

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### 2 CFR Chapter IV

#### 7 CFR Part 3017

RIN 0505-AA11

#### Office of the Chief Financial Officer; Department of Agriculture Implementation of OMB Guidance on Nonprocurement Debarment and Suspension

**AGENCY:** Office of the Chief Financial Officer, USDA.

**ACTION:** Interim rule.

**SUMMARY:** The Department of Agriculture (USDA) is establishing a new part 417 on nonprocurement debarment and suspension at 2 CFR Chapter 4 that adopts and supplements the Office of Management and Budget (OMB) guidance at 2 CFR part 180 as USDA's policies and procedures for nonprocurement debarment and suspension. Part 417 of 2 CFR replaces the existing USDA implementation of the governmentwide common rule on nonprocurement debarment and suspension at 7 CFR part 3017, and 7 CFR part 3017 is removed. This action also modifies exclusions from covered transactions and codifies a statutory permanent debarment provision. This action also finalizes an earlier proposed rule to eliminate an appeal to a USDA administrative law judge (ALJ) of a suspension or debarment decision. USDA also makes adjustments to its current exclusions from covered transactions. Finally, this interim rule implements Section 14211 of the Food, Conservation, and Energy Act of 2008, Public Law 110-246 (7 U.S.C. 2209j), which requires the Secretary to debar permanently from participation in USDA programs those convicted of having knowingly committed fraud in USDA programs.

**DATES:** This interim final rule is effective September 22, 2010, unless written adverse comments or written notice of intent to submit adverse comments are received on or before July 26, 2010.

**ADDRESSES:** Comments may be submitted by any of the following methods: Federal eRulemaking Portal: Go to <http://www.regulations.gov>, select "Department of Agriculture—All" from the agency drop-down menu, select "Proposed Rules" from the document type menu, and then click "Submit." In the document title column, select the proposed rule with "2 CFR 417, Implementation of OMB Guidance on Nonprocurement Debarment and Suspension" in the title to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

*E-mail:* [peter.laub@cfo.usda.gov](mailto:peter.laub@cfo.usda.gov) or Fax: (202) 690-1529. Include Regulatory Information Number (RIN) 0505-AA11 in the subject line of the message.

**Postal Mail/Commercial Delivery:** Please send four copies of your comments (an original and three copies) to Peter Laub, OCFO/CTGPD Room 3451-S, Stop 9010, 1400 Independence Avenue, SW., Washington, DC 20250-9010.

All comments submitted must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Peter Laub, (202) 720-1554; Fax: (202) 690-1529, E-mail: [peter.laub@usda.gov](mailto:peter.laub@usda.gov).

**SUPPLEMENTARY INFORMATION:**

*Background:* On August 31, 2005, OMB issued interim final guidance for governmentwide nonprocurement debarment and suspension (70 FR 51863). This guidance, located at 2 CFR part 180, is substantively the same as the common rule but is published in a form that each agency can adopt, thus eliminating the need for each agency to publish its separate version of the same rule. It also facilitates the ability to update governmentwide requirements without each agency having to re-

promulgate its own rules. On November 15, 2006, OMB published a final rule adopting the interim final guidance with changes (71 FR 66431).

USDA's current regulation on nonprocurement debarment and suspension is found at 7 CFR part 3017. In accordance with OMB's guidance, this rule places USDA's nonprocurement debarment and suspension regulations in Title 2 of the CFR, along with other agencies' nonprocurement debarment and suspension regulations. The new regulation at 2 CFR part 417 adopts the OMB guidelines and includes, with few exceptions, the same additions and clarifications that USDA made to the governmentwide common rule on this subject issued November 26, 2003 (68 FR 66534, 66562). In addition to those additions and clarifications, USDA is eliminating the ALJ appeal processes for suspension and debarment, which were authorized in 7 CFR 3017.765 and 3017.890, respectively. In 68 FR 66562, USDA stated an intention to remove the ALJ appeal. The Department did not receive any adverse comments regarding its intention to remove the ALJ appeals. The Department decided to remove the appeal to an ALJ to conform to the same process as other Federal agencies.

USDA is replacing the exclusion from covered transaction status for nonprocurement transactions currently found in paragraph (i) of 7 CFR section 3017.215 with narrower exclusions in paragraphs (a)(8) and (9) of 2 CFR section 417.215. The exclusion from covered transaction status under 7 CFR 3017.215(i) applied to any transactions below the primary tier covered transaction in USDA's export and foreign assistance programs, with one exception relating to the Market Access Program. USDA is also replacing the exclusion from covered transaction status for procurement transactions currently found in subsection (c) of 7 CFR 3017.220 with narrower exclusions in paragraphs (c) and (d) of 2 CFR section 417.220. The exclusion from covered transaction status under 7 CFR 3017.220(c) applied to any procurement transactions below the primary tier covered transaction in USDA's export and foreign assistance programs, with the exception of a contract for the procurement of ocean transportation in connection with USDA's foreign assistance programs.

The exclusions from covered transaction status in 2 CFR 417.215(a)(8) and (9) and 417.220(c) and (d) will apply only to USDA's foreign assistance programs and two categories of USDA's export programs, the export credit guarantee programs and the direct credit programs. Furthermore, the exclusions will apply only to lower tier transactions that will be implemented outside the United States. In two newly added sections, 2 CFR 417.221 and 417.222, USDA explains how the exclusions from covered transaction status for its foreign assistance, export credit guarantee and direct credit programs will apply. The examples of transactions provided in these sections are intended to be illustrative but not exhaustive.

At the current time, USDA is implementing two foreign assistance programs, the Food for Progress Program and the McGovern-Dole International Food for Education and Child Nutrition Program. USDA also has authority to carry out foreign assistance activities under section 416(b) of the Agricultural Act of 1949. With regard to USDA's foreign assistance programs, the vast majority of transactions below the primary tier covered transactions are carried out in foreign countries.

For example, a private voluntary organization receiving a grant under the McGovern-Dole International Food for Education and Child Nutrition Program might enter into an agreement with a foreign subrecipient that would hire a construction company to build a school in Afghanistan. In the absence of the exclusions from covered transaction status in 2 CFR 417.215(a)(8) and 417.220(c), the private voluntary organization would have to insert compliance language into its agreement with the subrecipient, which would be a participant in a covered transaction at the first lower tier, and require the subrecipient to insert appropriate language into its contract with the construction company. This contract would most likely be written in the foreign language. This would place a tremendous burden on the private voluntary organization. Entities in some countries may not have ready access to the Excluded Parties List System (EPLS). Furthermore, due to language and logistical difficulties, it would be very difficult for USDA to monitor compliance by participants in lower tier transactions who are located and carrying out activities in foreign countries. The exceptions in 2 CFR 417.215(a)(8) and 417.220(c) have been narrowly drawn to recognize the realities of foreign transactions and to avoid an adverse impact upon the

implementation of USDA's foreign assistance programs.

Currently, the only export credit guarantee program operated by USDA is the Commodity Credit Corporation (CCC) Export Credit Guarantee Program, commonly known as the GSM-102 program. USDA does not currently operate a direct credit program. Under the GSM-102 program, CCC guarantees repayment of certain loans extended to foreign bank obligors. The guarantee itself is originally issued in favor of an exporter of U.S. agricultural commodities, and in the vast majority of cases, is assigned by such exporter to a U.S. financial institution. The currently authorized but dormant direct credit sales program authorizes CCC to finance commercial export sales of privately owned stocks of commodities.

For example, under GSM-102, a CCC guarantee would exist in favor of a U.S. exporter or U.S. financial institution, as assignee of such exporter. At inception, such a guarantee would contemplate a U.S. exporter, a foreign importer, a CCC-approved foreign bank, and, in all likelihood, an assignee U.S. financial institution. The guarantee would extend to certain obligations of the CCC-approved foreign bank. To the extent the foreign bank and the importer are considered participants in a covered transaction at the first lower tier, then, in the absence of an exception, the foreign bank and the importer would each be required to adhere to the provisions of 2 CFR 180.300 when entering into a covered transaction with another person at the next lower tier. This would have the effect of requiring each foreign bank and each importer involved in a GSM-102 transaction, with respect to any person with whom it enters into a lower tier covered transaction, to check the EPLS, collect a certification, or add a clause or condition to the covered transaction with that person. Similar concerns would arise with respect to the direct credit sales program, in the event it became active.

It would be difficult in the extreme to monitor compliance by each importer participant and foreign bank participant with respect to each person with whom it entered into a lower tier covered transaction. More importantly, the inability to ensure compliance with such a requirement could readily cause U.S. financial institutions to opt out of participation in the program. As nearly 100 percent of all GSM-102 transactions currently involve a U.S. financial institution as assignee of the program, such reticence on the part of the U.S. financial institutions would effectively

cause the demise of the program altogether.

While there will be no covered transactions below the primary tier covered transaction in USDA's foreign assistance programs, export credit guarantee programs, and direct credit programs, USDA will still require primary tier participants in these programs to check the EPLS and not to enter into a nonprocurement transaction or a procurement contract that is expected to equal or exceed \$25,000 at the first lower tier with a person who is excluded or disqualified. Complying with this requirement will not be impracticable or impose undue hardship upon the primary tier participant.

USDA is also eliminating the exclusion from covered transaction status for nonprocurement transactions currently found in subsection (j) of 7 CFR 3017.215. This exclusion applied to any transactions under USDA's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities. With regard to USDA's conservation and commodity programs, after approximately 20 years, USDA has determined that the interests of the United States are not adequately protected if persons who have been suspended or debarred are allowed to participate in these programs. With respect to USDA's warehouse licensing programs, these would be excluded from covered transaction status pursuant to 2 CFR 417.215(a)(3), which excludes the receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety.

It is important to note that, consistent with its predecessor in 7 CFR part 3017, this rule excludes from covered transaction status those nonprocurement transactions provided as individual benefits, sometimes referred to as personal entitlements, which are received without regard to an individual's present responsibility. An individual debarred or suspended from participation in a covered transaction under this part, then, would not be prohibited on that basis from participation in a transaction that involves Federal funds but does not have covered transaction status under this part. To clarify further, an individual debarred or suspended nevertheless remains eligible to participate in a USDA transaction excluded from covered transaction status by this rule. For instance, based on a criminal conviction in connection

with the performance of a grant related to another Federal agency's program, an individual may be debarred from participation in all covered transactions governmentwide. Despite being debarred, however, the individual would remain eligible to participate in a USDA transaction excluded from covered transaction status here, such as the receipt of individual or household benefits under the USDA's Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program). This particular exemption is also consistent with that established in Section 1(c) of Executive Order 12549, Debarment and Suspension, the basis for the governmentwide nonprocurement debarment and suspension authorities codified here, which specifically "does not cover \* \* \* benefits to an individual as a personal entitlement." Examples of other noncovered transactions, for purposes of nonprocurement debarment and suspension, include participation as an authorized retailer in SNAP or as a retail vendor in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), because exclusion under this part is superseded by other law, *i.e.*, comprehensive statutory disqualification provisions are in place for these entities that would conflict with the application of this part.

In addition, this rule codifies at 2 CFR 417.865(b) the Secretary's recently enacted statutory authority to debar permanently a specific class of participants involved in USDA programs. Section 14211(b)(2) of the Food, Conservation, and Energy Act of 2008, Public Law 110-246 (7 U.S.C. 2209j), directs the Secretary to debar permanently from subsequent participation in USDA programs an "individual, organization, corporation, or other entity" convicted of a felony for "knowingly defrauding" the USDA related to any of its programs. While a conviction may be imposed by a State, local, or Federal jurist, the underlying crime must encompass a fraud committed with knowledge by the defendant. Permanent debarment is also statutorily limited—extending only to a felon's future participation in USDA programs.

Section 14211(b)(2) limits the effect of permanent debarments imposed by the Secretary using this authority, stating that they "shall not apply with respect to participation in domestic food assistance programs (as defined by the Secretary)." In view of the definitional discretion afforded the Secretary, this rule includes an inclusive rather than exhaustive list of those domestic food

assistance programs. We note that the listed programs encompass benefits provided under domestic food assistance programs to *individuals or households* participating in and receiving benefits under those listed programs. In contrast, the rule provides that a business, organization, corporation, *etc.*, debarred by the Secretary using this authority would be prohibited from participation in the listed programs. Thus, for example, the Secretary could use the authority in § 417.865(b) to debar from future participation in USDA programs a day care home provider convicted of knowingly defrauding the USDA while participating in the Child and Adult Care Food Program. As an individual, the day care home provider and her household would remain eligible to participate in USDA's domestic food assistance programs as recipients—for example, receiving benefits under the Supplemental Nutrition Assistance Programs. Conversely, WIC retail vendors and other nonbeneficiary entities in the domestic food assistance programs are not considered participants and are therefore subject to permanent debarment under § 417.865(b).

In light of the new 2 CFR part 417, USDA is removing 7 CFR part 3017, which is the current location for USDA's nonprocurement debarment and suspension regulations.

#### **Executive Order 12866 "Regulatory Planning and Review"**

OMB has determined this rule to be "Nonsignificant."

#### **Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))**

This regulatory action will not have a significant, adverse impact on a substantial number of small entities.

#### **Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104-4)**

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

#### **Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)**

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### **Federalism (Executive Order 13132)**

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have

substantial direct effects on the 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.

#### **List of Subjects**

##### **2 CFR Part 417**

Debarment and suspension (nonprocurement), Grant programs (Agriculture).

##### **7 CFR Part 3017**

Debarment and suspension (nonprocurement), Grant programs (Agriculture).

■ For the reasons stated in the preamble, under the authority 2 CFR 180.20, USDA establishes 2 CFR Chapter IV and amends 7 CFR Chapter XXX as follows:

### **TITLE 2—GRANTS AND AGREEMENTS**

■ 1. Add Chapter IV, consisting of part 417, to Subchapter B to read as follows:

#### **Chapter IV—Department of Agriculture**

#### **PART 417—NONPROCUREMENT DEBARMENT AND SUSPENSION**

##### **Sec.**

417.10 What does this part do?

417.20 Does this part apply to me?

417.30 What policies and procedures must I follow?

##### **Subpart A—General**

417.137 Who in the USDA may grant an exception to let an excluded person participate in a covered transaction?

##### **Subpart B—Covered Transactions**

417.215 Which nonprocurement transactions, in addition to those listed in 2 CFR 180.215, are not covered transactions?

417.220 Are any procurement contracts included as covered transactions?

417.221 How would the exclusions from coverage for the USDA's foreign assistance programs apply?

417.222 How would the exclusions from coverage for the USDA's export credit guarantee and direct credit programs apply?

##### **Subpart C—Responsibilities of Participants Regarding Transactions**

417.332 What methods must I use to pass down requirements to participants in lower-tier covered transactions with whom I intend to do business?

##### **Subpart D—Responsibilities of USDA Officials Regarding Transactions**

417.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

**Subpart E—[Reserved]****Subpart F—[Reserved]****Subpart G—Suspension**

417.755 When will I know whether the USDA suspension is continued or terminated?

**Subpart H—Debarment**

417.800 What are the USDA causes for debarment?

417.865 How long may my debarment last?

417.870 When do I know if the USDA debarment official debar me?

**Subpart I—Definitions**

417.930 Debarment official (USDA supplement to governmentwide definition at 2 CFR 180.930).

417.1010 Suspending official (USDA supplement to governmentwide definition at 2 CFR 180.1010).

**Subpart J—[Reserved]**

**Authority:** 5 U.S.C. 301; Pub. L. 101–576, 104 Stat. 2838; Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); 7 U.S.C. 2209j; E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12698 (3 CFR, Comp., p. 235); 7 CFR 2.28.

**§ 417.10 What does this part do?**

This part adopts the OMB guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the USDA policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the USDA to the OMB guidance, as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103–355, 108 Stat. 3327).

**§ 417.20 Does this part apply to me?**

Through this part, pertinent portions of the OMB guidance in Subparts A through I of 2 CFR part 180 (*see* table at 2 CFR 180.100(b)) apply to you if you are a:

(a) Participant or principal in a “covered transaction” (*see* Subpart B of 2 CFR part 180 and the definition of “nonprocurement transaction” at 2 CFR 180.970, as supplemented by §§ 417.215 and 417.220 of this part);

(b) Respondent in a USDA debarment and suspension action;

(c) USDA debarment or suspension official; or

(d) USDA grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

**§ 417.30 What policies and procedures must I follow?**

The USDA policies and procedures that you must follow are the policies and procedures specified in this regulation and each applicable section of the OMB guidance in Subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (*i.e.*, 2 CFR 180.220) as supplemented by section 220 in this part (*i.e.*, § 417.220). For any section of OMB guidance in Subparts A through I of 2 CFR part 180 that has no corresponding section in this part, USDA policies and procedures are those in the OMB guidance.

**Subpart A—General****§ 417.137 Who in the USDA may grant an exception to let an excluded person participate in a covered transaction?**

Within the USDA, a debarment official may grant an exception to let an excluded person participate in a covered transaction as provided under 2 CFR 180.135.

**Subpart B—Covered Transactions****§ 417.210 Which nonprocurement transactions are covered transactions?**

All nonprocurement transactions, as defined in § 417.970, are covered transactions unless listed in § 417.215.

**§ 417.215 Which nonprocurement transactions, in addition to those listed in 2 CFR 180.215, are not covered transactions?**

(a) *Transactions not covered.* In addition to the nonprocurement transactions listed in 2 CFR 180.215, the following nonprocurement transactions are not covered transactions:

(1) An entitlement or mandatory award required by a statute, including a lower tier entitlement or mandatory award that is required by a statute.

(2) The export or substitution of Federal timber governed by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.* (The “Export Act”), which prevents a debarred person from entering into any contract for the purchase of unprocessed timber from Federal lands. *See* 16 U.S.C. 620(d)(1)(A).

(3) The receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety, and animal and plant health and safety.

(4) The receipt of official grading and inspection services, animal damage

control services, public health and safety inspection services, and animal and plant health and safety inspection services.

(5) If the person is a State or local government, the provision of official grading and inspection services, animal damage control services, animal and plant health and safety inspection services.

(6) The receipt of licenses, permits, or certificates under regulatory programs conducted in the interest of ensuring fair trade practices.

(7) Permits, licenses, exchanges and other acquisitions of real property, rights of way, and easements under natural resource management programs.

(8) Any transaction to be implemented outside the United States that is below the primary tier covered transaction in a USDA foreign assistance program.

(9) Any transaction to be implemented outside the United States that is below the primary tier covered transaction in a USDA export credit guarantee program or direct credit program.

(b) *Limited requirement to check EPLS.* Notwithstanding the fact that transactions to be implemented outside the United States that are below the primary tier covered transaction in a USDA foreign assistance program, export credit guarantee program or direct credit program are not covered transactions, pursuant to paragraphs (a)(8) and (9) of this section, primary tier participants under these programs must check the EPLS prior to entering into any transaction with a person at the first lower tier and shall not enter into such a transaction if the person is excluded or disqualified under the EPLS.

(c) *Exception.* A cause for suspension or debarment under § 180.700 or 180.800 of this title (as supplemented by § 417.800) may be based on the actions of a person with respect to a procurement or nonprocurement transaction under a USDA program even if such transaction has been excluded from covered transaction status by this section or § 417.220.

**§ 417.220 Are any procurement contracts included as covered transactions?**

(a) Covered transactions under this part:

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (*see* appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 417.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of a USDA official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

(c) Any procurement contract to be implemented outside the United States that is below the primary tier covered transaction in a USDA foreign assistance program is not a covered transaction, notwithstanding the provisions in paragraphs (a) and (b) of this section.

(d) Any procurement contract to be implemented outside the United States that is below the primary tier covered transaction in a USDA export credit guarantee program or direct credit program is not a covered transaction, notwithstanding the provisions in paragraphs (a) and (b) of this section.

(e) Notwithstanding the fact that procurement contracts to be implemented outside the United States that are below the primary tier covered transaction in a USDA foreign assistance program, export credit guarantee program or direct credit program are not covered transactions, pursuant to paragraphs (c) and (d) of this section, primary tier participants under these programs must check the EPLS prior to entering into any procurement contract that is expected to equal or exceed \$25,000 with a person at the first lower tier and shall not enter into such a procurement contract if the person is excluded or disqualified under the EPLS.

**§ 417.221 How would the exclusions from coverage for the USDA's foreign assistance programs apply?**

The primary tier covered transaction would be the food aid grant agreement entered into between USDA and a program participant, such as a U.S. private voluntary organization. USDA would have to check the EPLS before entering into the food aid grant agreement to ensure that the U.S. private voluntary organization that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier might

be a subrecipient agreement between the U.S. private voluntary organization and a foreign subrecipient of the commodities that were provided under the food aid grant agreement. Pursuant to § 417.215(a)(8), this nonprocurement transaction would not be a covered transaction. In addition, a transaction at the first lower tier might be a procurement contract entered into between the U.S. private voluntary organization and a foreign entity to provide supplies or services that are expected to equal or exceed \$25,000 in value and that are needed by such organization to implement activities under the food aid grant agreement. Pursuant to § 417.220(c), this procurement contract would not be a covered transaction. However, pursuant to §§ 417.215(b) and 417.220(e), the U.S. private voluntary organization would be prohibited from entering into, at the first lower tier, an agreement with a subrecipient or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

**§ 417.222 How would the exclusions from coverage for USDA's export credit guarantee and direct credit programs apply?**

(a) *Export credit guarantee program.* In the case of the export credit guarantee program, the primary tier covered transaction would be the guarantee issued by the USDA to a U.S. exporter. The U.S. exporter usually assigns the guarantee to a U.S. financial institution, and this would create another primary tier covered transaction between USDA and the U.S. financial institution. USDA would have to check the EPLS before issuing a guarantee or accepting a guarantee assignment to ensure that the U.S. exporter or financial institution that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier under the export credit guarantee program might be a payment obligation of a foreign bank to the U.S. exporter to pay on behalf of the importer for the exported U.S. commodities that are covered by the guarantee. Similarly, a transaction at the first lower tier might be a payment obligation of a foreign bank under an instrument, such as a loan agreement or letter of credit, to the U.S. financial institution assigned the guarantee, which has paid the exporter for the exported U.S. commodities and, in so doing, issued a loan to the foreign bank, which the foreign bank is obligated to repay on deferred payment terms. Pursuant to § 417.215(a)(9), these nonprocurement transactions would not be covered transactions. In addition, a

transaction at the first lower tier under the export credit guarantee program might be a procurement contract (*i.e.*, a contract for the purchase and sale of goods) that is expected to equal or exceed \$25,000 entered into between the U.S. exporter and the foreign importer for the U.S. commodities, the payment for which is covered by the guarantee. Pursuant to § 417.220(d), this procurement contract would not be a covered transaction. However, pursuant to §§ 417.215(b) and 417.220(e), the U.S. exporter or U.S. financial institution would be prohibited from entering into, at the first lower tier, an agreement with an importer (or intervening purchaser) or foreign bank or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

(b) *Direct credit program.* In the case of the direct credit program, the primary tier covered transaction would be the financing agreement between the USDA and the U.S. exporter. USDA purchases the exporter's account receivable in a particular transaction pursuant to the financing agreement. On occasion, such transaction may contemplate a payment obligation of a U.S. or foreign bank to make the required payments. USDA would have to check the EPLS before entering into a financing agreement or accepting such a payor to ensure that the U.S. exporter or the bank, if any, that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier might be a payment obligation of the importer to pay the exporter for the exported U.S. commodities that are covered by the financing agreement. Pursuant to § 417.215(a)(9), this nonprocurement transaction would not be a covered transaction. In addition, a transaction at the first lower tier might be a procurement contract that is expected to equal or exceed \$25,000 entered into between the U.S. exporter and the foreign importer for the U.S. commodities, the payment for which is covered by the financing agreement. Pursuant to § 417.220(d), this procurement contract would not be a covered transaction. However, pursuant to §§ 417.215(b) and 417.220(e), the U.S. exporter would be prohibited from entering into, at the first lower tier, an agreement with an importer (or intervening purchaser) or bank, or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

### Subpart C—Responsibilities of Participants Regarding Transactions

#### § 417.332 What methods must I use to pass down requirements to participants in lower tier covered transactions with whom I intend to do business?

You as a participant must include a term or condition in lower tier covered transactions requiring lower tier participants to comply with Subpart C of the OMB guidance in 2 CFR part 180, as supplemented by Subpart C of this part.

### Subpart D—Responsibilities of Department of Agriculture Officials Regarding Transactions

#### § 417.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

To communicate to a participant the requirements described in 2 CFR 180.435, you must include a term or condition in the transaction that requires the participant's compliance with Subpart C of 2 CFR part 180, as supplemented by Subpart C of this part, and requires the participant to include a similar term or condition in lower tier covered transactions.

### Subpart E—[Reserved]

### Subpart F—[Reserved]

### Subpart G—Suspension

#### § 417.755 When will I know whether the USDA suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 180.725, even when you make a submission before the 30 days expire.

### Subpart H—Debarment

#### § 417.800 What are the USDA causes for debarment?

A Federal agency may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 180.135;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 180.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

#### § 417.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the

cause(s) upon which your debarment is based. Generally, debarment should not exceed 3 years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in 2 CFR 180.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed 5 years.

(d) The Secretary shall permanently debar from participation in USDA programs any individual, organization, corporation, or other entity convicted of a felony for knowingly defrauding the United States in connection with any program administered by USDA.

(1) *Reduction.* If the Secretary considers it appropriate s/he may reduce a debarment under this subsection to a period of not less than 10 years.

(2) *Exemption.* A debarment under this subsection shall not apply with regard to participation in USDA domestic food assistance programs. For purposes of this paragraph, participation in a domestic food assistance program does not include acting as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC), or as a nonbeneficiary entity in any of the domestic food assistance programs. The programs include:

(i) Special Nutrition Assistance Program, 7 U.S.C. 2011, *et seq.*;

(ii) Food Distribution Program on Indian Reservations, 7 U.S.C. 2013(b);

(iii) National School Lunch Program, 42 U.S.C. 1751, *et seq.*;

(iv) Summer Food Service Program for Children, 42 U.S.C. 1761; Child and Adult Care Food Program, 42 U.S.C. 1766;

(v) Special Milk Program for Children, 42 U.S.C. 1772; School Breakfast Program, 42 U.S.C. 1773;

(vi) Special Supplemental Nutrition Program for Women, Infants, and Children, 42 U.S.C. 1786;

(vii) Commodity Supplemental Food Program, 42 U.S.C. 612c note;

(viii) WIC Farmers Market Nutrition Program, 42 U.S.C. 1786;

(ix) Senior Farmers' Market Nutrition Program, 7 U.S.C. 3007; and

(x) Emergency Food Assistance Program, 7 U.S.C. 7501, *et seq.*

**§ 417.870 When do I know if the USDA debarring official debar me?**

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 180.820, even when you make a submission before the 30 days expire.

(b) The debarring official sends you written notice, pursuant to § 180.615, that the official decided, either:

- (1) Not to debar you; or
- (2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the Executive Branch of the Federal Government unless an agency head or an authorized designee grants an exception.

**Subpart I—Definitions****§ 417.930 Debarring official (USDA supplement to governmentwide definition at 2 CFR 180.930).**

(a) Debarring official means an agency official who is authorized to impose debarment. The debarring official is either:

- (1) The agency head; or
- (2) An official designated by the agency head.

(b) The head of an organizational unit within USDA (e.g., Administrator, Food and Nutrition Service), who has been delegated authority in 7 CFR part 2 to carry out a covered transaction, is delegated authority to act as the debarring official in connection with such transaction. This authority to act as a debarring official may not be redelegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may redelegate the authority to act as a debarring official to the Deputy Chief for the National Forest System or an Associate Deputy Chief for the National Forest System.

**§ 417.1010 Suspending official (USDA supplement to governmentwide definition at 2 CFR 180.1010).**

(a) Suspending official means an agency official who is authorized to impose suspension. The suspending official is either:

- (1) The agency head; or
- (2) An official designated by the agency head.

(b) The head of an organizational unit within USDA (e.g., Administrator, Food and Nutrition Service), who has been delegated authority in 7 CFR part 2 of this title to carry out a covered transaction, is delegated authority to act as the suspending official in connection with such transaction. This authority to act as a suspending official may not be redelegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may redelegate the authority to act as a suspending official to the Deputy Chief for the National Forest System or an Associate Deputy Chief for the National Forest System.

**Subpart J—[Reserved]****TITLE 7—AGRICULTURE****■ 2. Remove 7 CFR part 3017.**

Dated: March 24, 2010.

Issued at Washington, DC.

**Thomas J. Vilsack,**

*Secretary.*

[FR Doc. 2010-11864 Filed 5-24-10; 8:45 am]

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**DEPARTMENT OF AGRICULTURE****Animal and Plant Health Inspection Service****7 CFR Part 301**

[Docket No. APHIS-2009-0098]

**Emerald Ash Borer; Addition of Quarantined Areas in Kentucky, Michigan, Minnesota, New York, Pennsylvania, West Virginia, and Wisconsin**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the emerald ash borer regulations by adding portions of Kentucky, Michigan, Minnesota, New York, Pennsylvania, Wisconsin, and the entire State of West Virginia to the list of quarantined areas. This action will restrict the interstate movement of regulated articles from areas in the States of Kentucky, Michigan,

Minnesota, New York, Pennsylvania, West Virginia, and Wisconsin. This interim rule is necessary to prevent the artificial spread of the emerald ash borer to noninfested areas of the United States.

**DATES:** This interim rule is effective May 25, 2010. We will consider all comments that we receive on or before July 26, 2010.

**ADDRESSES:** You may submit comments by either of the following methods:

• Federal eRulemaking Portal: Go to (<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0098>) to submit or view comments and to view supporting and related materials available electronically.

• Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2009-0098, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0098.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at (<http://www.aphis.usda.gov>).

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Chaloux, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1231; (301) 734-0917.

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

The emerald ash borer (EAB) (*Agrilus planipennis*) is a destructive wood-boring insect that attacks ash trees (*Fraxinus* spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, Taiwan, and Canada, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues.

Although EAB adults have been known to fly as much as one-half mile from one tree to the next, the pest can also spread when infested nursery trees,