



Billing Code 3410-10

**DEPARTMENT OF AGRICULTURE**

**Foreign Agricultural Service**

**7 CFR Part 1599**

**RIN 0551-AA93**

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

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

**ACTION:** Final rule with request for comments.

**SUMMARY:** The Foreign Agricultural Service (FAS) is revising the regulations governing the McGovern-Dole International Food for Education and Child Nutrition (McGovern-Dole) Program to add provisions related to the local and regional procurement of commodities under the program, and to make other minor changes. The Agriculture Improvement Act of 2018 amended the statute authorizing the McGovern-Dole Program to provide that not more than ten percent of the funds made available to carry out the program shall be used to purchase agricultural commodities through local and regional procurement. This revision implements this statutory change by setting forth requirements applicable to the local or regional procurement of commodities by an award recipient under the McGovern-Dole Program, and it makes other technical changes to update the regulations.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written comments must be received by FAS or carry a postmark or equivalent no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments, identified by Regulatory Information Number (RIN) 0551-AA93, may be sent by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.
- *Email:* PPDED@fas.usda.gov. Include RIN 0551-AA93 in the subject line of the message.
- *Mail:* Senior Director, International Food Assistance Division, Global Programs, Foreign Agricultural Service, 1400 Independence Ave. SW, STOP 1034, Washington, DC 20250.

*Instructions:* All submissions received must include the agency name and RIN 0551-AA93.

**FOR FURTHER INFORMATION CONTACT:** Ingrid Ardjosoediro, Deputy Director, International Food Assistance Division, Global Programs, Foreign Agricultural Service, 1400 Independence Ave. SW, STOP 1034, Washington, DC 20250. Telephone: (202)720-2637; Fax: (202) 690-0251; E-mail: FAD\_Contact@fas.usda.gov.

**SUPPLEMENTARY INFORMATION:**

**Background**

The McGovern-Dole International Food for Education and Child Nutrition Program helps support food security, child development, and education in low-income, food-deficit countries around the world. The program provides for the donation of U.S. agricultural commodities, as well as financial and technical assistance, to support school feeding and maternal and child health and nutrition projects. The McGovern-Dole

Program is authorized in section 3107 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 1736o-1).

FAS uses the regulations in 7 CFR part 1599, McGovern-Dole International Food for Education and Child Nutrition Program, in the administration of the McGovern-Dole Program. The previous version of the regulations was published as a final rule on September 12, 2016 (81 FR 62614).

### **Revision of regulations**

FAS is revising the McGovern-Dole Program regulations in 7 CFR part 1599 through this final rule to implement a change made by the Agriculture Improvement Act of 2018 (Pub. L. 115-334) to section 3107 of the Farm Security and Rural Investment Act of 2002 to provide that not more than ten percent of the funds made available to carry out the McGovern-Dole Program shall be used to purchase agricultural commodities through local and regional procurement. FAS is adding definitions related to local and regional procurement in § 1599.2; adding a new § 1599.6, entitled “Local and regional procurement of commodities,” and re-numbering subsequent sections; and revising other sections within 7 CFR part 1599 to incorporate requirements applicable to the local or regional procurement of agricultural commodities by an award recipient under the McGovern-Dole Program.

In addition, FAS is revising the regulations to make changes that are technical in nature and intended to improve the efficiency and effectiveness of the McGovern-Dole Program, including the following:

(1) Clarifying that provisions specified by FAS during the negotiation of an agreement, which are in addition to provisions required by the regulations, will be

included in the agreement but will not necessarily be in the plan of operation component of the agreement (7 CFR 1599.5(d)(6)).

(2) Clarifying that the required assertion by a recipient that adequate transportation and storage facilities will be available in the target country refers to the time of arrival of the commodities in the target country (7 CFR 1599.5(e)(6)).

(3) Modifying references to economic sanction programs to allow for situations in which a U.S. Government economic sanction program is not country-specific (7 CFR 1599.12(e) and 1599.15(b)(2)).

(4) Replacing the specific reference to a percentage of the “Grand Total Costs” in the agreement budget with a more general reference to the amount specified in the agreement, which would allow FAS to make a change to the budget format if it determines that it would be beneficial (7 CFR 1599.12(h)(1)).

(5) Allowing FAS to specify in the agreement the circumstances in which a recipient must submit to FAS a contract with a provider of goods, services, or construction work (7 CFR 1599.12(k)).

(6) Allowing for the possibility that there might not be any closeout and post-closeout provisions specified in an agreement and that only those provisions in 2 CFR 200.343 and 200.344 would apply (7 CFR 1599.17(b)(3)).

### **Notice and Comment**

This rule is being issued as a final rule without prior notice and opportunity for comment. The Administrative Procedure Act exempts rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from the statutory requirement for prior notice and opportunity for comment (5 U.S.C.

553(a)(2)). Accordingly, this rule may be made effective less than 30 days after publication in the Federal Register. However, members of the public may participate in this rulemaking by submitting written comments, data, or views. FAS will consider the comments received and may conduct additional rulemaking based on the comments. Written comments must be received by FAS or carry a postmark or equivalent no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

### **Catalog of Federal Domestic Assistance**

The program covered by this regulation is listed in the Catalog of Federal Domestic Assistance (CFDA) under the following FAS CFDA number: 10.608, Food for Education.

### **E-Government Act Compliance**

FAS is committed to complying with the E-Government Act of 2002 (44 U.S.C. chapter 36), to promote the use of the Internet and other information technologies to provide increased opportunities for citizens' access to Government information and services, and for other purposes.

### **Executive Order 12866**

This rule is issued in conformance with Executive Order 12866, "Regulatory Planning and Review." It has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget.

### **Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988, “Civil Justice Reform.” This rule does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. This rule will not be retroactive.

### **Executive Order 12372**

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with officials of State and local governments that would be directly affected by the proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This rule will not directly affect State or local officials and, for this reason, it is excluded from the scope of Executive Order 12372.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally requires an agency to prepare a regulatory flexibility analysis of any rule that is subject to notice and comment rulemaking under the Administrative Procedure Act (APA) or any other law, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not apply to this rule because FAS is not required by the APA or any other law to publish a notice of proposed rulemaking with respect to the subject matter of the rule.

### **Executive Order 13132**

This rule has been reviewed under Executive Order 13132, “Federalism.” This rule will not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. This rule does not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States was not required.

### **Executive Order 13175**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. FAS does not expect this rule to have any effect on Indian tribes.

### **Unfunded Mandates**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because it does not impose any enforceable duty or contain any unfunded mandate as described under the UMRA.

### **List of Subjects in 7 CFR Part 1599**

Agricultural commodities, Cooperative agreements, Exports, Food assistance programs, Foreign aid, Grant programs-agriculture, Technical assistance.

For the reasons stated in the preamble, the Foreign Agricultural Service revises 7 CFR part 1599 to read as follows:

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

**Sec.**

1599.1 Purpose and applicability.

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AUTHORITY: 7 U.S.C. 1736o-1.

**§ 1599.1 Purpose and applicability.**

(a) This part sets forth the general terms and conditions governing the award of donated commodities and funds by the Foreign Agricultural Service (FAS) to recipients under the McGovern-Dole International Food for Education and Child Nutrition Program (McGovern-Dole Program). Under the McGovern-Dole Program, recipients use the donated commodities, proceeds from any sale of such commodities, FAS-provided funds, and program income to implement a project in a foreign country pursuant to an agreement with FAS. When authorized by an agreement, a recipient may use FAS-provided funds to make a local or regional procurement of qualified commodities to implement such a project.

(b)(1) The Office of Management and Budget (OMB) issued guidance on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200. In 2 CFR 400.1, the United States Department of Agriculture (USDA) adopted OMB's guidance in subparts A through F of 2 CFR part 200, as supplemented by 2 CFR part 400, as USDA policies and procedures for uniform administrative requirements, cost principles, and audit requirements for Federal awards.

(2) The OMB guidance at 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies to the McGovern-Dole Program, except as provided in paragraphs (e), (f), and (g) of this section.

(c) Except as otherwise provided in this part, other regulations that are generally applicable to grants and cooperative agreements of USDA, including the applicable regulations set forth in 2 CFR chapters I, II, and IV, also apply to the McGovern-Dole Program.

(d) In accordance with 7 U.S.C. 1736o-1(e), assistance under the McGovern-Dole Program may be provided to private voluntary organizations, cooperatives, intergovernmental organizations, governments of developing countries and their agencies, and other organizations.

(e) The OMB guidance at 2 CFR part 200, and the provisions of 2 CFR part 400 and of this part, do not apply to an award by FAS under the McGovern-Dole Program to a recipient that is a foreign public entity, as defined in 2 CFR 200.46, and, therefore, they do not apply to a foreign government or its agency or an intergovernmental organization.

(f)(1) The OMB guidance at subparts A through E of 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies to all awards by FAS under the McGovern-Dole Program to all recipients that are private voluntary organizations, including a private voluntary organization that is a foreign organization, as defined in 2 CFR 200.47; cooperatives, including a cooperative that is a for-profit entity or a foreign organization; or other organizations, including organizations that are for-profit entities or foreign organizations, but not including intergovernmental organizations.

(2) The OMB guidance at subparts A through E of 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies to all subawards to all subrecipients under this part, except in cases:

- (i) Where the subrecipient is a foreign public entity; or
- (ii) Where FAS determines that the application of the provisions in this part to a subaward to a subrecipient that is a foreign organization would be inconsistent with the international obligations of the United States or the statutes or regulations of a foreign government or would not be in the best interest of the United States.

(g)(1) The OMB guidance at subpart F of 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies only to awards by FAS to recipients that are private voluntary organizations, cooperatives, or other organizations, but that are not for-profit entities or foreign organizations.

(2) The OMB guidance at subpart F of 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies to subawards to subrecipients under this part, except where the subrecipient is a for-profit entity, foreign public entity, or foreign organization.

(3) Audit requirements for recipients and subrecipients that are for-profit entities or foreign organizations are set forth in § 1599.19.

### **§ 1599.2 Definitions.**

These are definitions for terms used in this part. The definitions in 2 CFR part 200, as supplemented in 2 CFR part 400, are also applicable to this part, with the exception that, if a term that is defined in this section is defined differently in 2 CFR part 200 or 400, the definition in this section will apply to such term as used in this part.

*Activity* means a discrete undertaking within a project to be carried out by a recipient, directly or through a subrecipient, that is specified in an agreement and is intended to fulfill a specific objective of the agreement.

*Agreement* means a legally binding grant or cooperative agreement entered into between FAS and a recipient to implement a project under the McGovern-Dole Program.

*Commodities* means agricultural commodities, or products of agricultural commodities, that:

(1) Are produced in the United States; or

(2)(i) Are produced in and procured from:

(A) A developing country that is a target country; or

(B) A developing country in the target region; and

(ii) At a minimum, meet each nutritional, quality, and labeling standard of the target country, as determined by the Secretary of Agriculture.

*Cooperative* means a private sector organization whose members own and control the organization and share in its services and its profits and that provides business services and outreach in cooperative development for its membership.

*Cost sharing or matching* means the portion of project expenses, or necessary goods and services provided to carry out a project, not paid or acquired with Federal funds. The term may include cash or in-kind contributions provided by recipients, subrecipients, foreign public entities, foreign organizations, or private donors.

*Country of origin* means the country in which procured commodities were produced.

*Developing country* means a country that has a shortage of foreign exchange earnings and has difficulty meeting all of its food needs through commercial channels.

*Disburse* means to make a payment to liquidate an obligation.

*Donated commodities* means the commodities produced in the United States that are donated by FAS to a recipient 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 recipient, or through a subagreement to a subrecipient, for expenses authorized in the agreement, such as expenses for the purchase of qualified commodities; any ocean transportation of the procured commodities; overland transportation, storage, and handling of the donated commodities or procured commodities; expenses involved in the administration, monitoring, and evaluation of the activities under the agreement; and the costs of activities conducted in the target country that would enhance the effectiveness of the activities implemented under the McGovern-Dole Program.

*Food assistance* means assistance that is provided to members of a targeted vulnerable group to meet their food needs.

*Local procurement* means the procurement of qualified commodities by a recipient, directly or through a subrecipient, in the target country to assist beneficiaries within that same country.

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

*Overland transportation* means any transportation other than ocean transportation. It includes internal transportation within the target country and regional transportation within the target region.

*Private voluntary organization* means a not-for-profit, nongovernmental organization (in the case of a United States organization, an organization that is exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code of 1986) that receives funds from private sources, voluntary contributions of money, staff time, or in-kind support from the public, and that is engaged in or is planning to engage in voluntary, charitable, or development assistance activities (other than religious activities).

*Procured commodities* means the qualified commodities that are procured by a recipient, directly or through a subrecipient, under an agreement.

*Program income* means interest earned on proceeds from the sale of donated commodities, as well as funds received by a recipient or subrecipient as a direct result of carrying out an approved activity under an agreement. The term includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under a Federal award, the sale of items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Program income does not include proceeds from; FAS-provided funds or interest earned on such funds; or funds provided for cost sharing

or matching contributions, refunds or rebates, credits, discounts, or interest earned on any of them.

*Project* means the totality of the activities to be carried out by a recipient, directly or through a subrecipient, to fulfill the objectives of an agreement.

*Purchase country* means a developing country in which procured commodities are purchased.

*Qualified commodities* means commodities that are produced in a developing country that is the target country or in the target region under an agreement, and that meet each nutritional, quality, and labeling standard of the target country, as determined by the Secretary of Agriculture, as well as any other criteria specified in § 1599.6(b).

*Recipient* means an entity that enters into an agreement with FAS and receives donated commodities, FAS-provided funds, or both to carry out activities under the agreement. The term recipient does not include a subrecipient.

*Regional procurement* means the procurement of qualified commodities by a recipient, directly or through a subrecipient, in a developing country in the target region, other than the target country, to assist beneficiaries within the target country.

*Sale proceeds* means funds received by a recipient from the sale of donated commodities.

*Subrecipient* means an entity that enters into a subagreement with a recipient for the purpose of implementing in the target country activities described in an agreement. The term does not include an individual that is a beneficiary under the agreement.

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

*Target region* means the continent on which the target country is located.

*USDA* means the United States Department of Agriculture.

*Voluntary committed cost sharing or matching contributions* means cost sharing or matching contributions specifically pledged on a voluntary basis by an applicant or recipient, which become binding as part of an agreement. Voluntary committed cost sharing or matching contributions may be provided in the form of cash or in-kind contributions.

**§ 1599.3 Eligibility and conflicts of interest.**

(a) A private voluntary organization, a cooperative, or another organization that is not an intergovernmental organization is eligible to submit an application under this part to become a recipient under the McGovern-Dole Program. FAS will set forth specific eligibility information, including any factors or priorities that will affect the eligibility of an applicant or application for selection, in the full text of the applicable notice of funding opportunity posted on the U.S. Government web site for grant opportunities.

(b) Applicants, recipients, and subrecipients must comply with policies established by FAS pursuant to 2 CFR 400.2(a), and with the requirements in 2 CFR 400.2(b), regarding conflicts of interest.

**§ 1599.4 Application process.**

(a) An applicant seeking to enter into an agreement with FAS must submit an application, in accordance with this section, that sets forth its proposal to carry out activities under the McGovern-Dole Program in a proposed target country(ies). An application must contain the items specified in paragraph (b) of this section and any other



items required by the notice of funding opportunity and must be submitted electronically to FAS at the address set forth in the notice of funding opportunity.

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

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

(2) An introduction and a strategic analysis, which includes an impact analysis, as specified in the notice of funding opportunity;

(3) A plan of operation that contains the elements specified in the notice of funding opportunity;

(4) A summary line item budget and a budget narrative that indicate:

(i) The amounts of any sale proceeds, FAS-provided funds, interest, program income, and voluntary committed cost sharing or matching contributions that the applicant proposes to use to fund:

(A) Administrative costs;

(B) Commodity procurement costs, where applicable, for qualified commodities obtained through local or regional procurement;

(C) Overland transportation, storage, and handling costs; and

(D) Activity costs;

(ii) Where applicable, how the applicant's indirect cost rate will be applied to each type of expense; and

(iii) The amount of funding that will be provided to each proposed subrecipient under the agreement;

(5) A project-level results framework that outlines the changes that the applicant expects to accomplish through the proposed project and is based on the McGovern-Dole Program-level results framework, as set forth in the notice of funding opportunity;

(6) Unless otherwise specified in the notice of funding opportunity, an evaluation plan that describes the proposed design, methodology, and time frame of the project's evaluation activities, and how the applicant intends to manage these activities, and that will include a baseline study, interim evaluation, final evaluation, and any applicable special studies; and

(7) Any additional required items set forth in the notice of funding opportunity.

(c) Each applicant (unless the applicant has an exception approved by FAS under 2 CFR 25.110(d)) is required to:

(1) Be registered in the System for Award Management (SAM) before submitting its application;

(2) Provide a valid unique entity identifier in its application; and

(3) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency.

#### **§ 1599.5 Agreements.**

(a) After FAS approves an application by an applicant, FAS will negotiate an agreement with the applicant. The agreement will set forth the obligations of FAS and the recipient.

(b) The agreement will specify the general information required in 2 CFR 200.210(a), as applicable.

(c) The agreement will incorporate general terms and conditions, pursuant to 2 CFR 200.210(b), as applicable.

(d) To the extent that this information is not already included in the agreement pursuant to paragraphs (b) and (c) of this section, the agreement will also include the following:

(1) The kind, quantity, and use of the donated commodities and an estimated commodity call forward schedule, with the month and year indicated for each expected commodity shipment;

(2) A plan of operation, which will include the following:

(i) The objectives to be accomplished under the project;

(ii) A detailed description of each activity to be implemented;

(iii) The target country(ies) and the areas of the target country(ies) in which the activities will be implemented;

(iv) The methods and criteria for selecting the beneficiaries of the activities;

(v) Any contributions for cost sharing or matching, including cash and non-cash contributions, that the recipient expects to receive from non-FAS sources that:

(A) Are critical to the implementation of the activities; or

(B) Enhance the implementation of the activities;

(vi) Any subrecipient that will be involved in the implementation of the activities, and the criteria for selecting a subrecipient that has not yet been identified;

(vii) Any other governmental or nongovernmental entities that will be involved in the implementation of the activities; and

(viii) Any processing, packaging, or repackaging of the donated commodities or procured commodities that will take place prior to the distribution, sale, or barter of the donated commodities, or the distribution of the procured commodities, by the recipient;

(3) A budget, which will set forth the maximum amounts of sale proceeds, FAS-provided funds, interest, program income, and voluntary committed cost sharing or matching contributions that may be used for each line item, as well as other applicable budget requirements;

(4) Performance goals for the agreement, including a list of results, with long-term benefits where applicable, to be achieved by the activities and corresponding indicators, targets, and time frames;

(5) Requirements relating to any local or regional procurement of qualified commodities authorized in the agreement, as set forth in §1599.6; and

(6) Any additional provisions specified by FAS during the negotiation of the agreement.

(e) The agreement will also include specific terms and conditions, and certifications and representations, including the following:

(1) The agreement will prohibit the sale, resale, or transshipment of the donated commodities or procured commodities by the recipient to a country not specified in the agreement, or the use of the donated commodities for other than domestic purposes, for as long as the recipient has title to such donated commodities or procured commodities;

(2) The agreement will prohibit the use of procured commodities, if applicable, for any purpose other than food assistance;

(3) The recipient will assert that it has taken action to ensure that any donated commodities that will be distributed to beneficiaries, and any qualified commodities that will be obtained through regional procurement, will be imported free from all customs, duties, tolls, and taxes; and all donated commodities and procured commodities will be distributed free from all customs, duties, tolls, and taxes. The recipient must submit information to FAS to support this assertion;

(4) The recipient will assert that, to the best of its knowledge, the importation, if applicable, and distribution of the donated commodities or procured commodities in the target country will not result in a substantial disincentive to or interference with domestic production or marketing in that country. The recipient must submit information to FAS to support this assertion;

(5) The recipient will assert that, to the best of its knowledge, any sale or barter of the donated commodities will not displace or interfere with any sales of United States commodities that may otherwise be made to or within the target country. The recipient must submit information to FAS to support this assertion; and

(6) The recipient will assert that adequate transportation and storage facilities will be available in the target country at the time of the arrival of the donated commodities, or any procured commodities obtained through regional procurement, to prevent spoilage or waste of the donated commodities or procured commodities. The recipient must submit information to FAS to support this assertion.

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

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

**§ 1599.6 Local and regional procurement of commodities.**

(a)(1) An agreement may authorize a recipient to use FAS-provided funds to procure qualified commodities, through a local or regional procurement or both, to implement a project. The provisions of this section will apply in such a situation.

(2) The agreement will specify the types of qualified commodities approved for procurement; the approved purchase country(ies); and the approved method(s) of procurement (local procurement, regional procurement, or a combination of these methods). The agreement will prohibit the recipient from procuring qualified commodities from any country not specified in the agreement or utilizing methods of procurement that differ from those approved in the agreement.

(b) In carrying out an agreement, the recipient must comply with the following requirements, as applicable, relating to the procurement of qualified commodities under the agreement:

(1) The recipient must procure qualified commodities at a reasonable market price with respect to the economy of the purchase country, as determined by FAS.

(2) If the recipient procures qualified commodities that are grains, legumes, or pulses, the commodities must meet the food safety standards of the target country; provided, however, that if the target country does not have food safety standards for grains, legumes, or pulses, as applicable, then the recipient must ensure that such commodities meet the food safety standards specified in the agreement.

(3) If the recipient procures qualified commodities that are food products other than grains, legumes or pulses, such as processed foods, fortified blended foods, and enriched foods, the commodities must comply, in terms of raw materials, composition, or manufacture, with the food safety standards specified in the agreement.

(4) If the recipient procures qualified commodities that are cereals, groundnuts, or tree nuts, or food products derived from or containing cereals, groundnuts, or tree nuts, the commodities must be tested for aflatoxin and have their moisture content certified. The maximum acceptable total aflatoxin level is 20 parts per billion, the U.S. Food and Drug Administration action level for aflatoxin in human foods.

(5) If the recipient procures an unprocessed commodity, it must ensure that the commodity has been produced either in the target country or in another developing country within the target region.

(6) If the recipient procures a processed commodity, it must ensure that the processing took place, and the primary ingredient has been produced, either in the target country or in another developing country within the target region. The primary ingredient is determined on the basis of weight in the case of solid foods, or volume in the case of liquids.

(7) If the recipient procures qualified commodities through a competitive tender, the recipient must specify the minimally acceptable commodity specifications and food safety and quality assurance standards in the tender. Purchases that are made from commercial wholesalers in a local or regional market must meet the food safety and quality assurance standards specified in paragraphs (b)(2), (3), and (4) of this section.

(8) The recipient must enter into a contract that complies with this paragraph (b) for every local or regional procurement of qualified commodities from a commodity vendor. The recipient must ensure that the contract between the recipient and the commodity vendor clearly specifies the country of origin and the specific market(s) in which the procurement will take place, commodity safety and quality assurance standards, product specifications, price per metric ton, and delivery terms. The recipient will be required to make such contract available to FAS upon request.

(9) The recipient must enter into a contract with an established inspection service to survey and report on the safety, quality, and condition of all procured commodities, prior to their shipment and distribution. The recipient will be required to submit any survey reports or certificates issued by such inspection service to FAS upon request.

(c) The agreement will require the recipient to submit a procurement plan for FAS's approval within the time period specified in the agreement. The procurement plan will include time periods, broken down by month, for commodity procurement, delivery, and distribution. The agreement will require the recipient to comply with the procurement plan, as approved by FAS, and will prohibit the recipient from making any changes to the procurement plan without obtaining the prior written approval of FAS.

**§ 1599.7 Payments.**

(a) If a recipient arranges for transportation in accordance with § 1599.8(b)(2), FAS will, as specified in the agreement, pay the costs of such transportation to the ocean carrier or to the recipient. The recipient must, as specified in the agreement, submit to FAS, arrange to be submitted to FAS, or maintain on file and make available to FAS, the following documents:



- (1) The original, or a true copy, of each on board bill of lading indicating the freight rate and signed by the originating ocean carrier;
  - (2) For all non-containerized cargoes:
    - (i) A signed copy of the Federal Grain Inspection Service (FGIS) Official Stowage Examination Certificate;
    - (ii) A signed copy of the National Cargo Bureau Certificate of Readiness; and
    - (iii) A signed copy of the Certificate of Loading issued by the National Cargo Bureau or a similar qualified independent surveyor;
  - (3) For all containerized cargoes, a copy of the FGIS Container Condition Inspection Certificate;
  - (4) A signed copy of the U.S. Food Aid Booking Note or charter party covering ocean transportation of the cargo;
  - (5) In the case of charter shipments, a signed notice of arrival at the first discharge port, unless FAS has determined that circumstances that could not have been reasonably anticipated or controlled (force majeure) have prevented the ocean carrier's arrival at the first port of discharge; and
  - (6) A request for payment of freight, survey costs other than at load port, and other expenses approved by FAS.
- (b) If the agreement specifies that some or all of the documents listed in paragraph (a) of this section will be submitted to FAS, then FAS will not render payment for transportation services until it has received all of the specified documents.
- (c) If a recipient arranges for transportation in accordance with § 1599.8(b)(2), and the recipient uses a freight forwarder, the recipient must ensure that the freight

forwarder is registered in the SAM and require the freight forwarder to submit the documents specified in paragraph (a) of this section. The recipient will ensure that the total commission or fees paid to intermediaries in the transportation procurement process will not exceed two and a half percent of the total transportation costs.

(d) In no case will FAS provide payment to a recipient for demurrage costs or pay demurrage to any other entity.

(e) If FAS has agreed to be responsible for the costs of transporting, storing, and distributing the donated commodities from the designated discharge port or point of entry, and if the recipient will bear or has borne any of these costs, in accordance with the agreement, FAS will either provide an advance payment or a reimbursement to the recipient in the amount of such costs, in the manner set forth in the agreement.

(f) If the agreement authorizes the payment of FAS-provided funds, FAS will generally provide the funds to the recipient on an advance payment basis, in accordance with 2 CFR 200.305(b). In addition, the following procedures will apply to advance payments:

(1) A recipient may request advance payments of FAS-provided funds, up to the total amount specified in the agreement. When making an advance payment request, a recipient must provide, for each agreement for which it is requesting an advance, total expenditures to date; an estimate of expenses to be covered by the advance; total advances previously requested, if any; the amount of cash on hand from the preceding advance; and, if necessary, a request to roll over any unused funds from the preceding advance to the current request period. The advance payment request must take into account any program income earned since the preceding advance.

(2) Whenever possible, a recipient should consolidate advance payment requests to cover anticipated cash needs for all food assistance program awards made by FAS to the recipient. A recipient may request advance payments with no minimum time required between requests.

(3) A recipient must minimize the amount of time that elapses between the transfer of funds by FAS and the disbursement of funds by the recipient. A recipient must fully disburse funds from the preceding advance before it submits a new advance request for the same agreement, with the exception that the recipient may request to retain a reasonable (minimal) balance of any funds that have not been disbursed and roll it over into a new advance request if the new advance request is made within 90 days after the preceding advance was made.

(4) FAS will review all requests to roll over funds from the preceding advance that have not been disbursed and make a decision based on the merits of the request. FAS will consider factors such as the amount of funding that a recipient is requesting to roll over, the length of time that the recipient has been in possession of the funds, any unforeseen or extenuating circumstances, the recipient's history of performance, and findings from recent financial audits or compliance reviews.

(5) FAS will not approve any request for an advance or rollover of funds if the most recent financial report, as specified in the agreement, is past due, or if any required report, as specified in any open agreement between the recipient and FAS or the Commodity Credit Corporation (CCC), is more than three months in arrears.

(6)(i) A recipient must return to FAS any funds advanced by FAS that have not been disbursed as of the 91st day after the advance was made; provided, however, that

paragraphs (f)(6)(ii) and (iii) of this section will apply if the recipient submits a request to FAS before that date to roll over the funds into a new advance.

(ii) If a recipient submits a request to roll over funds into a new advance, and FAS approves the rollover of funds, such funds will be considered to have been advanced on the date that the recipient receives the approval notice from FAS, for the purposes of complying with the requirement in paragraph (f)(6)(i) of this section.

(iii) If a recipient submits a request to roll over funds into a new advance, and FAS does not approve the rollover of some or all of the funds, such funds must be returned to FAS.

(iv) If a recipient must return funds to FAS in accordance with paragraph (f)(6) of this section, the recipient must return the funds by the later of five business days after the 91st day after the funds were advanced, or five business days after the date on which the recipient receives notice from FAS that it has denied the recipient's request to roll over the funds; provided, however, that FAS may specify a different date for the return of funds in a written communication to the recipient.

(7) Except as may otherwise be provided in the agreement, a recipient must deposit and maintain in an insured bank account located in the United States all funds advanced by FAS. The account must be interest-bearing, unless one of the exceptions in 2 CFR 200.305(b)(8) applies or FAS determines that the requirement in this paragraph (f)(7) would constitute an undue burden. A recipient will not be required to maintain a separate bank account for advance payments of FAS-provided funds. However, a recipient must be able to separately account for the receipt, obligation, and expenditure of funds under each agreement.

(8) A recipient may retain, for administrative expenses, up to \$500 per Federal fiscal year of any interest earned on funds advanced under an agreement. The recipient must remit to the U.S. Department of Health and Human Services, Payment Management System, any additional interest earned during a Federal fiscal year on such funds, in accordance with the procedures in 2 CFR 200.305(b)(9).

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

**§ 1599.8 Transportation of donated or procured commodities.**

(a) Shipments of donated commodities and procured commodities requiring ocean transportation are subject to the requirements of 46 U.S.C. 55305, 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 arranged for under a specific agreement in the manner determined by FAS. Such transportation will be arranged for by:

(1) FAS in accordance with the Federal Acquisition Regulation (FAR) in 48 CFR chapter 1, the Agriculture Acquisition Regulation (AGAR) in 48 CFR chapter 4, and directives issued by the Director, Office of Procurement and Property Management, USDA; or

(2) The recipient, with payment by FAS, in the manner specified in the agreement.

(c) A recipient must arrange for all transportation of procured commodities. FAS will pay for the transportation, as provided for in the agreement, through an advance payment or reimbursement to the recipient.

(d) A recipient that is responsible for arranging for the transportation of donated commodities or procured commodities must declare in the transportation contract the point at which the ocean carrier or overland transportation company will take custody of the donated commodities or procured commodities to be transported.

(e) A recipient may only use the services of a transportation company that is legally operating in the country in which it will be transporting the donated commodities or procured commodities and that would not have a conflict of interest in transporting such donated commodities or procured commodities.

(f) A recipient that arranges for 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 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 recipient 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 McGovern-Dole Program agreement to which the recipient is a party; and

(2) Is not affiliated with the recipient 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 recipient.

**§ 1599.9 Entry, handling, and labeling of donated or procured commodities and notification requirements.**

(a) A recipient must make all necessary arrangements for receiving in the target country the donated commodities and any procured commodities obtained through regional procurement, including obtaining appropriate approvals for entry and transit. The recipient must make arrangements with the target country government for all donated commodities that will be distributed to beneficiaries, and all procured commodities, to be imported and distributed free from all customs duties, tolls, and taxes. A recipient is encouraged to make similar arrangements, where possible, with the government of a country where donated commodities to be sold or bartered are delivered.

(b) A recipient must, as provided in the agreement, arrange for transporting, storing, and distributing the donated commodities or procured commodities from the designated point and time where title to the donated commodities or procured commodities passes to the recipient.

(c)(1) A recipient must 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.

(2) A recipient must store and maintain the procured commodities in good condition from the time of delivery at the port of entry or the point of receipt from the commodity vendor(s) until their distribution.

(d)(1) If a recipient arranges for the packaging or repackaging of donated commodities that are to be distributed, the recipient must ensure that the packaging:

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

(ii) Contains the name of the donated commodities;

(iii) Includes a statement indicating that the donated commodities are furnished by the United States Department of Agriculture; and

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

(2) If a recipient arranges for the processing and repackaging of donated commodities that are to be distributed, the recipient must ensure that the packaging:

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

(ii) Contains the name of the processed product;

(iii) Includes a statement indicating that the processed product was made with commodities furnished by the United States Department of Agriculture; and

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

(3) If a recipient arranges for the packaging or repackaging of procured commodities, the recipient must ensure that the packaging:

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

(ii) Contains the name of the procured commodities;

(iii) Contains the name of the country of origin;

(iv) Includes a statement indicating that the procured commodities are furnished through a project funded by the United States Department of Agriculture; and

(v) Includes a statement indicating that the procured commodities must not be sold, bartered, or exchanged.



(4)(i) If a recipient distributes donated commodities that are not packaged, the recipient must display a sign at the distribution site that includes the name of the donated commodities, a statement indicating that the commodities are being furnished by the United States Department of Agriculture, and a statement indicating that the donated commodities must not be sold, bartered, or exchanged.

(ii) If a recipient distributes procured commodities that are prepackaged or not packaged, the recipient must display a sign at the distribution site that includes the name of the procured commodities, the country of origin, a statement indicating that the procured commodities are being furnished through a project funded by the United States Department of Agriculture, and a statement indicating that the procured commodities must not be sold, bartered, or exchanged.

(e) A recipient must ensure that signs are displayed at all activity implementation and commodity distribution sites to inform beneficiaries that funding for the project was provided by the United States Department of Agriculture.

(f) A recipient must also ensure that all public communications relating to the project, the activities, or the donated commodities or procured commodities, whether made through print, broadcast, digital, or other media, include a statement acknowledging that funding was provided by the United States Department of Agriculture.

(g) FAS may waive compliance with one or more of the labeling and notification requirements in paragraphs (d), (e), and (f) of this section if a recipient demonstrates to FAS that the requirement presents a safety or security risk in the target country. If a recipient determines that compliance with a labeling or notification requirement poses an imminent threat of destruction of property, injury, or loss of life, the recipient must

submit a waiver request to FAS as soon as possible. The recipient will not have to comply with such requirement during the period prior to the issuance of a waiver determination by FAS. A recipient may submit a written request for a waiver at any time after the agreement has been signed.

(h) In exceptional circumstances, FAS may, on its own initiative, waive one or more of the labeling and notification requirements in paragraphs (d), (e), and (f) of this section for programmatic reasons.

**§ 1599.10 Damage to or loss of donated or procured commodities.**

(a)(1) FAS will be responsible for the donated commodities prior to the transfer of title to the donated commodities to the recipient. The recipient will be responsible for the donated commodities following the transfer of title to the donated commodities to the recipient. The title will transfer as specified in the agreement.

(2) A recipient will be responsible for the procured commodities following the transfer of title to the procured commodities from the commodity vendor(s) to the recipient. FAS may require the recipient to purchase transportation insurance against commodity loss or damage.

(b) A recipient must 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 or procured commodities that occurs following the transfer of title to the donated commodities or procured commodities to the recipient. The recipient must 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 or procured commodities that occurs after title has been transferred to the recipient.

(c) A recipient will be responsible for arranging for an independent cargo surveyor to inspect the donated commodities, and any procured commodities transported by ocean, upon discharge from the ocean carrier and to prepare a survey or outturn report. The report must show the quantity and condition of the donated commodities or procured commodities discharged from the ocean carrier and must indicate the most likely cause of any damage noted in the report. The report must also indicate the time and place when the survey took place. All discharge surveys must be conducted contemporaneously with the discharge of the ocean carrier, unless FAS determines that failure to do so was justified under the circumstances. For donated commodities or procured commodities shipped on a through bill of lading, the recipient must also obtain a delivery survey. All surveys obtained by the recipient must, to the extent practicable, be conducted jointly by the surveyor, the recipient, and the carrier, and the survey report must be signed by all three parties. The recipient must obtain a copy of each discharge or delivery survey report within 45 days after the completion of the survey. The recipient must make each such report available to FAS upon request, or in the manner specified in the agreement. FAS will reimburse the recipient for the reasonable costs of these services, as determined by FAS, in the manner specified in the agreement.

(d) When procured commodities are transported overland, the recipient will ensure that the overland transportation contract includes a requirement that a loading and offloading report be prepared and provided to the recipient. The report must show the quantity and condition of the procured commodities loaded on the overland conveyance, as well as the time and place that the loading and offloading occurred. The recipient must obtain a copy of the report from the overland transportation company within 45 days after

the completion of the commodity delivery. The recipient must make each such report available to FAS upon request, or in the manner specified in the agreement. FAS will reimburse the recipient for the reasonable costs of these services, as determined by FAS, in the manner specified in the agreement.

(e) If donated commodities or procured commodities are damaged or lost during the time that they are in the care of the ocean carrier or overland transportation company:

(1) The recipient must ensure that any reports, narrative chronology, or other commentary prepared by the independent cargo surveyor, and any such documentation prepared by a port authority, stevedoring service, or customs official, or an official of the transit or target country government or the transportation company, are provided to FAS;

(2) The recipient must provide to FAS the names and addresses of any individuals known to be present at the time of discharge or unloading, or during the survey, who can verify the quantity of damaged or lost donated commodities or procured commodities;

(3) If the damage or loss occurred with respect to a bulk shipment on an ocean carrier, the recipient must ensure that the independent cargo surveyor:

(i) Observes the discharge of the cargo;

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

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

(iv) Advises on the quality of sweepings;

(v) Obtains copies of port or ocean carrier records, if possible, showing the quantity discharged; and

(vi) Notifies the recipient 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

(4) If the damage or loss occurred with respect to a container shipment on an ocean carrier, the recipient must ensure that the independent cargo surveyor lists the container numbers and seal numbers shown on the containers, indicates whether the seals were intact at the time the containers were opened, and notes whether the containers were in any way damaged.

(f) If a recipient has title to the donated commodities or procured commodities, and commodities valued in excess of \$5,000 are damaged at any time prior to their distribution or sale under the agreement, regardless of the party at fault, the recipient must 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 donated commodities or procured commodities. The value of damaged donated commodities must be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities, as well as such costs incurred by the recipient and paid by FAS. The value of damaged procured commodities must be determined on the basis of the commodity acquisition, transportation, and related costs incurred by the recipient and paid by FAS with respect to

such commodities. The recipient must inform FAS of the results of the inspection and indicate whether the damaged donated commodities or procured 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.

(g)(1) If a recipient has title to the donated commodities or procured commodities, the recipient must arrange for the recovery of that portion of the donated commodities or procured commodities designated as fit for the use authorized in the agreement. The recipient must dispose of donated commodities or procured 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 another non-food use; or

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

(2) A recipient must arrange for all U.S. Government markings to be obliterated or removed before the donated commodities or procured commodities are transferred by sale or donation under paragraph (g)(1) of this section.

(h) A recipient may retain any proceeds generated by the disposal of the donated commodities or procured commodities in accordance with paragraph (g)(1) of this section and must use the retained proceeds for expenses related to the disposal of the donated commodities or procured commodities and for activities specified in the agreement.

(i) A recipient must notify FAS immediately and provide detailed information about the actions taken in accordance with paragraph (g) of this section, including the quantities, values, and dispositions of donated commodities or procured commodities determined to be unfit.

**§ 1599.11 Claims for damage to or loss of donated or procured commodities.**

(a)(1) 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 donated commodities to the recipient. The recipient will be responsible for claims arising out of damage to or loss of a quantity of the donated commodities after the transfer of title to the donated commodities.

(2) The recipient will be responsible for claims arising out of damage to or loss of a quantity of the procured commodities after the transfer of title to the procured commodities from the commodity vendor(s) to the recipient.

(b) If a recipient has title to donated commodities or procured commodities that have been damaged or lost, and the value of the damaged or lost commodities is estimated to be in excess of \$20,000, the recipient must:

(1) Notify FAS immediately and provide detailed information about the circumstances surrounding such damage or loss, the quantity of damaged or lost commodities, and the value of the damage or loss;

(2) Promptly upon discovery of the damage or loss, initiate a claim arising out of such damage or loss, including, if appropriate, initiating an action to collect pursuant to a commercial insurance contract;

(3) Take all necessary action to pursue the claim diligently and within any applicable periods of limitations; and

(4) Provide to FAS copies of all documentation relating to the claim.

(c) If a recipient has title to donated commodities or procured commodities that have been damaged or lost, and the value of the damaged or lost commodities is estimated to be \$20,000 or less, the recipient must notify FAS in accordance with the agreement and provide detailed information about the damage or loss in the next report required to be filed under §1599.14(f)(1) or (2).

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

(2) The value of a claim for damaged donated commodities will be determined on the basis of the commodity acquisition, transportation, and related costs incurred by FAS with respect to such commodities, as well as such costs incurred by the recipient and paid by FAS, less any funds generated if such commodities are sold in accordance with § 1599.10(g)(1). The value of a claim for damaged procured commodities will be determined on the basis of the commodity acquisition, transportation, and related costs incurred by the recipient and paid by FAS with respect to such commodities, less any funds generated if such commodities are sold in accordance with § 1599.10(g)(1).



(e) If FAS determines that a recipient has not initiated a claim or is not exercising due diligence in the pursuit of a claim, FAS may require the recipient to assign its rights to initiate or pursue the claim to FAS. Failure by the recipient to initiate a claim or exercise due diligence in the pursuit of a claim will be considered by FAS during the review of applications for subsequent food assistance awards.

(f)(1) A recipient 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 must be expended in accordance with the agreement or for other 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 recipient paid for the transportation of the donated commodities or procured commodities or a portion thereof, FAS will use a portion of such funds to reimburse the recipient for such expense on a prorated basis.

**§ 1599.12 Use of donated or procured commodities, sale proceeds, FAS-provided funds, and program income.**

(a) A recipient must use the donated commodities or procured commodities, any sale proceeds, FAS-provided funds, interest, and program income in accordance with the agreement.

(b) A recipient must not use donated commodities or procured commodities, sale proceeds, FAS-provided funds, interest, or program income for any activity or any expense incurred by the recipient or a subrecipient prior to the start date of the period of

performance of the agreement or after the agreement is suspended or terminated, without the prior written approval of FAS.

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

(d) A recipient must not permit the distribution, handling, or allocation of donated commodities or procured commodities by the military forces of any government or insurgent group without the specific authorization of FAS.

(e) A recipient must not use sale proceeds, FAS-provided funds, interest, or program income to acquire goods and services, either directly or indirectly through another party, in a manner that violates a U.S. Government economic sanction program, as specified in the agreement.

(f)(1) A recipient may sell or barter donated commodities only if such sale or barter is provided for in the agreement or the recipient is disposing of damaged donated commodities as specified in § 1599.10(g). The recipient must sell donated commodities at a reasonable market price. The recipient must obtain approval of its proposed sale price from FAS before selling donated commodities. The recipient must use any sale proceeds, interest, program income, or goods or services derived from the sale or barter of the donated commodities only as provided in the agreement.

(2) A recipient may sell procured commodities only if the recipient is disposing of damaged procured commodities as specified in § 1599.10(g).

(g) A recipient must deposit and maintain all sale proceeds, FAS-provided funds, and program income in a bank account until they are used for a purpose authorized under the agreement or the FAS-provided funds are returned to FAS in accordance with § 1599.7(f)(6). The account must be insured unless it is in a country where insurance is unavailable. The account must be interest-bearing, unless one of the exceptions in 2 CFR 200.305(b)(8) applies or FAS determines that the requirement in this paragraph (g) would constitute an undue burden. The recipient must comply with the requirements in § 1599.7(f)(7) with regard to the deposit of advance payments by FAS.

(h)(1) Except as provided in paragraph (h)(2) of this section, a recipient may make adjustments within the agreement budget between direct cost line items without further approval, provided that the total amount of adjustments does not exceed the amount specified in the agreement. Adjustments beyond the limits in this paragraph (h) require the prior approval of FAS.

(2) A recipient must not transfer any funds budgeted for participant support costs, as defined in 2 CFR 200.75, to other categories of expense without the prior approval of FAS.

(i) A recipient may use sale proceeds, FAS-provided funds, or program income to purchase real or personal property only if local law permits the recipient to retain title to such property. However, a recipient must not use sale proceeds, FAS-provided funds, or program 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 recipient may use sale proceeds, FAS-provided funds, or program 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 or procured commodities, but only if the structure is not used in whole or in part for any religious or sectarian purposes while the donated commodities or procured commodities are stored in it. If the use of sale proceeds, FAS-provided funds, or program income to pay for repairs to or rehabilitation of such a structure is not specifically provided for in the agreement, the recipient must not use the sale proceeds, FAS-provided funds, or program income for this purpose until it receives written approval from FAS.

(j) A recipient must comply with 2 CFR 200.321 when procuring goods and services in the United States. When procuring goods and services outside of the United States, a recipient should endeavor to comply with 2 CFR 200.321 where practicable.

(k) A recipient must enter into a written contract with each provider of goods, services, or construction work that is valued at or above the Simplified Acquisition Threshold. Each such contract must require the provider to maintain adequate records to account for all donated commodities, funds, or both furnished to the provider by the recipient and to comply with any other applicable requirements that may be specified by FAS in the agreement. The recipient must submit a copy of each signed contract to FAS, as specified in the agreement.

**§ 1599.13 Monitoring and evaluation requirements.**

(a) A recipient will be responsible for designing a performance monitoring plan for the project, obtaining written approval of the plan from FAS before putting it into

effect, and managing and implementing the plan, unless otherwise specified in the agreement.

(b) A recipient must establish baseline values, annual targets, and life of activity targets for each performance indicator included in the recipient's approved performance monitoring plan, unless otherwise specified in the agreement.

(c) A recipient must inform FAS, in the manner and within the time period specified in the agreement, of any problems, delays, or adverse conditions that materially impair the recipient's ability to meet the objectives of the agreement. This notification must include a statement of any corrective actions taken or contemplated by the recipient, and any additional assistance requested from FAS to resolve the situation.

(d) A recipient will be responsible for designing an evaluation plan for the project, obtaining written approval of the plan from FAS before putting it into effect, and arranging for an independent third party to implement the evaluation, unless otherwise specified in the agreement. This evaluation plan will detail the evaluation purpose and scope, key evaluation questions, evaluation methodology, time frame, evaluation management, and cost. This plan will generally be based upon the evaluation plan that the recipient submitted to FAS as part of its application, pursuant to §1599.4(b)(6), unless the notice of funding opportunity specified that an evaluation plan was not required to be included in the application. The recipient must ensure that the evaluation plan:

(1) Is designed using the most rigorous methodology that is appropriate and feasible, taking into account available resources, strategy, current knowledge and evaluation practices in the sector, and the implementing environment;

(2) Is designed to inform management, activity implementation, and strategic decision-making;

(3) Utilizes analytical approaches and methodologies, based on the questions to be addressed, project design, budgetary resources available, and level of rigor and evidence required, which may be implemented through methods such as case studies, surveys, quasi-experimental designs, randomized field experiments, cost-effectiveness analyses, implementation reviews, or a combination of methods;

(4) Adheres to generally accepted evaluation standards and principles;

(5) Uses participatory approaches that seek to include the perspectives of diverse parties and all relevant stakeholders; and

(6) Where possible, utilizes local consultants and seeks to build local capacity in evaluation.

(e)(1) Unless otherwise provided in the agreement, a recipient must arrange for evaluations of the project to be conducted by an independent third party that:

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

(ii) Has staff with demonstrated methodological, cultural, and language competencies, and specialized experience in conducting evaluations of international development programs involving agriculture, trade, education, and nutrition, provided that FAS may determine that, for a particular agreement, the staff of the independent third party evaluator is not required to have specialized experience in conducting evaluations of programs involving one or more of these four areas.

(2) A recipient must provide a written certification to FAS that there is no real or apparent conflict of interest on the part of any recipient staff member or third party entity

designated or hired to play a substantive role in the evaluation of activities under the agreement.

(f) FAS will be considered a key stakeholder in all evaluations conducted as part of the agreement.

(g)(1) A recipient is responsible for establishing the required financial and human capital resources for monitoring and evaluation of activities under the agreement. The recipient must maintain a separate budget for monitoring and evaluation, with separate budget line items for dedicated recipient monitoring and evaluation staff and independent third party evaluation contracts.

(2) Personnel at the recipient's headquarters offices and field offices with specialized expertise and experience in monitoring and evaluation may be used by the recipient for dedicated monitoring and evaluation. Unless otherwise specified in the agreement or approved evaluation plan, all evaluations must be managed by the recipient's evaluation experts outside of the recipient's line management for the activities.

(h) FAS may independently conduct or commission an evaluation of a single agreement or an evaluation that includes multiple agreements. A recipient must cooperate, and comply with any demands for information or materials made in connection, with any evaluation conducted or commissioned by FAS. Such evaluations may be conducted by FAS internally or by an FAS-hired external evaluation contractor.

**§ 1599.14 Reporting and record keeping requirements.**

(a) A recipient must comply with the performance and financial monitoring and reporting requirements in the agreement and 2 CFR 200.327 through 200.329.

(b) A recipient must submit financial reports to FAS, by the dates and for the reporting periods specified in the agreement. Such reports must provide an accurate accounting of sale proceeds, FAS-provided funds, interest, program income, and voluntary committed cost sharing or matching contributions.

(c)(1) A recipient must submit performance reports to FAS, by the dates and for the reporting periods specified in the agreement. These reports must include the information required in 2 CFR 200.328(b)(2), including additional pertinent information regarding the recipient's progress, measured against established indicators, baselines, and targets, towards achieving the expected results specified in the agreement. This reporting must include, for each performance indicator, a comparison of actual accomplishments with the baseline and the targets established for the period. When actual accomplishments deviate significantly from targeted goals, the recipient must provide an explanation in the report.

(2) A recipient must ensure the accuracy and reliability of the performance data submitted to FAS in performance reports. At any time during the period of performance of the agreement, FAS may review the recipient's performance data to determine whether it is accurate and reliable. The recipient must comply with all requests made by FAS or an entity designated by FAS in relation to such reviews.

(d) Baseline, interim, and final evaluation reports are required for all agreements, unless otherwise specified in the agreement. The reports must be submitted in accordance with the timeline provided in the FAS-approved evaluation plan. Evaluation reports submitted to FAS may be made public in an effort to increase accountability and transparency and share lessons learned and best practices.



(e)(1) A recipient must, 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 the commodities will be delivered. The date of export is the date that the ocean carrier carrying the donated commodities sails from the final U.S. load port.

(2) A recipient must, if it has obtained procured commodities requiring ocean transportation, within 30 days after export of all or a portion of the procured 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 the commodities will be delivered. The date of export is the date that the ocean carrier carrying the procured commodities sails from the load port in the target region.

(f)(1) A recipient must submit reports to FAS, using a form prescribed by FAS, covering the receipt, handling, and disposition of the donated commodities or procured commodities. Such reports must be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the donated commodities or procured 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 recipient must submit to FAS, using a form prescribed by FAS, reports covering the

receipt and use of the sale proceeds when the donated commodities were sold, the goods and services derived from barter when the donated commodities were bartered, and program income. Such reports must be submitted to FAS, by the dates and for the reporting periods specified in the agreement, until all of the sale proceeds and program income have been disbursed and reported to FAS. When reporting financial information, the recipient must include the amounts in U.S. dollars and the exchange rate if proceeds are held in local currency.

(g) If requested by FAS, a recipient must provide to FAS additional information or reports relating to the agreement.

(h) If a recipient requires an extension of a reporting deadline, it must ensure that FAS receives an extension request at least five business days prior to the reporting deadline. FAS may decline to consider a request for an extension that it receives after this time period. FAS will consider requests for reporting deadline extensions on a case by case basis and make a decision based on the merits of each request. FAS will consider factors such as unforeseen or extenuating circumstances and past performance history when evaluating requests for extensions.

(i) A recipient must retain records and permit access to records in accordance with the requirements of 2 CFR 200.333 through 200.337. The date of submission of the final expenditure report, as referenced in 2 CFR 200.333, will be the final date of submission of the reports required by paragraphs (f)(1) and (2) of this section, as prescribed by FAS. The recipient must retain copies of and make available to FAS all sales receipts, contracts, or other documents related to the procurement of qualified commodities, the sale or barter of donated commodities, and any goods or services derived from such

barter, as well as records of dispatch received from ocean carriers or overland transportation companies.

**§ 1599.15 Subrecipients.**

(a) A recipient may utilize the services of a subrecipient to implement activities under the agreement if this is provided for in the agreement. The subrecipient may receive donated commodities or procured commodities, sale proceeds, FAS-provided funds, program income, or other resources from the recipient for this purpose. The recipient must enter into a written subagreement with the subrecipient and comply with the applicable provisions of 2 CFR 200.331. The recipient must provide a copy of such subagreement to FAS, in the manner set forth in the agreement, prior to the transfer of any donated commodities or procured commodities, sale proceeds, FAS-provided funds, or program income to the subrecipient.

(b) A recipient must include the following requirements in a subagreement:

(1) The subrecipient is required to comply with the applicable provisions of this part and 2 CFR parts 200 and 400. The applicable provisions are those that relate specifically to subrecipients, as well as those relating to non-Federal entities that impose requirements that would be reasonable to pass through to a subrecipient because they directly concern the implementation by the subrecipient of one or more activities under the agreement. If there is a question about whether a particular provision is applicable, FAS will make the determination.

(2) The subrecipient is prohibited from using sale proceeds, FAS-provided funds, interest, or program income to acquire goods and services, either directly or indirectly

through another party, in a manner that violates a U.S. Government economic sanction program, as specified in the agreement.

(3) The subrecipient must pay to the recipient the value of any donated commodities or procured commodities, sale proceeds, FAS-provided funds, interest, or program income that are not used in accordance with the subagreement, or that are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(4) In accordance with § 1599.19 and 2 CFR 200.501(h), a description of the applicable compliance requirements and the subrecipient's compliance responsibility. Methods to ensure compliance may include pre-award audits, monitoring during the agreement, and post-award audits.

(c) A recipient must monitor the actions of a subrecipient as necessary to ensure that donated commodities or procured commodities, sale proceeds, FAS-provided funds, and program income provided to the subrecipient are used for authorized purposes in compliance with applicable U.S. Federal laws and regulations and the subagreement and that performance indicator targets are achieved for both activities and results under the agreement.

#### **§ 1599.16 Noncompliance with an agreement.**

If a recipient fails to comply with a Federal statute or regulation or the terms and conditions of the agreement, and FAS determines that the noncompliance cannot be remedied by imposing additional conditions, FAS may take one or more of the actions set forth in 2 CFR 200.338, including initiating a claim as a remedy. FAS may also initiate a claim against a recipient if the donated commodities or procured commodities are damaged or lost, or the sale proceeds, goods received through barter, FAS-provided

funds, interest, or program income are misused or lost, due to an action or omission of the recipient.

**§ 1599.17 Suspension and termination of agreements.**

(a) An agreement or subagreement may be suspended or terminated in accordance with 2 CFR 200.338 or 200.339. FAS may suspend or terminate an agreement if it determines that:

(1) One of the bases in 2 CFR 200.338 or 200.339 for termination or suspension by FAS has been satisfied;

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

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

(b) If an agreement is terminated, the recipient:

(1) Is responsible for the security and integrity of any undistributed donated commodities or procured commodities and must dispose of such commodities only as agreed to by FAS;

(2) Is responsible for any sale proceeds, FAS-provided funds, interest, or program income that have not been disbursed and must use or return them only as agreed to by FAS; and

(3) Must comply with any closeout and post-closeout procedures specified in the agreement and 2 CFR 200.343 and 200.344.

**§ 1599.18 Opportunities to object and appeals.**

(a) FAS will provide an opportunity to a recipient to object to, and provide information and documentation challenging, any action taken by FAS pursuant to §1599.16. FAS will comply with any requirements for hearings, appeals, or other administrative proceedings to which the recipient is entitled under any other statute or regulation applicable to the action involved. For example, if the action taken by FAS pursuant to § 1599.16 is to initiate suspension or debarment proceedings as authorized under 2 CFR parts 180 and 417, then the requirements in 2 CFR parts 180 and 417 will apply instead of the requirements in this section. In the absence of other applicable statutory or regulatory requirements, the requirements set forth in this section will apply.

(b) The recipient must submit its objection in writing, along with any documentation, to the official specified in the agreement within 30 days after the date of FAS's written notification to the recipient of the FAS action being challenged. This official will endeavor to notify the recipient of his or her determination (the initial determination) within 60 days after the date that FAS received the recipient's written objection.

(c) The recipient may appeal the initial determination to the Administrator, FAS. An appeal must be in writing and be submitted to the Office of the Administrator within 30 days after the date of the initial determination. The recipient may submit additional documentation with its appeal.

(d) The Administrator will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after the date that FAS received the appeal. The determination of the

Administrator will be the final determination of FAS. The recipient must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by the Administrator.

**§ 1599.19 Audit requirements.**

(a) The audit requirements in subpart F of 2 CFR part 200 apply to recipients and subrecipients under this part other than those that are for-profit entities, foreign public entities, or foreign organizations.

(b) A recipient or subrecipient that is a for-profit entity or a foreign organization, and that expends, during its fiscal year, a total of at least the audit requirement threshold in 2 CFR 200.501 in Federal awards, is required to obtain an audit. Such a recipient or subrecipient has the following two options to satisfy the requirement in this paragraph

(b):

(1)(i) A financial audit of the agreement or subagreement, in accordance with the Government Auditing Standards issued by the United States Government Accountability Office (GAO), if the recipient or subrecipient expends Federal awards under only one FAS program during such fiscal year; or

(ii) A financial audit of all Federal awards from FAS, in accordance with GAO's Government Auditing Standards, if the recipient or subrecipient expends Federal awards under multiple FAS programs during such fiscal year; or

(2) An audit that meets the requirements contained in subpart F of 2 CFR part 200.

(c) A recipient or subrecipient that is a for-profit entity or a foreign organization, and that expends, during its fiscal year, a total that is less than the audit requirement

threshold in 2 CFR 200.501 in Federal awards, is exempt from requirements under this section for an audit for that year, except as provided in paragraphs (d) and (f) of this section, but it must make records available for review by appropriate officials of Federal agencies.

(d) FAS may require an annual financial audit of an agreement or subagreement when the audit requirement threshold in 2 CFR 200.501 is not met. In that case, FAS must provide funds under the agreement for this purpose, and the recipient or subrecipient, as applicable, must arrange for such audit and submit it to FAS.

(e) When a recipient or subrecipient that is a for-profit entity or a foreign organization is required to obtain a financial audit under this section, it must provide a copy of the audit to FAS within 60 days after the end of its fiscal year.

(f) FAS, the USDA Office of Inspector General, or GAO may conduct or arrange for additional audits of any recipients or subrecipients, including for-profit entities and foreign organizations. Recipients and subrecipients must promptly comply with all requests related to such audits. If FAS conducts or arranges for an additional audit, such as an audit with respect to a particular agreement, FAS will fund the full cost of such an audit, in accordance with 2 CFR 200.503(d).

#### **§ 1599.20 Paperwork Reduction Act.**

The information collection requirements contained in this part have been approved by OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and have been assigned OMB control number 0551-0035. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.



Dated: October 29, 2019.

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Ken Isley,  
Administrator,  
Foreign Agricultural Service.

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