

**DEPARTMENT OF AGRICULTURE****48 CFR Part 470****Commodity Credit Corporation****7 CFR Parts 1496 and 1499****Foreign Agricultural Service****7 CFR Part 1599**

RIN 0551-AA78

**McGovern Dole International Food for Education and Child Nutrition Program and Food for Progress Program**

**AGENCY:** Foreign Agricultural Service and Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations to administer the Food for Progress (FFPr) Program and the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program) by making revisions to provide greater clarity with respect to all aspects of the program, with specific emphasis on the eligibility requirements that a participant must meet and the actions that must be undertaken by a participant in order to receive assistance under these programs, including the reports that are filed by program participants with the Foreign Agricultural Service (FAS). This final rule also amends the Agriculture Acquisition Regulation (AGAR), to specify the criteria that is used in determining whether a commodity that is procured under these programs and under domestic feeding programs administered by U.S. Department of Agriculture (USDA) is considered to be a product of the United States. The purpose of these amendments is to improve the efficiency of the programs and make it clearer to participants what they must do to meet eligibility requirements.

**DATES:** *Effective Date:* May 26, 2009.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Background**

On October 24, 2008, FAS published a proposed rule (73 FR 63387) to remove 7 CFR part 1496; revise 7 CFR parts 1499 and 1599, which contain the general regulations governing the FFPr and the McGovern-Dole Program; and add 48 CFR part 470, which governs the commodity acquisition procedures of USDA. The proposed rule was intended to accomplish the following objectives:

- Improve the efficiency of the programs by providing greater clarity to program participants on eligibility, reporting and performance requirements;
- Better define the criteria used to determine a product of the United States;
- Allow for the full utilization of all types of acquisition contracts that are authorized under the Federal Acquisition Regulations (FAR); and,
- Restructure and rewrite the regulations, including new subparts and sections, to make them easier to read and understand.

**Analysis of Comments Received**

Seventeen comments on the proposed rule were received from private entities that are affected by these regulations, including: three private voluntary organizations (PVOs), two PVO associations, seven commodity organizations, four shipping and freight industry representatives, and one Office of Inspector General (OIG). One comment was received by an organization comprised of over 250 non-governmental organizations that stated, "Overall we believe FAS has done an excellent job in revising part 1499 and that the changes will improve the quality of the food aid programs and increase the ability of PVOs to assist those in need." The comments are discussed below, except for those dealing with issues outside of the scope of the proposed rule, making editorial suggestions, or simply expressing support for the proposed rule.

**A. Eligibility Determination: 7 CFR Parts 1499.3(a)(1) and 1599.3(a)(1)**

*Comment:* One commenter suggested that USDA should change "grants" to "awards" to be more inclusive since "awards" includes grants and cooperative agreements.

*Response:* USDA accepts this suggestion and has made the changes accordingly.

**B. Agreements: 7 CFR Parts 1499.5(c) and 1599.5(c)**

*Comment:* One commenter suggested that USDA allow a participant to make 100 percent line item adjustments to the budget unless the agreement specifies otherwise. The commenter further stated that this is the norm for most Government regulations.

*Response:* The current language affords USDA the ability to provide greater flexibility to participants' budgets other than just line item adjustments. Additionally, due to various sources from which USDA receives funds for grants governed under parts 1499 and 1599, USDA cannot provide 100 percent flexibility between all budget line items as it has the potential of inadvertently creating an Antideficiency Act violation within the program. For example, FFPr operates under statutory authority that limits the amount of funds that may be spent each year for freight costs and administrative expenses. USDA only can allow flexibility within a budget that would not allow for the possibility of these limits being exceeded. This limitation is also covered in 7 CFR 3019.25(f).

**C. Payments: 7 CFR Parts 1499.6 and 1599.6**

*Comments:* One commenter questioned whether survey costs noted in sections 1499.6(a)(7) and 1599.6(a)(7) included load, discharge, and delivery surveys. A comment was received that questioned the necessity of an "original" bill of lading for payment, particularly given that an original is required to take title of commodities. Additionally, a commenter requested that all references to 7 CFR part 3019 be quoted directly in the relevant sections of 7 CFR parts 1499 and 1599 rather than referring the reader back to 7 CFR part 3019.

*Response:* Load survey costs are not included in sections 1499.6(a)(7) and 1599.6(a)(7). The determination whether a discharge survey, a delivery survey, or both have been completed is dependent upon multiple factors, including but not limited to destination country and contract terms. To provide greater clarity in these sections, USDA has replaced "survey costs" with "survey costs other than those at load port." In response to the comment about providing an original bill of lading, USDA agrees that an original or "true copy" of the bill of lading, such as a pdf version of the original bill of lading,

would be acceptable for payment purposes; this change has been made to these sections. USDA cannot accede to the request to directly quote applicable sections of 7 CFR part 3019 into the relevant sections of the regulations. The provisions of 7 CFR part 3019 are applicable to all USDA grant programs and refer to pertinent circulars released by the Office of Management and Budget (OMB). This regulation is likely to change more often than the FAS and the Commodity Credit Corporation (CCC) grant program regulations. Quoting the applicable sections of 7 CFR part 3019 directly into parts 1499 and 1599 would multiply the regulations requiring updates and notifications to the public that otherwise could be limited to only 7 CFR part 3019.

*D. Transportation of Goods: 7 CFR Parts 1499.7(b) and 1599.7(b)*

*Comments:* Two comments were received on this section. The first commenter encouraged USDA to implement direct ocean freight procurement for its food aid programs. The other commenter objected to USDA directly contracting for freight in accordance with the FAR on the bases that the current process is not unlawful and has been upheld in a previous court ruling, the change would preclude freight forwarders from participating in the program, the proposed system would return to a process that was ruled inefficient by the Grace Commission, and, finally, USDA failed to provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully on this change.

*Response:* USDA is committed to providing an efficient and effective acquisition process under its food donation programs. USDA is further committed to ensuring transparency and fairness in this process. Therefore, once the Final Rule is published, USDA will use the Food Aid Consultative Group (FACG) to outline acquisition processes that USDA is considering implementing under these regulations. The FACG is the official consultative group that allows all organizations with an interest in food aid programs to provide input to the U.S. Government.

With respect to the proposal to use the FAR to acquire freight, this provision is primarily included to reflect the fact that under this rule USDA would be directly contracting for freight in many circumstances and program recipients would not have the burden of obtaining such services. Further, under current practices, in most instances the program recipient is not solely responsible for procuring

freight services; but rather, while such entities do a significant portion of the work related to obtaining freight, decisions regarding the acceptance of freight contracts also involve decisions of employees of USDA. In order to alleviate any questions that exist concerning the propriety of this activity, the determination has been made to follow provisions of the FAR. To the extent that a program participant is solely responsible for these activities without regard to any involvement of employees of USDA, then the FAR provisions would not be applicable.

With respect to the use of freight forwarders, the use of the FAR to acquire freight does not preclude the use, by USDA, of the services of a licensed freight forwarder, similar to the process currently used in Title II of the Food for Peace Act, (Pub. L. 83–480, or referred to as Pub. L. 480 Title II). In such a case, a licensed freight forwarder would act as directed by USDA.

*E. Transportation of Goods: 7 CFR Parts 1499.7(c) and 1599.7(c)*

*Comments:* Four comments were received concerning the use of a licensed freight forwarder rather than a shipping agent. Three commenter's objected to the use of a licensed freight forwarder rather than a shipping agent to facilitate the acquisition of transportation. One commenter stated that sections 1499.7(c)(1)–(3) and 1599.7(c)(1)–(3) go beyond USDA's authority and conflict with that of the Federal Maritime Commission's (FMC) application requirements. Another comment was received asking to clarify the intention of sections 1499.7(c) and 1599.7(c) as to preclude the use of entities other than licensed freight forwarders or to govern only licensed freight forwarders within these sections.

*Response:* USDA agrees with the comments concerning sections 1499.7(c)(1)–(3) and 1599.7(c)(1)–(3) being in conflict with the FMC's application process and has removed these provisions. USDA further agrees with the comments concerning sections 1499.7(c)(4) and 1599.7(c)(4) and has removed this requirement since proof of financial responsibility is required in the FMC application process. As to the comments requesting the continued use of shipping agents, USDA does not agree with this comment and will adopt the proposed change set forth in the proposed rule. Currently, there is no definition of "shipping agent" and there are no services of a shipping agent identified that a licensed freight forwarder could not provide. In fact, an unlicensed freight forwarder may not book or arrange vessel space for others,

process shipping documentation or collect freight forwarder compensation from the ocean carriers. Further information regarding this issue is found at the Web site maintained by FMC at <http://www.fmc.gov/home/faq/index.asp>. In addition, FMC has a regulated process for licensing freight forwarders that will remove this duplicative process from USDA. Lastly, USDA has provided further clarification on the intention of sections 1499.7(c) and 1599.7(c) to allow only licensed freight forwarders to be used by participants in arranging transportation.

*F. Damage to and Loss of Commodities: 7 CFR Parts 1499.9 and 1599.9*

*Comment:* One commenter expressed concern regarding the number of times a notification of loss or damage to commodities may be required during the commodity voyage.

*Response:* USDA agrees with the concern expressed by the commenter but also notes that timely notification of damages to and losses of commodities are necessary to protect the assets of the program. USDA has removed the word "immediately" from this section and inserted the provision for a timeframe of notification to be outlined in the program agreement.

*G. Claims for Damage to or Loss of Commodities: 7 CFR Parts 1499.10 and 1599.10*

*Comments:* Three comments were received on this section. One commenter asked if funds arising from a claim could cover the cost of services from a third party sub-contract who settled the claims process, and if so, would this arrangement have to be stipulated in the program agreement or could "advance approval" for such a use of these funds be obtained in another manner. The second commenter recommended USDA to require program participants to purchase marine cargo insurance as this requirement would lend itself to the goal of timely resolution of cargo claims. This commenter also suggested that USDA adopt a percentage threshold for establishing claim value levels. The third commenter suggested that USDA allow the participant to determine whether or not to file a claim for losses under \$10,000 rather than \$20,000. This commenter also asked for clarification on who would provide funds for marine cargo insurance if such insurance were required.

*Response:* USDA agrees that, if such a situation were to arise, it should be handled outside the program agreement. The current regulation allows for advance approval and does not stipulate

that such approval must be stipulated in the program agreement; therefore, no changes are made to the regulations. However, USDA will include procedures on this subject matter in applicable program documents and in the guidance provided to participants, which will be developed once the final rule is in effect. Regarding the required purchase of marine cargo insurance, USDA will consider this provision on an agreement basis as USDA assesses the risk involved in moving the commodities. If USDA determines that it is in the best interest of the programs, USDA will require and provide funding for marine cargo insurance. As to the value for requiring a claim to be filed, USDA does not agree with either suggestion and therefore has not made any changes to these sections. The current language allows participants to file a claim at any level. In setting the \$20,000 value level, USDA determined that a benefit to the program could be reached while factoring in the amount of resources necessary to administer the claims process.

*H. Subrecipients: 7 CFR Parts 1499.12 and 1599.12*

*Comment:* One commenter questioned the need for USDA to receive copies of subrecipient contracts. The commenter suggested that the participant retain copies of the subrecipient contracts and make them available upon request by USDA.

*Response:* USDA understands the concern expressed by the commenter; however, USDA has had recent experiences with subrecipient contracts either not being in place or not providing adequate assurances to protect the integrity of the donation programs. Further, OIG also recommends that these contracts receive oversight by FAS and CCC. Therefore, USDA is retaining the current language in this section.

*I. Recordkeeping and Reporting Requirements: 7 CFR Parts 1499.13 and 1599.13*

*Comment:* One commenter recommended the following: require USDA to make the annual Single Audit Act and OMB Circular A-133 mandatory, regardless of funding availability; provide specific timeframes for participants to submit reports and evaluations; and clarify how the new evaluation requirement will complement FAS's current system of close-out reviews.

*Response:* USDA agrees that participants must conduct an annual audit in accordance with the Single Audit Act (31 U.S.C. 7501-7507) and

revised OMB Circular A-133. In support of this, 7 CFR 3019.26(a), that is referenced in sections 1499.13(d) and 1599.13(d), contains the reference to the Single Audit Act and OMB Circular A-133. Regarding the timeframe for report submissions, USDA intends to provide a specific timeframe for participants to submit reports and evaluations within the agreements. At this time, USDA does not foresee a change in reporting timeframes but has moved this provision into the agreements to afford flexibility in managing the programs. Evaluating activities conducted under USDA food aid programs will provide insight to USDA in developing more effective programs as well as enable USDA to highlight program outcomes rather than program outputs that are currently captured in semi-annual reports. These evaluations will complement FAS's current system of close-out reviews by using a third party neutral evaluator and, in the case of mid-period evaluations, afford more transparency on program short-comings prior to the actual closure process so that USDA can determine the best course of action to remedy the short-comings.

*J. Definitions: 48 CFR Part 470.101*

*Comments:* Three comments were received that outlined the ability for some commodities to be maintained in a non-commingled manner, and, therefore, requested that USDA consider either excluding some commodities from this definition, removing the definition, and thereby the allowance for commingling in its entirety, or modifying it to conform more closely to the domestic commodity donation programs.

*Response:* USDA recognizes that commodities are maintained and stored in various manners. USDA further agrees with protecting the U.S. origin integrity of commodities when this is the normal commercial practice. Accordingly, 48 CFR 470.101 has been revised to provide that in those instances in which it has been determined by USDA that a commodity that is stored in a commingled manner but which is one that can be reasonably stored on an identity preserved basis with respect to its origin, USDA will require such commodity that is being procured to originate from the United States.

*K. United States Origin of Agricultural Products: 48 CFR Part 470.103(b)*

*Comments:* USDA received three comments concerning USDA's attempt to harmonize the use of additives in international programs with those used

in domestic programs. The commenter's suggest replacing "or" with "and" at the end of section 470(b)(1).

*Response:* Section 402(2) of Public Law 480 provides, in relevant part, that with respect to the administration of Title II of that Act, "\* \* \* a product of an agricultural commodity shall not be considered to be produced in the United States if it contains any ingredient that is not produced in the United States, if that ingredient is produced and is commercially available at fair and reasonable prices. This provision is also made applicable to the FFPr Program by section 1110(e)(4) of the FFPr Act. With respect to the McGovern-Dole Program, section 3107(a) of the Farm Security and Rural Investment Act of 2002 defines an agricultural commodity to be "an agricultural commodity, or a product of an agricultural commodity, that is produced in the United States."

Based upon the review of the issues raised by this comment, since procurements of commodities for use in Public Law 480 and the FFPr Program must follow the requirements of section 402(2) of Public Law 480, the definition of "additive" has been modified to refer to "ingredient" and the cited statutory provision has been incorporated into the definition of "ingredient". With respect to the McGovern-Dole Program, in order to ensure consistency with these other two programs and in recognition of the fact that often procurements of commodities are done simultaneously for two or more of these programs, USDA will use the same definition of "ingredient."

USDA concurs with the comment since it is desirable to harmonize the manner in which ingredients are treated for this purpose. USDA has revised 48 CFR 470.103(b) to reflect the statutory provision regarding ingredients as found in Public Law 480 with regard to procurements made for FAS and the U.S. Agency for International Development (USAID) programs. Accordingly, for these international programs, the procurement of commodities with ingredients will be handled in the same manner as procurements relating to programs administered by the Food and Nutrition Service except as may otherwise be required by statute.

*L. United States Origin of Agricultural Products: 48 CFR Part 470.103(c)*

*Comments:* USDA received four comments concerning the use of commingled products as a product of the United States. Two of the comments expressed concern that non-U.S. origin products may be provided under USDA food assistance programs, while two

other comments suggested modifications related to the timing of the commodity procurement to bring the language into commercial norms.

**Response:** USDA agrees that this section does not adequately take into consideration the situation in which a vendor has procured U.S. agricultural products prior to the issuance of a solicitation. Accordingly, this provision has been revised to provide that a commingled product shall be considered to be a product of the United States, if the offeror can establish that the offeror has in inventory at the time the contract for the commodity or product is awarded to the offeror, or obtains during the contract performance period specified in the solicitation, or a combination thereof, a sufficient quantity of the commodity or product that was produced in the United States to fulfill the contract being awarded, and all unfulfilled contracts that the offeror entered into to provide such commingled product to the U.S. Government.

In addition, this section has been revised with respect to the domestic origin requirements for products of animals. Upon further consideration, USDA has determined that rather than to attempt to set forth in this section a generic provision regarding domestic origin, that the specific requirements applicable to the country in which the animal from which the product was obtained was bred, raised, slaughtered and processed should be set forth in individual solicitations. Under this process, USDA can take into account the differences that exist with respect to various animals, *e.g.*, poultry, pork or beef, and the various types of products that are obtained, *e.g.*, full cuts of meat or poultry and processed products.

#### *M. Issuance of Invitations: 7 CFR Part 1496.4*

**Comment:** One commenter pointed out that the removal of the provision requiring a one day turnaround of supplier bids would impose immense new market risks for suppliers.

**Response:** Regarding the turnaround time for the acceptance of offers (referred to as "bids"), the process would follow the practices prescribed by the FAR, 48 CFR Chapter 4. These are standard solicitation methods prescribed government-wide. Offerors would be given the opportunity to propose prices for a specific period of time, for example, 24, 36 or 48 hours. This would be the offer acceptance period. After that time, offers would expire and would no longer be valid, thereby preventing the imposition of new market risks for suppliers.

#### *N. Miscellaneous Points of Clarification*

**Comments:** One comment was received recommending that FAS continue to monitor agreements entered into under Section 416(b) of the Agricultural Act of 1949 (Section 416(b)) in the same manner and subject to the same regulations as the McGovern-Dole Program and FFPr. Another comment was received that recommended USDA create and attach reporting forms to the agreements. A commenter asked a question about the relevant application of OMB A-122 Circular to 7 CFR parts 1499 and 1599.

**Response:** In response to the comment on monitoring Section 416(b), USDA intends to monitor Section 416(b) in a manner consistent with 7 CFR parts 1499 and 1599 as relevant to the purpose and scope of Section 416(b). Under Section 416(b), CCC makes available commodities that it has acquired in its normal operations for use in international programs. No commodities are procured for use under this provision. By using the **Federal Register** to announce and administer Section 416(b), USDA will have the flexibility to apply the relevant sections of 1499 and 1599 to this donation program while taking into account any unique requirements for this program. In response to the comment on reporting forms, USDA may reference the reporting form number and revision date within the agreement but attaching the reporting forms will only add to the volume of the agreement. With regard to OMB A-122 Circular, this circular, as well as others, has been incorporated into 7 CFR 3019, entitled "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations".

In reviewing the language in 48 CFR part 470, we have determined that while changes to the actual provisions of 48 CFR 470.202(e)(3) are not needed, USDA does wish to make clear that with respect to the lowest landed cost determination, as the programs have evolved over many years, the program participant obtains potential bids from prospective carriers and these bids are provided to the Farm Service Agency (FSA) which utilizes a sophisticated computer program to analyze the freight bids in conjunction with the various bids obtained in the procurement of commodities to ascertain which combination of carrier bids and commodity bids produces the lowest landed cost of delivery of the commodity to foreign destinations. Prior to the computer system running a lowest landed cost analysis, the grantees

and/or USAID determine if each offeror's service and rates are responsive to their needs. Once the grantee and/or USAID provides their acceptance of the offers of service, USDA then runs an analysis to determine lowest landed cost. USAID and grantee organizations will have full discretion over carrier responsiveness determinations in accordance with the procedures identified in 22 CFR 211.

Changes to the AGAR have been reviewed and approved by the Acting Deputy Assistant Secretary for Departmental Administration as authorized in 48 CFR Chapter 4, subpart 401.601(a)(1).

#### **Executive Order 12866**

The final rule has been determined to be non-significant under E.O. 12866 and has not been reviewed by the Office of Management and Budget.

#### **Regulatory Flexibility Act**

This rule is not subject to the Regulatory Flexibility Act because FAS is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking and as such under Section 601(2) of the Act it is exempt.

#### **Environmental Assessment**

FAS has determined that this rule does not constitute a major State or Federal action that would significantly affect the human or natural environment consistent with the National Environmental Policy Act (NEPA), 40 CFR part 1502.4, Major Federal actions requiring the preparation of Environmental Impact Statements; and Compliance with NEPA implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500-1508. Therefore no environmental assessment or environmental impact statement will be prepared.

#### **Executive Order 12988**

This rule has been reviewed under E.O. 12988. This rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. This rule would not be retroactive.

#### **Executive Order 12372**

This program is not subject to E.O. 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).

**Executive Order 13132**

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

**Unfunded Mandates**

This rule contains no unfunded mandates as defined in sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA).

**Paperwork Reduction Act of 1995**

In accordance with the Paperwork Reduction Act of 1995, FAS has previously received approval from OMB with respect to the information collection required to support these programs. The Information Collection is described below:

*Title:* Food Donation Programs (Food for Progress, Section 416(b)) and McGovern-Dole International Food for Education and Child Nutrition.

*OMB Control Number:* 0551-0035.

**E-Government Act Compliance**

FAS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. The forms, regulations, and other information collection activities required to be utilized by a person subject to this rule are available at <http://www.fas.usda.gov>.

**List of Subjects****7 CFR Part 1496**

Agricultural commodities, Food assistance programs, Foreign aid, Government procurement.

**7 CFR Part 1499**

Agricultural commodities, Food assistance programs, Foreign aid.

**7 CFR Part 1599**

Agricultural commodities, Food assistance programs, Exports, Foreign aid.

**48 CFR Part 470**

Government procurement, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, under the authority of 5 U.S.C. 553; 15 U.S.C. 714b and 714c, 7

CFR parts 1496, 1499, 1599 and 48 CFR part 470 are amended as follows:

**Title 7—Agriculture****PART 1496—[REMOVED]**

- 1. 7 CFR part 1496 is removed.
- 2. Revise part 1499 to read as follows:

**PART 1499—FOOD FOR PROGRESS PROGRAM****Sec.**

- 1499.1 General statement.
- 1499.2 Definitions.
- 1499.3 Eligibility determination.
- 1499.4 Application process.
- 1499.5 Agreements.
- 1499.6 Payments.
- 1499.7 Transportation of goods.
- 1499.8 Entry and handling of commodities.
- 1499.9 Damage to or loss of commodities.
- 1499.10 Claims for damage to or loss of commodities.
- 1499.11 Use of commodities and sales proceeds.
- 1499.12 Subrecipients.
- 1499.13 Recordkeeping and reporting requirements.
- 1499.14 Noncompliance with an agreement.
- 1499.15 Suspension, termination, and closeout of agreements.
- 1499.16 Appeals.
- 1499.17 Paperwork Reduction Act.

**Authority:** 7 U.S.C. 1736o; and 15 U.S.C. 714b and 714c.

**§ 1499.1 General statement.**

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Commodity Credit Corporation (CCC) to participants in the Food for Progress Program (FFPr). Under FFPr, participants use the donated commodities or proceeds from the sale of such commodities to implement activities in a foreign country pursuant to an agreement with CCC. The Foreign Agricultural Service (FAS) of the Department of Agriculture (USDA) administers FFPr on behalf of CCC.

(b) In addition to the provisions of this part, other regulations of general application issued by USDA, including the regulations set forth in Chapter 30 of this title, are applicable to the FFPr. All provisions of the CCC Charter Act (15 U.S.C. 714 et seq.) and any other statutory provisions that are generally applicable to CCC are applicable to FFPr and the regulations set forth in this part.

(c) This part shall not apply to a donation by CCC to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under FFPr.

**§ 1499.2 Definitions.**

The following definitions are applicable to this part:

*Activity* means a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* means a legally binding agreement entered into between CCC and a participant to implement activities under FFPr.

*CCC* means the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*CCC-provided funds* means U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and handling of the donated commodities, expenses involved in the administration and monitoring of the activities under the agreement, and technical assistance related to the monetization of donated commodities.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*Donated commodities* means the commodities donated by CCC to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service acting on behalf of CCC.

*FFPr* means the Food for Progress Program.

*Force majeure* is a common clause in contracts, exempting the parties from non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and other sources.

*Participant* means an entity with which CCC has entered into an agreement.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a participant for the purpose of implementing in the targeted country activities described in a FFPr agreement and that is accountable to such participant for the use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Targeted country* means the country in which activities are implemented under an agreement.

#### **§ 1499.3 Eligibility determination.**

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

(1) Organizational experience in implementing and managing awards, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;

(2) Experience working in the proposed targeted country;

(3) An adequate financial framework to implement the activities the entity proposes to carry out under FFPr. In order to determine whether the entity is financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a FFPr agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1599 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

#### **§ 1499.4 Application process.**

(a) An entity seeking to enter into an agreement with CCC shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under FFPr in the proposed targeted country. An application shall contain the items specified in paragraph (b) of this section and shall be submitted electronically to FAS at the address set forth at <http://www.fas.usda.gov>. An entity that has not yet met the eligibility requirements in § 1499.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1499.3.

(b) An applicant shall include the following items in its application:

(1) A completed Form SF-424, which is a standard application for Federal assistance;

(2) An introduction that contains the elements specified in paragraph (c) of this section; and

(3) A plan of operation that contains the elements specified in paragraph (d) of this section.

(c) The introduction shall include:

(1) An explanation of the need for the food aid in the targeted country and how the applicant's proposed activities would address that need;

(2) Information regarding the applicant's ability to become registered and operate in the targeted country;

(3) Information about the applicant's past food aid projects; and

(4) A budget that details the amount of any sale proceeds, income, and CCC-provided funds that the applicant proposes to use to fund:

(i) Administrative costs;

(ii) Inland transportation, storage and handling costs; and

(iii) Activity costs.

(d) A plan of operation shall include:

(1) The name of the targeted country where the proposed activities would be implemented;

(2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefor, and the proposed delivery schedule;

(3) If monetization or barter is proposed:

(i) The quantity of the requested commodities that would be sold or bartered;

(ii) The amount of sale proceeds anticipated;

(iii) The amount of income expected to be generated;

(iv) The anticipated monetization completion date;

(v) The goods or services to be generated from the barter of the requested commodities; and

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, and any other required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution or barter of the requested commodities or funded by sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities requested and of any sale proceeds and income expected to be generated to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-CCC sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which FFPr will strengthen or increase the capabilities of such entities to further economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's progress towards achieving the objectives of the proposed activities;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of any port, transportation, storage, and warehouse facilities that would be used with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste, and, in cases where the applicant proposes to distribute some or all of the requested

commodities, a description of how they would be transported from the receiving port to the point at which distribution would be made to the beneficiaries;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the applicant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

#### **§ 1499.5 Agreements.**

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of CCC and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or CCC-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated, except as approved by FAS.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and CCC-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or CCC-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that the participant is aware of, and has the capacity to complete, all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using CCC-provided funds to acquire goods and services, either directly or indirectly through another party, from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by CCC of the agreement, in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for as long as such donated commodities are controlled by the participant.

(g) CCC may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) CCC may provide donated commodities and CCC-provided funds under a multiyear agreement contingent upon the availability of commodities and funds.

#### **§ 1499.6 Payments.**

(a) If the participant arranges for transportation in accordance with § 1499.7(b)(2), and the participant seeks payment directly, the participant shall, as specified in the agreement, either submit to FAS, or maintain on file and make available to FAS, the following documents:

(1) A signed copy of the completed Form CCC-512;

(2) The original, or a true copy of, each on-board bill of lading indicating the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and,

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes, a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of the liner booking note or charter party covering ocean transportation of the cargo;

(6) In the case of charter shipments, a signed notice of arrival at the first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs other than at load port, and other

expenses approved by CCC, indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with § 1499.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in § 1499.6(a) in order to receive payment from CCC.

(c) In no case will CCC reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing the donated commodities from the designated port or point of entry, the participant will be reimbursed in the manner set forth in the agreement.

(e) If the agreement authorizes the payment of CCC-provided funds, CCC will pay these funds to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of CCC-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance if:

(i) It is received earlier than 60 days after the date of a previous advance made in connection with the same agreement; or

(ii) Any required reports, as specified in § 1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by CCC. The account shall be interest-bearing, unless the exceptions in § 3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to CCC any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS



accounting for all funds advanced and all interest earned.

(3) The participant shall return to CCC any funds that are advanced by CCC if such funds have not been obligated as of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to CCC in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment according to the purchase contract with CCC.

#### **§ 1499.7 Transportation of goods.**

(a) Shipments of donated commodities are subject to the requirements of 46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by CCC under FFPr will be acquired under a specific agreement in the manner determined by FAS. Such transportation will be acquired by:

(1) CCC in accordance with the Federal Acquisition Regulations (FAR), USDA's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR), and directives issued by the Director, Office of Procurement and Property Management, USDA; or

(2) The participant, with reimbursement by CCC, in the manner specified in the agreement.

(c) A participant that acquires transportation in accordance with paragraph (b)(2) of this section may only use the services of a freight forwarder that is licensed by the FMC and that would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(1) Is not engaged in, and will not engage in, supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under any FFPr agreement to which the participant is a party; and

(2) Is not affiliated with the participant and has not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) A participant that is responsible for transportation under paragraph (b)(2)

of this section shall declare in the transportation contract the point at which the ocean carrier will take custody of commodities to be transported.

#### **§ 1499.8 Entry and handling of commodities.**

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities from the designated point and time where title to the commodities passes to the participant by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and,

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

(i) Is plainly labeled in the language of the targeted country;

(ii) Contains the name of the reprocessed product;

(iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and,

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered.

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

(i) Banners, posters or other media informing the public of the name and source of the donated commodities; and

(ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(d) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

#### **§ 1499.9 Damage to or loss of commodities.**

(a) FAS will be responsible for the donated commodities prior to the transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer as specified in the agreement.

(b) A participant shall inform FAS, in the manner and within the time period set forth in the agreement, of any damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of CCC with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant. The agreement will specify whether the participant is responsible for obtaining a survey in the event that the donated commodities are damaged or lost following the transfer of title to the commodities to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor, CCC will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

(i) The participant was required by the agreement to pay for the survey;



(ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or

(iii) The survey was not conducted contemporaneously with the discharge of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, and the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to:

(i) Observe the discharge of the cargo;

(ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales are not used, state the reason therefor and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the participant has title to the donated commodities, and the value of any damaged donated commodities is in excess of \$1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The value of damaged donated commodities shall be determined on the basis of the

commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

(1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or

(2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

(i) Sale for the most appropriate use, *i.e.*, animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;

(ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or

(iii) Destruction of the commodities if they are unfit for any use, in such manner as to prevent their use for any purpose.

(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e)(1) of this section and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e)(1) of this section, including the quantities, values, and dispositions of commodities determined to be unfit.

#### **§ 1499.10 Claims for damage to or loss of commodities.**

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be \$20,000 or greater, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be less than \$20,000, the participant will be responsible for providing detailed information about the damage or loss in the next report required to be filed under § 1499.13(c)(1) or (2) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities, less any funds generated if such commodities are sold in accordance with § 1499.9(e)(1).

(e) If FAS determines that a participant is not exercising due diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

#### **§ 1499.11 Use of commodities and sale proceeds.**

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity or affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of

donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1499.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines that this requirement would constitute an undue burden.

(f) A participant may use sale proceeds or income to purchase real or personal property only if local law permits the participant to retain title to such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(g) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. As provided for in the agreement, the participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the

participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

#### **§ 1499.12 Subrecipients.**

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or CCC-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or CCC-provided cash funds that are not used in accordance with the subagreement or are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient, FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or CCC-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and that performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter XXX of this title.

#### **§ 1499.13 Recordkeeping and reporting requirements.**

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing

the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and, in the case of bartered commodities, covering the services and goods derived from the barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the sale proceeds and income have been disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(4) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of two years after the agreement has been closed out.

(5) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an annual financial audit with respect to a particular agreement, and CCC provides funds for this purpose, the participant shall arrange for such audit and submit it to FAS, in the manner specified in the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-

point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

- (i) Is financially and legally separate from the participant's organization;
- (ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;
- (iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;
- (iv) Uses local consultants, as appropriate, to conduct portions of the evaluation; and,
- (v) Provides a detailed outline of the evaluation, major tasks, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (e)(1) of this section is a condition for the participant to retain any funds provided by CCC to carry out the evaluations.

(f) A participant shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The agreement will specify the acceptable forms and time requirements for submission.

#### **§ 1499.14 Noncompliance with an agreement.**

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, or CCC-provided funds are lost due to an action or omission of the participant.

#### **§ 1499.15 Suspension, termination, and closeout of agreements.**

(a) An agreement may be suspended or terminated by CCC if it determines that:

- (1) The continuation of the assistance provided under the agreement is no longer necessary or desirable; or
- (2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title.

(c) An agreement will be considered completed when CCC and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The procedures in sections §§ 3019.71 through 3019.73 of this title will apply to the closeout of a completed agreement.

#### **§ 1499.16 Appeals.**

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

#### **§ 1499.17 Paperwork Reduction Act.**

The information collection requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Number 0551-0035.

■ 3. Revise part 1599 to read as follows:

### **PART 1599—McGOVERN-DOLE INTERNATIONAL FOOD FOR EDUCATION AND CHILD NUTRITION PROGRAM**

Sec.

- 1599.1 General statement.
- 1599.2 Definitions.
- 1599.3 Eligibility determination.
- 1599.4 Application process.
- 1599.5 Agreements.
- 1599.6 Payments.
- 1599.7 Transportation of goods.
- 1599.8 Entry and handling of commodities.
- 1599.9 Damage to or loss of commodities.
- 1599.10 Claims for damage to or loss of commodities.
- 1599.11 Use of commodities and sales proceeds.
- 1599.12 Subrecipients.
- 1599.13 Recordkeeping and reporting requirements.
- 1599.14 Noncompliance with an agreement.
- 1599.15 Suspension, termination, and closeout of agreements.
- 1599.16 Appeals.
- 1599.17 Paperwork Reduction Act.

**Authority:** 7 U.S.C. 1736o–1.

#### **§ 1599.1 General statement.**

(a) This part sets forth the general terms and conditions governing the donation of commodities by the Foreign Agricultural Service (FAS) of the U.S. Department of Agriculture (USDA) to

participants in the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program). Under the McGovern-Dole Program, participants use the donated commodities, proceeds from the sale of such commodities, or funds provided by FAS to implement activities in a foreign country pursuant to an agreement with FAS. FAS administers the McGovern-Dole Program and acts on behalf of the Commodity Credit Corporation (CCC) in cases where the agreement is funded with CCC resources.

(b) In addition to the provisions of this part, other regulations of general application issued by the Department, including the regulations set forth in Chapter 30 of this title, are applicable to the McGovern-Dole Program. In cases where an agreement is funded with CCC resources, provisions of the CCC Charter Act (15 U.S.C. 714 et seq.) and any other statutory provisions that are generally applicable to CCC are applicable to McGovern-Dole Program and the regulations set forth in this part.

(c) This part shall not apply to a donation by FAS to a foreign government or an intergovernmental agency or organization (such as the United Nations' World Food Program) under the McGovern-Dole Program.

#### **§ 1599.2 Definitions.**

The following definitions are applicable to this part:

*Activity* means a project to be carried out by a participant, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Agreement* means a legally binding agreement entered into between FAS and a participant to implement activities under the McGovern-Dole Program.

*CCC* means the Commodity Credit Corporation and includes any official of the United States delegated the responsibility to act on behalf of CCC.

*Commodities* mean U.S. agricultural commodities or products of U.S. agricultural commodities.

*Donated commodities* mean the commodities donated by FAS to a participant under an agreement. The term may include donated commodities that are used to produce a further processed product for use under the agreement.

*FAS* means the Foreign Agricultural Service of the United States Department of Agriculture.

*FAS-provided funds* means U.S. dollars provided under an agreement to a participant for expenses for the internal transportation, storage and handling of the donated commodities,

expenses involved in the administration and monitoring of the activities under the agreement, and the costs of activities conducted in the targeted country that would enhance the effectiveness of the activities implemented by the participant under the McGovern-Dole Program.

*Force majeure* is a common clause in contracts, exempting the parties for non-fulfillment of their obligations as a result of conditions beyond their control, such as earthquakes, floods or war.

*Income* means interest earned on sale proceeds and other resources received by a participant, other than sale proceeds, as a result of carrying out an agreement. The term may include resources from VAT refunds, activity fees, interest on loans, and other sources.

*McGovern-Dole Program* means the McGovern-Dole International Food for Education and Child Nutrition Program.

*Participant* means an entity with which FAS has entered into an agreement.

*Subrecipient* means a legal entity that receives donated commodities, income, sale proceeds or other resources from a participant for the purpose of implementing in the targeted country activities described in a McGovern-Dole Program agreement and that is accountable to such participant for the use of such commodities, funds, or resources. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of FAS.

*Sale proceeds* mean funds received by a participant from the sale of donated commodities.

*Targeted country* means the country in which activities are implemented under an agreement.

### § 1599.3 Eligibility determination.

(a) An entity will be eligible to become a participant only after FAS determines that the entity has:

- (1) Organizational experience in implementing and managing awards, and the capability and personnel to develop, implement, monitor, report on, and provide accountability for activities in accordance with this part;
- (2) Experience working in the proposed targeted country;
- (3) An adequate financial framework to implement the activities the entity proposes to carry out under McGovern-Dole Program. In order to determine whether the entity is financially responsible, FAS may require it to submit corporate policies and financial materials that have been audited or otherwise reviewed by a third party;

(4) A person or agent located in the United States with respect to which service of judicial process may be obtained by FAS on behalf of the entity; and

(5) An operating financial account in the proposed targeted country, or a satisfactory explanation for not having such an account and a description of how a McGovern-Dole Program agreement would be administered without such an account.

(b) In determining whether an entity will be eligible to be a participant, FAS may consider the entity's previous compliance or noncompliance with the provisions of this part and part 1499 of this title. FAS may consider matters such as whether the entity corrected deficiencies in the implementation of an agreement in a timely manner and whether the entity has timely and accurately filed reports and other submissions that are required to be filed with FAS and other agencies of the United States.

### § 1599.4 Application process.

(a) An entity seeking to enter into an agreement with FAS shall submit an application, in accordance with this section, that sets forth its proposal to carry out activities under the McGovern-Dole Program in the proposed targeted country. An application shall contain the items specified in paragraph (b) of this section and shall be submitted electronically to FAS at the address set forth at <http://www.fas.usda.gov>. An entity that has not yet met the eligibility requirements in § 1599.3 may submit an application, but FAS will not enter into an agreement with an entity until FAS had made a determination of eligibility under § 1599.3.

(b) An applicant shall include the following items in its application:

- (1) A completed Form SF-424, which is a standard application for Federal assistance;
- (2) An introduction that contains the elements specified in paragraph (c) of this section; and
- (3) A plan of operation that contains the elements specified in paragraph (d) of this section.
  - (c) The introduction shall include:
    - (1) An explanation of the need for food aid in the targeted country and how the applicant's proposed activities would address that need;
    - (2) An explanation of the need for a school feeding program in the targeted country and information regarding:
      - (i) The country's current school feeding operations, if they exist, the length and sessions of a typical school year, and current funding resources; and

(ii) Teacher training, parent-teacher associations, community infrastructure, and health, nutrition, water and sanitation conditions;

(3) Information regarding the applicant's ability to become registered and operate in the targeted country;

(4) Information about the applicant's past food aid projects;

(5) Methods that the applicant proposes to use to involve indigenous institutions as well as local communities and governments in the development and implementation of the activities in order to foster local capacity building and leadership;

(6) A budget that details the amount of any sale proceeds, income, and FAS-provided funds that the applicant proposes to use to fund:

- (i) Administrative costs;
- (ii) Inland transportation, storage and handling costs; and
- (iii) Activity costs;

(7) A statement verifying the commitment of the government of the targeted country to work toward, through a national action plan, the goals of the World Declaration on Education for All convened in 1990 in Jomtien, Thailand, and the follow-up Dakar Framework for Action of the World Education Forum, convened in 2000; and

(8) A description of:

(i) How the benefits of education, enrollment, and attendance of children in schools in the targeted communities will be sustained when the assistance under the McGovern-Dole Program terminates; and

(ii) The estimated period of time required until the targeted country or the applicant would be able to sustain the program without additional assistance under the McGovern-Dole Program.

(d) A plan of operation shall include:

- (1) The name of the targeted country where the proposed activities would be implemented;
- (2) The kind, quantity, and proposed use of the commodities requested, and any commodities that would be acceptable substitutions therefor, and the proposed delivery schedule;
- (3) If monetization or barter is proposed:
  - (i) The quantity of the requested commodities that would be sold or bartered;
  - (ii) The amount of sale proceeds anticipated;
  - (iii) The amount of income expected to be generated;
  - (iv) The anticipated monetization completion date;
  - (v) The goods or services to be generated from the barter of the requested commodities;

(vi) The value of the goods or services anticipated to be generated from the barter of the requested commodities; and

(vii) A justification for monetizing the requested commodities that discusses why monetization would provide a greater benefit than the receipt of FAS-provided funds to carry out activities.

(4) A list of each of the activities that would be implemented, with a brief statement of the objectives to be accomplished under each activity;

(5) For each proposed activity, the targeted geographic area, anticipated beneficiaries, and methods that the applicant would use to choose such beneficiaries, including obtaining and considering statistics on poverty levels, food deficits, literacy rates, and any other required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

(6) For each proposed activity:

(i) An explanation of whether the activity would be carried out through the distribution or barter of the requested commodities or funded by FAS-provided funds, sale proceeds, income, or a combination thereof; and

(ii) The amount of commodities and FAS-provided funds requested, and of any sale proceeds and income expected to be generated, to carry out such activity; and

(iii) A detailed description of the activity, including the steps involved in its implementation and the anticipated completion date;

(7) Any cash or non-cash contributions that the applicant expects to receive from non-FAS sources that:

(i) Are critical to the implementation of the proposed activities; or

(ii) Enhance the implementation of the activities;

(8) Any subrecipient that would be involved and a description of each subrecipient's responsibilities and its capability to perform responsibilities;

(9) Any governmental or nongovernmental entities that would be involved and the extent to which the McGovern-Dole Program will strengthen or increase the capabilities of such entities to further educational and economic development in the targeted country;

(10) The method by which the applicant intends to inform beneficiaries of an activity about the source of the requested commodities or funding for the activity and, where the beneficiaries will be receiving the commodities directly, how to prepare and use them properly;

(11) Established baselines, a timeline, and proposed outcomes that would enable FAS to measure the applicant's

progress towards achieving the objectives of the proposed activities and the McGovern-Dole Program, which include:

(i) Increased enrollment and attendance rates, especially for girls;

(ii) Improved student achievement levels through improvements in the learning environment;

(iii) Improved maternal, child and student health and nutrition;

(iv) Attracting non-FAS contributions to development activities;

(v) Enabling community support for infrastructure development; and

(vi) Increased government and community support in education;

(12) If the proposed activities would involve the use of sale proceeds or income:

(i) The process that the applicant would use to sell the requested commodities, including steps the applicant would take to use, to the extent possible, the private sector in the monetization process; and

(ii) The procedures that the applicant would use to assure that sale proceeds and income are received and deposited into a separate, interest-bearing account and disbursed from such account for use only in accordance with the agreement;

(13) A description of any port, transportation, storage, and warehouse facilities that would be used with sufficient detail to demonstrate that they would be adequate to handle the requested commodities without undue spoilage or waste, and, in cases where the applicant proposes to distribute some or all of the requested commodities, a description of how they would be transported from the receiving port to the point at which distribution is made to the beneficiaries;

(14) Any reprocessing or repackaging of the requested commodities that would take place prior to the distribution, sale or barter by the applicant;

(15) The action the applicant would take to ensure that any commodities to be distributed to beneficiaries, rather than sold, would be imported and distributed free from all customs, duties, tolls, and taxes;

(16) A plan that shows how the requested commodities could be imported and distributed without a disruptive impact upon production, prices and marketing of the same or like products in the country where they will be delivered, and the extent to which any sale or barter of the requested commodities would displace or interfere with any sales that may otherwise be made by the applicant or any other entity in the country where they will be delivered; and

(17) Any additional required items set forth on the FAS Web site at <http://www.fas.usda.gov>.

#### **§ 1599.5 Agreements.**

(a) After FAS approves an applicant's proposal, FAS will develop an agreement in consultation with the applicant. The agreement will set forth the obligations of FAS and the participant. A participant must comply with the terms of the agreement to receive assistance.

(b) A participant shall not use donated commodities, sale proceeds, income or FAS-provided funds for any activity or any expenses incurred by the participant prior to the date of the agreement or after the agreement is suspended or terminated, except as approved by FAS.

(c) The agreement will include a budget that sets forth the maximum amounts of sale proceeds and FAS-provided funds that may be expended for various purposes under the agreement. A participant may make adjustments to this budget without prior approval from FAS only as specified in the agreement.

(d) Prior to providing any donated commodities or FAS-provided funds to a participant under an agreement, FAS may require the participant to complete a training program administered by FAS that is designed to ensure that the participant is aware of, and has the capacity to complete, all required reporting and audit functions set forth in this part.

(e) A participant will be prohibited from using FAS-provided funds to acquire goods and services, either directly or indirectly through another party, from certain countries that will be specified in the agreement. Any violation of this provision of the agreement will be a basis for immediate termination by FAS of the agreement in addition to the imposition of any other applicable civil and criminal penalties.

(f) The agreement will prohibit the sale or transshipment of the donated commodities to a country not specified in the agreement for as long as such donated commodities are controlled by the participant.

(g) FAS may enter into a multicountry agreement in which donated commodities are delivered to one country and activities are carried out in another.

(h) FAS may provide donated commodities and FAS-provided funds under a multiyear agreement contingent upon the availability of commodities and funds.

**§ 1599.6 Payments.**

(a) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant seeks payment directly, the participant shall, as specified in the agreement, either submit to FAS, or maintain on file and make available to FAS, the following documents:

(1) A signed copy of the completed Form CCC-512;

(2) The original, or a true copy of, each on-board bill of lading indicating the freight rate and signed by the originating carrier;

(3) For all non-containerized cargoes:

(i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate (Vessel Hold Certificate);

(ii) A signed copy of the National Cargo Bureau Certificate of Readiness (Vessel Hold Inspection Certificate); and

(iii) A signed copy of the National Cargo Bureau Certificate of Loading;

(4) For all containerized cargoes, a copy of the FGIS Container Condition Inspection Certificate;

(5) A signed copy of the liner booking note or charter party covering ocean transportation of the cargo;

(6) In the case of charter shipments, a signed notice of arrival at the first discharge port, unless FAS has determined that circumstances of force majeure have prevented the vessel's arrival at the first port of discharge;

(7) A request by the participant for reimbursement of freight, survey costs other than at load port, and other expenses approved by FAS indicating the amount due and accompanied by a certification from the carrier or other parties that payments have been received from the participant; and

(8) A document on letterhead and signed by an officer or agent of the participant specifying the name of the entity to receive payment; the bank ABA number to which payment is to be made; the account number for the deposit at the bank; the participant's taxpayer identification number; and the type of the account into which the payment will be deposited.

(b) If the participant arranges for transportation in accordance with § 1599.7(b)(2), and the participant has used a freight forwarder, the participant shall cause the freight forwarder to submit the documents specified in § 1599.6(a) in order to receive payment from FAS.

(c) In no case will FAS reimburse a participant for demurrage costs or pay demurrage to any other entity.

(d) If FAS has agreed to pay the costs of transporting, storing, and distributing the donated commodities from the

designated port or point of entry, the participant will be reimbursed in the manner set forth in the agreement.

(e) If the agreement authorizes the payment of FAS-provided funds, FAS will pay these funds to the participant on a reimbursement for expenses basis, except as provided in paragraph (f)(1) of this section. The participant shall request the payment of FAS-provided funds to reimburse it for authorized expenses in the manner set forth in the agreement.

(f)(1) A participant may request an advance of the amount of funds specified in the agreement. FAS will not approve any request for an advance if:

(i) It is received earlier than 60 days after the date of a previous advance made in connection with the same agreement; or

(ii) Any required reports, as specified in § 1499.13 and in the agreement, are more than six months in arrears.

(2) Except as may otherwise be provided in the agreement, the participant shall deposit and maintain in a bank account located in the United States all funds advanced by FAS. The account shall be interest-bearing, unless the exceptions in § 3019.22(k) of this title apply, or FAS determines that this requirement would constitute an undue burden. The participant shall remit semi-annually to FAS any interest earned on the advanced funds. The participant shall, no later than 10 days after the end of each calendar quarter, submit a financial statement to FAS accounting for all funds advanced and all interest earned.

(3) The participant shall return to FAS any funds that are advanced by FAS if such funds have not been obligated as of the 180th day after the advance was made. Such funds and interest shall be transferred to FAS within 30 days of such date.

(g) If a participant is required to pay funds to FAS in connection with an agreement, the participant shall make such payment in U.S. dollars, unless otherwise approved in advance by FAS.

(h) Suppliers of commodities shall seek payment according to the purchase contract.

**§ 1599.7 Transportation of goods.**

(a) Shipments of donated commodities are subject to the requirements of 46 U.S.C. 55305 and 55314, regarding carriage on U.S.-flag vessels.

(b) Transportation of donated commodities and other goods such as bags that may be provided by FAS under the McGovern-Dole Program will be acquired under a specific agreement

in the manner determined by FAS. Such transportation will be acquired by:

(1) FAS in accordance with the Federal Acquisition Regulations (FAR), the Department's procurement regulations set forth in chapter 4 of title 48 of the Code of Federal Regulations (the AGAR) and directives issued by the Director, Office of Procurement and Property Management, U.S. Department of Agriculture; or

(2) The participant, with reimbursement by FAS, in the manner specified in the agreement.

(c) A participant that acquires transportation in accordance with paragraph (b)(2) of this section may only use the services of a freight forwarder that is licensed by the Federal Maritime Commission (FMC) and that would not have a conflict of interest in carrying out the freight forwarder duties. To assist FAS in determining whether there is a potential conflict of interest, the participant must submit to FAS a certification indicating that the freight forwarder:

(1) Is not engaged, and will not engage, in supplying commodities or furnishing ocean transportation or ocean transportation-related services for commodities provided under any McGovern-Dole Program agreement to which the participant is a party; and

(2) Is not affiliated with the participant and has not made arrangements to give or receive any payment, kickback, or illegal benefit in connection with its selection as an agent of the participant.

(d) A participant that is responsible for transportation under paragraph (b)(2) of this section shall declare in the transportation contract the point at which the ocean carrier will take custody of commodities to be transported.

**§ 1599.8 Entry and handling of commodities.**

(a) The participant shall make all necessary arrangements for receiving the donated commodities in the targeted country, including obtaining appropriate approvals for entry and transit. The participant shall store and maintain the donated commodities in good condition from the time of delivery at the port of entry or the point of receipt from the originating carrier until their distribution, sale or barter.

(b) The participant shall, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities from the designated point and time where title to the commodity passes to the participant by contracting directly with suppliers of services, as set forth in the agreement.

(c)(1) If a participant arranges for the packaging or repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

- (i) Is plainly labeled in the language of the targeted country;
- (ii) Contains the name of the donated commodities;
- (iii) Includes a statement indicating that the donated commodities are furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the donated commodities shall not be sold, exchanged or bartered.

(2) If a participant arranges for the reprocessing and repackaging of donated commodities that are to be distributed, the participant shall ensure that the packaging:

- (i) Is plainly labeled in the language of the targeted country;
- (ii) Contains the name of the reprocessed product;
- (iii) Includes a statement indicating that the reprocessed product was made with commodities furnished by the people of the United States of America; and

(iv) Includes a statement indicating that the reprocessed product shall not be sold, exchanged or bartered;

(3) If a participant distributes donated commodities that are not packaged, the participant shall, to the extent practicable, display:

- (i) Banners, posters or other media informing the public of the name and source of the donated commodities; and
- (ii) A statement that the donated commodities may not be sold, exchanged, or bartered.

(d) A participant shall arrange with the government of the targeted country that all donated commodities to be distributed will be imported and distributed free from all customs, duties, tolls, and taxes. A participant is encouraged to make similar arrangements, where possible, with the government of the country where donated commodities to be sold or bartered are delivered.

#### **§ 1599.9 Damage to or loss of commodities.**

(a) FAS will be responsible for the donated commodities prior to the transfer of title to the commodities to the participant. The participant will be responsible for the donated commodities following the transfer of title to the commodities to the participant. The title will transfer as specified in the agreement.

(b) A participant shall inform FAS, in the manner and within the time period set forth in the agreement, of any

damage to or loss of the donated commodities that occurs following the transfer of title to the commodities to the participant. The participant shall take all steps necessary to protect its interests and the interests of FAS with respect to any damage to or loss of the donated commodities that occurs after title has been transferred to the participant. The agreement will specify whether the participant is responsible for obtaining a survey in the event that the donated commodities are damaged or lost following the transfer of title to the commodities to the participant.

(c) If the donated commodities are damaged or lost during the time that they are in the care of the carrier:

(1) And either FAS or the participant engages the services of an independent cargo surveyor, the surveyor will provide to FAS and the participant any report, narrative chronology or other commentary that it prepares;

(2) FAS and the participant will provide to each other the names and addresses of any individuals known to be present at the time of discharge or during the survey who can verify the quantity of damaged or lost commodities;

(3) And the participant engages the services of the surveyor, FAS will reimburse the participant for the reasonable costs, as determined by FAS, of the survey, unless:

- (i) The participant was required by the agreement to pay for the survey;
- (ii) The survey was a delivery survey and the surveyor did not also prepare a discharge survey; or
- (iii) The survey was not conducted contemporaneously with the discharge of the vessel, unless FAS determines that such action was justified under the circumstances;

(4) Any survey obtained by the participant shall, to the extent practicable, be conducted jointly by the surveyor, the participant, and the carrier, and the survey report shall be signed by all parties;

(5) And the damage or loss occurred with respect to a bulk grain shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall obtain the services of an independent cargo surveyor to:

- (i) Observe the discharge of the cargo;
- (ii) Report on discharging methods, including scale type, calibrations and any other factor that may affect the accuracy of scale weights, and, if scales are not used, state the reason therefor and describe the actual method used to determine weight;

(iii) Estimate the quantity of cargo, if any, lost during discharge through carrier negligence;

(iv) Advise on the quality of sweepings;

(v) Obtain copies of port or vessel records, if possible, showing the quantity discharged; and

(vi) Notify the participant immediately if the surveyor has reason to believe that the correct quantity was not discharged or if additional services are necessary to protect the cargo; and

(6) And the damage or loss occurred with respect to a container shipment, if the agreement provides that the participant is responsible for survey and outturn reports, the participant shall engage the services of an independent cargo surveyor to list the container numbers and seal numbers shown on the containers, indicate whether the seals were intact at the time the containers were opened, and note whether the containers were in any way damaged.

(d) If the participant has title to the donated commodities, and the value of any damaged donated commodities is in excess of \$1,000, the participant shall immediately arrange for an inspection by a public health official or other competent authority approved by FAS and provide to FAS a certification by such public health official or other competent authority regarding the exact quantity and condition of the damaged commodities. The value of damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by CCC with respect to such commodities. The participant shall inform FAS of the results of the inspection and indicate whether the damaged commodities are:

- (1) Fit for the use authorized in the agreement and, if so, whether there has been a diminution in quality; or
- (2) Unfit for the use authorized in the agreement.

(e)(1) If the participant has title to the donated commodities, the participant shall arrange for the recovery of that portion of the donated commodities designated as suitable for the use authorized in the agreement. The participant shall dispose of donated commodities that are unfit for such use in the following order of priority:

- (i) Sale for the most appropriate use, i.e., animal feed, fertilizer, industrial use, or another use approved by FAS, at the highest obtainable price;
- (ii) Donation to a governmental or charitable organization for use as animal feed or for other non-food use; or
- (iii) Destruction of the commodities if they are unfit for any use, in such



manner as to prevent their use for any purpose.

(2) The participant shall arrange for all U.S. Government markings to be obliterated or removed before the donated commodities are transferred by sale or donation.

(f) A participant may retain any proceeds generated by the disposal of the donated commodities in accordance with paragraph (e)(1) of this section and shall use the proceeds for expenses related to the disposal of the donated commodities and for activities specified in the agreement.

(g) The participant shall notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (e) of this section, including the quantities, values and dispositions of commodities determined to be unfit.

**§ 1599.10 Claims for damage to or loss of commodities.**

(a) FAS will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities prior to the transfer of title to the commodities to the participant.

(b) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be \$20,000 or greater, the participant will be responsible for:

(1) Initiating a claim arising out of such damage or loss, including actions relating to collections pursuant to commercial insurance contracts; and

(2) Notifying FAS immediately and providing detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost donated commodities, and the value of the damage or loss.

(c) If the participant has title to the donated commodities, and the value of the damaged or lost donated commodities is estimated to be less than \$20,000, the participant will be responsible for providing detailed information about the damage or loss in the next report required to be filed under § 1599.13(c)(1) or (2) and shall not be required to initiate a claim collection action.

(d)(1) The value of a claim for lost donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities.

(2) The value of a claim for damaged donated commodities shall be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities, less any

funds generated if such commodities are sold in accordance with § 1599.9(e)(1).

(e) If FAS determines that a participant is not exercising due diligence in the pursuit of a claim, FAS may require the participant to assign its rights to pursue the claim to FAS.

(f)(1) The participant may retain any funds obtained as a result of a claims collection action initiated by it in accordance with this section, or recovered pursuant to any insurance policy or other similar form of indemnification, but such funds shall only be expended for purposes approved in advance by FAS.

(2) FAS will retain any funds obtained as a result of a claims collection action initiated by it under this section; provided, however, that if the participant paid for the freight or a portion thereof, FAS will use a portion of such funds to reimburse the participant for such expense on a prorated basis.

**§ 1599.11 Use of commodities and sale proceeds.**

(a) A participant must use the donated commodities in accordance with the agreement.

(b) A participant shall not permit the distribution, handling, or allocation of donated commodities on the basis of political affiliation, geographic location, or the ethnic, tribal or religious identity or affiliation of the potential consumers or beneficiaries.

(c) A participant shall not permit the distribution, handling, or allocation of donated commodities by the military forces or any government or insurgent group without the specific authorization of FAS.

(d) A participant may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the participant is disposing of damaged commodities as specified in § 1599.9. The participant shall sell the donated commodities at a reasonable market price in the economy where the sale occurs. The participant shall use any sale proceeds, income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(e) The participant shall deposit all sale proceeds and income into a separate, interest-bearing account unless the exceptions in § 3019.22(k) of this title apply, the account is in a country where the laws or customs prohibit the payment of interest, or FAS determines that this requirement would constitute an undue burden.

(f) A participant may use sale proceeds or income to purchase real or personal property only if local law

permits the participant to retain title to such property. However, the participant shall not use sale proceeds or income to pay for the acquisition, development, construction, alteration or upgrade of real property that is:

(1) Owned or managed by a church or other organization engaged exclusively in religious pursuits; or

(2) Used in whole or in part for sectarian purposes, except that a participant may use sale proceeds or income to pay for repairs to or rehabilitation of a structure located on such real property to the extent necessary to avoid spoilage or loss of donated commodities, but only if such structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities are stored in it. If such use is not specifically provided for in the agreement, such use may only occur after receipt of written approval from FAS.

(g) A participant shall endeavor to comply with §§ 3019.41 through 3019.43 of this title when procuring goods and services and when engaging in construction work to implement the agreement. The participant shall also establish procedures to prevent fraud. As provided for in the agreement, the participant shall enter into a written contract with each provider of goods, services or construction work that requires the provider to maintain adequate records to account for all donated commodities or funds or both provided to the provider by the participant and to submit periodic reports to the participant. The participant shall submit a copy of the signed contracts to FAS.

**§ 1599.12 Subrecipients.**

(a) If provided for in the agreement, a participant may utilize the services of a subrecipient to implement activities under this agreement. The participant shall enter into a written subagreement with the subrecipient, and provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities, sale proceeds, income or FAS-provided funds to the subrecipient. Such written subagreement shall require the subrecipient to pay to the participant the value of any donated commodities, sale proceeds, income, or FAS-provided cash funds that are not used in accordance with the subagreement or are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(b) If a participant demonstrates to FAS that it is not feasible to enter into a subagreement with a subrecipient,

FAS may grant approval to proceed without a subagreement; provided, however, that the participant must obtain such approval from FAS prior to transferring any donated commodities, sale proceeds, income, or FAS-provided funds to the subrecipient.

(c) The participant shall monitor the actions of a subrecipient as necessary to ensure that donated commodities or funds provided to the subrecipient are used for authorized purposes in compliance with applicable laws and regulations and the agreement and that performance goals are achieved. The participant shall provide in the subagreement that the subrecipient must comply with applicable provisions of the regulations set forth in Chapter XXX of this title.

**§ 1599.13 Recordkeeping and reporting requirements.**

(a) A program participant shall retain records and permit access to records in accordance with the requirements of § 3019.53 of this title. The date of submission of the final expenditure report, as referenced in § 3019.53(b) of this title, shall be the final date of submission of the forms required by paragraphs (c)(1) and (2) of this section, as prescribed by FAS.

(b) A participant shall, within 30 days after export of all or a portion of the donated commodities, submit evidence of such export to FAS, in the manner set forth in the agreement. The evidence may be submitted through an electronic media approved by FAS or by providing the carrier's on board bill of lading. The evidence of export must show the kind and quantity of commodities exported, the date of export, and the country where commodities were delivered.

(c)(1) A participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt, handling and disposition of the donated commodities. Such report shall be submitted to FAS, by the dates and for the reporting periods specified in the program agreement, until all of the donated commodities have been distributed, sold or bartered and such disposition has been reported to FAS.

(2) If the agreement authorizes the sale or barter of donated commodities, the participant shall submit to FAS information, using a form as prescribed by FAS, covering the receipt and use of sale proceeds and income, and, in the case of bartered commodities, covering the services and goods derived from the barter of donated commodities. Such reports shall be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the sale proceeds and income have been

disbursed and reported to FAS. When reporting financial information, the participant shall include the amounts in U.S. dollars and the exchange rate.

(3) The participant shall report, in the manner specified in the agreement, its progress, measured against established baselines, towards achieving the objectives of the activities under the agreement.

(4) The participant shall retain copies of and make available to FAS all barter receipts, contracts or other documents related to the barter of the donated commodities and the services or goods derived from such barter, for a minimum of two years after the agreement has been closed out.

(5) The participant shall provide to FAS additional information or reports relating to the agreement if requested by FAS.

(d) A participant shall submit to FAS, in the manner specified in the agreement, an annual audit in accordance with § 3019.26 of this title. If FAS requires an annual financial audit with respect to a particular agreement, and FAS provides funds for this purpose, the participant shall arrange for such audit and submit to FAS, in the manner specified in the agreement.

(e)(1) A participant shall, as provided in the agreement, submit to FAS interim and final evaluations of the implementation of the agreement. Unless otherwise provided in the agreement, the evaluations shall be submitted at the mid-point and end-point of the implementation period. The participant shall arrange for the evaluations to be conducted by an independent third party that:

(i) Is financially and legally separate from the participant's organization;

(ii) Has staff with demonstrated knowledge, analytical capability, language skills and experience in conducting evaluations of development programs involving agriculture, education, and nutrition;

(iii) Uses acceptable analytical frameworks such as comparison with non-project areas, surveys, involvement of stakeholders in the evaluation, and statistical analyses;

(iv) Uses local consultants, as appropriate, to conduct portions of the evaluation; and

(v) Provides a detailed outline of the evaluation, major tasks, and specific schedules prior to initiating the evaluation.

(2) Receipt by FAS of the evaluations referred to in paragraph (e)(1) of this section is a condition for the participant to retain any funds provided by FAS to carry out the evaluations.

(f) A participant shall submit to FAS the financial reports and information outlined in § 3019.52 of this title. The agreement will specify the acceptable forms and time requirements for submission.

**§ 1599.14 Noncompliance with an agreement.**

If a participant fails to comply with a term of an agreement, FAS may take one or more of the enforcement actions set forth in § 3019.62 of this title and, if appropriate, initiate a claim against the participant. FAS may also initiate a claim against a participant if the donated commodities are damaged or lost or the sale proceeds, income, or FAS-provided funds are lost due to an action or omission of the participant.

**§ 1599.15 Suspension, termination, and closeouts of agreements.**

(a) An agreement may be suspended or terminated by FAS if it determines that:

(1) The continuation of the assistance provided under the agreement is no longer necessary or desirable; or

(2) Storage facilities are inadequate to prevent spoilage or waste, or distribution of the donated commodities will result in substantial disincentive to, or interference with, domestic production or marketing in the targeted country.

(b) An agreement may be terminated in accordance with § 3019.61 of this title. If an agreement is terminated, the participant shall:

(1) Be responsible for the safety of any undistributed donated commodities and dispose of such commodities only as agreed to by FAS; and

(2) Follow the closeout procedures in §§ 3019.71 through 3019.73 of this title.

(c) An agreement will be considered completed when FAS and the participant have fulfilled their responsibilities under the agreement or the agreement has been terminated. The procedures in §§ 3019.71 through 3019.73 of this title will apply to the closeout of a completed agreement.

**§ 1599.16 Appeals.**

A participant may appeal a determination arising under this part to FAS. Such appeal will be in writing and submitted to the FAS official and in the manner set forth in the agreement. The participant will be given an opportunity to have a hearing before a final decision is made regarding its appeal.

**§ 1599.17 Paperwork Reduction Act.**

The information collection requirements contained in this regulation have been approved by OMB under provisions of 44 U.S.C. Chapter

35 and have been assigned OMB Number 0551-0035.

## Title 48—Federal Acquisition Regulations System

### CHAPTER 4—DEPARTMENT OF AGRICULTURE

■ 4. Amend 48 CFR Chapter 4 by establishing subchapter I consisting of part 470 to read as follows:

#### SUBCHAPTER I—FOOD ASSISTANCE PROGRAMS

#### PART 470—COMMODITY ACQUISITIONS

Sec.	
470.000	Scope of part.
470.101	Definitions.
470.102	Policy.
470.103	United States origin of agricultural products.
470.200	[Reserved]
470.201	Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.
470.202	Acquisition of commodities for United States Agency for International Development (USAID) programs.
470.203	Cargo preference.

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1691 through 1726b; 1731 through 1736g-3; 1736o; 1736o-1; 40 U.S.C. 121(c); 46 U.S.C. 53305, 55314 and 55316.

#### 470.000 Scope of part.

This part sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by the Department of Agriculture for use:

- (a) Under any domestic feeding and assistance program administered by the Food and Nutrition Service; and
- (b) Under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*); the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

#### 470.101 Definitions.

The following definitions are applicable to this part:

**Commingled product** means grains, oilseeds, rice, pulses, other similar commodities and the products of such commodities, when such commodity or product is normally stored on a commingled basis in such a manner that the commodity or product produced in the United States cannot be readily distinguished from a commodity or product not produced in the United States.

**Department** means the Department of Agriculture.

**Food and Nutrition Service** means such agency located within the Department of Agriculture.

**Foreign Agriculture Service** means such agency located within the Department of Agriculture.

**Free alongside ship (f.a.s.) (\* \* \* named port of shipment)** means a term of sale which means the seller fulfills its obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. The buyer bears all costs and risks of loss of or damage to the goods from that moment.

**Grantee organization** means an organization which will receive commodities from the United States Agency for International Development under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*) or from the Foreign Agricultural Service under the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

**Ingredient** means spices, vitamins, micronutrients, desiccants, and preservatives when added to an agricultural commodity product.

**Free carrier (FCA) (\* \* \* named place)** means a term of sale which means the seller fulfills its obligation when the seller has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose, within the place or range stipulated, where the carrier should take the goods into their charge.

**Last contract lay day** means the last day specified in an ocean freight contract by which the carriage of goods must start for contract performance.

**Lowest landed cost** means, as authorized by 46 U.S.C. 55314(c), with respect to an agricultural product acquired under this part the lowest aggregate cost for the acquisition of such product and the shipment of such product to a foreign destination.

**Multi-port voyage charter** means the charter of an ocean carrier in which the carrier will stop at two or more ports to discharge cargo.

#### 470.102 Policy.

(a) **Policy.** It is the policy of the Department to follow the policies and procedures set forth in the Federal Acquisition Regulation (FAR) as supplemented by the Agriculture Acquisition Regulation, including this part, in the procurement of agricultural commodities and products of agricultural commodities that are used in domestic feeding and international feeding and development programs.

(b) **Electronic submission.** To the maximum extent possible, the use of

electronic submission of solicitation-related documents shall be used with respect to the acquisition of agricultural commodities and related freight; however, to the extent that a solicitation allows for the submission of written information in addition to information in an electronic format and there is a discrepancy in such submissions, the information submitted in a written format shall prevail unless the electronic submission states that a specific existing written term is superseded by the electronic submission.

(c) **Freight.** With respect to the acquisition of freight for the shipment of agricultural commodities and products of agricultural commodities, the provisions of the FAR, including Part 47, shall be utilized and various types of services to be obtained may include multi-trip voyage charters.

#### 470.103 United States origin of agricultural products.

(a) **Products of United States origin.** As provided by 7 U.S.C. 1732(2) and 1736o-1(a) commodities and the products of agricultural commodities acquired for use in international feeding and development programs shall be products of United States origin. A product shall not be considered to be a product of the United States if it contains any ingredient that is not produced in the United States if that ingredient is:

- (1) Produced in the United States; and
- (2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(b) **Use by the Food and Nutrition Service.** Commodities and the products of agricultural commodities acquired for use by the Food and Nutrition Service shall be a product of the United States, except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to ingredients. Ingredients from non-domestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

- (1) Produced in the United States; and
- (2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(c) **Commingled product.**

(1) Except as provided in paragraph (c)(2) of this section, a commingled product shall be considered to be a product of the United States if the offeror can establish that the offeror has in inventory at the time the contract for the commodity or product is awarded to

the offeror, or obtains during the contract performance period specified in the solicitation, or a combination thereof, a sufficient quantity of the commodity or product that was produced in the United States to fulfill the contract being awarded, and all unfulfilled contracts that the offeror entered into to provide such commingled product to the United States.

(2) To the extent the Department has determined a commodity is one that is generally commingled, but is also one which can be readily stored on an identity preserved basis with respect to its country of origin, the Department may require that the commodity procured by the Department shall be of 100 percent United States origin.

(d) *Product derived from animals.* With respect to the procurement of products derived from animals, the solicitation will set forth any specific requirement that is applicable to the country in which the animal was bred, raised, slaughtered or further processed.

#### **470.200 [Reserved]**

#### **470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.**

##### *(a) Lowest landed cost and delivery considerations.*

(1) Except as provided in paragraphs (a)(3) and (4) of this section, in contracts for the Foreign Agricultural Service for commodities and related freight shipment for delivery to foreign destinations, the contracting officer shall consider the lowest landed cost of delivering the commodity to the intended destination. This lowest landed cost determination will be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement or a related freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or related freight, when combined with other offers for commodities or related freight, results in a lower landed cost to the Department.

(2) The Department may contact any port prior to award to determine the

port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors considered in this determination may include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of the Department to have the commodity delivered in a safe and timely manner. Such situations include:

- (i) A port is congested;
- (ii) Port facilities are overloaded;
- (iii) A vessel would not be able to dock and load cargo without delay;
- (iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or
- (v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) *Use of other than lowest landed cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the contracting officer may award an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section if:

- (i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or
- (ii) After issuance of the solicitation, it is determined that:
  - (A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;
  - (B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors may adversely affect the delivery of such commodities through damage or untimely delivery. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels not being able to dock and load cargo without delay due to conditions at the port; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the timely delivery of the commodity;

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured; or

(E) The contracting officer determines that extenuating circumstances preclude awards on the basis of lowest-landed cost, or that efficiency and cost-savings justify use of types of ocean service that would not involve an analysis of freight. However, in all such cases, commodities would be transported in compliance with cargo preference requirements. Examples of extenuating circumstances are events such as internal strife at the foreign destination or urgent humanitarian conditions threatening the lives of persons at the foreign destination. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery cost and freight (C & F), delivery cost insurance and freight (CIF), and indexed ocean freight costs.

(4) If a contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer will provide to the Head of Contracting Activity Designee a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis consistent with Title 48 Code of Federal Regulations. This request shall include a statement of the reasons for not using lowest landed cost basis. The Head of the Contracting Activity Designee, or the designee one level above the contracting officer, may either accept or reject this request and shall document this determination.

(b) *Multiple offers or delivery points.* If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

##### *(c) Freight shipping and rates.*

(1) In determining the lowest-landed cost, the Department shall use the freight rates offered in response to solicitations issued by the Department or, if applicable, the grantee organization.

(2) Freight rates offered must be submitted as specified in the solicitation issued by the Department or, if applicable, the grantee organization.

Any such solicitation issued by a grantee organization must contain the following elements:

(i) If directed by the Department, include a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that freight offers are required to have a canceling date no later than the last contract lay day specified in the solicitation;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Be received and opened prior to any related offer for acquisition of commodities to be shipped.

(3) The Department may require organizations that will receive commodities from the Department to submit information relating to the capacity of a U.S. port, or, if applicable, a terminal, prior to the acquisition of such commodities or freight.

(d) *Freight rate notification.* If the Department is not the party procuring freight with respect to a shipment of an agricultural commodity for delivery to a foreign destination, the organization that will receive commodities from the Department, or its shipping agent, shall be notified by the Department of the vessel freight rate used in determining the commodity contract award and the organization will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate.

#### **470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.**

(a) *Lowest landed cost and delivery considerations.*

(1) Except as provided in paragraphs (a)(3) and (e)(2) of this section, with respect to the acquisition of agricultural commodities for delivery to foreign destinations and related freight to transport such commodities under Title II of Public Law 480, contracts will be entered into in a manner that will result in the lowest landed cost of such commodity delivery to the intended destination. This lowest landed cost determination shall be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a

commodity procurement or a freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or freight, when combined with other offers for commodities or freight, results in a lower landed cost to USAID.

(2) The Department may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of the Department to have the commodity delivered in a safe and/or timely manner. Such situations include:

- (i) A port is congested;
- (ii) Port facilities are overloaded;
- (iii) A vessel would not be able to dock and load cargo without delay;
- (iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or
- (v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) *Use of other than lowest landed cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the Department may complete an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

- (i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or
- (ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors will adversely affect the delivery of such commodities without damage or in a timely manner. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels would not be able to dock and load cargo without

delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of the Department to achieve timely delivery of the commodity; or

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer shall provide to the head of contracting activity designee and to USAID, a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis. This request shall include a statement of the reasons for not using lowest landed cost basis. The head of contracting authority designee, or one level above the contracting officer, with the concurrence of USAID, shall, on an expedited basis, either accept or reject this request and shall document this determination in writing and provide a copy to USAID.

(b) *Freight shipping and rates.*

(1) In determining lowest-landed cost as specified in paragraph (a) of this section, the Department shall use vessel rates offered in response to solicitations issued by USAID or grantee organizations receiving commodities under 7 U.S.C. 1731 *et seq.*

(2) USAID may require, or direct a grantee organization to require, an ocean carrier to submit offers electronically through a Web-based system maintained by the Department. If electronic submissions are required, the Department may, at its discretion, accept corrections to such submissions that are submitted in a written form other than by use of such Web-based system.

(c) *Delivery date.* The contracting officer shall consider total transit time, as it relates to a final delivery date, in order to satisfy Public Law 480 Title II program requirements.

(d) *Delivery points.*

(1) Commodities offered for delivery free alongside ship Great Lakes port range or intermodal bridge-point Great Lakes port range that represent the overall (foreign and U.S. flag) lowest landed cost will be awarded on a lowest landed cost basis. Tonnage allocated on this basis will not be reevaluated on a lowest landed cost U.S.-flag basis unless

the contracting officer determines that 25 percent of the total annual tonnage of bagged, processed, or fortified commodities furnished under 7 U.S.C. 1731 *et seq.* has been, or will be, transported from the Great Lakes port range during that fiscal year.

(2) The contracting officer shall consider commodity offers as offers for delivery "intermodal bridge-point Great Lakes port range" only if:

(i) The offer specifies delivery at a marine cargo-handling facility that is capable of loading ocean going vessels at a Great Lakes port, as well as loading ocean going conveyances such as barges and container vans, and

(ii) The commodities will be moved from one transportation conveyance to another at such a facility.

(e) *Multiple awards or delivery points.*

(1) If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(2) The contracting officer may determine that extenuating circumstances preclude awards on the basis of lowest landed cost. However, in all such cases, commodities may be transported in compliance with cargo preference requirements as determined by USAID.

(3) The contracting officer shall notify USAID or, if applicable, the grantee organization, that its shipping agent will be notified of the vessel freight rate used in determining the commodity contract award. The grantee organization or USAID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

#### **470.203 Cargo preference.**

An agency having responsibility under this subpart shall administer its programs, with respect to this subpart, in accordance with regulations prescribed by the Secretary of Transportation.

Dated: March 19, 2009.

**Suzanne Hall,**

*Acting Administrator, Foreign Agricultural Service, and Acting Executive Vice President, Commodity Credit Corporation.*

[FR Doc. E9-6487 Filed 3-25-09; 8:45 am]

**BILLING CODE 3410-10-P**

## **NATIONAL CREDIT UNION ADMINISTRATION**

### **12 CFR Parts 701 and 742**

**RIN 3133-AD53**

### **Regulatory Flexibility Regarding Ownership of Fixed Assets**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** NCUA is amending its Regulatory Flexibility (RegFlex) Program to provide additional flexibility to qualifying federal credit unions (FCUs) when acquiring unimproved land for future expansion. Previously, when an FCU acquired unimproved land for future expansion and did not fully occupy the completed premises within one year, it was required to partially occupy the completed premises within three years or obtain a waiver. This amendment increases the three years to six years for RegFlex FCUs without a waiver. NCUA is also making conforming amendments to its fixed asset rule to be consistent with the RegFlex changes.

**DATES:** The rule is effective April 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frank Kressman, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

#### **SUPPLEMENTARY INFORMATION:**

#### **A. Background**

##### *1. Proposal*

NCUA issued proposed amendments to its RegFlex and fixed assets rules in September 2008 as summarized above. 73 FR 57013 (October 1, 2008). NCUA received six comment letters on the proposal: three from credit unions, two from credit union trade associations, and one from a bank trade association. All commenters except the bank trade association support the amendments.

##### *2. Fixed Assets*

The Federal Credit Union Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations. 12 U.S.C. 1757(4). Generally, the fixed asset rule provides limits on fixed asset investments, establishes occupancy and other requirements for acquired and abandoned premises, and prohibits certain transactions. 12 CFR 701.36. Fixed assets are defined in § 701.36(e) as premises, furniture, fixtures, and equipment and include any office,

branch office, suboffice, service center, parking lot, facility, real estate where a credit union transacts or will transact business, office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.

Section 701.36 prohibits an FCU with \$1 million or more in assets from investing in fixed assets, the aggregate of which exceeds five percent of the FCU's shares and retained earnings; although upon an FCU's application, a regional director may set a higher limit. 12 CFR 701.36(a)(1)-(2). If an FCU acquires premises, as broadly defined in § 701.36(e), for future expansion and does not fully occupy the space within one year, its board must have a resolution in place by the end of that year with plans for full occupation and make those plans available to NCUA upon request. 12 CFR 701.36(b)(1). Additionally, the FCU must partially occupy the premises within a reasonable period, not to exceed three years, unless the FCU obtains a waiver within 30 months of acquiring the premises. 12 CFR § 701.36(b)(1)-(2). In this rulemaking, NCUA is only addressing the circumstance where an FCU is acquiring unimproved land but no other kind of premises.

#### *3. Regulatory Flexibility Program*

The RegFlex Program exempts from certain regulatory restrictions and grants additional powers to those FCUs that have demonstrated sustained superior performance as measured by CAMEL ratings and net worth classifications. 12 CFR 742.1. An FCU may qualify for RegFlex treatment automatically or by application to the appropriate regional director. 12 CFR 742.2. Also, an FCU's RegFlex authority can be lost or revoked. 12 CFR 742.3.

#### **B. Discussion**

Although a RegFlex eligible FCU is exempt from the five percent aggregate limit on fixed asset investments under the current rule, it is not exempt from the requirement to partially occupy premises acquired for future expansion within three years or request a waiver of this requirement. 12 CFR 701.36(a), 701.36(b)(2), 701.36(d), 742.4(a)(3). Where an FCU is acquiring unimproved land, the partial occupancy requirement often is more difficult to satisfy than if the FCU were purchasing premises with an existing branch building. The Board is aware that some FCUs contend the fixed asset rule's three-year partial occupancy requirement, even with a waiver option, is burdensome and an unnecessary level of oversight for