is at least one way to interpret FETRA's provisions consistently and in harmony, with none made superfluous or insignificant. See *Corley v. United States*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1558, 1566, 173 L.Ed.2d 443 (2009); *City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 522 (D.C.Cir.2009).

For the purpose of this appeal, the court need only observe that USDA's present interpretation is not mandated by the plain text of FETRA. USDA does not maintain that its interpretation of FETRA is a permissible view of an ambiguous statute entitled to deference under *Chevron* step 2, 467 U.S. at 843, 104 S.Ct. 2778. Given that FETRA does not appear to be susceptible of only a single interpretation, we reverse and remand to the district court with instructions to remand Prime Time's FETRA claims to the USDA for further proceedings. See *PDK Labs, Inc. v. U.S. DEA*, 362 F.3d 786, 797–98 (D.C.Cir.2004).

### Alternative Step B Methods

As a result, the Court remanded the claims to USDA to reconsider and this request for comment is part of the process of reconsidering. Several points should be noted. First, the Court refers

to weights for dividing cigars into two Step A subcategories. USDA does not have weight data for domestically manufactured small and large cigars. Cigars are not taxed based on weight. Weight information is not available on the Treasury reports and may not be known or reported by any part of the Federal government for domestically manufactured cigars. (There has been no reason for the Federal government to collect weights for cigars because they are not taxed on that basis). The same is true of cigarette weight data. USDA could ask the companies for the data, but subsection 518d(h) of FETRA requires tax reports to be used for these calculations. Those reports do not include the weight data either. Also, each manufacturer would be dependent on the accuracy of all other manufacturer's weight data reports to receive a correct assessment. The title of subsection (h), the subsection mentioned in (g), seems telling in this regard—"Measurement of Volume of Domestic Sales." The only metric on the reports for cigars is units.

There is another problem with this alternate approach. Ultimately, the alternative requires that large cigars be divided by unit. There are presumably variations in weight among small cigars but, in any event, there are wide weight and size variations among large cigars and if to pay more than the share represented by the respective weight violates subsection 518d(e), then it would appear that for the makers of smaller large cigars the alternative would violate subsection 518d(e). Therefore, it seems, the alternative would be self-contradictory.

To, however, do the Step B division strictly on weight (or on some other measure like taxes paid) would appear to disregard subsection 518d(g). If the point of the interpretation is to give meaning to all part of the statute, then dismissing subsection 518d(g) does not work. In the reply brief submitted in support of an alternative approach in the litigation, it was suggested that taxes paid would be used in lieu of weight:

If FETRA is read plainly, wholly and harmoniously, then the cigar assessment process is clean, simple, and direct: (A) Allocate the amount of the total assessment among the six classes based on the federal excise taxes paid by each class, with separate figures for large and small cigars as USDA currently does. (B) Divide the class assessment for cigars into large and small cigar segments. This will divide the market share of cigars along the lines of the overall size and weight (and coincidentally market value) of the products removed. (C) For large cigars, divide the amount of the total cigar assessment attributable to large cigars by the number or stick count of the large cigars

removed by each company to establish a company assessment. For small cigars, divide the amount of the total cigar assessment attributable to small cigars by the number of small cigars each company removes to establish the company assessment. This procedure respects all of FETRA's sections, calculating market share based on number of cigars while also ensuring assessments do not exceed respective shares of total gross domestic volume from all sources, as required by FETRA.

That approach still leaves dividing up large cigars by units. (That is also a problem for small cigars if small cigars are not standard in size.) Therefore, it has the same internal contradiction problem as the strict weight based alternative. Plus, as noted below, weights and taxes for cigars do not vary proportionately. To the contrary, taxes actually in some cases, at least since 2009, vary inversely to the size of the cigar in those instances where smallest large cigars are big enough to be taxed on a value basis rather than a unit basis.

The Court referred to common uses of the term "volume." It could be argued that volume might suggest weight in the proper instance. It does not, it would seem, suggest taxes paid. As for the use of units, there is no reason why volume cannot be a number and as to FETRA, as we note below, the word "volume" is strictly defined in subsection 518d(g) as a number and that makes particular sense it would seem since the government does not have weights for domestically manufactured cigars and it was based on units that the Step A calculation was made. Thus, and for the other reasons given here, the only definition for "volume" that makes sense is the actual one given in the statute—that which is in (g). This does not seem at all unusual for the reasons given. For example, if the issue were the volume of pedestrian traffic on a bridge, volume could well be measured as a number rather than the weight of the person who crossed the bridge or the taxes they paid.

Also, in the alternative suggested in the litigation, the Step A allotment would effectively be a seven category calculation. Yet, FETRA specifically only provides for six. There does not appear to be any rational reason why Congress would have put six in FETRA if seven were meant.

And, there is legislative history to suggest the use of six categories not seven was no accident. FETRA was enacted in October of 2004. The Senate Bill passed that summer had two assessments. One was to be a FDA assessment (ultimately jettisoned). The Bill's FDA assessment followed the same structure as section 518d. There

was in the FDA assessment a Step A division among categories but that Step A division had seven categories, not six, as "large" and "little" cigars were made separate categories (150 C.R. 16047 (July 16, 2004), also 150 C.R. S8389). ("Little" was defined the same as "small" is now.) The TTPP assessment in the Senate Bill did not cover cigars at all (150 C.R. 16056 (July 16, 2004), also 150 C.R. S8397). There were only five categories. But in the end, the FDA provisions were taken out of the legislation that enacted FETRA and cigars were added to the TTPP without the cigar subcategories of the FDA assessment. That is, in the TTPP provisions that are now law, Congress went from five to six categories, specifically rejecting the seven-category (two-cigar category), FDA assessment model of the Bill that was at one time under consideration and which is what is actually suggested here. That is, Congress seems to have intentionally made cigars one category, not two, after considering the alternative. In addition, recent events noted below in which manufacturers have been fleeing the small cigar category for the cheaper taxes of the large cigar category indicates that there is not much difference between cigars on either side of the margin of the two categories, making it seemingly burdensome and market-affecting to separate the categories, which may have been a motivation for Congress as well.

That would seem to be important in this instance since the alternative suggested in the litigation was a two-cigar category alternative. Seemingly, Congress considered, but rejected, the breakout. The Senate Bill TTPP assessment provisions as they stood before cigars were added as a category was basically the same as they are now. Cigars were simply added.

Before cigars were added, size differential was not really a potential issue in theory because the other four categories of tobacco were weight categories and cigarettes may not have the weight variations of cigars. Congress added cigars purposely as a single category and did nothing to add provisions dealing with separating cigars by size.

To add a size element now or subcategories would seem to be to legislate rather than to interpret the legislation. FETRA has been in existence for 6 years without change. The definition of volume that seems to apply and be intended is that of subsection 518d(g)(3). That is why, for now, USDA, pending comment, maintains the current regulation and Step B procedure.

### Fairness of Assessment, Congressional Intent

With regard to the alternative, there is in its favor, to the extent relevant, the potential equitable concern of small cigars generating the same liability as large ones. We address that more below. The Step A calculations are done separately for small and large cigars even though the end result is one Step A category. In support, on the other hand, of the current method, reading subsection 518d(g) as requiring a unit method can be seen as actually giving meaning to the other provisions of FETRA rather than being contrary to them.

FETRA as it was finally enacted does bounce among several concepts. Among them are (1) "market share" and (2) "volume of domestic sales" and (3) "gross domestic volume." Also there is the "pro rata" language. Under subsection 518d(e), USDA is to allocate Step B on a "pro rata" basis and subsection 518d(i)(4) specifies that each manufacturer and importer only pay their "correct share of total gross domestic volume from all sources." Specifically in subsection 518d(e) FETRA provides that the assessment be "allocated on a pro rata basis" based on the manufacturer's or importer's "share of gross domestic volume."

In the alternative view suggested in the litigation, it is suggested that a maker of small cigars is paying more than its "pro rata" share of the "gross domestic volume" if it pays the assessment as currently calculated because "gross domestic volume" cannot, it is suggested there, be based just on units. However, in subsection 518d(f) FETRA requires that the manufacturers and importers be assessed based on "market share" and "market share" is defined in subsection 518d(a) to mean "volume of domestic sales."

There appears to be a logical progression towards subsection 518d(g), which is entitled "Determination of volume of domestic sales." That is also the expression in the title of subsection 518d(h). Subsection 518d(g)(2) specifies that "the volume of domestic sales" be calculated based on "gross domestic volume" therefore tying the two concepts together, or seeming to, and then subsection 518d(g)(3) specifies that "volume of domestic sales" will be measured by units for cigars. Therefore, considering all of the sections together and weighing them all together with all of the potential for controversy that they may produce, it seems on balance at this time and subject to comment and further consideration that all FETRA

subsections seem to be tied together and given precise meaning in subsection 518d(g)(3) by tying the measure to units. This interpretation of all the parts of the statute to resolve any ambiguities produced by the various subsections seems particularly strong when all the suggested alternatives suggested so far result in contradictory interpretation for separate subsections of FETRA or involve data that no Federal Government agency has and cannot be verified if supplied by manufacturers, and would involve calculations that Congress presumably would have laid out in the statute. This view is not one of convenience on the part of the agency but reflects the actual provision of the statute both as to what Congress did express and what it did not.

Congress in subsection 518d(h) specifically called for the use of official government reports that do not include weight data for domestically manufactured cigars, and that section is specifically entitled “Measurement of Volume of Domestic Sales” and has only a unit metric for cigars. It was Congress that recognized the need for a ready method to collect the assessment. It was an add-on to the taxes paid elsewhere. The reports show taxes paid, but taxes paid is not a volume measure—a view that may be at issue in the Step A litigation referred to earlier—and, in any event, (h) is referenced in (g) which specifies that the “volume” method to be used is a unit method.

If Congress wanted to calculate Step B some other way, presumably Congress would have told USDA what to do and not left parts of the calculation to speculation, particularly given how detailed the specifications otherwise are in FETRA. Congress could have omitted the unit provision and specified that payments would be made on the basis of taxes paid. They did not do that. It may be that a particular party can show that the unit figures used by USDA are inaccurate. But that is a different issue than the method of the assessment.

It seems to follow, pending comment, that a manufacturer’s or importer’s “pro rata” share of the cigar volume would under FETRA and these provisions be their share of the total number of units together of all cigars thus resolving any ambiguities that might otherwise be left to debate by the more general provisions elsewhere in FETRA. The word “based” in subsection 518d(g)(2) would not seem to mean merely “derived from” allowing other elements to intercede in the volume determination since subsection 518d(f) (in conjunction with subsection 518d(a)) provides that the “volume of domestic sales” is determinative and subsection 518d(g)(3) specifies that that

volume is a unit-based matter solely. It is not derived from that number—it is that number, or so FETRA seems to say.

The current approach therefore does seem to give meaning to all parts of FETRA. The current approach handles the matter in a coherent and logically consistent way. Companies, accordingly, do seem under the current regime to pay their pro rata share of the correct volume. Subsection 518d(g) defines “volume” (and is the only provision to do so) and therefore gives meaning to other parts of FETRA. Plus, as noted, the calculation method in FETRA is detailed and specific and Congress only enacted six categories not seven and seemed to do so intentionally. Congress has never changed FETRA even though it changed other taxes among the tobacco product categories in 2009.

The alternatives discussed in this notice are largely based on interpretations of 7 U.S.C. 518d(e) and whether the current method provides a fair assessment so that no company is paying more than its share of gross domestic volume. The current method that USDA uses could arguably be seen as “unfair” because tiny cigars generate as much assessment as very large, and expensive, cigars. However, USDA cannot change its obligations on the basis of what it believes to be fair not fair—that would be to legislate and it is not clear that Congress was unaware of these issues or regarded the current method as unfair. There is nothing in the statute to suggest that the calculation method is a policy call and, in any event on further consideration, there is no reason to necessarily consider the assessments “unfair” as enacted—or now.

Rather, the Step B assessments have only been about one-third of one cent per unit for small cigars, or about \$3 per 1,000 units. This does not seem to have impeded the marketing of small cigars, judging from the numbers that have been reported to USDA from the tax reports. Presumably, this very small assessment was passed on to consumers. It was common to all parties in the same category so there was no competitive advantage.

Further, we understand that small cigars can be packaged like cigarettes, can be about the same size, and can compete with cigarettes. In 2004 the difference in general tax rates between small cigars and cigarettes was about \$18 per 1,000 units (“small cigars” were taxed at about \$2 per 1,000 units). The FETRA assessment of \$3 per 1,000 units was much less than that difference and also cigarettes themselves generate a FETRA assessment. “Small cigars” thus

would still have had an overall tax advantage. That may have figured in Congress’s thinking in enacting FETRA.

There have been some changes in the tax situation since as noted above, the 2009 tax changes equalized “small cigar” and cigarette tax rates at about \$50 per 1,000 units, but made no changes to FETRA. However, the tax changes apparently motivated small cigar makers to increase the size of their cigars so that they could be taxed at a value rate (about 50 percent of value) as “large cigars” (which results in an amount well below the maximum unit rate for large cigars) and not at a unit rate as small cigars.

At current rates, taxes for smaller large cigars (those are just heavy enough to be in the “large” category) are small enough (because their value is low enough) that they are taxed more cheaply (converted to a per unit basis) than those in the “small cigar” category. That is, these now slightly bigger cigars are now taxed, per unit, at a rate that is well below the roughly \$50 per 1,000 units rate for “small cigars” and cigarettes. In fact, the difference between these smaller large cigars (which still may be marketed like the small cigars of old in packages of 20) and cigarettes may even be greater than the old difference between “small cigars” and cigarettes prior to the 2009 tax changes. That difference, it appears, can be even greater than the \$18 difference under the former rates. Smaller large cigars still have a tax advantage over cigarettes.

We add in the way of perspective on these issues that there has been a reported shift in market volume from the “small” cigar category into the large category and cigar numbers have increased steeply as reflected in the change in the FETRA cigar Step A allotment. This means that that those that would benefit from a breakout of “small cigars” may now no longer so benefit from the alternate method of making the Step B calculation, thus suggesting a certain volatility in result which of itself may have been something that Congress would have wanted to avoid. Some companies that formerly exclusively sold small cigars appear to be primarily selling “large” cigars to maintain their tax advantages over cigarettes. “Large cigar” market volume numbers have increased substantially since the 2009 tax change. As for the future, if all small cigars are reformulated to meet the weight per 1,000 units requirements of the large cigar category and its cheaper tax rates, it could be that there are no marketings at all in the small cigar category, in which case the result of using the

alternate method would be exactly the same as the method currently used by USDA.

But assuming a situation in which there are substantial small cigar marketings in the actual "small cigar" tax category, changing the Step B method would substantially change assessment levels. Even applied to assessment data from the first quarter of 2010, it appears that the alternative method of using cigar subcategories would have increased the large cigar unit assessment as much as 12 times. That difference might actually have been greater before then because in 2010, the shift in market volume from small to large cigars had already begun.

We request comments on all aspects of the Step B assessment. Commenters can address whether they believe the Court's decision absolutely requires a change or merely requires a change if agency reconsideration of the current method of Step B division suggests that a change is appropriate. Comments in support of a change should suggest where USDA would obtain the data to implement the alternative and how that information would be verified.

Comments should address the question of whether a change would be retroactive for all, or prospective only, for those other than the company in connection with the current litigation. Commenters may want to indicate whether "small cigars" are standard in size or provide other marketing information that may be germane to the consideration of this issue.

Commenters may want to address whether cigarettes should be impacted by any potential resulting changes. Because the statutory provisions at issue are also used for the assessment of cigarettes, particularly with respect to the use of units, cigarette manufacturers and importers may wish to comment on whether the cigarette Step B method currently in use should be changed or remain the same. For example, if our assumption that all cigarettes weigh the same is inaccurate, a change to the Step B calculation to take weight into account could impact cigarette manufacturers or importers.

#### Conclusion and Guidance for Comments

CCC is requesting comments from the public on the method used to calculate TTPP assessments for cigar manufacturers and importers, and any related issues. Any change would be reflected in the regulations in 7 CFR part 1463. Specific comments addressing the issues raised above are preferred, but all comments are welcome. Proposals for alternatives

should address data sources and costs and the provisions of FETRA that support the alternative. This notice does not change the regulations; any change would be published in a subsequent rulemaking document. Because FETRA exempts TTPP from notice and comment rulemaking, any future action would likely be a final rule.

The following suggestions may be helpful for preparing your comments:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and data on which you based your views.
- Provide specific examples to illustrate your points.
- Offer specific alternatives to the current regulations or policies and indicate the source of necessary data, the estimated cost of obtaining the data, and how the data can be verified.
- Submit your comments to be received by FSA by the comment period deadline.

#### Executive Order 12866

The Office of Management and Budget (OMB) designated this notice as not significant under Executive Order 12866, "Regulatory Planning and Review," and therefore has not reviewed this notice.

Signed in Washington, DC, on March 15, 2011.

**Val Dolcini,**

*Acting Executive Vice President, Commodity Credit Corporation.*

[FR Doc. 2011-6668 Filed 3-21-11; 8:45 am]

**BILLING CODE 3410-05-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2011-0254; Directorate Identifier 2010-NM-180-AD]

RIN 2120-AA64

#### Airworthiness Directives; The Boeing Company Model 737-600, -700, -700C, -800, -900, and -900ER Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. For certain airplanes, this proposed AD would

require a one-time inspection for damage of the hydraulic actuator rod ends and actuator attach fittings on the thrust reversers, and repair or replacement if necessary. For all airplanes, this proposed AD also would require repetitive inspections for damage of the hydraulic actuator rod ends, attach bolts, and nuts; repetitive inspections for damage of fitting assemblies, wear spacers, and actuator attach fittings on the thrust reverser; repetitive measurements of the wear spacer; and corrective actions if necessary. This proposed AD was prompted by in-service damage of the attachment fittings for the thrust reverser actuator. We are proposing this AD to detect and correct such damage, which could result in actuator attach fitting failure, loss of the thrust reverser auto restow function, and consequent loss of control of the airplane.

**DATES:** We must receive comments on this proposed AD by May 6, 2011.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, *Attention:* Data & Services Management, P.O. Box 3707, MC 2H-65, Seattle, Washington 98124-2207; *phone:* 206-544-5000, extension 1; *fax:* 206-766-5680; *e-mail:* [me.boecom@boeing.com](mailto:me.boecom@boeing.com); *Internet:* <https://www.myboeingfleet.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425-227-1221.

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office