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pre-employment processing specified by the Department of State, including background investigation, medical examination, and drug testing. As a condition of eligibility for continued receipt of grant funds, fellows are required to complete prescribed coursework and maintain a satisfactory grade point average as determined by the Department of State. Fellows are also required to accept employment with the Department of State's Foreign Service upon successful completion of the program, and Foreign Service entry requirements. Fellows must continue employment for a period of one and one-half years for each year of education funded by the Department of State.

§ 196.3 Grants to post-secondary education institutions.

The Department of State may make a grant to a post-secondary education institution for the purpose of increasing the level of knowledge and awareness of and interest in employment with the Foreign Service, consistent with 22 U.S.C. 3905, not to exceed $1,000,000, unless otherwise authorized by law.

§ 196.4 Administering office.

The Department of State's Bureau of Human Resources, Office of Recruitment is responsible for administering the Thomas R. Pickering Foreign Affairs/Graduate Foreign Affairs Fellowship Program and grants to post-secondary institutions and may be contacted for more detailed information.

CHAPTER II—AGENCY FOR INTERNATIONAL DEVELOPMENT

Part		Page
200	Employee responsibilities and conduct	767
201	Rules and procedures applicable to commodity transactions financed by USAID	767
202	Overseas shipments of supplies by voluntary non-profit relief agencies	804
203	Registration of agencies for voluntary foreign aid	808
204	Housing guaranty standard terms and conditions	813
205	Participation by religious organizations in USAID programs	817
206	Testimony by employees and the production of documents in proceedings where A.I.D. is not a party	819
207	Indemnification of employees	821
208	Governmentwide debarment and suspension (non-procurement)	821
209	Non-discrimination in federally-assisted programs of the Agency for International Development—effectuation of Title VI of the Civil Rights Act of 1964	844
210	Governmentwide requirements for drug-free workplace (financial assistance)	853
211	Transfer of food commodities for food use in disaster relief, economic development and other assistance	859
212	Public information	885
213	Claims collection	896
214	Advisory committee management	913
215	Regulations for implementation of Privacy Act of 1974	920
216	Environmental procedures	928
217	Nondiscrimination on the basis of handicap in programs or activities receiving Federal financial assistance	942

Part		Page
218	Nondiscrimination on the basis of age in programs or activities receiving Federal financial assistance	954
219	Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by International Development Cooperation Agency, Agency for International Development	959
221	Israel loan guarantee standard terms and conditions	965
223	Administrative enforcement procedures of post-employment restrictions	968
224	Implementation of the program fraud civil remedies act	970
225	Protection of human subjects	985
226	Administration of assistance awards to U.S. non-governmental organizations	996
227	New restrictions on lobbying	1024
228	Rules on source, origin and nationality for commodities and services financed by USAID	1036
229	Nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance	1047
230	Israel loan guarantees issued under the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. 108–11—Standard terms and conditions	1064
231–299	[Reserved]	

PART 200—EMPLOYEE RESPONSIBILITIES AND CONDUCT

CROSS REFERENCES: The regulations governing the responsibilities and conduct of employees of the Agency for International Development are codified as part 2635 of title 5, prescribed by the Office of Government Ethics.

PART 201—RULES AND PROCEDURES APPLICABLE TO COMMODITY TRANSACTIONS FINANCED BY USAID

Subpart A—Definitions and Scope of This Part

Sec.
201.01 Definitions.
201.02 Scope and application.
201.03 OMB approval under the Paperwork Reduction Act.

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for USAID Financing

201.10 Purpose.
201.11 Eligibility of commodities.
201.12 Eligibility of incidental services.
201.13 Eligibility of delivery services.
201.14 Eligibility of bid and performance bonds and guaranties.
201.15 U.S. flag vessel shipping requirement.

Subpart C—Procurement Procedures; Responsibilities of Importers

201.20 Purpose.
201.21 Notice to supplier.
201.22 Procurement under public sector procedures.
201.23 Procurement under private sector procedures.
201.24 Progress and advance payments.
201.25 Bid and performance bonds and guaranties.
201.26 Expenditure of marine insurance loss payments.

Subpart D—Responsibilities of Suppliers

201.30 Purpose.
201.31 Suppliers of commodities.
201.32 Suppliers of delivery services.

Subpart E—General Provisions Relating to USAID Financing of Commodities and Commodity-Related Services

201.40 Purpose.
201.41 Audit and inspection.
201.42 Reexport of USAID-financed commodities.
201.43 Diversion clause.
201.44 Vesting in USAID of title to commodities.
201.45 Termination or modification of a loan, grant or implementing document.
201.46 Compensation to supplier if shipment is prohibited.
201.47 Use of marine insurance loss proceeds.

Subpart F—Payment and Reimbursement

201.50 Purpose.
201.51 Methods of financing.
201.52 Required documents.
201.53 Final date for presentation of documents.

Subpart G—Price Provisions

201.60 Purpose and applicability of this subpart.
201.61 Meaning of terms in this subpart.
201.62 Responsibilities of borrower/grantee and of supplier.
201.63 Maximum prices for commodities.
201.64 Application of the price rules to commodities.
201.65 Commissions, discounts and other payments, credits, benefits and allowances.
201.66 Side payments.
201.67 Maximum freight charges.
201.68 Maximum prices for commodity-related services.
201.69 Cooperating country taxes and fees.

Subpart H—Rights and Responsibilities of Banks

201.70 Purpose.
201.71 Terms of letters of credit.
201.72 Making payments.
201.73 Limitations on the responsibilities of banks.
201.74 Additional documents for USAID.
201.75 Termination or modification.

Subpart I—Rights and Remedies of USAID, and Waiver Authority

201.80 Purpose.
201.81 Rights of USAID against borrower/grantees.
201.82 Rights of USAID against suppliers.
201.83 No waiver of alternative rights or remedies by USAID.
201.84 Limitation on period for making refund requests.
201.85 Legal effect of USAID approvals and decisions.
201.86 Waiver and amendment authority.
APPENDIX A TO PART 201—SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID 282)

APPENDIX B TO PART 201—APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY (AID 11)

AUTHORITY: 22 U.S.C. 2381.

SOURCE: 55 FR 34232, Aug. 22, 1990, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 201 appear at 62 FR 38027, July 16, 1997.

Subpart A—Definitions and Scope of This Part

§ 201.01 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) *The Act* means the Foreign Assistance Act of 1961, as amended from time to time.

(b) *USAID* means the U.S. Agency for International Development or any successor agency, including when applicable, each USAID Mission abroad.

(c) *USAID Geographic Code* means a code in the USAID Geographic Code Book which designates a country, a group of countries, or an otherwise defined area. Principal USAID geographic codes are described in § 201.11(b)(4) of this part.

(d) *USAID/W* means the USAID in Washington, DC 20523, including any office thereof.

(e) *Approved applicant* means the individual or organization designated by the borrower/grantee to establish credits with banks in favor of suppliers or to instruct banks to make payments to suppliers, and includes any agent acting on behalf of such approved applicant.

(f) *Bank* means a banking institution organized under the laws of the United States, or any State, commonwealth, territory, or possession thereof, or the District of Columbia.

(g) *Borrower/grantee* means the government of any cooperating country, or any agency, instrumentality or political subdivision thereof, or any private entity, to which USAID directly makes funds available by loan or grant.

(h) *Commission* means any payment or allowance made or agreed to be made by a supplier to any person for the contribution which that person has made to securing the sale for the supplier or which the person makes to securing similar sales on a continuing basis for the supplier.

(i) *Commodity* means any material, article, supply, goods, or equipment.

(j) *Commodity Approval Application* means the Application for Approval of Commodity Eligibility (Form AID 11) which appears as appendix B to this part 201.

(k) *Commodity-related services* means delivery services and/or incidental services.

(l) *Cooperating country* means the country receiving the USAID assistance subject to provisions of this part 201.

(m) *Delivery* means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

(n) *Delivery service* means any service customarily performed in a commercial export transaction which is necessary to effect a physical transfer of commodities to the cooperating country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. *Delivery services* may also include work and materials necessary to meet USAID marking requirements.

(o) *Implementing document* means any document, including a letter of commitment, issued by USAID which authorizes the use of USAID funds for the procurement of commodities and/or commodity related services and which specifies conditions which will apply to such procurement.

(p) *Importer* means any person or organization, governmental or otherwise, in the cooperating country who is authorized by the borrower/grantee to use USAID funds under this Regulation for the procurement of commodities, and includes any borrower/grantee who undertakes such procurement.

(q) *Incidental services* means the installation or erection of USAID-financed equipment, or the training of

personnel in the maintenance, operation and use of such equipment.

(r) *Mission* means the USAID Mission or representative in a cooperating country.

(s) *Non-vessel-operating common carrier* (NVOCC) under Section 3(17) of the Shipping Act of 1984 means a common carrier pursuant to Section 3(6) of such Act that does not operate any of the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean carrier.

(t) *Purchase contract* means any contract or similar arrangement under which a supplier furnishes commodities and/or commodity-related services financed under this part.

(u) *Responsible bidder* is one who has the technical expertise, management capability, workload capacity, and financial resources to perform the work successfully.

(v) *Responsive bid* is a bid that complies with all the terms and conditions of the invitation for bids without material modification. A material modification is a modification which affects the price, quantity, quality, delivery or installation date of the commodity or which limits in any way responsibilities, duties, or liabilities of the bidder or any rights of the importer or USAID as any of the foregoing have been specified or defined in the invitation for bids.

(w) *Schedule B* means the ''Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States'' issued and amended from time to time by the U.S. Bureau of the Census, Department of Commerce and available as stated in 15 CFR 30.92.

(x) *Source* means the country from which a commodity is shipped to the cooperating country, or the cooperating country if the commodity is located therein at the time of the purchase. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, source means the country from which the commodity was shipped to the free port or bonded warehouse.

(y) *State* means the District of Columbia or any State, commonwealth, territory or possession of the United States.

(z) *Supplier* means any person or organization, governmental or otherwise, who furnishes commodities and/or commodity-related services financed under this part 201.

(aa) *Supplier's Certificate* means Form AID 282 ''Supplier's Certificate and Agreement with the Agency for International Development,'' including the ''Invoice and Contract Abstract'' on the reverse of such form (which appears as appendix A to this part 201), or any substitute form which may be prescribed in the letter of commitment or other pertinent implementing document.

(bb) *United States* means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

(cc) *Vessel operating common carrier* (VOCC) means an ocean common carrier pursuant to section 3(18) of the Shipping Act of 1984 which operates the vessel by which ocean transportation is provided.

§ 201.02 Scope and application.

(a) The appropriate implementing documents will indicate whether and the extent to which this part 201 shall apply to the procurement of commodities or commodity-related services or both. Whenever this part 201 is applicable, those terms and conditions of this part will govern which are in effect on the date of issuance of the direct letter of commitment to the supplier; if a bank letter of commitment is applicable, the terms and conditions govern which are in effect on the date of issuance of an irrevocable letter of credit under which payment is made or is to be made from funds made available under the Act, or, if no such letter of credit has been issued, on the date payment instructions for payment from funds made available under the Act are received by the paying bank.

(b) The borrower/grantee is responsible for compliance with the applicable provisions of this part by importers and suppliers and for assuring that importers and suppliers are informed of the extent to which this part applies.

(c) Unless otherwise indicated, references in this part 201 to subparts or to sections relate to subparts or sections of this part 201.

§ 201.03 OMB approval under the Paperwork Reduction Act.

(a) OMB has approved the following information collection and recordkeeping requirements established by this part 201 (OMB Control No. 0412–0514, expiring July 31, 2000):

Sec.
201.13(b)(1)
201.13(b)(2)
201.15(c)
201.31(f)
201.31(g)
201.32(b)
201.32(c)
201.51(c)
201.52(a)
201.74

(b) USAID will use the information requested in these sections to verify compliance with statutory and regulatory requirements and to assist in the administration of USAID-financed commodity programs. The information is required from suppliers in order to receive payment for commodities or commodity-related services. The public reporting burden for this collection of information is estimated to average a half hour per response, including the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Procurement, Policy Division (M/OP/P), U.S. Agency for International Development, 1300 Pennsylvania Avenue, Washington, DC 20523–7801, and the Office of Management and Budget, Paperwork Reduction Project (0412–0514), Washington, DC 20503.

[64 FR 17535, Apr. 12, 1999]

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for USAID Financing

§ 201.10 Purpose.

This subpart sets forth requirements for USAID financing applicable to transactions for the procurement of commodities and/or commodity-related services.

§ 201.11 Eligibility of commodities.

To qualify for USAID financing, a commodity procurement transaction shall satisfy the following requirements:

(a) *Description and condition of the commodity*. The commodity shall conform to the description in the implementing document. Unless otherwise authorized by USAID/W in writing, the commodity shall be unused, and may not have been disposed of as surplus by any governmental agency.

(b) *Source*. The authorized source for procurement shall be a country or countries authorized in the implementing document by name or by reference to a USAID geographic code. The source and origin of a commodity must be an authorized source country. The applicable rules on source, origin and nationality for commodities and commodity-related services are in subparts (B), (C), and (F) of part 228 of this chapter.

(c) *Date of shipping documents*. The documents required as evidence of shipment under § 201.52(a)(4) shall show that the date of shipment was within the shipping period, if any, specified in the implementing document.

(d) *Medium of transportation*. Shipment shall not be effected:

(1) By a transportation medium owned, operated or under the control of any country not included within USAID Geographic Code 935; or

(2) Under any ocean or air charter which has not received prior approval by USAID/W, Office of Procurement (Transportation Division).

(e) *Marine insurance*. In accordance with the provisions of § 228.23 of this chapter, USAID may require that any USAID-financed commodity shipped to

the cooperating country shall be insured against marine risks and that such insurance shall be placed in the United States with a company or companies authorized to do marine insurance business in a State of the United States.

(f) *Timely submission of documents.* All documents required under § 201.52 to be submitted by a supplier in order to receive payment or reimbursement shall be submitted to USAID under direct letters of commitment or to a designated bank under bank letters of credit on or before the terminal date specified in the letter of commitment or letter of credit, respectively.

(g) *U.S. Treasury Department regulations.* Procurement transactions shall comply with the requirements of the U.S. Treasury Department Foreign Assets, Sanctions, Transactions and Funds Control Regulations published in 31 CFR parts 500 through 599, as from time to time amended.

(h) *Commodities shipped out of a free port or bonded warehouse.* No commodity shipped out of a free port or bonded warehouse is eligible for USAID financing if it was shipped to the free port or bonded warehouse without compliance with the requirements set forth in paragraph (d)(1) of this section, or if it was shipped from the free port or bonded warehouse without compliance with the requirements set forth in paragraphs (d) (1) and (2) of this section.

(i) *Purchase price.* The purchase price for the commodity shall satisfy the requirements of subpart G.

(j) *Purchases from eligible suppliers.* Commodities procured with funds made available under this part 201 shall be purchased from eligible suppliers. The rules on the nationality of suppliers of commodities are in section 228.14 of this chapter.

(k) *Determination of commodity eligibility.* The commodity shall be approved in writing by USAID for each purchase transaction as eligible for USAID financing. Such approval shall be indicated on the Application for Approval of Commodity Eligibility (Form AID 11) submitted to USAID by the supplier.

[55 FR 34232, Aug. 22, 1990, as amended at 58 FR 48797, Sept. 20, 1993; 62 FR 38027, July 16, 1997]

§ 201.12 Eligibility of incidental services.

Incidental services may be financed under the same implementing document which makes funds available for the procurement of equipment only if:

(a) Such services are specified in the purchase contract relating to the equipment;

(b) The price satisfies the requirements of § 201.68;

(c) The portion of the total purchase contract price attributable to such services does not exceed 25 percent; and

(d) The supplier of such services, prior to approval of the USAID Commodity Approval Application, has neither been suspended or debarred by USAID under part 208 of this chapter, nor has been placed on the ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs,'' published by the U.S. General Services Administration.

(e) The supplier of such services meets the requirements of § 228.25 of this chapter.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.13 Eligibility of delivery services.

(a) *General.* Delivery of USAID-financed commodities may be financed under the implementing document provided the delivery services meet the requirements of this section and the applicable provisions in part 228, subpart C of this chapter.

(b) *Transportation costs.* USAID will not finance transportation costs:

(1) For shipment beyond the point of entry in the cooperating country except when intermodal transportation service covering the carriage of cargo from point of origin to destination is used, and the point of destination, as stated in the carrier's through bill of lading, is established in the carrier's tariff; or

(2) On a transportation medium owned, operated or under the control of any country not included in Geographic Code 935; or

(3) Under any ocean or air charter covering full or part cargo (whether for a single voyage, consecutive voyages, or a time period) which has not received prior approval by USAID/W, Office of Procurement, Transportation Division); or

(4) Which are attributable to brokerage commissions which exceed the limitations specified in § 201.65(h) or to address commissions, dead freight, demurrage or detention.

(c) *Inspection services.* USAID will finance inspection of USAID-financed commodities when inspection is required by USAID, or in those cases where inspection is required by the importer and such inspection is specified in the purchase contract, performed by independent inspectors and is either customary in export transactions for the commodity involved or is necessary to determine conformity of the commodities to the contract. Section 228.24 of this chapter covers the nationality requirements for suppliers of inspection services.

(d) *Marine insurance.* (1) Unless otherwise authorized, USAID will finance premiums for marine insurance including war risk on USAID-financed commodities only if:

(i) The insurance is placed in a country included in the authorized Geographic Code: Provided, that if the authorized Geographic Code is any other than USAID Geographic Code 000, the cooperating country itself shall be recognized as an eligible source; and

(ii) Such insurance is placed either in accordance with the terms of the commodity purchase contract or on the written instructions of the importer; and

(iii) Insurance coverage relates only to the period during which the commodities are in transit to the cooperating country, except that it may include coverage under a warehouse-to-warehouse clause; and

(iv) The premiums do not exceed the limitations contained in § 201.68; and

(v) The insurance provides that loss payment proceeds shall be paid in U.S. dollars or other freely convertible currency.

(2) Within the meaning of § 201.11(e), as well as this paragraph, insurance is placed in a country only if payment of the insurance premium is made to, and the insurance policy is issued by, an insurance company office located in that country.

(e) *Suspension and debarment.* In order to be eligible for USAID financing, the costs of any delivery services must be paid to carriers, insurers, or suppliers of inspection services who, prior to approval of the USAID Commodity Approval Application, have neither been suspended nor debarred under USAID Regulation 8, 22 CFR part 208, nor included on the ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' published by the U.S. General Services Administration.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.14 Eligibility of bid and performance bonds and guaranties.

The cost of any bid bond or guaranty posted by a successful bidder or of any performance bond or guaranty posted by a supplier is eligible for financing under the implementing document, provided that the bond or guaranty conforms to the requirements of the invitation for bids or the contract, as applicable, and to the extent that the principal amount of the bond or guaranty does not exceed the amount customary in international trade for the type of transaction and commodity involved. Bonds or guaranties may be payable in U.S. dollars, or a freely convertible currency or local currency, and shall be posted in favor of the purchaser. Nationality requirements for sureties, insurance companies or banks who issue bonds or guaranties under USAID-financed transactions are set forth in § 228.38(b) of this chapter.

[55 FR 34232, Aug. 22, 1990, as amended at 62 FR 38027, July 16, 1997]

§ 201.15 U.S. flag vessel shipping requirements.

(a) *General requirements.* Unless USAID determines that privately owned U.S. flag commercial ocean vessels are not available at fair and reasonable rates for such vessels:

(1) At least fifty percent (50%) of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers from each of two geographic

areas—the U.S. and all other countries) of all goods financed by USAID which are transported on ocean vessels shall be transported on privately owned U.S. flag commercial vessels; and

(2) At least fifty percent (50%) of the gross freight revenue generated by all shipments of USAID-financed commodities which are transported to the territory of the borrower/grantee on dry cargo liners shall be paid to or for the benefit of privately owned U.S. flag commercial vessels.

(b) *Methods of compliance.* (1) Compliance with these requirements with respect to dry cargo liner vessels shall be achieved for the total of liner shipments made during the term of the loan or grant agreement. If USAID determines at any time during the term of the agreement that compliance may not be achieved, USAID may require that all subsequent shipments be made on U.S. flag liners until compliance is assured.

(2) Compliance with these requirements with respect to dry bulk carriers and tankers shall be achieved for each quantitative unit of cargo. A quantitative unit of cargo is the total tonnage of a commodity or commodities included in one invitation for bids or other solicitation of offers from ocean carriers for the transportation of cargo which may move in full shipload lots. USAID shall approve a charter or other contract of affreightment for a non-U.S. flag vessel only if USAID has determined that at least 50% of the quantitative unit will move on U.S. flag vessels, to the extent that such vessels are available at fair and reasonable rates for such vessels. U.S. flag dry cargo liners whose offers are responsive to the terms of the invitation for bids or other solicitation of vessels may be used for achieving compliance for the quantitative unit.

(c) *Nonavailability of U.S. flag vessels.* Upon application of the borrower/grantee or the supplier, USAID/W, Office of Procurement, Transportation Division, shall determine and advise the applicant whether or not privately owned U.S. flag vessels are available for any specific shipment of commodities at fair and reasonable rates. A determination that U.S. flag vessels are not available does not carry with it the authorization for USAID to finance freight on a vessel not otherwise authorized; this requires a separate waiver approval in accordance with § 201.13(b)(1)(ii).

(d) *Responsibility.* The borrower/grantee is responsible for compliance with the requirements of this section and for imposing upon subborrowers, contractors and importers such requirements regarding shipping arrangements with suppliers as will assure discharge of this responsibility.

(e) *Privately owned U.S. flag commercial vessels.* For purposes of this section the term ''privately owned U.S. flag commercial vessels'' shall not include any vessel which, subsequent to September 21, 1961, shall have been either built outside the U.S., rebuilt outside the U.S. or documented under any foreign registry until such vessel shall have been documented under the laws of the U.S. for a period of 3 years.

Subpart C—Procurement Procedures; Responsibilities of Importers

§ 201.20 Purpose.

This subpart prescribes procurement procedures which shall apply to an importer whenever a commodity procurement is to be financed by USAID subject to this part 201.

§ 201.21 Notice to supplier.

The importer is responsible for providing the supplier with the following information (either through the invitation for bids, the request for quotations or otherwise):

(a) Notice that the transaction is to be financed by USAID under this part 201;

(b) The identification number of the implementing document;

(c) All additional information prerequisite to USAID financing and contained in the instructions from the borrower/grantee to the importer (for example, eligible source of commodity, periods during which deliveries must be made, shipping provisions, and documentation requirements); and, where appropriate,

(d) Notice of the marking requirements in § 201.31(d), when the importer is the government of the cooperating

country or any if its subdivisions or instrumentalities.

§ 201.22 Procurement under public sector procedures.

(a) *General requirements.* When the importer is the government of the cooperating country or any of its subdivisions, agencies or instrumentalities, all purchase contracts for commodities shall be awarded under public sector procedures in this section unless otherwise authorized by USAID. Such contracts shall be awarded on a competitive basis unless otherwise authorized by USAID under paragraph (g) of this section.

(b) *Formal competitive bidding.* Formal competitive bidding procedures shall be used for all procurements estimated to exceed $100,000 or the equivalent, exclusive of ocean or air transportation costs, except when other procedures are authorized in accordance with this section. Formal competitive bidding procedures may also be used for procurements under $100,000 at the option of the importer. Formal competitive bidding procedures include advertising the availability of an invitation for bids in accordance with paragraph (h) of this section, issuance of the invitation for bids, public opening of sealed bids, evaluation of bids, and award of the contract, except as provided in § 201.22(b)(3), to the lowest responsive bid by a responsible bidder.

(1) *Contents of the invitation for bids.* The invitation for bids and every attachment and amendment thereto shall be in the English language and shall be available to prospective suppliers free of charge unless otherwise authorized by USAID. The following minimum requirements are applicable:

(i) *Statement of requirements.* The invitation for bids shall state specifically that the formal competitive bidding procedures set forth in this § 201.22 apply. The terms and conditions of the procurement shall be clearly indicated, including any factors other than price to be used in the evaluation. Commodity specifications shall be stated in a non-restrictive manner and in sufficient detail to permit maximum response from prospective suppliers. The metric system of measurements shall be used for specifications unless USAID determines in writing that such use is impractical or is likely to cause significant inefficiencies or the loss of markets to U.S. firms.

(ii) *Statement regarding submission of bids.* The invitation for bids shall be appropriately numbered and state the complete physical address, as well as any post office box number, to which bids or offers are to be sent, the closing hour and date for submission and the date, hour and place of the public opening of the bids. If additional drawings, details, regulations or forms are necessary for submitting a bid, the invitation shall state where such material may be obtained.

(iii) *Statement regarding this part 201.* The invitation for bids shall expressly indicate the extent to which any resulting contract is subject to the requirements of this part 201.

(iv) *Statement regarding late bids.* The invitation for bids shall state that no bid received at the address designated in the invitation after the closing hour and date for submission will be considered for award unless its late arrival at that address is attributable solely to mishandling of the bid documents by the importer or any of its agents directly associated with receiving or processing the bids. In no case will the importer consider a bid which was not received at the place of public opening before the award was made.

(2) *Handling bids.* Bids received shall be held intact and sealed and shall be safeguarded against disclosure of contents prior to bid opening. The bids shall be opened publicly as specified in the bid invitation, and all properly submitted bids shall be considered. Direct submission of a bid by a prospective supplier, rather than through an agent or other representative of the supplier in the cooperating country, shall not be cause for rejection.

(3) *Awards.* Every award shall be made to that responsible bidder whose responsive bid is lowest in price. If any factor other than price is used in evaluating bids, each such factor shall be computed in accordance with the formula in the invitation for bids.

(c) *Two-stage formal competitive bidding.* Subject to the approval of USAID, two-stage formal competitive bidding

may be used in the procurement of specialized equipment, where requirements are stated in performance-type specifications. Two-stage bidding involves a request for technical proposals for the equipment being purchased, submission of proposals without price information, discussions with the offerors as necessary to clarify proposals, followed by a request for priced bids for those proposals found to be fully acceptable following discussions between the offerors and the purchaser. The priced bids shall be publicly opened. Handling and award of the bids shall comply with paragraphs (b) (2) and (3) of this section.

(d) *Competitive negotiation procedures.* (1) If approved by USAID based on a written record of the reasons therefor, a competitive negotiation procedure may be used. Competitive negotiation procedures include advertising the availability of a request for quotations in accordance with paragraph (h) of this section, issuance of the request for quotations, receipt and evaluation of offers, negotiation (when appropriate), and award of the contract to the offeror submitting the most advantageous offer, price and other factors considered. Competitive negotiation procedures may be approved in the following circumstances:

(i) When it is impossible to develop adequate commodity specifications for use in an invitation for bids;

(ii) When price alone would not be an effective means of determining an award (*i.e.*, when criteria, such as time of delivery or service capability need to be evaluated);

(iii) When emergency procurement is justified by a demonstration that the time required for formal competitive bid procedures would result in an unacceptable delay in delivering the commodities;

(iv) When proprietary procurement is justified; or

(v) When adherence to formal competitive procedures would impair program objectives.

(2) When formal competitive bidding procedures have failed, all bids have been rejected, and further use of such procedures would clearly not be productive, the Mission Director may authorize the use of competitive negotiation procedures. Further advertising is not required. The request for quotations may be prepared as a new document or may incorporate appropriate provisions of the invitation for bids. It shall be submitted to those potential suppliers who originally submitted bids in response to the invitation for bids.

(e) *Small value procurement.* When the estimated value of the contract does not exceed $100,000 or equivalent (exclusive of ocean and air transportation costs), the purchaser may award a contract by advertising the procurement in accordance with paragraph (h) of this section and soliciting quotations from a reasonable number of sources, including, where feasible, producers of the commodity, taking into consideration:

(1) The nature of the commodities to be purchased;

(2) The number of sources which can supply the commodities;

(3) The value of the procurement; and

(4) The administrative cost of procuring the commodities.

The contract shall be awarded to the offeror with the most advantageous offer, price and other factors considered.

(f) *Proprietary procurement.* Purchasing by brand or trade name or by a restrictive specification (proprietary procurement) may be justified for reasons such as:

(1) Substantial benefits, such as economies in maintenance of spare parts inventories, stronger local dealer organization, better repair facilities, or greater familiarity by operating personnel, can be achieved through standardizing on a particular brand;

(2) Compatibility with equipment on hand is required; or

(3) Special design or operational characteristics are required.

The need for proprietary procurement may serve as the basis for approving the use of competitive negotiation procedures in accordance with paragraph (d) of this section or a waiver for negotiation with a single source in accordance with paragraph (g) of this section.

(g) *Negotiation with a single source*—(1) *Circumstances.* Competition may be waived and negotiation with a single

source authorized by USAID under one of the following circumstances:

(i) the purchaser can demonstrate the existence of an emergency situation in which the requirement for competition would result in an unacceptable delay in the procurement of the commodities;

(ii) proprietary procurement is justified and the necessary commodities or spare parts are available from only one source, taking into account any special requirements such as the need for in-country service capability; or

(iii) adherence to competitive procedures would result in the impairment of the objectives of the United States foreign assistance program or would not be in the best interest of the United States.

(2) *Amendments*. Negotiation with a single source to amend an existing contract outside the scope of the contract must be justified under one or more of the criteria in paragraph (g)(1) of this section and formally approved by USAID.

(h) *Advertising*—(1) *Requirements*. (i) For each procurement estimated to exceed $25,000, or equivalent (exclusive of ocean and air transportation costs), notice of the availability of the invitation for bids, request for quotations or specific information about procurements under $100,000 shall be published by the USAID Office of Small and Disadvantaged Business Utilization/Minority Resource Center in the appropriate USAID Bulletin. The purchaser shall submit three copies of each invitation for bids or request for quotations (if any) to the USAID Mission with its request for advertising. The Mission will forward the request for advertising and the procurement documents to USAID/W. The request for advertising should arrive in the Office of Small and Disadvantaged Business Utilization/Minority Resource Center at least 45 days prior to the final date for receiving bids or quotations. The purchaser may, in addition, advertise in appropriate local, regional, and international journals, newspapers, etc., and otherwise, in accordance with local practice.

(ii) Additionally, if the estimated value of the contract is more than $100,000, or equivalent (exclusive of ocean and air transportation costs), the notice of availability of the invitation for bids or request for quotations shall be published in the ''Commerce Business Daily'' of the U.S. Department of Commerce.

(2) *Exceptions*. (i) When negotiation with a single source has been authorized, advertising is not required.

(ii) When formal competitive bid procedures have failed to result in an award pursuant to paragraph (d)(2) of this section and a determination is made to follow competitive negotiation procedures, no further advertising is required.

(iii) The requirements for advertising as set forth above may be waived by USAID to avoid serious procurement delays in certain circumstances, provided, however, that efforts shall be made to secure bids or offers from a reasonable number of potential suppliers.

(i) *USAID approvals*. (1) Each invitation for bids or request for quotations for an USAID-financed procurement which is estimated to exceed $100,000, or equivalent (exclusive of ocean and air transportation costs), must be approved by USAID prior to issuance.

(2) Each contract in excess of $100,000, or equivalent (exclusive of ocean and air transportation costs), must be formally approved by USAID prior to finalization with the supplier.

(3) USAID may require that contracts under $100,000 be formally approved prior to finalization with the supplier.

§ 201.23 Procurement under private sector procedures.

(a) *General requirements*. Procurements under private sector procedures will normally be carried out by importers using negotiated procurement procedures, unless the importer chooses to follow the procedures in § 201.22. Procurement on a negotiated basis shall be in accordance with good commercial practice. Solicitations by the importer for quotations or offers shall be made uniformly to a reasonable number of prospective suppliers, including, where feasible, producers of a commodity, and all quotations or offers received, whether or not specifically solicited, shall be given consideration before making an award.

(b) *Publicizing*. To provide suppliers in the United States with an opportunity to participate in furnishing commodities which may be purchased on a negotiated basis under USAID financing, USAID will periodically publish for each cooperating country a list of commodities which may be expected to be imported and the names and contact information for the importers which have traditionally purchased those commodities. Interested suppliers may then make offers or furnish quotations on the products they desire to sell directly to the importers of those products. USAID will not publicize specific proposed purchases which are to be undertaken by private sector importers on a negotiated basis unless specifically requested to do so by the importer in accordance with the provisions of paragraph (c) of this section.

(c) *Notification*. If the importer elects to solicit quotations and offers for specific proposed purchases through publication by USAID, USAID will notify prospective suppliers of the export opportunity through the appropriate USAID bulletin. Requests for such notification shall be submitted to the Office of Small and Disadvantaged Business Utilization/Minority Resource Center, USAID, Washington, DC 20523–7700, and shall contain the name and contact information for the importer, a full description of the commodities and any commodity related services required, applicable price and delivery terms and other relevant procurement data, in the English language. The metric system of measurements shall be used for specifications unless USAID determines in writing that such use is impractical or is likely to cause significant inefficiencies or the loss of markets to U.S. firms.

(d) *Notice of quotations and offers received*. USAID may require that the importer furnish an abstract in the English language and identify thereon all offers or quotations received, the offer accepted or order placed, the price, the quantity, the name and address of all persons submitting offers or quotations and of their principals, if any (including manufacturers or processors of the commodity).

(e) *Procurement under special supplier-importer relationships*—(1) Solicitation of offers from more than one supplier is not required if:

(i) The importer is purchasing for resale or processing, as the supplier's regularly authorized distributor or dealer, a commodity which, under the terms of the distributorship or dealer agreement, the importer is precluded from buying from another supplier; or

(ii) The importer is purchasing for resale a registered brand-name commodity from a supplier who is the exclusive distributor of that commodity to the area of the importer.

(2) USAID may require the importer to furnish, or cause to be furnished, to USAID documentary evidence of the existence of the relationships described in paragraph (e)(1) of this section.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.24 Progress and advance payments.

(a) *Definitions*—(1) *Progress payments*. Progress payments are payments made prior to shipment under a fixed price procurement contract, which are based on actual costs incurred or on an actual stage or percentage of completion accomplished.

(2) *Advance payments*. Advance payments are payments to a supplier prior to, and in anticipation of, performance under a procurement contract. They are not based on actual performance or actual costs incurred.

(b) *Progress Payments*—(1) *Conditions for eligibility*. USAID will approve progress payments only if:

(i) The period between the commencement of work and the first required delivery will exceed four months;

(ii) There will be substantial predelivery costs that may have a material impact on a suppliers's working capital;

(iii) The total FAS purchase price will exceed $200,000;

(iv) The supplier must establish a performance bond or guaranty in favor of the borrower/grantee providing adequate security for the amount of the progress payments; and

(v) The amount of the progress payments does not exceed 95 percent of the total FAS purchase price.

(2) *Notice*. In order for progress payments to be eligible under a competitive procurement, the solicitation document must state that such payments will be allowed and that a request for progress payments will not be considered an adverse factor in the award of the contract.

(3) *Approval*. All progress payments must be approved in writing by USAID.

(c) *Advance payments*—(1) *Conditions for eligibility*. Advance payments may be authorized only if USAID has made a positive determination in writing that:

(i) USAID will benefit therefrom, in terms of increased competition and/or lower prices, prior to the issuance of the solicitation or prior to award of a noncompetitive contract; and

(ii) The supplier has a financial management system which is adequate for controlling and accounting for U.S. government funds.

(2) *Amount*. The amount of the advance is based on an analysis of the working capital required under the procurement contract, taking into consideration the availability of the supplier's own working capital and shall be limited to the minimum amount needed for immediate disbursing needs.

(3) *Security*. The supplier must establish an advance payment bond or guaranty in favor of the borrower/grantee providing adequate security for the amount of the advance payment.

(4) *Notice*. In order for advance payments to be eligible under a competitive procurement, the solicitation document must state that such payments will be allowed and that a request for advance payments will not be considered an adverse factor in the award of the contract.

(5) *Approvals*. All advance payments must be approved by USAID in writing.

§ 201.25 Bid and performance bonds and guaranties.

Whenever the importer requires the posting of a bid bond or guaranty or performance bond or guaranty, the type of bond or guaranty (certified check, irrevocable letter of credit, bank bond, bank guaranty, or surety bond) shall be at the option of the bidder or supplier. Posted bid bonds or guaranties shall be returned to unsuccessful bidders promptly after an award is made. Unless converted to a required performance bond or guaranty, any bid bond or guaranty posted by the successful bidder shall also be returned promptly. Performance bonds or guaranties (as distinguished from commodity warranties of quality or performance) shall be canceled no later than 30 days after completion of the contract performance guarantied.

§ 201.26 Expenditure of marine insurance loss payments.

Unless otherwise authorized by USAID, any marine insurance loss payment under a marine insurance policy financed pursuant to this part 201 received by the importer, either directly or indirectly, shall be used by the importer as follows:

(a) To procure from a source specified in the implementing document which originally provided the USAID funds, commodities which have been designated by USAID to the borrower/grantee as eligible for USAID financing; or

(b) To cover the cost of repairs to commodities damaged during shipment.

Subpart D—Responsibilities of Suppliers

§ 201.30 Purpose.

This subpart establishes the responsibilities of suppliers who furnish commodities and/or commodity-related services.

§ 201.31 Suppliers of commodities.

(a) *Performance of the sales contract*. The supplier of commodities shall comply with the terms and conditions of its contract with the importer and any letter of credit or direct letter of commitment under which it secures payment.

(b) *Responsibilities relating to eligibility of commodities*. The supplier shall fulfill its responsibilities under § 201.11 by assuring that:

(1) The commodity conforms to the description contained in its contract and letter of credit or direct letter of

commitment and, unless otherwise authorized by USAID in writing, the commodity is unused and has not been disposed of as surplus by any governmental agency;

(2) The source of the commodity complies with the provisions of § 201.11(b) relating to source as required by its contract, letter of credit or direct letter of commitment;

(3) The provisions of § 201.11(d) relating to the medium of transportation are complied with to the extent that the supplier arranges such transportation;

(4) All documents required by § 201.52 to be submitted by the supplier to receive payment are submitted by it on or before the terminal date specified in the letter of credit, direct letter of commitment, or, if payment is to be made at sight, the purchase contract;

(5) The provisions of the U.S. Treasury Department Foreign Assets, Sanctions, Transactions and Funds Control Regulations published in 31 CFR parts 500 through 599, as from time to time amended, are complied with; and

(6) The purchase price of the commodity meets the requirements of subpart G of this part applicable to the supplier.

(c) *Responsibilities relating to eligibility of delivery services.* The supplier of commodities shall be responsible for assuring that any delivery services obtained by it for its own or for the importer's account comply with the requirements of § 201.13 and, if required by USAID, for assuring that any shipping documents obtained by it contain an appropriate diversion clause pursuant to § 201.43. The supplier shall deliver to USAID any shipping documents available to it whenever such delivery is requested by USAID.

(d) *Marking of shipping containers and commodities*—(1) *Affixing emblems and identification numbers.* The supplier of commodities shall be responsible for assuring that all export packaging, whether shipped from the United States or from any other source country, carries the official USAID (clasped hands) emblem. Additionally, except as USAID may otherwise prescribe, when the supplier is given notice by the importer that the importer is the government of the cooperating country or any of its subdivisions or instrumentalities, the supplier shall also be responsible for assuring that, in addition to the shipping cartons or other export packaging, all commodities carry the USAID emblem. The USAID financing document number shall be marked on each export shipping carton and box in characters at least equal in height to the shipper's marks. When commodities are shipped as containerized freight in a reusable shipping container, the container is not considered export packaging within the meaning of this paragraph and the outside of the container need not be marked; however, the cartons, boxes, etc., inside the container must be marked.

(i) *Durability of emblems.* Emblems shall be affixed by metal plate, decalcomania, stencil, label, tag or other means, depending upon the type of commodity or export packaging and the nature of the surface to be marked. The emblem placed on commodities shall be as durable as the trademark, commodity or brand name affixed by the producer; the emblem on each export packaging unit shall be affixed in a manner which assures that the emblem will remain legible until the unit reach the consignee.

(ii) *Size of emblems.* The size of an emblem may vary depending upon the size of the commodity and the size of the export packaging. The emblem shall in every case be large enough to be clearly visible at a reasonable distance.

(iii) *Design and color of emblems.* Emblems shall conform in design and color to samples available from the Office of Procurement, Commodity Support Division, USAID, Washington, DC 20523–1415, and from the Mission.

(2) *Exception to requirement for affixing emblems.* To the extent compliance is impracticable, emblems shall not be required for:

(i) Raw materials shipped in bulk (including grain, coal, petroleum, oil, and lubricants);

(ii) Vegetable fibers packaged in bales; and

(iii) Semifinished products which are not packaged in any way.

(3) *Waiver.* If compliance with the marking requirement is found to be impracticable with respect to other commodities not excepted by paragraph

(d)(2) of this section, the supplier (or, when appropriate, the borrower/grantee) may request a waiver from USAID (Regional Assistant Administrator or his/her designee).

(e) *Export licenses and approvals.* The supplier shall be solely responsible for assuring that all necessary export licenses and approvals are obtained.

(f) *Distribution of shipping documents.* The supplier shall make the customary commercial document distribution, as well as any special distribution (e.g., to the USAID Mission in the importing country) which may be specified in the letter of credit, direct letter of commitment or other payment instruction covering the transaction. Prior to presenting the documents specified in § 201.52 for payment, the supplier shall mail not later than 30 days from the date of shipment a legible copy of all rated ocean bill(s) of lading described in § 201.52(a)(4)(i) to: Maritime Administration, Division of National Cargo, 400 Seventh Street SW., Washington, DC 20590–0001; and Transportation Division, Office of Procurement, USAID, Washington, DC 20523–7900.

(g) *Adjustment refunds, credits, and allowances.* All adjustments in the purchase price in an USAID-financed transaction in favor of the importer arising out of the terms of the contract or the customs of the trade shall be made by the supplier in the form of a dollar payment to USAID. Any such payment shall be transmitted to the Office of Financial Management, USAID, Washington, DC 20523–7702, and shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed. USAID will advise the borrower/grantee of such adjustment refunds received. Despatch earned by the supplier, other than despatch earned at the port of loading on c.i.f. and c. & f. shipments, shall be refunded to USAID in accordance with § 201.67(a)(5).

(h) *Vesting in USAID of title to commodities.* The supplier shall be responsible for compliance with the provisions of § 201.44 applicable to it.

(i) *Termination or modification of USAID-financing.* The supplier shall be responsible for compliance with the provisions of § 201.45 applicable to it.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.32 Suppliers of delivery services.

(a) *Performance of the service contract.* The supplier of delivery services financed by USAID shall comply with the terms and conditions of its contract to supply delivery services.

(b) *Adjustment in the price of delivery services.* The supplier of delivery services shall pay to the Office of Financial Management, USAID, Washington, DC 20523–7792, all adjustments in the purchase price in favor of the importer (or person purchasing the ocean transportation services) arising out of the terms of the contract or the customs of the trade. Any such payment shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer or other person for whom the adjustment is made, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed.

(c) *Marine insurance reporting requirement.* With respect to any loss payment exceeding $10,000 in value which a supplier of marine insurance makes under a marine insurance policy financed pursuant to this part, the supplier of marine insurance shall, within 15 days of making such payment, report to the Commodity Support Division, Office of Procurement, USAID, Washington, DC 20523–7900, the amount and date of the payment, a description of the commodity, the USAID identification number, name of the carrier, vessel, and voyage number (alternatively, flight or inland carrier run number), date of the bill(s) of lading, the identity and address of the assured, and the identity and address of the assignee of the assured to whom payment has actually been made.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

Subpart E—General Provisions Relating to USAID Financing of Commodities and Commodity-Related Services

§ 201.40 Purpose.

This subpart sets forth certain provisions of general application to transactions subject to this part.

§ 201.41 Audit and inspection.

The borrower/grantee shall maintain records adequate to document the arrival and disposition in the cooperating country of all commodities financed by USAID, and to identify the importer (or the first purchaser or transferee if the commodity is imported by the borrower/grantee) for a period of 3 years following the date of payment or reimbursement by USAID or for such other period as USAID and the borrower/grantee agree. In addition, the borrower/grantee or the importer shall, to the extent either exercises control or custody over the commodities, permit USAID or any of its authorized representatives at all reasonable times during the 3-year or other agreed period to inspect the commodities at any point, including the point of use, and to inspect all records and documents pertaining to such commodities.

§ 201.42 Reexport of USAID-financed commodities.

Unless specifically authorized by USAID, commodities imported into a cooperating country under USAID-financing may not be exported in the same or substantially in the same form from the cooperating country. In the event of any unauthorized reexport, the borrower/grantee shall pay promptly to USAID, upon demand, the entire amount reimbursed or such lesser or greater amount as USAID may deem appropriate under the circumstances of the particular transaction. Such an amount shall in no event, however, exceed the greater of either the amount reimbursed or the amount realized from the reexport.

§ 201.43 Diversion clause.

USAID may require that charter parties, bills of lading, or other ocean shipping documents covering USAID-financed commodities contain a clause substantially as follows:

> USAID may at any time prior to unloading prescribe a different port of discharge from among the ports covered by the applicable tariff. Diversion charges shall apply in accordance with the tariff or contract of affreightment. Deviation insurance and extra handling costs actually incurred shall be reimbursed.

§ 201.44 Vesting in USAID of title to commodities.

(a) *Vesting upon order of USAID* USAID may direct that title to USAID-financed commodities in transit to a cooperating country shall be vested in USAID if, in the opinion of USAID, such action is necessary to assure compliance with the provisions or purposes of any act of Congress.

(1) *Rights of USAID upon vesting of title.* In accordance with instructions by USAID, the borrower/grantee, supplier, and bank shall transfer such negotiable bills of lading, suppliers' invoices, packing lists, inspection certificates or other designated documents relating to the commodities as are in, or may come into, their possession.

(2) *Diversion of commodities.* USAID may direct the master or operator of a vessel or an inland carrier carrying the commodities to divert them away from the port or other destination specified in the shipping documents and to deliver them at such other destination as USAID may designate.

(b) *Financial responsibility of USAID under vesting order.* (1) USAID will reimburse a supplier who has not already received payment under the purchase contract for all commodities with respect to which USAID has taken title under a vesting order.

(2) USAID will assume the responsibility for any extra costs (including the costs of marine insurance and handling) which are incurred as a result of a diversion. Such costs shall not exceed diversion charges as per tariff (liner shipments) or contract of affreightment (charters), and shall include only those deviation insurance and extra handling costs which are actually incurred.

(3) USAID shall incur no liability to the borrower/grantee, the importer, or to the approved applicant by reason of any order which vests in USAID title

to commodities, or by reason of any request for the diversion of commodities.

§ 201.45 Termination or modification of a loan, grant or implementing document.

(a) *Effect of termination or modification*. (1) Except as provided in paragraph (a)(2) of this section, the availability of USAID funds to finance the procurement of commodities and commodity-related services shall terminate or shall be modified, whenever and to the same extent that the implementing document which relates to such delivery is terminated or modified by operation of provisions contained in the document, or by the exercise of rights otherwise reserved to USAID.

(2) Unless the supplier and USAID agree otherwise, to the extent that the supplier has received an irrevocable letter of credit from a bank under an USAID letter of commitment, the purchase contract shall be affected only to the extent necessary to comply with any vesting order issued by USAID in accordance with § 201.44.

(b) *Responsibilities of parties after termination or modification of USAID-financing*. Upon termination or modification of USAID-financing of commodities or commodity-related services, the supplier, importer and approved applicant shall make such arrangements as are necessary to obtain the cancellation or modification of any letter of credit in favor of the supplier.

§ 201.46 Compensation to supplier if shipment is prohibited.

(a) *Payment to supplier*. USAID shall make appropriate payment to a supplier for the value of USAID-financed commodities available for immediate shipment from the United States if all the following conditions are satisfied:

(1) Shipment is prohibited by order of the U.S. Government and such order has general application to all shipments to the cooperating country.

(2) Payment may not be made by the bank under the terms of the letter of credit or payment instructions.

(3) The supplier is unable to dispose of the commodities without loss.

(4) The supplier tenders to USAID a negotiable warehouse receipt covering the commodities in question and presents to USAID such other documentation required by § 201.52 as may be appropriate under the circumstances.

(b) *Other settlement*. In lieu of accepting title to the commodities, USAID may negotiate with the supplier such other settlement as may be fair and equitable under the circumstances.

§ 201.47 Use of marine insurance loss proceeds.

The borrower/grantee shall pay promptly to USAID a sum equal to the proceeds received by an importer or its assignee in settlement of a marine insurance claim under a marine insurance policy financed pursuant to this part 201, if such proceeds are not expended in the manner provided by § 201.26 within a reasonable period after receipt by the importer.

Subpart F—Payment and Reimbursement

§ 201.50 Purpose.

This subpart describes:

(a) The methods by which USAID will make payment or reimbursement for commodities and commodity related services which have been furnished;

(b) The documentation required to be submitted to USAID for the purpose of obtaining such payment or reimbursement; and

(c) The terminal date for presentation of documents which USAID requires as a condition for payment or reimbursement.

§ 201.51 Methods of financing.

Under procurements subject to this part 201, the following methods of financing may be employed by USAID In each case, the method of financing shall be consistent with provisions in the pertinent implementing documents.

(a) *Direct reimbursement*. Upon presentation to USAID of the documents specified in § 201.52, a borrower/grantee will be reimbursed for the cost of commodities and commodity-related services procured by the borrower/grantee directly or procured by other importers with the authorization of the borrower/

grantee, if such commodities or services are eligible under the implementing document and under this part 201 for USAID-financing.

(b) *Letter of commitment to a bank.* At the request of the borrower/grantee, USAID will issue a letter of commitment to a bank for a specified amount in dollars. Reimbursement to a bank will be in accordance with the terms of such letter of commitment for sight payments made for the account of an approved applicant. Any such payment by a bank made in anticipation of a letter of commitment and falling within the scope of payments authorized by such letter of commitment when issued, will be deemed to be a payment to be reimbursed by USAID thereunder.

(1) *Requests for bank letters of commitment.* All requests for bank letters of commitment shall be in the English language and shall be submitted to USAID by the borrower/grantee in duplicate. They shall contain the following:

(i) Identification of the loan or grant agreement;

(ii) The dollar amount of the letter of commitment;

(iii) The name and address of the bank to which the letter of commitment is to be issued;

(iv) The name and address of the approved applicant;

(v) The expiration date to be stated in the letter of commitment, which shall be not later than the final date specified in the implementing document for submission of documentation to the bank as a basis for disbursement against the letter of commitment, except that, if a terminal shipping date is provided in the implementing document, the expiration date shall be the last day of the month following the month in which the terminal shipping date occurs.

(vi) Identification of the items to be financed under the letter of commitment (including the Schedule B identification).

(2) *Approved applicant's request to bank*—(i) *Form and effect of request.* An approved applicant may apply to the bank holding a letter of commitment for the issuance, confirmation, or advice of a commercial letter of credit for the benefit of a supplier, or may instruct the bank to make payments at sight to such supplier, or may instruct the bank to make payments at sight to or for the account of the borrower/grantee.

(ii) *Borrower/grantee assignment under a letter of commitment.* The borrower/grantee's request to USAID for a letter of commitment shall be deemed notification to USAID of assignment of any rights to receive reimbursement for the specified funds under the related implementing document. USAID, by issuance of the letter of commitment, shall be deemed to have consented to such assignment. Any such assignment or consent shall inure to the benefit of the bank's legal successors and assignees.

(iii) *Requirements imposed by bank.* The borrower/grantee and the approved applicant shall be deemed to have consented to imposition by the bank upon the beneficiary of any letter of credit or payment instruction of such requirements as the bank deems necessary in order to comply with its applicable obligations to USAID. Such consent shall be deemed an express condition incorporated in any request of the approved applicant under paragraph (b)(2)(i) of this section.

(3) *Reimbursement of bank.* Upon presentation to USAID of the documents described in § 201.52, USAID will reimburse the bank for any amounts paid by it in dollars to or on behalf of the approved applicant pursuant to a letter of commitment, subject, however, to compliance by the bank with the requirements of subpart H. Such documents in the normal course should be presented to USAID promptly. Bank charges will be eligible for reimbursement if authorized in the letter of commitment. Reimbursement normally will be made within 7 days by an electronic funds transfer.

(c) *Bank charges under letters of commitment.* (1) To claim reimbursement for commissions, transfers or other charges, not including interest on advances, the bank shall submit the Voucher SF 1034 and shall attach thereto a copy of the payment advice which identifies the costs being billed.

(2) To claim reimbursement for interest on advances, the bank shall claim

reimbursement on the Voucher SF 1034, attaching thereto:

(i) The monthly statement of advance account established under the letter of commitment, in duplicate, showing:

(A) The opening balance;

(B) The date and amount of each type of charge attributable to the letter of commitment, indicating the number of the letter of commitment, subsidiary letter of credit, or payment instruction or request under which the charge was made;

(C) The date and amount of each USAID reimbursement to the bank, indicating either the USAID bureau voucher number or the number of the letter of commitment, subsidiary letter of credit, or payment instruction or request under which the payment was made; and

(D) The closing balance;

(ii) The bank's monthly advice of charge, in duplicate, showing:

(A) The outstanding balance in the advance account on each day of the period covered; and

(B) The amount of interest charged during the period.

(3) *Certification*. Each claim for reimbursement shall have endorsed thereon or attached thereto a certification by an authorized representative of the bank that the charges for which payment is being claimed are in accordance with the schedule of charges agreed on between the bank and the approved applicant or beneficiary.

(4) *Report*. The bank shall submit a report showing the financial status of each letter of commitment issued to it by USAID. The content, format and frequency of the report shall be prescribed in the letter of commitment. The report shall be prepared in an original and two copies, and distributed as follows: USAID/W (original), approved applicant (copy) and cognizant Mission (copy). The report to USAID/W should be sent to the Office of Financial Management, Cash Management and Payment Division (M/FM/CMP), USAID, Washington, DC 20523–7702. The report shall be certified by an authorized signatory of the bank.

(d) *Direct letter of commitment to a supplier*. (1) At the request of a borrower/grantee, USAID may issue a direct letter of commitment to a supplier assuring payment by USAID of specified amounts to cover the cost of commodities and commodity-related services. The letter of commitment to a supplier will identify the purchase contract to which it relates and the implementing document under which it is issued.

(2) Assignment may be permitted as provided for in the direct letter of commitment.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.52 Required documents.

(a) *Commodities and commodity-related services*. Claims for reimbursement or payment with respect to commodities and commodity-related services shall be supported by the documents listed in paragraphs (a)(1) through (8) of this section or by such other documents as may be required in the letter of commitment or other applicable implementing document. Each document shall indicate the identification number of the letter of commitment or other applicable implementing document.

(1) *Voucher*. Voucher SF 1034 with three copies, to be prepared by the borrower/grantee, by the approved applicant, by the bank as assignee or agent for the approved applicant, or, in the case of a direct letter of commitment, by the supplier.

(2) *Supplier's invoice*. (i) One copy of the supplier's detailed invoice showing the following:

(A) The name and address of the importer;

(B) The quantity and the description of each item shipped, in sufficient detail, including the U.S. Department of Commerce Schedule B number, for ready identification;

(C) The total gross sales price;

(D) The total net sales price (determined by deducting from the total gross sales price the amounts required to be deducted under § 201.65(d));

(E) The sales price for each item net of all trade discounts under § 201.65(d);

(F) The delivery terms (e.g., f.o.b., f.a.s., c.i.f. or c. & f.);

(G) The type and dollar amount of each incidental service which is not included in the price of the commodity

and for which reimbursement is claimed;

(H) The type and dollar amount of each delivery service obtained by the supplier of the commodity for the importer's account which is not included in the price of the commodity and for which reimbursement is claimed;

(I) To the extent that the commodity price includes commodity-related services, a list of each such service and the dollar amounts attributable to each such service; and

(J) Unless a Supplier's certificate covering marine insurance is submitted, the name and address of the supplier of such insurance and the dollar cost thereof.

(ii) Each invoice submitted under a bank letter of commitment shall be marked PAID by the supplier, or alternatively, the bank may certify by an endorsement on or attachment to the invoice that payment has been made in the amount shown on the invoice.

(iii) Each invoice must contain certifications from the supplier to the effect that:

(A) The USAID marking requirements set forth in § 201.31(d) have been met;

(B) Unless otherwise specified by USAID, the supplier has airmailed to the USAID Mission in the capital city of the cooperating country one copy each of the invoice, packing list and bill(s) of lading;

(C) If shipment is effected by ocean vessel, one copy of all bill(s) of lading described in § 201.52(a)(4) has been mailed to: Maritime Administration, Division of National Cargo, 400 Seventh Street SW., Washington, DC 20590–0001; and Transportation Division, Office of Procurement, USAID, Washington, DC 20523–7900.

(3) *Charter party*. A copy (or photostat) of any approved charter party under which shipment is made, submitted:

(i) By the commodity supplier whenever USAID-finances any portion of the dollar price of a commodity sale under c.&f. or c.i.f. delivery terms, or

(ii) By the supplier of ocean transportation whenever USAID-finances the freight under any freight reimbursement arrangement.

If shipment is made under a consecutive voyage or time charter and the person or organization seeking reimbursement or payment has previously submitted to USAID a copy (or photostat) of said charter party in support of a prior claim for reimbursement or payment, such person or organization may, in lieu of further submission of the charter party, certify to the fact of prior submission.

(4) *Evidence of shipment*. (i) A copy (or photostat) of the bill(s) of lading (ocean, charter party, air, rail, barge, or truck) or parcel post receipt evidencing shipment from the point of export in the source country or free port or bonded warehouse. The bill(s) of lading shall indicate the carrier's complete statement of charges, including all relevant weights, cubic measurements, rates and additional charges, whether or not freight is financed by USAID If an NVOCC is used, rated copies of both the NVOCC's through bill of lading and the bill(s) of lading of all VOCCs must be included.

(ii) When the commodity is transported to the cooperating country under its own power (e.g., a fishing vessel), USAID will require a certificate signed by the importer or its authorized agent, certifying that the commodity has been received by the importer, to be submitted instead of a bill of lading.

(iii) When the supplier is not responsible under the terms of its agreement with the importer for assuring that the commodities are loaded on board the vessel, such as when delivery terms are f.a.s. port of shipment, the importer may request and the Commodity Support Division, Office of Procurement, USAID, Washington, DC 20523–7900 may authorize the following documents, instead of a bill of lading, to be submitted with a claim for reimbursement or payment for the commodities:

(A) A dock or warehouse receipt containing the commodity description, weight and cubic measurement, port of loading, and, if available, name and flag of vessel; the receipt must show consignment of the commodities to a person or organization designated by the importer; and

(B) A letter from the consignee addressed to USAID undertaking to arrange for shipment of the goods to the cooperating country and to deliver to: FM/CMPD, Office of Financial Management, USAID, Washington, DC 20523–7702, within 15 days from the date of shipment, a copy of the bill of lading evidencing shipment to the cooperating country. The bill of lading shall indicate the carrier's complete statement of charges, as in paragraph (a)(4)(i) of this section.

(5) *Documentation on shipments to a free port or bonded warehouse.* When a commodity is shipped out of a free port or bonded warehouse, the supplier shall:

(i) Provide as an attachment to a copy of the invoice, a copy of the bill of lading (bearing a notation of the freight cost) covering the shipment of the commodity into the free port or bonded warehouse, or

(ii) If such a bill of lading is not available to the supplier, provide the following information and certify to the accuracy of the information: the country or area from which the commodities were shipped to such free port or bonded warehouse; the name and flag of the vessel which transported the commodities from the source country to the free port or bonded warehouse; the cost of the freight for such shipment; and the free port or bonded warehouse to which shipment was made from the source country, or

(iii) If commodities have been commingled in the warehouse in such a way that shipments out of the warehouse cannot be related to particular shipments into the warehouse, the supplier shall certify to the best of its knowledge and belief that a portion of the commodities was transported to the free port or bonded warehouse as required by § 201.13(b)(1)(i)(D), and the quantity for which USAID-financing is sought does not exceed that amount.

(6) *Supplier's Certificate (form AID 282).* An original and one copy of the Supplier's Certificate executed, without modification, by:

(i) The supplier of the commodity for the cost of the commodity and any commodity-related services furnished by the commodity supplier;

(ii) The carrier for the cost of ocean or air transportation financed by USAID;

(iii) The insurer for the cost of marine insurance financed by USAID if such cost exceeds $50.

(7) *Freight forwarder's invoice.* One copy of the freight forwarder's invoice, if any, marked PAID and containing a complete, individually priced itemization of all charges and fees billed by or through the forwarder.

(8) *Commodity approval application (form AID 11).* One signed original of the Commodity Approval Application executed by the commodity supplier and countersigned by USAID. In the case of a claim for reimbursement or payment for partial shipment presented subsequent to submission of the original Commodity Approval Application, one reproduced copy of the original countersigned Commodity Approval Application, appropriately certified as such by the supplier.

(b) *Execution of Certificates.* (1) The original of each Supplier's Certificate and Commodity Approval Application shall be signed by hand and shall bind the person or organization in whose behalf the execution is made.

(2) The Supplier's Certificate covering the cost of marine insurance may be executed on behalf of the marine insurer by an insurance broker or by a commodity supplier if the commodity supplier is the assured under an open cargo insurance policy issued by the marine insurer and is authorized under such policy to bind the marine insurer by issuing insurance certificates or policies in favor of importers. In each such case, the insurance broker or commodity supplier shall indicate on the Supplier's Certificate the name and address of the insurance company which is acting as the supplier of marine insurance and shall describe itself below its signature as a commodity supplier issuing a certificate under an open cargo insurance policy or as an insurance broker.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.53 Final date for presentation of documents.

(a) *Direct reimbursement.* Prescribed documents shall be presented to USAID

by the borrower/grantee no later than the terminal date specified in the implementing document.

(b) *Letter of commitment to a bank.* Prescribed documents shall be presented by the bank to USAID and shall cover:

(1) Payments or negotiations made under letters of credit expiring no later than the expiration date stated in the letter of commitment, or

(2) Payments to a supplier, the approved applicant, or, at the request of an approved applicant, to a person other than the supplier, made no later than such expiration date.

(c) *Direct letter of commitment to supplier.* Documents prescribed for payment under a direct letter of commitment to a supplier shall be presented by the supplier to USAID no later than the expiration date stated therein. Such documents must evidence shipment no later than the terminal shipment date provided in the direct letter of commitment.

Subpart G—Price Provisions

§ 201.60 Purpose and applicability of this subpart.

This subpart prescribes rules relating to prices, discounts, commissions, credits, allowances, and other payments. These rules shall be observed in the procurement of commodities and commodity-related services financed under this part. The rules implement and supplement the requirements of the Act relating to prices in such procurement. The general purpose of these rules is to assure the prudent use of USAID funds.

(a) *Statutory price limitations.* (1) Section 604(a) of the Act provides *inter alia* that funds made available under this Act may be used for procurement outside the United States only if the price of any commodity procured in bulk is lower than the market price prevailing in the United States at the time of procurement adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(2) Section 604(b) of the Act provides that no funds made available under this Act shall be used for the purchase in bulk of any commodities at prices higher than the market price prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(b) *Transactions covered.* The rules and conditions prescribed by this subpart apply to all USAID-financed transactions subject to this regulation, whether or not the commodities are purchased in bulk.

(c) *Compliance.* Compliance with this subpart G and with any additional price requirement contained in the implementing document shall be a condition to the financing by USAID of procurement transactions under this part. Post-audit of transactions will be made by USAID to determine whether there has been such compliance.

§ 201.61 Meaning of terms in this subpart.

(a) *Class of purchaser* means any group of purchasers which is separately identifiable and which is distinguishable from other purchasers on the basis of quantity purchased, distribution function or established trade practice.

(b) *Commission.* See § 201.01(h).

(c) *Comparable domestic sale* means any comparable sale not in export transactions.

(d) *Comparable export sale* means any comparable sale in export transactions.

(e) *Comparable sale* means any sale of or bona fide offer to sell the same commodity, or (in the absence of such a sale or offer to sell) any sale of or offer to sell a similar commodity which, with respect to the quantity, quality, grade, period of delivery, supply area, terms of sale, or class of purchaser, either:

(1) Is not sufficiently different from the sale being tested to result customarily in a price different from the price in the sale being tested; or

(2) Can be related to the sale being tested through application of a customary price differential. A sale which is otherwise comparable to another sale is not rendered noncomparable by virtue of its being made out of a free port or bonded warehouse. The fact that a sale is made out of a free port or bonded warehouse shall not cause that

sale to differ from otherwise comparable sales with respect to terms of sale, supply area, or period of delivery.

(f) The *date the purchase price is fixed* means the date on which the parties agree on the price. If, however, the parties establish the price as of any other date which is subsequent to the date of such agreement and not later than the date of delivery, the term means such other date regardless of whether it precedes, coincides with or follows the legally effective date of the purchase contract.

(g) *Export differential* means the customary difference in price, if any, between domestic sales and otherwise comparable export sales.

(h) *Period of delivery* means the length of time between the date the purchase price is fixed or the date of the purchase contract, whichever is later, and the date by which delivery is to be completed.

(i) *Producer* means any person who grows, mines, manufactures, processes, or assembles a commodity in the form in which it is exported.

(j) *Purchase price* means the total amount which the purchaser agrees to pay or make available to or for the benefit of the supplier (including any person or organization designated by the supplier to receive such payment) for any commodity or commodity-related service which is wholly or partly financed by USAID.

(k) *Representative of the importer* means any entity affiliated with the importer by ownership or management ties, and any office or employee of such entity.

(l) *Similar commodity* means a commodity which is functionally interchangeable with the commodity in the sale being tested, and affords the purchaser substantially equivalent serviceability.

(m) *Supply area* means the source country, or if the commodity is customarily sold at different prices (exclusive of transportation costs) from different geographic areas within a source country, the specific geographic area within the source country from which the commodity is shipped to the cooperating country.

(n) *Time of purchase* means that period encompassing the date the purchase price is fixed during which prices in comparable sales remain substantially constant.

(o) *Transportation cost* means the cost of all transportation by land, sea, or air from the port of export to the destination in the cooperating country, plus the cost of marine insurance, if any, covering such transaction. Such costs are financed by USAID only to the extent provided in § 201.13.

§ 201.62 Responsibilities of borrower/grantee and of supplier.

(a) *Responsibilities of borrower/grantee.* The borrower/grantee shall:

(1) When required by USAID, develop and periodically update, or cooperate with USAID in the development and updating of, lists of importers who have traditionally imported the commodities which may be purchased under the loan or grant. Such listings shall be by commodity groupings selected by USAID, cover all commodities eligible for financing, and, to the extent such information is available, show the names and addresses of all importers, regardless of the source from which their imports originated.

(2) Insure that the importer

(i) Procures in accordance with the conditions set forth in subpart C as applicable, and

(ii) Except as provided otherwise in § 201.22, pays no more than the lowest available competitive price, including transportation cost, for the commodity.

(b) *Responsibility of supplier.* In accordance with the provisions contained in the Supplier's Certificate, which the supplier must execute in order to receive payment, the supplier is responsible for compliance with the provisions of this subpart G, other than paragraph (a) of this section.

§ 201.63 Maximum prices for commodities.

(a) *U.S. prevailing market price—U.S. source.* The purchase price for a commodity, the source of which is the United States, shall not exceed the market price prevailing in comparable export sales in the United States at the time of purchase, adjusted for differences in the transportation cost: *Provided, however,* That if there are no

such comparable export sales, then the purchase price, excluding transportation cost, may not exceed the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential.

(b) *U.S. prevailing market price—non-U.S. source.* The purchase price, including transportation cost, for a commodity the source of which is not the United States shall be lower than the market price prevailing in comparable export sales in the United States at the time of purchase including transportation cost: *Provided, however,* That if there are no such comparable export sales in the United States, then the purchase price from the source outside the United States, including transportation cost, must be lower than the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential and transportation cost.

(c) *Supplier's comparable export price—U.S. and non-U.S. sources.* (1) The purchase price excluding transportation cost, shall not exceed prices generally charged by the supplier in comparable export sales from the source country at the time of purchase.

(2) The requirement in paragraph (c)(1) of this section shall not apply to the purchase price:

(i) In any sale under formal competitive bid procedures; or

(ii) In any sale of a commodity generally traded on an organized commodity exchange.

(3) *Comparable export sales* for the purpose of paragraph (c) of this section shall not include sales:

(i) Under formal competitive bid procedures; or

(ii) Of a commodity by a supplier to affiliates if the supplier demonstrates an established practice of selling the commodity to affiliates at prices lower than the prices it charges to nonaffiliates.

(d) *Source country prevailing market price—non-U.S. source.* The purchase price, excluding transportation cost, shall not exceed the market price prevailing in the source country in comparable export sales at the time of purchase: *Provided, however,* That, if there are no such comparable export sales, then the purchase price, excluding transportation cost, shall not exceed the market price prevailing in comparable domestic sales in the source country at the time of purchase, adjusted upward or downward by the appropriate export differential.

(e) *Price test in the absence of comparable sales at time of purchase*—(1) *Sale by supplier who is not the producer.* The purchase price shall not exceed the sum of:

(i) The lower of the following: The price paid by the supplier for the commodity or the price charged by the producer in the original sale of that specific commodity; and

(ii) A markup over the amount allowed in paragraph (e)(1)(i) of this section which may not exceed the lower of the following: The markup over direct cost that is usual and customary in sales by the supplier of the same commodity, if any, or the most similar commodity, or, the markup over direct cost that is usual and customary in such sales by the competitors of the supplier; and

(iii) To the extent not included in paragraph (e)(1)(i) of this section an amount not to exceed the cost at prevailing rates of those expenses recognized in § 201.64(a) and actually incurred in moving the commodities supplied from the point of purchase to a position alongside or on board the vessel or other export conveyance at point of export.

(2) *Sale by a supplier who is the producer.* The purchase price shall not exceed a price established in accordance with the customary pricing practices of the supplier for other products of the same general class as the commodity sold.

(f) *Additional rules for sales through or out of a free port or bonded warehouse.* (1) The purchase price, including transportation costs to a cooperating country, of a commodity which has passed through a free port or bonded warehouse shall not exceed:

(i) The maximum price f.o.b. or f.a.s. source country eligible for USAID-financing under the foregoing provisions of this § 201.63: plus

(ii) Transportation cost calculated on the basis of the prevailing ocean freight rate for shipments using the most direct route from the source country to the cooperating country on the type and flag of vessel on which the commodity actually moved from the free port or bonded warehouse to the cooperating country.

(2) The purchase price of a commodity f.o.b. or f.a.s. a free port or bonded warehouse shall not exceed the maximum price established in paragraph (f)(1) of this section, minus transportation costs from the free port or bonded warehouse to the cooperating country, calculated on the basis of the prevailing ocean freight rate from the free port or bonded warehouse to the cooperating country for the type and flag of vessel on which the commodity actually moved between those points.

(g) *Commodity price subject to escalation.* If a purchase contract contains a price escalation clause, USAID will finance:

(1) The purchase price of the commodity before the operation of the escalation clause to the extent that it does not exceed the applicable price limitations contained in this subpart; and

(2) That portion of the commodity price attributable to the operation of the price escalation clause if such clause:

(i) Uses a formula based on variations in a cost factor which is reasonably related to the price of the commodity subject to escalation and is readily determinable;

(ii) Provides for downward as well as upward adjustment of the price; and

(iii) Accords with recognized trade practices.

§ 201.64 Application of the price rules to commodities.

(a) *Calculation of commodity prices on a common basis.* In testing whether the purchase price of a commodity exceeds the price in comparable export sales or in comparable domestic sales, as applicable under § 201.63 (a), (c), (d) and (e), it is necessary to insure that the price being tested as well as the prices being used as a test or measurement are calculated on the basis of delivery alongside or on board the vessel or other export conveyance. Such prices will include, therefore, in addition to the price of the commodity at an internal point in the source country, transportation from that point to the port of export in the source country, and to the extent not already included in the price at the internal point, inspection, export packing, forwarder's fees at customary rates, the cost of placing the commodities on board the vessel or export conveyance (unless this cost is covered in the export freight), and other necessary costs customary in the trade.

(b) *Calculation of commodity prices which involve transportation costs.* (1) In testing the purchase price which includes transportation cost (customarily known as a c. & f. or c.i.f. price) for compliance with the requirements of § 201.63 (a), (c), (d) and (e), USAID will subtract transportation cost as calculated by reference to the freight rate, for the type and flag of vessel on which the commodity was shipped, prevailing on the date the purchase price is fixed. In the absence of evidence to the contrary, the actual transportation cost paid by the supplier shall be presumed to be the transportation cost calculated in accordance with the formula contained in the foregoing sentence.

(2) In testing a purchase price involving transportation cost for compliance with § 201.62 and § 201.63(b), the test or measurement prices shall be:

(i) Prices based upon transportation by a U.S.-flag vessel if the price tested involves transportation by such vessel; or

(ii) Prices based upon transportation by either a U.S.-flag or a foreign-flag vessel, whichever is lower, if the price tested involves transportation by a foreign-flag vessel.

(c) *Calculation of amount eligible for financing when shipment is through or out of a free port or bonded warehouse.* (1) When a shipment to a cooperating country has passed through a free port or bonded warehouse, USAID will finance no more than the lower of the following:

(i) The maximum price described in § 201.63(f)(1), or

(ii) The maximum price described in § 201.63(f)(1)(i), plus any transportation costs into the free port or bonded warehouse which meet the requirements of § 201.13(b)(1)(i)(D), and any transportation costs out of the free port or bonded warehouse on a vessel flying the flag of a country included in the authorized geographic code.

(2) When a shipment is f.o.b. or f.a.s. a free port or bonded warehouse, USAID will finance no more than the lower of the following:

(i) The maximum price described in § 201.63(f)(2), or

(ii) The maximum price described in § 201.63(f)(1)(i), plus any transportation costs into the free port or bonded warehouse which meet the requirements of § 201.13(b)(1)(i)(D).

(d) *Determination of prevailing prices.* In the determination of any prevailing market price of any commodity or any prevailing price or maximum eligible freight rate for a commodity related service, relevant published and unpublished price information will be considered.

§ 201.65 Commissions, discounts and other payments, credits, benefits and allowances.

(a) *General.* This section sets forth the rules which govern the eligibility of commissions, discounts and certain other payments, credits, benefits and allowances for USAID-financing.

(b) *Commissions to sales agents.* Unless otherwise provided in the implementing document, a commission paid, or to be paid, to a bona fide agent of the supplier is eligible for financing under this part, if such agent either has made a direct and substantial contribution toward securing the purchase contract for the supplier or is engaged on a continuing basis in securing similar contracts for the supplier. Such commissions are eligible to the extent they comply with § 201.65(f).

(c) *Commissions and other payments, credits, benefits or allowances to importers, purchasing agents and others.* Unless otherwise authorized by USAID, no commission or other payment, credit, benefit or allowance of any kind shall be paid, made, or given, or agreed to be paid, made or given, in connection with any sale subject to this part by the supplier or its agent:

(1) To or for the benefit of the importer;

(2) To or for the benefit of a purchasing agent or other agent or representative of an importer, even though such agent or representative may also have an agreement with a supplier to represent the supplier; or

(3) To any third party in connection with a sale by the supplier to its dealer, distributor, or established agent in the cooperating country.

(d) *Trade discounts.* To arrive at the net amount eligible for USAID-financing, all trade discounts, whether in the form of payments, credits, or allowances, to which the importer is entitled shall be deducted from the gross amount of the supplier's invoice submitted under § 201.52(a)(2)(i)(D).

(e) *Commissions and other payments or benefits attributable to USAID-financing.* Every commission or other payment, credit, benefit, or allowance of any kind paid, made or given, or agreed to be paid, made or given, in connection with the sale of commodities financed under this part to any person described in § 201.65(c) (1), (2) or (3) shall be presumed conclusively to have been paid from USAID funds and shall thereby be subject to the requirements of this part 201.

(f) *Maximum commission.* A commission shall not exceed the lesser of the amount which the supplier customarily pays in connection with similar transactions or the amount which is customary in the trade.

(g) *Reporting.* All commissions and other payments, credits, benefits or allowances of any kind paid, made or given, or agreed to be paid, made or given, by the supplier in connection with USAID-financed sales of commodities and commodity-related services shall be fully reported on the Invoice-and-Contract Abstract of the Supplier's Certificate required under § 201.52(a)(6). Any such amounts not reported shall be ineligible for USAID-financing.

(h) *Brokerage commission.* In connection with ocean freight services, USAID will finance a brokerage commission only if:

(1) Such commission does not exceed 2½ percent of the ocean freight charge

(exclusive of deadfreight, demurrage and detention);

(2) Such commission is payable to an individual resident in a country included in the authorized source code; a non-resident citizen of a country included in the authorized source code; or a corporation or partnership organized under the laws of a country included in the authorized source code; and

(3) The names of all persons receiving such commissions appear on the face of the charter party.

(i) *Address commissions.* An address commission to or for the benefit of a charterer shall be deemed a discount on the stated freight rate or freight charge which the supplier of transportation services shall deduct from the cost of transportation financed by USAID. If the supplier of the commodity is the charterer, it shall refund to USAID any address commission received by it. If the supplier of the commodity is not the charterer, the borrower/grantee shall be responsible for making a refund to USAID of any such commissions received by the charterer.

§ 201.66 Side payments.

Any payment which an importer makes to a supplier, whether or not indicated on the supplier's invoice and whether or not financed by USAID, in connection with an USAID-financed transaction, shall be disclosed by the supplier on the Supplier's Certificate and shall be considered as part of the actual purchase price in applying the rules of this subpart G.

§ 201.67 Maximum freight charges.

(a) *Ocean freight rates*—(1) *Similar shipments. Similar shipments* means shipments which are similar with respect to type of commodity, commodity rate classification, quantity, vessel flag category (U.S.-or foreign-flag), choice of ports, and other pertinent factors. In determining whether shipments are similar, no effect shall be given to the identity of the shipper or the circumstance that the shipment is or is not financed by the Government of the United States.

(2) *Maximum charter rates.* (i) USAID will not finance ocean freight under any charter which has not been submitted to and received prior approval by USAID/W. USAID will not approve a charter if the freight rate exceeds:

(A) The rate prevailing for similar shipments; or

(B) The lowest rate charged by the vessel for similar shipments on the same voyage.

(ii) In determining the rate prevailing for similar shipments, recognized sources of charter market rate information will be consulted and, if necessary, will be supplemented by other information which contributes to a realistic determination of the prevailing charter rate.

(3) *Effect of USAID approval of a charter.* USAID prior approval of a charter shall be confirmed by USAID in writing and shall then be final except in cases where the freight rate exceeds the lowest rate charged by the vessel for similar shipments on the same voyage or where USAID's prior approval is based on false or misleading representations made to USAID by the charterer or vessel owner(s).

(4) *Maximum liner rates.* USAID will not finance ocean freight for a cargo liner shipment at a rate which exceeds the lowest of the following:

(i) The conference contract rate or the conference noncontract rate, whichever is lower;

(ii) The rate named in any tariff or other rate listing for the same destination and commodities on file at the Federal Maritime Commission; or

(iii) The lowest rate charged by the VOCC for similar shipments on the same voyage.

(5) *Despatch.* (i) The borrower/grantee, or the supplier with respect to despatch earned by the supplier, shall be responsible for refunding to USAID all despatch earned:

(A) At the port of unloading on c.i.f. or c. & f. shipments, or

(B) At the port of loading or unloading on f.o.b. or f.a.s. shipments, to the extent that despatch exceeds demurrage incurred on the same voyage.

(ii) Refunds of despatch, supported by the vessel's signed laytime statement(s), must be transmitted to the Office of Financial Management, USAID, Washington, DC 20523–7702, within 90 days after date of discharge of cargo on which the despatch was earned.

(b) *Airfreight rates*. USAID will not finance airfreight which exceeds the following:

(1) The rate under any air charter approved by USAID covering the transaction;

(2) The lowest rate charged by the carrier for similar shipments on the same flight; or

(3) The rate prevailing in the industry for similar shipments. A similar shipment is one which is similar with respect to type of commodity, commodity rate classification, quantity, flag category, choice of airport, and other pertinent factors.

[55 FR 34232, Aug. 22, 1990, as amended at 64 FR 17535, Apr. 12, 1999]

§ 201.68 Maximum prices for commodity-related services.

(a) The price for an USAID-financed commodity-related service, other than ocean or air transportation, shall not exceed the lower of:

(1) The prevailing price, if any, for the same or similar services; or

(2) The price paid to the supplier under similar circumstances by other customers.

(b) The eligible price of services covered by an NVOCC bill of lading is limited to the sum of the costs of individual delivery services eligible under § 201.13 of this part, and only to the extent that the cost of each such service is eligible for USAID-financing under § 201.67 or § 201.68(a) of this part.

§ 201.69 Cooperating country taxes and fees.

USAID will not finance any taxes or fees imposed under the laws in effect in the cooperating country, including customs duties, consular and legalization fees, and other levies.

Subpart H—Rights and Responsibilities of Banks

§ 201.70 Purpose.

This subpart sets forth the rights and responsibilities of banks with regard to reimbursement under a letter of commitment opened pursuant to an USAID request. Banks will not be held responsible for the requirements of subparts B, C, D, E (excluding § 201.44(a)(1)), and subpart G except insofar as provisions of these subparts are included in this subpart H or in a letter of commitment issued by USAID to a bank.

§ 201.71 Terms of letters of credit.

Any letter of credit issued, confirmed or advised under an USAID letter of commitment and any agreement relating to such letter of credit or to instructions for payment issued by an approved applicant shall not be inconsistent with or contrary to the terms of the letter of commitment. Any such letter of credit or agreement may be modified or extended at any time in such a manner and to such extent as is acceptable to the approved applicant and the bank: *Provided*, That such modification or extension may not be inconsistent with or contrary to the terms of the letter of commitment. In the case of any inconsistency or conflict between the terms and conditions of the letter of commitment and the instructions of the approved applicant, the terms and conditions of the letter of commitment shall control.

§ 201.72 Making payments.

(a) *Collection of documents*. The bank shall be responsible for obtaining the documents specified in subpart F and in the letter of commitment when making payment under a letter of credit pursuant to instructions of an approved applicant.

(b) *Examination of documents other than Supplier's Certificate*. The bank shall examine the documents (other than the Supplier's Certificate and the Commodity Approval Application) to be submitted to USAID in accordance with good commercial practice to determine whether such documents comply with the requirements of paragraphs (b) (1) through (7) of this section in the following particulars, and no other.

(1) *Shipment*. The documents submitted as evidence of the shipment of commodities under § 201.52(a)(4) shall be dated within the shipping period, if any, specified in the letter of commitment. The bill of lading shall contain the carrier's statement of charges whether or not freight is financed by USAID.

(2) *Source of commodities.* The documents submitted in connection with the claim for reimbursement on commodities may not indicate that the source of the commodities is inconsistent with the USAID geographic code designation contained in the letter of commitment.

(3) *Destination.* The documents submitted shall indicate that the destination of the commodities, by shipment, transshipment, or reshipment, is the cooperating country named in the letter of commitment.

(4) *Description.* The documents shall describe and identify the commodities or services in a manner which, according to good commercial practice, is not inconsistent with the description contained in the letter of credit or payment instructions issued under a letter of commitment. The bank shall not be required to determine whether the supplier's invoice meets the detailed requirements of § 201.52(a)(2)(i).

(5) *Discounts and purchasing agents' commissions.* If the documents disclose that the invoice price includes either discounts or commissions payable to purchasing agents, the bank shall not make payment of such discounts and commissions. In the absence of such information, however, the bank shall not be required to make independent inquiry as to whether the invoice price includes such items.

(6) *Certifications.* Each supplier's invoice presented for payment shall contain such other certifications as may be required in the letter of commitment. The bank shall accept only certifications which, to the best of its knowledge and belief, have been signed by hand.

(7) *Other requirements.* The documents submitted shall contain such other information as required by the letter of commitment, except that the bank shall have responsibility in this regard only to the extent specifically indicated in the letter of commitment.

(c) *Acceptance of certificates.* A bank shall not accept for submission to USAID the original of the Supplier's Certificate, or the Commodity Approval Application, unless, to the best knowledge and belief of the bank, each such original has been signed by hand by the supplier and the Commodity Approval Application has been countersigned by USAID.

§ 201.73 Limitations on the responsibilities of banks.

The following general limitations on the responsibilities of banks issuing, advising, or confirming letters of credit and making payments under letters of credit or otherwise shall apply.

(a) *Sufficiency and completeness of documents.* Any document, including the Supplier's Certificate and the Commodity Approval Application, submitted by a bank to USAID in support of a claim for reimbursement, shall be sufficient if it purports to be the sort required to be delivered and if it has been accepted by the bank in the ordinary course of business in good faith. Except as may be required in the discharge of its responsibilities under § 201.72 (b) and (c), the bank's right of reimbursement shall not be affected by the fact that any document required to be submitted by it is incomplete or may indicate noncompliance with any provision of this part.

(b) *Reimbursement right notwithstanding certain deficiencies.* A bank's right to reimbursement from USAID for payments which the bank has made will not be affected by the fact that the Commodity Approval Application or the Invoice-and-Contract Abstract on the reverse of the Supplier's Certificate may be incomplete, or may indicate noncompliance with any provision of this part 201, the letter of commitment, or any other implementing document, or may be inconsistent with other documents required for reimbursement.

(c) *Nonresponsibility of bank for truth or accuracy of statements or certifications.* The bank shall not be responsible for the truth or accuracy of any information or statement contained in any Supplier's Certificate or any other document certification to be submitted by it to USAID, notwithstanding any knowledge or information in the actual or constructive possession of the bank to the contrary. The bank shall not be obligated to look beyond the documents, including any certifications endorsed thereon, to be submitted by it or to make any independent investigation as to the truth or accuracy of any

information or statement contained therein.

(d) *Protection of bank making payment.* Acceptance by the bank of any document in the ordinary course of business in good faith as being a genuine and valid document and sufficient in the premises, and the delivery thereof to USAID, shall constitute full compliance by the bank with any provision of this part, the letter of commitment requiring delivery of a document of the sort that the document actually so delivered purports to be. The bank shall be entitled to receive and retain reimbursement of the amount of all payments made by it against documents so accepted, notwithstanding that such payments may be made in connection with a purchase in excess of the price calculated in accordance with the applicable provisions of subpart G.

(e) *Payment to third persons.* The bank's right of reimbursement shall not be affected by the fact that payment is made to the approved applicant or at the request of the approved applicant or such beneficiary to a person other than the supplier under the contract to which such payment relates, if the bank has complied with all other requirements of the letter of commitment and has satisfied itself in good faith that the person to whom it makes payment has, in turn, made payment to the supplier.

(f) *Bank procedures with regard to certain suppliers.* In the event a bank receives written advice from USAID concerning special conditions which are applicable to transactions of particular suppliers, such bank will use reasonable care to maintain procedures designed to ensure that accommodations thereafter furnished by it with respect to such suppliers by means of the issuance, confirmation, advising or transfer of letters of credit, or the making of payments not under letters of credit shall reflect such special conditions. While banks are expected to comply with the foregoing obligation, a bank which has used reasonable care to establish and maintain such procedures will not be responsible for any inadvertent furnishing of any such accommodation not containing applicable special conditions or the making of payment thereunder. For the purpose of ascertaining whether the supplier is a person or organization subject to an USAID advice concerning special conditions applicable to its transactions under this paragraph, a bank, in making payment under a letter of credit or otherwise, may consider as supplier the person or organization issuing the invoice.

(g) *Provision of implementing documents.* A bank shall not be responsible for compliance with any provision of an implementing document other than a letter of commitment.

§ 201.74 Additional documents for USAID.

In addition to the documents required for reimbursement, a bank shall retain in its files for a period of at least 3 years and shall make available to USAID promptly upon request a copy of any of the following documents which may pertain to an USAID-financed transaction:

(a) Each letter of credit issued, confirmed, or advised by it, together with any extension or modification thereof;

(b) Payment instructions received from the approved applicant;

(c) Each application and agreement relating to such letter of credit or instructions for payment, together with any extension or modification thereof;

(d) A detailed advice of the interest, commissions, expenses, or other items charged by it in connection with each such letter of credit or payment instructions.

§ 201.75 Termination or modification.

If USAID directs that the delivery of commodities be terminated, orders that title to commodities be vested in it, or modifies any implementing document concerning the disposition of documents, USAID shall give written notice thereof to the banks holding applicable letters of commitment and shall instruct each bank with regard to the disposition of documents. Each such bank shall be relieved of any liability whatsoever to the approved applicant for anything done or omitted to be done under instruction of USAID. Notwithstanding the foregoing, a bank shall comply with the instructions of USAID only to the extent that it may do so without impairing or affecting

any irrevocable obligation to any person or organization except an approved applicant, and in the event the bank shall incur any costs, expenses, or liabilities, including any liability to the approved applicant, it shall be repaid and reimbursed by USAID in respect thereof.

Subpart I—Rights and Remedies of USAID, and Waiver Authority

§ 201.80 Purpose.

This subpart sets forth certain USAID rights and remedies against borrower/grantees and suppliers, and prescribes certain general provisions relating to the waiver by USAID of this part.

§ 201.81 Rights of USAID against borrower/grantees.

If any transaction financed hereunder violates the requirements of this part or any U.S. statute or any rule or regulation of USAID promulgated under any such statute, USAID may require the borrower/grantee to refund the amounts USAID determines are attributable to such violation and may exercise any right of acceleration or termination contained in the implementing document. The borrower/grantee shall be deemed to have agreed to make such refund or accelerated payment promptly upon request by USAID and shall be deemed to have consented to any modification of the implementing document determined by USAID to be necessary to reflect any such refund or acceleration.

§ 201.82 Rights of USAID against suppliers.

Without limiting the responsibility of the borrower/grantee or other parties, USAID may require an appropriate refund to it by a supplier under any transaction which violates the requirements of this part, whenever in USAID's opinion the failure of the supplier to comply with the rules and other requirements of this part has contributed to such violation. Any refund requested will include interest from the time of payment to the supplier. Interest will be charged at the rate established by the Secretary of the Treasury in accordance with the Internal Revenue Code, 26 U.S.C. 6621(b).

§ 201.83 No waiver of alternative rights or remedies by USAID.

No right reserved to USAID in this subpart to seek a refund from a borrower/grantee, and no exercise of such right, whether or not successful, shall in any way limit or affect, under the doctrine of the election of remedies or otherwise, USAID's rights against a supplier under this subpart I or under the laws of the United States, or of any other country or political subdivision thereof, nor shall any right or remedy herein reserved to USAID against a supplier in any way derogate from or otherwise limit any other rights or remedies which may accrue to USAID under such laws.

§ 201.84 Limitation on period for making refund requests.

USAID will endeavor, but shall not be bound, to make any requests for refunds from a borrower/grantee within three years from the date of the last disbursement of USAID funds for the transaction to which such request relates.

§ 201.85 Legal effect of USAID approvals and decisions.

In any transaction subject to this part 201, USAID may reserve certain rights to approve the transaction for USAID-financing. USAID, in reserving any approval rights, acts solely as a financing entity to assure the proper use of United States Government funds. Any decision by USAID to exercise or refrain from exercising these approval rights shall be made as a financier and shall not be construed as making USAID a party to the contract or incurring any liability to the parties jointly or to any of them.

§ 201.86 Waiver and amendment authority.

USAID may waive, withdraw, or amend at any time any or all of the provisions of this part.

APPENDIX A TO PART 201—SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT (AID 282)

INVOICE-AND-CONTRACT ABSTRACT

1. COMMODITY SUPPLIER'S NAME AND ADDRESS	2. FOR A.I.D. USE 3. A.I.D. IMPLEMENTATION NUMBER
4. IMPORTER'S NAME AND ADDRESS	

5. VESSEL	6. FLAG	7. PORT OF LOADING

8. COMMODITY INFORMATION		
a. Description of Commodity and Schedule B No.	b. Gross Weight	c. Measurement

9. INVOICE INFORMATION	10. CONTRACT INFORMATION	11. SUPPLIER INFORMATION	
a. Number	a. Number	a. Small Business ☐ Yes ☐ No (Complete b)	b. Estimated Value (% of Block 9c) Furnished From Small Businesses _____%
b. Date	b. Date	c. Socially and Economically Disadvantaged Enterprise ☐ Yes ☐ No (Complete d)	d. Estimated Value (% of Block 9c) Furnished From Socially and Economically Disadvantaged Enterprises _____%
c. Amount After Discount	c. Total Amount	e. Women-Owned Business ☐ Yes ☐ No (Complete f)	f. Estimated Value (% of Block 9c) Furnished From Women-Owned Business _____%
	d. Source/Origin (Country)		

12. INSURANCE INFORMATION		13. TRANSPORTATION INFORMATION	
a. Insured Value	c. ☐ All-Risk Rate_____ ☐ War Risk Rate_____ ☐ Other (Specify) _____ Rate_____	a. Vessel Type ☐ Bulk ☐ Berth ☐ Tnkr. ☐ Air	d. Freight Rate
b. Premium		b. B/L or Air Waybill Number	Other Freight Charges
		c. B/L or Air Waybill Date	Total Freight Charges

14. INFORMATION AS TO COMMISSIONS, CREDITS, ALLOWANCES, SIMILAR PAYMENTS, AND SIDE PAYMENTS		
a. Recipient's Name	b. Recipient's Address	c. Amount Paid or To Be Paid

15. ADDITIONAL INFORMATION AND REMARKS	16. If Certification On Other Side Is Made By ☐ Carrier Or ☐ Insurer, Type Or Print Name And Address Of Company.

AID 282 (5-90) (OMB No. 0412-0012 Exp. 11/30/91) Page 1

SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT

The supplier hereby acknowledges that the sum claimed on the accompanying invoice to be due and owing under the terms of the purchase contract identified on the reverse hereof ('said contract') is to be paid, in whole or in part, out of funds made available by the United States Agency for International Development (A.I.D.) under the Foreign Assistance Act of 1961, as amended. In consideration of the receipt of such sum, the supplier agrees with and certifies to A.I.D. as follows:

1. The undersigned is the supplier of the commodities or commodity-related services indicated in the Invoice-and-Contract Abstract on the reverse hereof, has complied with the applicable provisions of Regulation 1 (22 CFR Part 201), as in effect on the date hereof is entitled under said contract and under the applicable letter of credit, credit advice, or other payment instructions to payment of the sum claimed, and is executing this Certificate and Agreement to obtain such payment from A.I.D. funds.

2. On the basis of information from such sources as are available to the supplier upon reasonable investigation and to the best of its information and belief, the purchase price is not higher than the maximum price permitted under each of the applicable price rules of suabpart G of A.I.D. Regulation 1.

3. The supplier will, upon request of A.I.D., promptly refund to A.I.D. any amount by which the purchase price exceeds the maximum price permitted under such provisions of subpart G of Regulation 1, plus interest from the time of payment to the supplier.

4. The supplier will, upon request of A.I.D., promptly make appropriate refund to A.I.D., plus interest from the time of payment to the supplier, in the event of

(a) its nonperformance, in whole or in part, under said contract, or including any failure to pay despatch or

(b) any breach by it of any of its undertakings in this Certificate and Agreement, or

(c) any false certification or representation made by it in this Certificate and Agreement or in the Invoice-and-Contract Abstract on the reverse hereof.

5. The amount shown on the reverse hereof in block 9c is net of all trade discounts, whether in the form of payments, credits, or allowances by the supplier or its agent to or for the account of the importer, including quantity and prompt payment discounts allowed other customers under similar circumstances. The supplier will promptly pay to A.I.D. (Office of Financial Management, A.I.D., Washington, D. C. 20523-0209) any adjustment refunds, credits, or allowances which hereafter become payable to or for the account of the importer arising out of the terms of said contract or the customs of the trade.

6. The supplier has complied with the provisions of Section 201.65 of A.I.D. Regulation 1 and has not compensated any person to obtain said contract except to the extent, if any, indicated on the reverse hereof.

7. The supplier or its agent has not given or received and will not give or receive a side payment, "kickback", commission, or any other payment, credit, allowance or benefit of any kind in connection with the said contract or any transaction or series of transactions of which said contract is a part, other than those payments or benefits permitted under Section 201.65 of A.I.D. Regulation 1 and those referred to in paragraphs 1 and 5 above.

8. Any commodity supplied under said contract

(a) is accurately described on the reverse hereof and, unless otherwise authorized by A.I.D., is new and unused, is not rebuilt or reconditioned, does not contain any rebuilt or reconditioned components, and has not been disposed of as surplus by any government agency; and

(b) on the basis of information from such sources as are available to the supplier upon reasonable investigation, and to the best of its information and belief, meets the requirements of Section 201.11(b) of A.I.D. Regulation 1 as to source, country where mined, grown, or produced, and limitation on components.

9. If the supplier is the producer, manufacturer, or processor of the commodity, said contract is not a cost-plus-percentage-of-cost contract.

10. The supplier will for a period of not less than three (3) years after the date hereof maintain all business records and other documents which bear on its compliance with any of the undertakings and certifications herein and will, at any time requested by A.I.D., promptly make such records and documents available to A.I.D.for examination and promptly furnish to A.I.D. additional information in such form as A.I.D. may request concerning the purchase price, the cost to the supplier of the commodities and/or commodity-related services involved, and/or any other facts, data, or business records relating to the supplier's compliance with its undertakings and certifications in this certificate and agreement.

11. The supplier has complied with the provisions contained and referred to in subpart D of A.I.D. Regulation 1.

12. The supplier was not ineligible to act as a supplier or otherwise participate in A.I.D.-financed transactions at the time of approval of the A.I.D. Commodity Approved Application.

13. The commodity supplier certifies that it has submitted a copy of every ocean bill of lading, applicable to the commodities and transactions described on the reverse hereof to: (i) the Maritime Administration, National Cargo Division, 400 Seventh Street, S. W., Washington, D. C. 20590-0001; and (ii) Office of Procurement, Transportation Division, A.I.D., Washington, D. C. 20523-1419; and that such bill(s) of lading state all the carrier's charges including the basis for calculation such as weight or cubic measurements.

14. The supplier has filled in all applicable portions of the Invoice-and-Contract Abstract on the reverse hereof and certifies to the completeness and correctness of the information shown therein.

PERSONAL CERTIFICATION BY NATURAL PERSON SIGNING THIS CERTIFICATE AND AGREEMENT

The natural person who signs this Certificate and Agreement hereby certifies either that he/she is the supplier or that he/she has actual authority to sign on behalf of the supplier and to bind the supplier with regard to all certifications and agreements contained in this Certificate and Agreement. He/she further certifies, if he/she is not personally the supplier, that he/she is either an employee of the supplier or has written power of attorney to sign for and bind the supplier. He/she acknowledges signing and submitting this Certificate and Agreement to receive payment from A.I.D. funds and that A.I.D. in making such payment will rely on the truth and accuracy of this Personal Certificate as well as of all other representations in this Certificate and Agreement.

The Supplier's Certificate and Agreement and the Personal Certificate herein shall be governed by and interpreted according to the laws of the United States of America.

_____
Type or print name and title of official authorized to sign

_____
Signature of official authorized to sign for (check one) Date

☐ Commodity Supplier ☐ Carrier ☐ Insurer

_____
Place executed (City, County, State, Country)

NOTES: (a) Any amendments of or additions to the printed provisions of this Supplier's Certificate and Agreement are improper and will not be considered a part hereof. (b) False statements herein are punishable by United States Law. (c) The word "Copy" must be written after the signature on all copies other than the original.

INSTRUCTIONS FOR COMPLETING FORM AID 282

PAPERWORK REDUCTION ACT NOTICE. Information furnished will be used to verify compliance with legal requirements, as a basis for recourse in the event of noncompliance, and to monitor participation in A.I.D. programs. It will be disclosed outside A.I.D. only as provided by law. Submission of this information has been determined to be necessary to receive payment from A.I.D. funds pursuant to 22 U.S.C. 2381.

Public reporting burden for this collection of information is estimated to average thirty minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to:

Agency For International Development
Office of Procurement Policy, Planning
& Evaluation, MS/PPE
Washington, D. C. 20523-1435;
and
Office of Management and Budget
Paperwork Reduction Project (0412-0020)
Washington, D. C. 20503

EXECUTION OF FORM. This form is designed for use with the U.S. Standard Master for International Trade. An original and one (1) copy of this form, completed by the following suppliers, as applicable, must accompany each invoice for which payment is requested:

(a) Commodity Supplier - executed by the commodity supplier covering the cost of the commodity, including the cost of any commodity-related service paid by the commodity supplier for its own or the buyer's account;

(b) Transportation Supplier (Carrier) - executed by each carrier or in the case of a through Bill of Lading, the issuing carrier, for the cost of the ocean or air transportation financed by A.I.D., whether or not the transportation is paid by the commodity supplier;

(c) Insurance Supplier (Insurer) - executed by the insurer (or under the circumstances set forth in Section 201.52(b) (2) of A.I.D. Regulation 1, by an insurance broker or the commodity supplier), whether or not the insurance is paid by the commodity supplier, for the cost of marine insurance financed by A.I.D. when such cost exceeds $50.

The original *must* be signed by a person authorized by the supplier who shall indicate his/her title and certify to his/her authority.

LANGUAGE. The form must be completed in the English language *only* and all amounts of money must be shown in U.S. dollars.

OBTAINING FORMS. The form (as well copies of A.I.D. Regulation 1 referenced in this form) may be obtained in limited quantities from banks holding A.I.D. Letters of Commitment, from district offices of the Department of Commerce, the A.I.D. office in the supplier's country, or the Resources Management Division, Agency for International Development, Washington, D. C. 20523-1410. The form may be reproduced, providing the reproduction is identical in size and format.

INSTRUCTIONS FOR COMPLETING ENTRIES ON INVOICE-AND-CONTRACT ABSTRACT

GENERAL INSTRUCTIONS

Except as provided in the instructions for specific blocks, suppliers must complete all blocks or enter the letters 'NA' (Not Applicable), as follows:

Commodity Supplier - Complete all Blocks except 12 and 13; however, if the commodity supplier has paid for the transportation and/or insurance for its own or the buyer's account, Blocks 12 and/or 13 will also be completed by the commodity supplier. Block 11 is to be completed only when the address in block 1 is a U.S. address.

Transportation Supplier (Carrier) - Complete Blocks 1 through 8 as well as 13, 14, and 16.

Insurance Supplier (Insurer) - Complete Blocks 1 through 8a as well as 12, 14, and 16.

INSTRUCTIONS FOR INDIVIDUAL BLOCKS

Block 1: Enter the commodity supplier's name and address. *Caution: if the form is executed by the carrier or the insurer, enter the commodity supplier's name and address in Block 1 and complete Block 16.*

BLOCK 2: For A.I.D. use *only*.

BLOCK 3: Enter A.I.D. implementing document number furnished in the Letter of Credit or Importer's instructions. This number will normally be the Letter of Commitment number.

BLOCK 4: ENTER THE IMPORTER'S NAME AND ADDRESS. *Caution: on other documents prepared from the Standard Master, such as the Bill of Lading, the corresponding block may call for the name and address of the party whom the carrier is to give notice of arrival. When such party is not the importer; be sure to enter the importer's name and address.*

BLOCK 5: Enter the name of the vessel.

BLOCK 6: Enter the flag of registry.

BLOCK 7: Enter the port shown on the Bill of Lading.

BLOCK 8: COMMODITY INFORMATION

a. Enter the description of each commodity and its U.S. Department of Commerce Schedule B number, if available. For multi-item invoices, enter a summary description of the group of items and the appropriate Schedule B number (s), if available.

b. Enter the Bill of Lading weight.

c. Enter the Bill of Lading measurement.

BLOCK 9: INVOICE INFORMATION

a. Enter the number of the accompanying invoice to which this abstract relates.

b. Enter the invoice date.

c. Enter the net amount for which the supplier seeks payment (*see paragraphs 5 and 6 of the Supplier's Certificate*).

BLOCK 10: CONTRACT INFORMATION

a. Enter the contract number.

b Enter the date of the contract.

c. Enter the total contract amount

d. Enter the country of source as defined in Section 201.01 of A.I.D. Regulation 1.

BLOCK 11: SUPPLIER INFORMATION

Complete *only* when a U.S. address is indicated in Block 1. The information is required to enable A.I.D. to compile reports requested by Congress.

a. Indicate whether the supplier is a small business concern as defined in FAR 19.101 (CFR Title 48). "Small business concern" means a concern, including its affiliates, that is independently owned and operated (for profit), not dominant in its field of operations, and qualified as a small business under the criteria and size standards in 13 CFR 121 (see FAR 19.102). If there is no size standard in 13 CFR 121 for the industry, field of operation, or activity in which a concern is engaged, the concern is a small business if, including its affiliates, it is independently owned and operated (for profit), is not dominant in the field of operation, and, for manufacturing concerns -- has no more than 500 employees, or for concerns offering services -- its average annual receipts for its preceding 3 fiscal years do not exceed $3.5 million.

b. If the supplier is not a small business, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are small business concerns.

c. Indicate whether the supplier is an socially and economically disadvantaged enterprise. "Socially and economically disadvantaged enterprise" means a business-

(i) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by one or more socially disadvantaged individuals, and

(ii) whose management and daily business operations are controlled by one or more such individuals.

"Socially disadvantaged" individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

INSTRUCTIONS FOR COMPLETING FORM AID 282

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged. Women and individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged.

"Subcontinent Asian Americans" means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.

"Asian Pacific Americans" means United States citizens whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia.

"Native Americans" means American Indians, Eskimos, Aleuts, and native Hawaiians.

d. If the supplier is not a socially and economically disadvantaged enterprise, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are socially and economically disadvantaged enterprises.

e. Indicate whether the supplier is a women-owned business. "Women-owned business " means a business which is at least 51 percent owned by one or more women who are United States citizens and who also control and operate the business.

f. If the supplier is not a women-owned business, enter the best estimate of the percentage of the total invoice amount paid or to be paid to subcontractors or suppliers of components who are women-owned businesses.

BLOCK 12: INSURANCE INFORMATION

COMPLETE BLOCK 12 *only* if the insurance premium exceeds $50.

a. Enter the insured value of the shipment.

b. Enter the total premium.

c. Enter the type of coverage and insurance rate. If "Other" is checked, explain below or in Block 15.

BLOCK 13: TRANSPORTATION INFORMATION

a. Check vessel type.

b. Enter Bill of Lading or air waybill number.

c. Enter Bill of Lading or air waybill date.

d. Enter the freight rate, other freight charges and the total dollar amount of freight charges after discount.

BLOCK 14: INFORMATION AS TO COMMISSIONS, CREDIT, ALLOWANCES, SIMILAR PAYMENTS AND SIDE PAYMENTS

Enter information on (a) all commissions and other payments, credits, allowances or benefits of any kind, paid or to be paid by the supplier to or for the benefit of its agent, the importer, or the importer's agent as required by Section 201.65 of A.I.D. Regulation 1; and (b) any side payments, not shown on the invoice, made or to be made by the importer to the supplier, in connection with the transaction, as required by Section 201.66 of A.I.D. Regulation 1. If there is insufficient space to furnish the required information in block 14, continue in block 15 or enter "Continued" or "See attached" in block 14a, and attach a separate sheet to the form. If no commissions or other payments, credits, allowances, benefits, or side payments are involved, enter "NONE" in block 14.

BLOCK 16: If the Supplier's Certificate is completed by the carrier or insurer, check the appropriate box and print or type carrier's or insurer's name and address.

DO NOT INCLUDE THE INSTRUCTIONS ON PAGES 3 AND 4 WITH THE SUBMISSION OF THE COMPLETED FORM.

APPENDIX B TO PART 201—APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY (AID 11)

OMB No. 0412-0004
Expiration Date: 5/31/93

APPLICATION FOR APPROVAL OF COMMODITY ELIGIBILITY | **Transaction No.** *(Assigned by A.I.D.)*

TRANSACTION IDENTIFICATION

1. AID No.	2. Payment Terms			
	Letter of Credit		Name and Address of U.S. Bank	Other Payment Terms
	No.	Date		

3. Import License		4. Supplier's Relationship to Authorized Source Country
No.	Date	☐ Corporation or Partnership Organized under Source Country Laws ☐ Individual: Citizen or Permanent Resident of Source Country ☐ Controlled Foreign Corporation ☐ Other

5. Supplier's Name and Address	6. Importer's Name and Address

7. Contract		8. Shipping Plans at Time of Application			
Total Amount	Date	a. Partial Shipment ☐ No ☐ Yes $ _____	b. Loading Port	c. Destination Port	d. Month(s) of Shipment

COMMODITY IDENTIFICATION

9. Schedule B 10-Digit Code(s)	10. Commodity Description, Quantity, Size	11. Unit and Unit Price, FAS/FOB Vessel *(Named Port of Loading)*
(a)		
(b)		
(c)		
(d)		
(e)		

12. Commodity Condition:
- ☐ New and Unused
- ☐ Used - Not Rebuilt or Reconditioned
- ☐ Rebuilt
- ☐ Reconditioned
- ☐ Other

13. Source			14. Components		
a. Authorized Area	b. Shipped From	c. Produced In	a. From Other than 13.a Source ☐ Yes ☐ No	b. If 14.a is "Yes", Country Imported From	c. Cost Per Unit of 14.b Components

AID 11 (6-90)

AID 11 (6-90) Back

OMB No. 0412-0004
Expiration Date: 5/31/93

15. Remarks and Additional Information

16. SUPPLIER'S CERTIFICATIONS

As a condition for securing a determination of commodity eligibility for funds made available by the United States under the Foreign Assistance Act of 1961, as amended, in payment in whole or in part in the transaction described and for the commodity identified on this form, the undersigned, acting on behalf of the supplier whose name appears in block 5 above and authorized to bind the supplier, agrees with and certifies to A.I.D. as follows:

1. The supplier has contracted with the importer named in block 6 for the purchase of the commodity described on this form, and the supplier has either attached to this form a copy of such contract or has furnished in block 2 information concerning a letter of credit confirmed or advised in its favor under a payment obligation assumed by the importer in the contract.

2. The supplier has filled in the applicable portions of this form and certifies to the correctness of the information shown herein.

3. The supplier agrees that the commodity will be shipped and invoiced in accordance with the information shown herein; that if any change in commodity identification takes place after A.I.D. has approved this transaction, the supplier will resubmit this form to A.I.D. for review and further approval for financing in light of the changed commodity; and that this Commodity Approval Application which the supplier proposes to use as a basis for securing payment from A.I.D. funds, is in every respect the original or true copy of the original application approved by A.I.D. The supplier acknowledges that any commodity, other than a commodity described on this form by the supplier and approved by A.I.D. below, is ineligible for A.I.D. financing with respect to the purchase transaction for which this form must be submitted as a condition for payment.

4. The supplier certifies that it is an individual citizen or lawfully admitted permanent resident of a country included in the authorized source code; a corporation or partnership organized under the laws of a country included in the authorized source code and with a place of business in such country; or a controlled foreign corporation (within the meaning of § 957 et seq. of the Internal Revenue Code) as attested by current information on file with the Internal Revenue Service of the United States (on IRS Form 959, 2952, 3646, or any substitute or successor forms) submitted by shareholders of the corporation, or a joint venture or unincorporated association consisting entirely of individuals, corporations or partnerships which fit any of the foregoing categories. If the supplier is a controlled foreign corporation without a regular place of business in the United States, the supplier appoints any shareholder or officer thereof agent for the supplier to receive service of process in the United States in connection with any dispute arising between the supplier and A.I.D. and relating to the commodity sale financed by A.I.D.

5. The supplier has not, at the time of submission of this application, been debarred or suspended by A.I.D. or placed on the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs," published by the General Services Administration, or the Treasury Department's "Consolidated List of Designated Nationals", and thereby rendered ineligible to receive A.I.D. funds. To the best of its knowledge upon reasonable investigation, the supplier has not acquired, nor will it acquire, for resale under A.I.D. financing the goods described on this form from any supplier included on the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs," or included on the Treasury "Consolidated List of Designated Nationals" or from any affiliate of such a person.

6. The supplier acknowledges that this application, when approved, is not valid for shipments having a delivery date on or after the expiration date shown below.

Typed or Printed Name and Title | *Signature of Authorized Representative of Supplier* | *Date*

17. A.I.D. APPROVAL

By the signature and seal which appear below, A.I.D. has given limited approval to the sale described on this form. This approval is limited strictly to a determination that the commodity which the supplier has described is of a description, condition, and source eligible for A.I.D. financing. This approval and determination of commodity eligibility do not represent an approval of the purchase price and do not in any way preclude an A.I.D. refund claim based upon a detailed post-audit of the transaction in accordance with the provisions of A.I.D. Regulation 1 (22 CFR Part 201). A.I.D. expressly reserves such rights as it may have under that Regulation and under such other A.I.D. forms as the supplier may be required to submit by the terms of financing documents and by the terms of Regulation 1.

APPROVED FOR A.I.D._____
Authorized signature

EXPIRATION DATE_____

_____
Date

18. CERTIFICATE FOR PARTIAL SHIPMENT

I hereby certify that the partial shipment for which payment is being requested from A.I.D. funds is being made under the contract by the original validated form AID 11 of which this is a true copy.

Typed or Printed Name and Title | *Signature of Authorized Representative of Supplier* | *Date*

AID 11 (6-90)

OMB No. 0412-0004
Expiration Date: 5/31/93

GENERAL INSTRUCTIONS

Paperwork Reduction Act Notice. Information furnished will be used to verify compliance with legal requirements, as a basis for recourse in the event of noncompliance, and to monitor participation in A.I.D. programs. It will be disclosed outside A.I.D. only as provided by law. Submission of this information has been determined to be necessary to receive payment from A.I.D. funds pursuant to 22 U.S.C. 2381.

Public reporting burden for this collection of information is estimated to average fifteen minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to:

Agency for International Development
Office of Procurement Policy, Planning &
Evaluation, MS/PPE
Washington, D. C. 20523-1435;
and
Office of Management and Budget
Paperwork Reduction Project (0412-0020
Washington, D. C. 20503

Requirement for Payment. Section 201.11(k) of A.I.D. Regulation 1 declares that a commodity purchase transaction is eligible for A.I.D. financing only if A.I.D. provides a determination of the commodity eligibility on the Commodity Approval Application. Section 201.52(a)(8) of the Regulation states that to secure payment a supplier must submit the signed original of this form, countersigned by A.I.D. As appropriate, a reproduced copy of the validated form, certified as provided in the second paragraph following, is required with each subsequent claim for partial shipments made under the original validated form AID-11. Alterations to Block 16 are not acceptable.

Approval by A.I.D. To secure A.I.D. approval, a supplier must submit the signed and properly executed original and one copy of the form, addressed to the Agency for International Development, Office of Procurement, Washington, D. C. 20523-1412. A.I.D. will indicate its approval in Block 18 of the form if the form is properly executed and if A.I.D. has no objection to financing the described commodity. If A.I.D. refuses approval, the Agency will return the form to the supplier with an explanation for refusal. In either case, an identification number will be assigned by A.I.D. in the upper right-hand corner of the form. Any follow-up correspondence between the supplier and A.I.D. should refer to this number.

Partial Shipments. In the event a supplier expects to make more than one shipment under a single contract, letter of credit, or collection document, it may either submit a separate form AID-11 covering each shipment, or submit a single form AID-11 covering the entire contract. In the latter case, the original AID-approved form will be presented to the paying bank with the supplier's first request for payment and a reproduced copy of the approved form, properly certified in Block 18, will be presented with each request for payment for subsequent partial shipments. See detailed instructions for Block 8.

Duration of A.I.D. Approval. A.I.D. approval remains valid for 6 months as evidenced by the expiration date entered by A.I.D. in Block 17. If the letter of credit is valid for a longer period, upon request from the supplier and submission of a copy of the letter of credit, A.I.D. will provide an approved expiration date corresponding to the expiration date of the letter of credit. If the A.I.D. approval expires prior to delivery, the supplier must reapply for approval, making reference to the transaction number assigned by A.I.D.

Timing of Submission. Under letter of credit financing the application should be submitted subsequent to receiving confirmation or advice of credit, but prior to shipment. The form may, however, be submitted prior to receipt of such credit provided that an original or true copy of the purchase contract accompanies the application. Under any other method of financing, the application will be submitted following receipt of instructions that the transaction is to be A.I.D.-financed and must be accompanied by an original or true copy of the contract with the importer. The form should not be submitted prior to the time supplier is able to furnish all required information in Blocks 12 through 15.

Language. Every commodity description which appears on the form must be stated in English. If a supplier furnishes as an attachment to this form a contract in a language other than English, an English translation of the commodity description must also be furnish.

Completeness. All numbered Blocks MUST be fully and appropriately completed. If the application contains incomplete blocks, it will NOT be processed but will be returned for completion.

Obtaining Forms. Forms may be obtained in limited quantities from banks holding A.I.D. letters of commitment, field offices of the Department of Commerce, the A.I.D. office in the supplier's country, or the Resources Management Division , Agency for International Development, Washington, D. C. 20523-1410. A supplier may reproduce the form provided the reproduction is identical with the original copy in every respect, including size, color, and format. A supplier may overprint its name and address in Block 5.

INSTRUCTIONS RELATING TO SPECIFIC ITEMS

BLOCK 1: Enter the letter of commitment number. If not available, enter the loan or grant agreement number. A.I.D. cannot act on an application unless one of these numbers is provided.

BLOCK 2: Indicate the method of financing. If by letter of credit, enter the letter of credit number assigned by the U.S. bank, the date the bank issued, advised, or confirmed the letter of credit, and the name and address of the bank concerned. If the application is submitted prior to receipt of this information, enter the words "Firm contract" and attach a copy of the contract.

If the transaction is not to be financed by letter of credit, enter the applicable payment terms (e.g., sight draft collection, open account) and attach a copy of the contract.

BLOCK 3: The importer should provide the supplier with this information. Generally the import license number appears on the letter of credit. If the information is not known or is not available at the time of submission of the application, enter "Unknown." (In some cases it may be necessary for A.I.D. to require this information before approving the application.)

Enter "N/A" (not applicable) if the importer has not been required by its government to secure an import license.

BLOCK 4: Check the appropriate box to indicate the supplier's relationship to a country or area in the authorized source code. This information relates to certification 4 in block 16. If "Other" is checked, furnish explanation of relationship in block 15.

BLOCK 5: Enter name and address. Please center the information in order to permit A.I.D. to use a window envelope in returning the form.

BLOCK 7: Enter the total purchase price, i.e., the total remuneration (in whatever currency and whether to be paid directly to the supplier or in whole or in part to a designee of the supplier) to be received under the contract. Enter contract date or date pro forma invoice was accepted.

AID 11 (6-90)

OMB No. 0412-0004
Expiration Date: 5/31/93

BLOCK 8: (a) Check the appropriate box to indicate whether the supplier expects to make partial shipments. If "yes" and a separate application form will be submitted for each partial shipment, enter the value of the shipment to which this application relates if only one application form will be submitted to cover all partial shipments, omit the dollar value.

(b) Enter the proposed loading port. If only the range of ports is known, enter the range of ports; e.g., North Atlantic, South Atlantic, Gulf, Pacific, Great Lakes. If expected that partial shipments will be made, but only one application form is to be submitted, entries under (b) and (c) will relate to the first shipment only.

(c) Enter the proposed destination port.

(d) Enter the month in which it is expected shipment will be made. In the case of partial shipments, indicate the estimated first and last months of shipments: e.g., April-September.

BLOCKS 9 and 10: Enter the U.S. Department of Commerce Schedule B 10-digit code in block 9 and describe the commodity in block 10, giving size, quantity, and a clear word description of the commodity, including any special formula or other distinguishing characteristics, such as substandard quality (e.g., reject, imperfect, second) which will help to identify it.

If the contract or letter of credit identifies the commodity by other than Schedule B code (e.g., importing country tariff classification), this identification should be furnished as part of the commodity description.

If the commodity description varies significantly within the same Schedule B Code, separate entries must be furnished for each commodity.

BLOCK 11: Enter the unit and unit price for the commodity on an FAS or FOB basis for the loading port specified in block 8.(b). For other delivery terms, enter a constructive price FAS or FOB vessel; i.e., subtract from a C&F or CIF price estimated ocean freight and marine insurance, or add to an inland price (e.g., ex plant, FOB rail cars (named point)) the estimated inland freight and accessorial costs necessary to place the commodity in the custody of the ocean carrier.

If the supplier is unable to compute a unit price FAS or FOB vessel, the unit price of the commodity may be shown on the basis of the inland price with estimated inland freight cost, if available, footnoted in an explanatory entry in block 15.

SPECIAL INSTRUCTIONS--MULTIPLE ITEMS: If the shipment (or contract) is made up of commodities bearing differing Schedule B codes, or if the commodity description varies significantly within the same Schedule B code, separate entries must be furnished for each code or description. When there are six or more items to be listed in blocks 9 through 11, a signed and dated accepted contract, order, invoice, or other separate listing of the information may be attached to the original and copy of the form AID 11, provided the full 10-digit Schedule B code, complete and accurate description of the commodity, and FAS or FOB vessel unit price are shown for each. If the information required by Clocks 12 through 14 is not common to all commodities listed, appropriate information related to each such commodity is also required to be shown either on the attachment or in the blocks 12 through 14 and related to the appropriate line of the attachment. If an attachment is used in lieu of entry of the information on form AID-11, complete blocks 9-11 inclusive, and 12-14 inclusive (when applicable) by entering the words "See attachment.

SPECIAL INSTRUCTIONS--BLOCKS 12 through 14: If more than one commodity is listed in block 9, provide information required by blocks 12 through 14 on separate lines in those blocks, identified to the corresponding line on which the commodity is listed in block 9. For example, information concerning a commodity listed on line (c) in block 9 would be identified as line (c) in block 12 through 14. When only one form AID-11 is submitted, information in these blocks should be descriptive of the total contract. If a separate form AID-11 is submitted for each shipment under the contract, the information in these blocks should cover only that single shipment.

BLOCK 12: Enter check mark in the appropriate box to indicate the condition of the commodity. If the commodity is other than new and unused, describe the condition in the space below or in block 15. For this purpose, any commodity declared surplus by the U. S. Government agency and any commodity which has been rebuilt or reconditioned or contains components which have been rebuilt or reconditioned are not considered as "unused."

BLOCK 13: See § 201.11(b)(4) of A.I.D Regulation 1 for countries and areas included in geographic code numbers.

(a) Enter in block 13(a) the authorized geographic source area stated in the letter of credit or A.I.D. direct letter of commitment.

(b) Enter in block 13(b) the country from which the commodity will be shipped to the importer. If the commodity will be shipped from a free port or bonded warehouse, indicate this fact in block 16 and give location.

(c) Enter in block 13(c) the country in which the commodity has been or will be mined, grown, or produced through manufacturing, processing or assembly.

BLOCK 14: (a) Enter in block 14(a) "Yes" if the commodity includes components imported into the country of production from a country not included in the authorized geographic source area indicated in block 13(a). If such components are not included, enter "no."

(b) If block 14(a) "Yes," identify in block 14b each country from which components were imported into the country of production.

(c) In block 14(c), enter the total cost, within each unit of the finished product, attributable to components imported from each country indicated in blocks 14(b). If the suppliers unable to furnish the information required by block 14(b) and 14(c) at the time of submission of the application and no componentry percentage other than the 50 percent set forth in § 201.11(b)(2)(ii)(b) of A.I.D. Regulation 1 has been authorized for the commodity, A.I.D. will accept a statement in these blocks or in block 15 that (1) the commodity contains no components from other than "free world" countries, and (2) the total cost of components imported into the country of production from other than countries included in the authorized geographic source code (or the cooperating country itself whenever Code 941 is authorized) per unit of finished commodity is no more than 50 percent of the lowest selling price per unit at which the supplier makes the commodity available for export. If A.I.D. has authorized a percentage of such components other than 50 percent, the supplier should state such other higher or lower modification of the percentage rule, with a citation to the pertinent modification, and the actual percentage of such components in the product, or an affirmation that the percentage of such components is not in excess of the percentage allowed by A.I.D. The supplier should thereafter be prepared to demonstrate the accuracy of these statements upon the request of A.I.D.

BLOCK 15: This block may be used to furnish explanation or additional information in connection with any entries on the form. Identify block (and line, as appropriate) to which entry relates.

BLOCK 16: The supplier, or its authorized representative, must manually sign this certification, showing name, title and date signed.

BLOCK 17: For A.I.D. use. Note that A.I.D. approval is not valid for deliveries on and after the expiration date shown in this block.

BLOCK 18: If reproduced copies of this original form are presented with the supplier's request for payment (see fifth paragraph of General Instructions), the supplier or its authorized representative must manually sign this certification in block 18 of the reproduced form, showing name, title and the date signed.

PART 202—OVERSEAS SHIPMENTS OF SUPPLIES BY VOLUNTARY NON-PROFIT RELIEF AGENCIES

Sec.

202.1 Definition of terms.
202.2 Shipments eligible for reimbursement of freight charges.
202.3 Freight reimbursement limitations.
202.4 Certificates.
202.5 Approval of programs, projects and services.

202.6 Applications for reimbursement of freight charges.
202.7 Documentation required for reimbursement.
202.8 Refund by suppliers and/or agencies.
202.9 Waiver authority.
202.10 Participation by faith-based organizations.

AUTHORITY: 22 U.S.C. 2381(a).

SOURCE: 44 FR 41425, July 17, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 202 appear at 62 FR 38027, July 16, 1997.

§ 202.1 Definition of terms.

(a) *The Administrator* means the Administrator of the Agency for International Development.

(b) *The Committee* means the Advisory Committee on Voluntary Foreign Aid of the Agency for International Development.

(c) *Supplies* means development, relief and rehabilitation supplies shipped in support of programs approved by AID as well as administrative supplies and equipment shipped in support of such programs. In no case shall such supplies include items for the personal use of representatives of the registered agency.

(d) *Agency* or *agencies* means the American Red Cross and any United States voluntary non-profit relief agency registered with and approved by the Committee.

(e) *Duty free* means exempt from all customs duties, and other duties, tolls, and taxes of any kind.

(f) *Recipient country* means any country or area in which voluntary non-profit relief agencies registered with and approved by the Advisory Committee on Voluntary Foreign Aid have programs approved by AID.

(g) *Reimbursement* means (1) payment directly to an agency by AID, or (2) payment to an agency by a banking institution in the United States acting under letter of commitment issued by AID guaranteeing subsequent reimbursement to the banking institution of such payment.

(h) *Port of entry* means an ocean port in the recipient country.

(i) *Point of entry* means the first customs point, or any otherwise designated point in a recipient country which receives imported commodities via an ocean port not located in the recipient country.

§ 202.2 Shipments eligible for reimbursement of freight charges.

(a) In order to further the efficient use of United States voluntary contributions for development, relief, and rehabilitation in nations or areas designated by the Administrator of AID from time to time, agencies may be reimbursed by AID within specified limitations for freight charges incurred and paid in transporting supplies donated to or purchased by such agencies from United States ports or, in the case of excess or surplus property supplied by the United States, from foreign ports to ports of entry in the recipient country or to points of entry in the recipient country in cases (1) of landlocked countries, (2) where ports cannot be used effectively because of natural or other disturbances, (3) where carriers to a specified country are unavailable, or (4) where a substantial savings in costs or time can be effected by the utilization of points of entry other than ports.

(b) Shipments shall be eligible for reimbursement of freight charges only as authorized by the issuance by AID of a Procurement Authorization (Form AID 1160–4).

(c) The Office of Commodity Management, Bureau for Program and Management Services, AID, shall be responsible for determining when carriers are ''unavailable.''

§ 202.3 Freight reimbursement limitations.

Economic utilization of AID funds available for reimbursement to agencies for freight charges incurred and paid by such agencies for the shipment of donated or purchased supplies to a recipient country requires the following limitations on amounts reimbursable:

(a) *Ocean freight*. The amount of ocean freight charges reimbursable to an agency is limited to the actual cost of transportation of the supplies as assessed by the delivering carrier either in accordance with its applicable tariff for delivery to the discharge port or in accordance with the applicable charter

or booking contract at a rate not exceeding the prevailing rate, if any, for similar freight services, or the rate paid to the supplier of ocean transportation for similar services by other customers similarly situated, as attested to by the supplier in Block 13 of Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate.'' (See § 202.4(a).)

(b) *Inland freight*. The amount of inland freight charges reimbursable to an agency is limited to the actual cost of transportation of supplies from pickup point in initial port of discharge to designated point of entry in the recipient country at a rate negotiated by the agency representative as attested to by such agency representative in Block 14 of Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate.'' (See § 202.4(b).)

(c) *Related shipping costs*. Where inland freight charges are reimbursed, expenses incurred in transferring supplies from ocean carrier to inland carrier may be reimbursed to the agency when such expenses are not for account of the ship nor included in the inland transportation charges.

§ 202.4 Certificates.

Certificates will be required as follows:

(a) *Ocean transportation*. The supplier of ocean transportation will execute Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate,'' in an original and two copies.

(b) *Inland transportation and related shipping costs*. Where inland transportation, including related shipping costs, is reimbursable under provisions of § 202.3, the representative of the agency will execute Form AID 1550–1, entitled ''Voluntary Agency and Carrier Certificate,'' in an original and two copies when, in the absence of published tariffs or a prevailing rate, it is necessary to negotiate for the shipment of the supplies.

§ 202.5 Approval of programs, projects and services.

(a) Prior to applying for reimbursement for freight charges, an agency must obtain AID's written approval of its programs by submitting the following information to the Chief, Public Liaison Division, Office of Private and Voluntary Cooperation, Bureau for Private and Development Cooperation, Agency for International Development, Department of State, Washington, DC 20523.

(1) A narrative description detailing the agency's specific country programs, objectives, projects, or services of relief, rehabilitation, disaster assistance, development assistance and welfare;

(2) Except as provided for in paragraph (b) of this section, evidence that written assurances have been obtained from the government of the recipient country that:

(i) Appropriate facilities are or will be afforded for the necessary and economical operations of the program, project, or service;

(ii) The specific program, project, or service has been accepted;

(iii) The supplies provided in support of the program, project or service will be free of customs duties, other duties, tolls and taxes;

(iv) The supplies will be treated as a supplementary resource;

(v) The supplies will be identified, to the extent practicable, as being of United States origin; and

(vi) Insofar as practicable, the supplies will be received, unloaded, warehoused, and transported cost-free to points of distribution;

(3) Evidence that:

(i) Shipments will be made only to consignees reported to AID, and full responsibility is assumed by the agency for the noncommercial distribution of the supplies free of cost to the persons ultimately receiving them, or in special cases and following notice to AID, for the sale to recipients at nominal cost or as payment for work performed to promote projects of self-help and economic development, but in no case shall supplies be withheld from needy persons because of their inability to pay or work; and

(ii) Distribution is made solely on the basis of need without regard to race, color, religion, sex or national origin;

(iii) That paragraphs (a)(3) (i) and (ii) of this section are conducted under the supervision of the agency's representative specifically charged with responsibility for the program or project.

(b) Compliance with paragraph (a)(2) of this section is not required when the specific program, project, or service is within the scope of any agreement that has been concluded between the U.S. Government and the Government of the recipient country which furthers the operations of an agency acceptable to the recipient country.

(c) On approval of the agency's programs written notice thereof will be issued by AID to the agency.

§ 202.6 Application for reimbursement of freight charges.

(a) Any agency may make application for reimbursement of freight charges incurred and paid on shipments eligible under § 202.2 provided:

(1) The agency has received AID's written approval of the programs, projects, and services in accordance with §202.5.

(2) The application for reimbursement of freight charges together with documentation required under § 202.7 is submitted to the Agency for International Development, Attention: Banking and Finance Division, Office of Financial Management, Washington, DC 20523, or to a U.S. bank holding an AID letter of commitment.

(b) In the case of ocean transportation, the application must be submitted within 60 days of the date of the related ocean bill of lading. In the case of inland transportation the application must be submitted within 180 days of the date of the related ocean bill of lading.

§ 202.7 Documentation required for reimbursement.

Claims for reimbursement of freight charges must be supported by the following documents:

(a) *Voucher SF 1034*. ''Public Voucher for Purchases and Services Other than Personal''—Voucher SF 1034 in original and three copies to be prepared by the agency requesting reimbursement of freight charges.

(b) *Bills of lading*—(1) *To ports of entry*. Where the shipment is made to a port of entry, ocean or charter party bill of lading (or photostat) evidencing shipment from an eligible port of export as prescribed in § 202.2(a) to the port of entry. The bill of lading shall indicate the carrier's complete statement of charges including all relevant weights, cubic measurements, rates, and any applicable tariff surcharges.

(2) *To points of entry*. (i) Where the shipment is made to a point of entry and through bills of lading to designated point of entry are not issued, an ocean or charter party bill of lading (or photostat) evidencing shipment from an eligible port of export as precribed in § 202.2(a) to the port of discharge, and a receipted copy of the rail, truck, or barge bills of lading (or other acceptable commercial document) covering the transportation of the supplies from the ocean carrier's point of delivery at port of discharge to point of entry in recipient country, correctly assessed at time of loading by the land carrier for freight on a weight, measurement, or unit basis to point of entry in recipient country and from point of entry to point of delivery in the recipient country. The bill of lading shall indicate the carrier's complete statement of charges including all relevant weights, cubic measurements, rates and any applicable tariff surcharges.

(ii) Where shipment is made to point of entry and through bills of lading are issued, a receipted copy of the through bill of lading evidencing shipment from an eligible port of export as prescribed in § 202.2(a) to point of entry in the recipient country. The bill of lading shall include the carrier's complete statement of charges including all relevant weights, cubic measurements, rates, and any applicable tariff surcharges.

(c) *Receipted invoices*. One copy (or photostat) of the detailed invoice of the supplier of the transportation evidencing payment by the agency to the carrier. If the bills of lading required by paragraph (b) of this section meet the requirements of this subparagraph, no invoice is required.

(d) *Voluntary Agency and Carrier Certificate, Form AID 1550–1*. (i) As provided in § 202.4(a), the original and two copies of the Voluntary Agency and Carrier Certificate executed by the supplier of ocean transportation, and

(ii) As provided in § 202.4(b), the original and two copies of the Voluntary Agency and Carrier Certificate executed by the Agency.

§ 202.8 Refund by suppliers and/or agencies.

(a) *By suppliers.* Any supplier of freight to whom freight charges have been financed by AID will promptly refund to AID upon demand the entire amount, or any lesser amount specified, of such freight charges determined by AID to be in excess of the prevailing rate at time of shipment, if any, or the rate paid the supplier for similar services by other customers similarly situated.

(b) *By agencies.* Any agency to which freight charges have been paid or reimbursed under this Regulation will promptly refund to AID upon demand the entire amount, or any lesser amount specified, of inland transportation and/or related shipping costs, (1) whenever AID determines that the reimbursements were improper as being in violation of the provisions of the Foreign Assistance Act of 1961, and relevant appropriation acts, or any rules, regulations, or procedures of AID promulgated under any of these acts, or (2) whenever it is determined by the agency or AID that any of the supplies for which reimbursement was made have not been accorded duty-free status by the recipient country.

§ 202.9 Waiver authority.

The Administrator may waive, withdraw, or amend from time to time any or all of the provisions of this part.

§ 202.10 Participation by faith-based organizations.

The procedures established under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[69 FR 61723, Oct. 20, 2004]

PART 203—REGISTRATION OF AGENCIES FOR VOLUNTARY FOREIGN AID

Sec.

203.1 Purpose.
203.2 Conditions of registration and documentation requirements for U.S. private and voluntary organizations.
203.3 Annual requirements.
203.4 Certificates of registration.
203.5 Denial of registration and reconsideration.
203.6 Registration of foreign private and voluntary organizations.
203.7 Termination of registration.
203.8 Delegation of authority.
203.9 Access to records.
203.10 Waiver authority.

AUTHORITY: Sec. 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381).

SOURCE: 48 FR 2760, Jan. 21, 1983, unless otherwise noted.

§ 203.1 Purpose.

(a) AID maintains two registries of PVOs engaging in, or intending to engage in, voluntary foreign aid operations—one of U.S., the other of foreign PVOs. The registry facilitates cooperation between AID and the nonprofit private sector by providing a mechanism for identifying which organizations are eligible for AID resources intended for PVOs.

(b) Registration is a condition of eligibility for assistance under sections 123b and 607(a) of the FAA (the payment of transportation charges and the sale of services or commodities such as excess property) and confers a preference for assistance under section 202 of Pub. L. 480. Other eligibility requirements apply, however, including a program review.

(c) Registration is a condition of eligibility for assistance under the ''PVO grant program.'' However, it is only one of several eligibility requirements for such assistance. Others include: (1) Program review; (2) pre-grant award review, including compliance with OMB Circulars A–110 and A–122; and (3) funding requirements of section 123(g) of the FAA.

(d) The registry serves as the basis for computing the amount of AID funding made available to PVOs.

(e) Registration provides the information necessary to determine whether a PVO meets the funding requirements of section 123(g) of the FAA. Section 123(g) provides that a PVO must obtain at least 20 percent of its total annual financial support for its international activities from sources other than the United States Government to be eligible to receive funding under the PVO grant program. Further, a preference is given to those PVOs

which receive cash from private, *i.e.*, nongovernmental, sources.

(f) It is not the purpose of registration to make, or enable to be made, any representation to the public concerning the meaning of being registered.

(g) Definitions: As used in this part:

(1) *AID* means Agency for International Development.

(2) *FAA* means the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq*.

(3) *Funds from private U.S. sources* means cash contributions received from private nongovernmental U.S. sources, e.g., private individuals, groups, foundations and corporations. Cash contributions received directly or indirectly from the U.S. Government, state or local governments, the United Nations and other public international organizations, and foreign governments, institutions and individuals are not included. All in-kind contributions are excluded.

(4) *Overseas program costs* means the costs of all voluntary foreign aid operations conducted outside the U.S. and includes that portion of applicable indirect costs incurred in the U.S. (excluding fund-raising costs) necessary to carry out those voluntary foreign aid operations.

(5) *Pub. L. 480* means the Agricultural Trade and Development Assistance Act of 1954, as amended. 7 U.S.C. 1691 *et seq*.

(6) *PVO* means private and voluntary organizations.

(7) *PVO grant program* means those grants which AID has determined as a matter of policy can be made to only those PVOs which are registered and which meet the funding requirements of section 123(g) of the FAA, 22 U.S.C. 215u(g).

(8) *Subventions* means (i) The payment of transportation charges under section 123(b) of the FAA, 22 U.S.C. 215u(b); (ii) The sale of services or commodities, e.g., excess property, under section 607(a) of the FAA, 22 U.S.C. 2357(a); and (iii) The furnishing of agricultural commodities under section 202 of Pub. L. 480, 7 U.S.C. 1722.

§ 203.2 Conditions of registration and documentation requirements for U.S. private and voluntary organizations.

An applicant shall be registered with A.I.D. as a U.S. PVO if A.I.D. finds that the applicant has satisfied all the conditions and documentation requirements of registration listed below. An applicant seeking registration shall submit to A.I.D., Washington, DC 20523, the documentation listed below accompanied by a letter stating the reasons for seeking registration signed by its chief executive officer and supported by a resolution of its governing body. In addition, the applicant shall submit such other information as A.I.D. may reasonably require to determine if the applicant should be registered.

(a) *Condition and documentation requirement no. 1*—(1) *Condition*. That the applicant is a private nongovernmental organization which is organized under U.S. law and maintains its principal place of business in the United States and is not a university, college, accredited degree-granting institution of education, private foundation, organization engaged exclusively in research or scientific activities, church, or organization engaged exclusively in religious activities.

(2) *Documentation requirement*. Articles of incorporation, bylaws, relevant documents establishing its legal status, and a statement as to the location of the organization's principal offices.

(b) *Condition and documentation requirement, no. 2*—(1) *Condition*. That the applicant receives funds from private U.S. sources, as defined in paragraph (g)(3) of § 203.1.

(2) *Documentation requirement*. The latest audited financial statement (see Condition No. 6 at § 203.2(f) of this section).

(c) *Condition and documentation requirement no. 3*—(1) *Condition*. That the applicant is a nonprofit organization and has a tax exemption under any one of the following provisions of the Internal Revenue Code: section 501(c)(3), except private foundations under section 509(a)(2); as a social welfare organization under section 501(c)(4); section 501(c)(5); or section 501(c)(6).

(2) *Documentation requirement*. IRS Statement of Tax Exemption, and a

copy of IRS Form 990 or 990–PF ''Return of Organization Exempt from Income Tax,'' or one comparable to the Internal Revenue Service document.

(d) *Condition and documentation requirement no. 4*—(1) *Condition*. That the applicant is a voluntary organization, *i.e.*, receives voluntary contributions of money, staff time or in-kind support from the general public.

(2) *Documentation requirement*. Latest annual report (or similar document) and audited financial statement (see Condition No. 6 at § 203.2(f)).

(e) *Condition and documentation requirement no. 5*—(1) *Condition*. That the applicant is, or anticipates becoming, engaged in voluntary charitable or development assistance operations abroad (other than religious), including but not limited to services of relief, rehabilitation, disaster assistance, development assistance, welfare, training, or program support and coordination for such services, in the fields of health, education, population planning, nutrition, agriculture, industry, environment, ecology, refugee services, emigration, resettlement, and development of capacities in indigenous PVOs and institutions to meet basic human needs; and that such operations are consistent with its articles of incorporation and related documentation included in the application, and with the broad purposes of the Foreign Assistance Act and Pub. L. 480.

(2) *Documentation requirement*. Latest annual report (or similar document) describing the development assistance operations. For organizations who anticipate initiating overseas activities, a statement should be included in the letter accompanying the registration documentation describing steps taken to date to undertake a program of development assistance overseas.

(f) *Condition and documentation requirement no. 6*—(1) *Condition*. That the applicant accounts for its funds in accordance with generally accepted accounting principles (''GAAP''); has a sound financial position as evidenced by its audited financial statements; and exercises financial planning through the preparation of an annual budget for the year subsequent to that covered in the annual audit.

(i) Further tests of the financial management systems of a PVO are part of the A.I.D. pre-grant award process. In judging the financial management systems of grant applicants the requirements set by the Office of Management and Budget (OMB) Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and other Nonprofit Organizations,'' Attachment F, ''Standards for Financial Management Systems'' will apply, and by reference, OMB Circular A–122 ''Cost Principles for Nonprofit Organizations'' will also apply. The determination as to whether an applicant can conform to these requirements is made through a pre-grant award review which is the responsibility of the grant officer with information provided by the A.I.D. Inspector General.

(2) *Documentation requirement*. The most recent audited financial statement including Balance Sheet, Statement of Support, Revenue and Expenditure and Statement of Change in Financial Position prepared in accordance with generally accepted accounting principles (''GAAP'') disclosing administrative, program, and fund-raising costs; and separately disclosing overseas program costs and sources and amounts of funds received for overseas programs. The audit shall be conducted by an independent Certified Public Accountant in accordance with the generally accepted auditing standards (''GAAS'') of the ''Statement on Auditing Standards'' of the American Institute of Certified Public Accountants. A budget for the year subsequent to that covered in the year reported in a format consistent with the audit, including the detailing of anticipated amounts and sources of support and revenue.

(i) New organizations which have been incorporated less than a year must provide an independent CPA's statement that financial statements can be prepared in accordance with GAAP, along with an unaudited financial statement covering the period between incorporation and application for registration. The CPA's statement for new organizations will also indicate whether the organization has installed

internal controls to enable the execution of an audit in accordance with the applicable auditing standards at the end of the first year of operations.

(g) *Condition and documentation requirement no. 7*—(1) *Condition*. That the applicant has a Board of Directors which meets at least annually, whose members serve without compensation for such services, and that paid officers or staff members do not constitute a majority in any decision.

(2) *Documentation requirement*. A statement indicating that paid officers or staff members who serve on the Board do not constitute a majority in any decision and members of the governing body receive no compensation for their services on that body; the names and addresses of members; and minutes of meetings or excerpts from minutes which demonstrate that the Board holds meetings at least annually.

(h) *Condition and documentation requirement no. 8*—(1) *Condition*. That the applicant expends and distributes its funds and resources in accordance with the stated purposes of the organization, without unreasonable cost for salaries, promotion, publicity, fund raising and administration, at home or abroad, and provides public disclosure of its financial circumstances.

(i) In determining whether an applicant obtains, expends, and distributes its funds without unreasonable cost for promotion, publicity, fund raising, and administration, A.I.D. shall consider fund raising costs as presumptively unreasonable if they exceed 20 percent of the total cash and in-kind contributions to the organization (as reflected in the audited financial statement).

(ii) An applicant for registration or a registered agency whose fund raising costs exceed the 20 precent limitation must demonstrate that such costs are not unreasonable in light of the nature of the organization's operations. Upon such a showing, A.I.D. may permit exceptions to the 20 percent limitation on a case-by-case basis.

(iii) *Contributions* as used in this section, include U.S. Government financial support, both cash and in-kind, as well as private support; similarly, it is expected that fund raising costs will include costs incurred in securing government contributions.

(2) *Documentation requirement*. A certification that audited financial statements are available to the public upon request and a statement indicating salaries and allowances of the top five principal headquarters positions (determined by salary level) and country director positions. When provided directly by the applicant, salaries and/or allowances may be valued at actual cost; when provided by the recipient country or local institution, they may be valued at fair market value. Any other documentation or evidence which the applicant wishes to submit addressing the degree to which annual program spending has been consistent with the stated purposes of the organization and annual expenses are reasonable in amount.

(i) *Condition and documentation requirement no. 9—(1) Condition*. That the applicant is not:

(i) Suspended or debarred by an agency of the United States Government;

(ii) Designated as a foreign terrorist organization by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act, as amended; or

(iii) The subject of a decision by the Department of State to the effect that registration, or a financial relationship between USAID and the organization, is contrary to the national defense, national security, or foreign policy interests of the United States.

(2) Documentation requirement. None.

[48 FR 2760, Jan. 21, 1983, as amended at 65 FR 54790, Sept. 11, 2000]

§ 203.3 Annual requirements.

In order to maintain its registration, each registered PVO shall submit annually, within 180 days after the close of the fiscal year, the following documents: An independently audited financial statement; a report of income and expenditures (A.I.D. Form 1550–2), which is relatable to the audited financial statements; an annual report (or similar document); a copy of IRS Form 990 or 990–PF; a budget for the new fiscal year; and a statement that all other circumstances described in the original registration material remain

unchanged except as noted. A.I.D. may revise the above list of documents from time to time. In addition, each registrant shall submit such other information as A.I.D. may reasonably require to determine that the organization continues to meet the conditions of registration.

§ 203.4 Certificates of registration.

Certificates of Registration will be issued by A.I.D. to applicants which A.I.D. finds satisfy the conditions and documentation requirements for registration set forth in § 203.2.

§ 203.5 Denial of registration and reconsideration.

(a) *Notification of denial of registration.* If A.I.D. decides to deny an applicant registration, the applicant will be informed in writing of the denial with a specific statement of those conditions and documentation requirements of registration in § 203.2 that the applicant has failed to satisfy.

(b) *Reconsideration.* An applicant may, within 30 days after receipt of a notification of denial of registration, request that A.I.D. reconsider its application for registration and may submit additional information to A.I.D. bearing on its suitability for registration. An applicant requesting reconsideration will be informed in writing of A.I.D.'s decision upon reconsideration. In addition, A.I.D. may, at its own discretion, reconsider a denial of registration at any time.

(c) An applicant may resubmit an application for registration in accordance with § 203.2 at any time.

§ 203.6 Registration of foreign private and voluntary organizations.

(a) For the purpose of this part, foreign PVOs shall consist of the following:

(1) An ''indigenous'' PVO is a non-U.S. PVO which conducts operations in the country under the laws of which it is organized.

(2) A ''regional'' PVO is a non-U.S. PVO that is organized under the laws of a country in an A.I.D. geographic region, and conducts operations in more than one country in that region but not in more than one such region.

(3) A ''third country'' PVO is a non-U.S. PVO which is not organized under the laws of any country in the A.I.D. geographic region or regions in which it conducts its operations.

(4) An ''international'' PVO is an organization which is not registered as a U.S. PVO, receives funds from two or more countries, has an international governing body, and conducts operations in one or more A.I.D. geographic regions.

(b) Foreign PVOs shall be registered in accordance with guidance for eligibility of non-U.S. private and voluntary organizations for participation in A.I.D.-supported programs approved by the Deputy Administrator of A.I.D., March 15, 1978 and A.I.D. handbooks, policies, regulations (published or otherwise) and procedures as they may be amended, supplemented or supported from time to time.

§ 203.7 Termination of registration.

(a) Registration shall remain in force until: (1) Relinquished voluntarily by the registrant upon written notice to A.I.D.; or

(2) Terminated by A.I.D. for failure of the registrant to fulfill and maintain the conditions of registration.

(b) Termination proceedings pursuant to paragraph (a)(2) of this section shall include prior written notice to the registrant of the grounds for the proposed termination and opportunity for the registrant to file a written statement as to why its registration should not be terminated.

§ 203.8 Delegation of authority.

(a) The authority to register and to terminate registrations is delegated to: (1) The Assistant Administrator for Food for Peace and Voluntary Assistance, or his/her designee for U.S., international, and third country PVOs.

(2) The Regional Assistant Administrator, or their designees, for regional PVOs within their respective regions; and

(3) The principal A.I.D. officer, or, if there is none, the United States Ambassador, or their designees, for indigenous PVOs.

(b) Notices of registration and terminations of registration issued by the officials in paragraphs (a) (2) and (3) of

this section will be forwarded to the Bureau for Food for Peace and Voluntary Assistance within 30 days for inclusion in the registry.

§ 203.9 Access to records.

All records, reports, and other documents which are made available to A.I.D. pursuant to this part shall be made available for public inspection and copying pursuant to and under the procedures established by the public information regulation (22 CFR part 212) of the Agency for International Development.

§ 203.10 Waiver authority.

The Administrator of the Agency for International Development or his/her designee may waive, withdraw, or amend from time to time, any or all of the provisions of the regulations in this part.

PART 204—HOUSING GUARANTY STANDARD TERMS AND CONDITIONS

Subpart A—Definitions

Sec.
204.1 Definitions.

Subpart B—The Guaranty

204.11 The Guaranty.
204.12 Guaranty eligibility.
204.13 Non-impairment of the guaranty.
204.14 Transferability of guaranty; Note Register.
204.15 Paying agent obligation.

Subpart C—Procedure for Obtaining Compensation

204.21 Event of default; Application for compensation; Payment.
204.22 Right of A.I.D. to cure default.
204.23 Payment to A.I.D. of excess amounts received by the lender of any assignee.

Subpart D—Covenants

204.31 Prosecution of claims.
204.32 Change in agreements.
204.33 A.I.D. approval of acceleration of notes.

Subpart E—Administration

204.41 Arbitration.
204.42 Notice.
204.43 Governing law.
EXHIBIT A TO PART 204—APPLICATION FOR COMPENSATION
EXHIBIT B TO PART 204—ASSIGNMENT

AUTHORITY: 22 U.S.C. 2381.

SOURCE: 53 FR 33805, Sept. 1, 1988, unless otherwise noted.

Subpart A—Definitions

§ 204.1 Definitions.

Wherever used in these standard terms and conditions:

(a) *A.I.D.* means the United States Agency for International Development or its successor with respect to the housing guaranty authorities contained in title III, chapter 2 of part I of the Foreign Assistance Act of 1961, as amended (the ''Act'').

(b) *Eligible Note(s)* means (a) Note(s) meeting the eligiblity criteria set out in § 204.12 hereof.

(c) *Eligible Investor* means an ''eligible investor'' as defined in section 238(c) of the Act.

(d) *Lender* means an Eligible Investor who initially provides loan funds to the Borrower in exchange for Eligible Note(s).

(e) *Investment* respecting any Eligible Note means the principal amount of such Eligible Note.

(f) *Assignee* means the owner of an Eligible Note who is registered as an Assignee on the Note Register of Eligible Notes required to be maintained by the Paying Agent and who is an ''Eligible Investor.''

(g) *Outstanding Investment* respecting any Eligible Note means the Investment less the net amount of any repayments of principal of the Investment made by or on behalf of the Borrower or A.I.D.

(h) *Further Guaranteed Payments* means the amount of any loss suffered by the Lender or by any Assignee by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless the Lender and Assignee from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Note in the country of the Borrower.

(i) *Loss of Investment* respecting any Eligible Note means an amount in Dollars equal to the total of the (1) Outstanding Investment determined as of the Date of Application, (2) Further Guaranteed Payments unpaid as of the Date of Application, and (3) interest accrued at the rate(s) specified in the Note(s) and unpaid on the Outstanding Investment and Further Guaranteed Payments to and including the date on which full payment thereof is made to the Lender or any Assignee.

(j) *Application for Compensation* means an executed application in the form of Exhibit A hereto which the Lender or any Assignee files with A.I.D. pursuant to § 204.21 of this part.

(k) *Applicant* means a Lender or Assignee who files an Application for Compensation with A.I.D.

(l) *Date of Application* means the effective date of an Application for Compensation filed with A.I.D. pursuant to § 204.21 of this part.

(m) *Business Day* means a date on which banks of the District of Columbia of the United States of America are open for business.

(n) *Guaranty Payment Date* means a Business Day not more than sixty (60) calendar days after the related Date of Application; provided that (1) compensation to the party filing the related Application for Compensation is due and payable on such date, in accordance with the terms of this Guaranty and (2) tender of assignment referred to in subsection 204.21(f) is made as therein provided.

[53 FR 33805, Sept. 1, 1988; 53 FR 39015, Oct. 4, 1988]

Subpart B—The Guaranty

§ 204.11 The Guaranty.

Subject to these standard terms and conditions, the United States of America, acting through A.I.D., agrees to pay to any Lender or Assignee who has been determined to be an Eligible Investor compensation in Dollars equal to its Loss of Investment under the Eligible Note; provided, however, that no such payment shall be made for any such loss arising out of fraud or misrepresentation for which such Lender or Assignee is responsible or of which it had knowledge at the time it became such Lender or Assignee.

This Guaranty shall apply to each Eligible Note registered on the Note Register required to be maintained by the Paying Agent.

§ 204.12 Guaranty eligibility.

(a) Eligible Notes only may be guarantied hereunder, and Eligible Investors only are entitled to the benefits of this Guaranty. Notes in order to achieve Eligible Note status must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower; and they must contain a guaranty legend incorporating these standard terms and conditions signed on behalf of A.I.D. by either a manual signature or a facsimile signature or an authorized representative of A.I.D. together with a certificate of authentication manually executed by a Paying Agent whose appointment by the Borrower is consented to by A.I.D. in a Paying and Transfer Agency Agreement.

(b) A.I.D. shall designate in a certificate delivered to the Lender and to the Paying Agent, the person(s) whose signature shall be binding on A.I.D. The certificate of authentication of the Paying Agent issued pursuant to the Paying and Transfer Agency Agreement shall, when manually executed by the Paying Agent, be conclusive evidence binding on A.I.D. that the Note has been duly executed on behalf of the Borrower and delivered.

§ 204.13 Non-impairment of the guaranty.

The full faith and credit of the United States of America is pledged to the performance of this Guaranty. The Guaranty shall not be affected or impaired by any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by the Lender, A.I.D., the Paying Agent or the Borrower in connection with the transactions contemplated by this Guaranty. This non-impairment of the guaranty provision shall not, however, be operative with respect to any amount arising out of fraud or misrepresentation for which the Lender or Assignee is responsible

or of which it had knowledge prior to the time it became such Lender or Assignee.

§ 204.14 Transferability of guaranty; Note Register.

The Lender of any Assignee may assign, transfer or pledge the Eligible Notes to any Eligible Investor. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Assignee is entered on the Note Register required to be maintained by the Paying Agent pursuant to the Paying and Transfer Agency Agreement. A.I.D. shall be entitled to treat the persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guaranty and A.I.D. shall not be affected by notice to the contrary.

§ 204.15 Paying agent obligations.

Failure of the Paying Agent to perform any of its obligations pursuant to the Paying and Transfer Agency Agreement shall not impair the Investor's or any Assignee's rights under this Contract of Guaranty, but may be the subject of action for damages against the Paying Agent by A.I.D. as a result of such failure or neglect; provided, however, that the Paying Agent is not authorized to issue and authenticate and have Notes outstanding at any time in excess of the principal amount of the Loan.

Subpart C—Procedure for Obtaining Compensation

§ 204.21 Event of default; Application for compensation; Payment.

(a) Within one year after an Event of Default, as this term is defined in an Eligible Note, the Lender or Assignee may file with A.I.D. an Application for Compensation in form as provided in Exhibit A. A.I.D. shall make the required payment not later than sixty (60) days after the Date of Application unless A.I.D. has cured the default under § 204.22.

(b) *Guaranty Payment*. On or before the Guaranty Payment Date, the Applicant shall tender assignment of all Applicant's right, title and interest as of the Date of Application in and to all sums for which Application has been made. A.I.D. shall accept the assignment and pay or cause to be paid to Applicant and compensation due to the Applicant pursuant to the Guaranty.

§ 204.22 Right of A.I.D. to cure default.

Within sixty (60) days after the Date of Application for Compensation, A.I.D. may at any time make payments to the Lender or any Assignee equal to all installments of principal due and unpaid under any Note (other than installments whose maturity has been accelerated), together with interest on the unpaid principal amount of the Note to the date of such payment by A.I.D., and any Further Guaranteed payments due and unpaid, and thereby prevent or cure any default under the Note. Upon such a payment by A.I.D., if the Lender or Assignee shall have accelerated such Note, such acceleration shall be immediately rescinded or, if such Note shall not have been accelerated, such Note shall not thereafter be accelerated as a result of such Event of Default.

§ 204.23 Payment to A.I.D. of excess amounts received by the lender of any assignee.

If the Lender or Assignee shall, as a result of A.I.D. paying compensation under this Guaranty, receive an excess payment, it shall refund the excess to A.I.D.

Subpart D—Covenants

§ 204.31 Prosecution of claims.

After an assignment to A.I.D. by the Lender or any Assignee pursuant to § 204.21(b), A.I.D. shall have exclusive power to prosecute all claims related to the outstanding Eligible Notes so assigned. If the Lender or such Assignee continues to have an interest in the outstanding Eligible Notes, the Lender or such Assignee and A.I.D. shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 204.32 Change in agreements.

Neither the Lender nor any Assignee will consent to any change or waiver of

any provision of any document contemplated by this Guaranty without the prior written consent of A.I.D.

§ 204.33 A.I.D. approval of acceleration of notes.

Without the prior approval of A.I.D., the Lender or any Assignee shall not accelerate any Eligible Notes held by it on account of the happening of an Event of Default other than failure to make a payment when due on the note.

Subpart E—Administration

§ 204.41 Arbitration.

Any controversy or claim between A.I.D. and the Lender or any Assignee arising out of this Guaranty shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 204.42 Notice.

Any communication to A.I.D. pursuant to this Guaranty shall be in writing in the English language, shall refer to the A.I.D. Housing Guaranty Project Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by A.I.D. at the address specified below:

Mail Address:
Office of Housing and Urban Programs, Agency for International Development, Washington, DC 20523.
Re: A.I.D. Housing Guaranty Project ____–HG–____ [1]
Telex Nos.: ITT 440001 (Answer back is AIDWNDC) RCA 248379 (Answer back is 248379 AID UR) WU 892703 (Answer back is AID WSH) WU 64154 (Answer back is AID 64154)
Fax No.: 202/647–4958
Cable Address: AID WASH DC

Other addresses may be substituted for the above upon the giving of notice of such substitution to each Lender or Assignee by first class mail at the addresses set forth in the Note Register.

[1] Enter title and numerical designation of the relevant A.I.D. Housing Guaranty Project as inscribed on each Note guaranty legend.

§ 204.43 Governing law.

This Guaranty shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

EXHIBIT A TO PART 204—APPLICATION FOR COMPENSATION

Office of Housing and Urban Programs, Agency for International Development, International Development Cooperation Agency, Washington, DC 20523
Ref: Guaranty dated as of ____, 19____: A.I.D. Housing Project HG–_____

Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments as defined in Section 204.01(i) of the Standard Terms and Conditions of the above-mentioned Guaranty [1]) was due on _____, 19___, on $_____ principal amount of Notes held by the undersigned of the _____ (the "Borrower"), issued pursuant to the Loan Agreement, dated as of _____, _____, between the Borrower and _____. Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guaranty, the undersigned hereby applies, under Section 204.21 of said Guaranty, for payment of a total of $_____, representing $_____, the outstanding principal amount of the presently outstanding Notes of the Borrower held by the undersigned issued pursuant to said Loan Agreement, and $_____ in Further Guaranteed Payments,[2] plus accrued and unpaid interest thereon to and including the date payment in full is made by you pursuant to said Guaranty. Such payment is to be made at your office in Washington, DC.

[Name of Applicant]

By _____
Name _____
Title _____
Dated _____

[1] Strike inapplicable portion.
[2] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

EXHIBIT B TO PART 204—ASSIGNMENT

The undersigned, being the registered owner of a Note in the principal amount of $_____ issued by the _____ (the ''Borrower''), pursuant _____, and guaranty, dated as of _____, _____ the ''Guaranty''), between the Lender and the United States of America, acting through the Agency for International Development (''A.I.D.''), hereby assigns to A.I.D., without recourse (i) its entire right, title and interest in and to the Note of the Borrower referred to above (which Note is attached hereto), including its rights to unpaid interest on such Note, and (ii) its entire outstanding right, title and interest arising out of said Loan Agreement with respect to such Note, except the undersigned's right to receive payments under the Loan Agreement in respect of which A.I.D. has made no payment to the undersigned as of the date hereof.

[Name of Applicant]

By _____

Name _____

Title _____

Dated _____

Accepted:

UNITED STATES OF AMERICA

By _____

Name _____

Title _____

Dated _____

PART 205—PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

AUTHORITY: 22 U.S.C. 2381(a).

§ 205.1 Grants and cooperative agreements.

(a) Religious organizations are eligible, on the same basis as any other organization to participate in any USAID program for which they are otherwise eligible. In the selection of service providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, the term ''program'' refers to Federally funded USAID grants and cooperative agreements, including sub-grants and sub-agreements. The term also includes grants awarded under contracts that have been awarded by USAID for the purpose of administering grant programs. As used in this section, the term ''grantee'' includes a recipient of a grant or a signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements and contracts.

(b) Organizations that receive direct financial assistance from USAID under any USAID program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded with direct financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from USAID, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance. These restrictions on inherently religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in USAID-funded programs or services will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission

statements and other governing documents.

(d) USAID funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under this part. Where a structure is used for both eligible and inherently religious activities, USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USAID funds in this part. Sanctuaries, chapels, or other rooms that a USAID-funded religious congregation uses as its principal place of worship, however, are ineligible for USAID-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition. (*See* 22 CFR part 226).

(e) An organization that participates in programs funded by financial assistance from USAID shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief.

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in Sec. 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from USAID.

(h) Many USAID grant programs require an organization to be a ''nonprofit organization'' in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. Grantees should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID programs in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a state or national parent organization, together with a

statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(i) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

[69 FR 61723, Oct. 20, 2004]

PART 206—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE A.I.D. IS NOT A PARTY

Sec.

206.1 Purpose and scope.
206.2 Production or disclosure prohibited unless approved by the General Counsel.
206.3 Procedure in the event of a demand for production or disclosure.
206.4 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.
206.5 Procedure in the event of an adverse ruling.
206.6 Considerations in determining whether production or disclosure should be made pursuant to a demand.

AUTHORITY: Sec. 621, Foreign Assistance Act of 1961, as amended, 75 Stat. 424 (22 U.S.C. 2381).

SOURCE: 53 FR 24260, June 28, 1988, unless otherwise noted.

§ 206.1 Purpose and scope.

(a) This part sets forth the procedures to be followed in proceedings in which the U.S. Agency for International Development (the ''Agency'') is not a party, whenever a subpoena, order or other demand (collectively referred to as a ''demand'') of a court or other authority set forth in § 206.1(d) of this part is issued for the production or disclosure of (1) any material contained in the files of the Agency, (2) any information relating to material contained in the files of the Agency, or (3) any information or material acquired by any person while such person was an employee of the Agency as a part of the performance of his official duties or because of his official status.

(b) For purposes of this part, the term ''employee of the Agency'' includes all officers and employees of the Agency appointed by, or subject to the supervision, jurisdiction or control of, the Administrator of the Agency, including personal services contractors.

(c) This part is intended to provide instructions regarding the internal operations of the Agency, and is not intended, and does not and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by a party against the Agency.

(d) This part applies to:

(1) State and local court, administrative and legislative proceedings.

(2) Federal court and administrative proceedings.

(e) This part does not apply to:

(1) Congressional requests or subpoenas for testimony or documents.

(2) Employees or former employees making appearances solely in their private capacity in legal or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents, domestic relations, etc.). Any question whether the appearance relates solely to the employee's or former employee's private capacity should be referred to the General Counsel or his designee.

(f) Nothing in this part affects disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a. the Sunshine Act, 5 U.S.C. 552b, or the Agency's implementing regulations. Nothing in this part otherwise permits disclosure of information by the Agency except as is provided by statue or other applicable law.

§ 206.2 Production or disclosure prohibited unless approved by the General Counsel.

No employee or former employee of the Agency shall, in response to a demand of a court or other authority set forth in § 206.1(d), produce any material or disclose any information described in § 206.1(a) without the approval of the General Counsel or his designee.

§ 206.3 Procedure in the event of a demand for production or disclosure.

(a) Whenever an employee or former employee of the Agency receives a demand for the production of material or the disclosure of information described

in § 206.1(a), he shall immediately notify and provide a copy of the demand to the General Counsel or his designee. The General Counsel, or his designee, shall be furnished by the party causing the demand to be issued or served a written summary of the information sought, its relevance to the proceeding in connection with which it was served and why the information sought is unavailable by any other means or from any other sources.

(b) The General Counsel, or his designee, in consultation with appripriate Agency officials, and in light of the considerations listed in § 206.6, will determine whether the person on whom the demand was served should respond to the demand.

(c) To the extent he deems it necessary or appropriate, the General Counsel, or his designee, may also require from the party causing such demand to be issued or served a plan of all reasonably foreseeable demands, including but not limited to names of all employees and former employees from whom discovery will be sought, areas of inquiry, length of time of proceedings requiring oral testimony and identification of documents to be used or whose production is sought.

§ 206.4 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.

If the response to the demand is required before the instructions from the General Counsel, or his designee, are received, an attorney designated by the Department of Justice for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the General Counsel and shall respectfully request the court or other authority to stay the demand pending receipt of the requested instructions.

§ 206.5 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 206.4 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, the employuee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this part and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

§ 206.6 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, the General Counsel, or his designee, may consider, among things:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute or a rule of procedure,

(2) Disclosure would violate a specific regulation,

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal trade secrets or proprietary information without the owner's consent,

(5) Disclosure would otherwise adversely affect the foreign policy interets of the United States or impair the foreign assistance program of the United States, or

(6) Disclosure would impair an ongoing Inspector General or Department of Justice investigation.

PART 207—INDEMNIFICATION OF EMPLOYEES

§ 207.01 Policy.

(a) A.I.D. may indemnify, in whole or in part, its employees (which for the purpose of this regulation includes former employees) for any verdict, judgment or other monetary award which is rendered against any such employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Agency and that such indemnification is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(b) A.I.D. may settle or compromise a personal damage claim against its employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Administrator, or his or her designee, in his or her discretion.

(c) Absent exceptional circumstances, as determined by the Administrator or his or her designee, A.I.D. will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify A.I.D. that such an action is pending.

(e) The employee may, thereafter, request either: (1) Indemnification to satisfy a verdict, judgment or award entered against the employee or (2) payment to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with documentation including copies of the verdict, judgment, award or settlement proposal, as appropriate, to the General Counsel. The General Counsel may also seek the views of the Department of Justice. The General Counsel shall forward the request and the General Counsel's recommendation to the Administrator for decision.

(f) Any payment under this part either to indemnify an employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds.

(5 U.S.C. 301; 22 U.S.C. 2381(a))

[53 FR 29658, Aug. 8, 1988]

PART 208—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Sec.

208.25 How is this part organized?
208.50 How is this part written?
208.75 Do terms in this part have special meanings?

Subpart A—General

208.100 What does this part do?
208.105 Does this part apply to me?
208.110 What is the purpose of the nonprocurement debarment and suspension systems?
208.115 How does an exclusion restrict a person's involvement in covered transactions?
208.120 May we grant an exception to let an excluded person participate in a covered transaction?
208.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?
208.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?
208.135 May the U.S. Agency for International Development exclude a person who is not currently participating in a nonprocurement transaction?
208.140 How do I know if a person is excluded?
208.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Subpart B—Covered Transactions

208.200 What is a covered transaction?
208.205 Why is it important to know if a particular transaction is a covered transaction?
208.210 Which nonprocurement transactions are covered transactions?
208.215 Which nonprocurement transactions are not covered transactions?

208.220 Are any procurement contracts included as covered transactions?
208.225 How do I know if a transaction in which I may participate is a covered transaction?

Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

208.300 What must I do before I enter into a covered transaction with another person at the next lower tier?
208.305 May I enter into a covered transaction with an excluded or disqualified person?
208.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?
208.315 May I use the services of an excluded person as a principal under a covered transaction?
208.320 Must I verify that principals of my covered transactions are eligible to participate?
208.325 What happens if I do business with an excluded person in a covered transaction?
208.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

208.335 What information must I provide before entering into a covered transaction with the U.S. Agency for International Development?
208.340 If I disclose unfavorable information required under §208.335, will I be prevented from participating in the transaction?
208.345 What happens if I fail to disclose the information required under §208.335?
208.350 What must I do if I learn of the information required under §208.335 after entering into a covered transaction with the U.S. Agency for International Development?

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

208.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?
208.360 What happens if I fail to disclose the information required under §208.355?
208.365 What must I do if I learn of information required under §208.355 after entering into a covered transaction with a higher tier participant?

Subpart D—Responsibilities of USAID Officials Regarding Transactions

208.400 May I enter into a transaction with an excluded or disqualified person?
208.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?
208.410 May I approve a participant's use of the services of an excluded person?
208.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?
208.420 May I approve a transaction with an excluded or disqualified person at a lower tier?
208.425 When do I check to see if a person is excluded or disqualified?
208.430 How do I check to see if a person is excluded or disqualified?
208.435 What must I require of a primary tier participant?
208.440 What method do I use to communicate those requirements to participants?
208.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?
208.450 What action may I take if a primary tier participant fails to disclose the information required under §208.335?
208.455 What may I do if a lower tier participant fails to disclose the information required under §208.355 to the next higher tier?

Subpart E—Excluded Parties List System

208.500 What is the purpose of the Excluded Parties List System (EPLS)?
208.505 Who uses the EPLS?
208.510 Who maintains the EPLS?
208.515 What specific information is in the EPLS?
208.520 Who places the information into the EPLS?
208.525 Whom do I ask if I have questions about a person in the EPLS?
208.530 Where can I find the EPLS?

Subpart F—General Principles Relating to Suspension and Debarment Actions

208.600 How do suspension and debarment actions start?
208.605 How does suspension differ from debarment?
208.610 What procedures does the U.S. Agency for International Development use in suspension and debarment actions?
208.615 How does the U.S. Agency for International Development notify a person of a suspension and debarment action?
208.620 Do Federal agencies coordinate suspension and debarment actions?
208.625 What is the scope of a suspension or debarment action?

208.630 May the U.S. Agency for International Development impute the conduct of one person to another?
208.635 May the U.S. Agency for International Development settle a debarment or suspension action?
208.640 May a settlement include a voluntary exclusion?
208.645 Do other Federal agencies know if the U.S. Agency for International Development agrees to a voluntary exclusion?

Subpart G—Suspension

208.700 When may the suspending official issue a suspension?
208.705 What does the suspending official consider in issuing a suspension?
208.710 When does a suspension take effect?
208.715 What notice does the suspending official give me if I am suspended?
208.720 How may I contest a suspension?
208.725 How much time do I have to contest a suspension?
208.730 What information must I provide to the suspending official if I contest a suspension?
208.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?
208.740 Are suspension proceedings formal?
208.745 How is fact-finding conducted?
208.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?
208.755 When will I know whether the suspension is continued or terminated?
208.760 How long may my suspension last?

Subpart H—Debarment

208.800 What are the causes for debarment?
208.805 What notice does the debarring official give me if I am proposed for debarment?
208.810 When does a debarment take effect?
208.815 How may I contest a proposed debarment?
208.820 How much time do I have to contest a proposed debarment?
208.825 What information must I provide to the debarring official if I contest a proposed debarment?
208.830 Under what conditions do I get an additional opportunity to challenge the facts on which the proposed debarment is based?
208.835 Are debarment proceedings formal?
208.840 How is fact-finding conducted?
208.845 What does the debarring official consider in deciding whether to debar me?
208.850 What is the standard of proof in a debarment action?
208.855 Who has the burden of proof in a debarment action?
208.860 What factors may influence the debarring official's decision?
208.865 How long may my debarment last?
208.870 When do I know if the debarring official debars me?
208.875 May I ask the debarring official to reconsider a decision to debar me?
208.880 What factors may influence the debarring official during reconsideration?
208.885 May the debarring official extend a debarment?

Subpart I—Definitions

208.900 Adequate evidence.
208.905 Affiliate.
208.910 Agency.
208.915 Agent or representative.
208.920 Civil judgment
208.925 Conviction.
208.930 Debarment.
208.935 Debarring official.
208.940 Disqualified.
208.945 Excluded or exclusion.
208.950 Excluded Parties List System.
208.955 Indictment.
208.960 Ineligible or ineligibility.
208.965 Legal proceedings.
208.970 Nonprocurement transaction.
208.975 Notice.
208.980 Participant.
208.985 Person.
208.990 Preponderance of the evidence.
208.995 Principal.
208.1000 Respondent.
208.1005 State.
208.1010 Suspending official.
208.1015 Suspension.
208.1020 Voluntary exclusion or voluntarily excluded.

Subpart J [Reserved]

APPENDIX TO PART 208—COVERED TRANSACTIONS

AUTHORITY: E.O. 12163, 3 CFR 1979 Comp., p. 435; E.O. 12549 3 CFR 1986 Comp., p. 189; E.O. 12698, 3 CFR 1989 Comp., p. 235; sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended.

SOURCE: 68 FR 66544, 66584, Nov. 26, 2003, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 208 appear at 68 FR 66585, Nov. 26, 2003.

§ 208.25 How is this part organized?

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart . . .	You will find provisions related to . . .
A	general information about this rule.
B	the types of USAID transactions that are covered by the Governmentwide nonprocurement suspension and debarment system.
C	the responsibilities of persons who participate in covered transactions.
D	the responsibilities of USAID officials who are authorized to enter into covered transactions.
E	the responsibilities of Federal agencies for the *Excluded Parties List System* (Disseminated by the General Services Administration).
F	the general principles governing suspension, debarment, voluntary exclusion and settlement.
G	suspension actions.
H	debarment actions.
I	definitions of terms used in this part.
J	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are . . .	See subpart(s) . . .
(1) a participant or principal in a nonprocurement transaction.	A, B, C, and I.
(2) a respondent in a suspension action	A, B, F, G and I.
(3) a respondent in a debarment action	A, B, F, H and I.
(4) a suspending official	A, B, D, E, F, G and I.
(5) a debarring official	A, B, D, E, F, H and I.
(6) a (n) USAID official authorized to enter into a covered transaction.	A, B, D, E and I.
(7) Reserved	J.

§ 208.50 How is this part written?

(a) This part uses a ''plain language'' format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as ''I'' and ''you,'' change from subpart to subpart depending on the audience being addressed. The pronoun ''we'' always is the U.S. Agency for International Development.

(c) The ''Covered Transactions'' diagram in the appendix to this part shows the levels or ''tiers'' at which the U.S. Agency for International Development enforces an exclusion under this part.

§ 208.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded,* which refers only to discretionary actions taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified*, which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible*, which generally refers to a person who is either excluded or disqualified.

Subpart A—General

§ 208.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for USAID nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. 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, Public Law 103–355, 108 Stat. 3327).

§ 208.105 Does this part apply to me?

Portions of this part (see table at § 208.25(b)) apply to you if you are a—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the U.S. Agency for International Development has initiated a debarment or suspension action);

(c) USAID debarring or suspending official; or

(d) USAID official who is authorized to enter into covered transactions with non-Federal parties.

§ 208.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

§ 208.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§ 208.120, 208.315, and 208.420, a person who is excluded by the U.S. Agency for International Development or any other Federal agency may not:

(a) Be a participant in a USAID transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

§ 208.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The Director, Office of Procurement may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Director, Office of Procurement grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

§ 208.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

§ 208.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

§ 208.135 May the U.S. Agency for International Development exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

§ 208.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a

Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 208.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS;* and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) USAID transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

Subpart B—Covered Transactions

§ 208.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

§ 208.205 Why is it important to know if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 208.310 or § 208.415; or

(2) A USAID official obtains an exception from the Director, Office of Procurement to allow you to be involved in the transaction, as permitted under § 208.120.

§ 208.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 208.970, are covered transactions unless listed in § 208.215. (See appendix to this part.)

§ 208.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted).

For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 *et seq.*, those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the U.S. Agency for International Development needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the U.S. Agency for International Development specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

§ 208.220 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 § 208.210, and the amount of the contract is expected to equal or exceed $25,000.

(2) The contract requires the consent of a USAID 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.

§ 208.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

§ 208.300 What must I do before I enter into a covered transaction with another person at the next lower tier?

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

(a) Checking the *EPLS;* or

(b) Collecting a certification from that person if allowed by this rule; or

(c) Adding a clause or condition to the covered transaction with that person.

§ 208.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the U.S. Agency for International Development grants an exception under § 208.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

§ 208.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded

the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the U.S. Agency for International Development grants an exception under § 208.120.

§ 208.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the U.S. Agency for International Development grants an exception under § 208.120.

§ 208.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

§ 208.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

§ 208.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 208.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

§ 208.335 What information must I provide before entering into a covered transaction with the U.S. Agency for International Development?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the USAID office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 208.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 208.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

§ 208.340 If I disclose unfavorable information required under § 208.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under § 208.335 will not necessarily cause us to deny your participation in the covered

transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

§ 208.345 What happens if I fail to disclose information required under § 208.335?

If we later determine that you failed to disclose information under § 208.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 208.350 What must I do if I learn of the information required under § 208.335 after entering into a covered transaction with the U.S. Agency for International Development?

At any time after you enter into a covered transaction, you must give immediate written notice to the USAID office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by § 208.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 208.335.

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

§ 208.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

§ 208.360 What happens if I fail to disclose the information required under § 208.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

§ 208.365 What must I do if I learn of information required under § 208.355 after entering into a covered transaction with a higher tier participant?

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 208.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 208.355.

Subpart D—Responsibilities of USAID Officials Regarding Transactions

§ 208.400 May I enter into a transaction with an excluded or disqualified person?

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 208.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 208.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 208.120.

§ 208.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as

a principal under that transaction, unless you obtain an exception under § 208.120.

§ 208.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 208.120.

§ 208.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 208.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 208.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

§ 208.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in § 208.425.

(b) You must review information that a participant gives you, as required by § 208.335, about its status or the status of the principals of a transaction.

§ 208.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

§ 208.440 What method do I use to communicate those requirements to participants?

To communicate the requirements in § 208.35, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower-tier covered transactions.

[68 FR 68585, Nov. 26, 2003]

§ 208.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

§ 208.450 What action may I take if a primary tier participant fails to disclose the information required under § 208.335?

If you as an agency official determine that a participant failed to disclose information, as required by § 208.335, at the time it entered into a

covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 208.455 What may I do if a lower tier participant fails to disclose the information required under § 208.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by § 208.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

Subpart E—Excluded Parties List System

§ 208.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

§ 208.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under § 208.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under § 208.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

§ 208.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 208.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

§ 208.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by § 208.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

§ 208.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

§ 208.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at *http://epls.arnet.gov*.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238.

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 208.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

§ 208.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

A suspending official . . .	A debarring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings.	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must—	Must conclude, based on a *preponderance of the evidence,* that the person has engaged in conduct that warrants debarment.
(1) Have *adequate evidence* that there may be a cause for debarment of a person; and.	
(2) Conclude that *immediate action* is necessary to protect the Federal interest.	
(c) Usually imposes the suspension *first,* and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted.	Imposes debarment *after* giving the respondent notice of the action and an opportunity to contest the proposed debarment.

§ 208.610 What procedures does the U.S. Agency for International Development use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

§ 208.615 How does the U.S. Agency for International Development notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

§ 208.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

§ 208.625 What is the scope of a suspension or debarment action?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

§ 208.630 May the U.S. Agency for International Development impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization*. We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals*. We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization*. We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

§ 208.635 May the U.S. Agency for International Development settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

§ 208.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 208.645 Do other Federal agencies know if the U.S. Agency for International Development agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

Subpart G—Suspension

§ 208.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 208.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under § 208.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

§ 208.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

§ 208.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

§ 208.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;

(b) That your suspension is based on—

(1) An indictment;

(2) A conviction;

(3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

(4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under § 208.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, Subpart F of this part, and any other USAID procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

§ 208.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 208.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make rrangements to appear and present, the

information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 208.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the U.S. Agency for International Development may seek further criminal, civil or administrative action against you, as appropriate.

§ 208.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

§ 208.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

§ 208.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the U.S. Agency for International Development agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 208.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 208.755 When will I know whether the 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.

§ 208.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

Subpart H—Debarment

§ 208.800 What are the causes for debarment?

We 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 October 1, 1988, 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 § 208.120;

(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 § 208.640 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.

§ 208.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 208.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 208.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 208.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other USAID procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities.

§ 208.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

§ 208.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 208.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 208.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in § 208.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the U.S. Agency for International Development may seek further criminal, civil or administrative action against you, as appropriate.

§ 208.830 Under what conditions do I get an additional opportunity to challenge the facts on which the proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

§ 208.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

§ 208.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the U.S. Agency for International Development agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 208.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in § 208.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at § 208.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 208.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

§ 208.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

§ 208.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the

individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

§ 208.865 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 three 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 § 208.860. 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 five years.

§ 208.870 When do I know if the debarring official debars 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.

(b) The debarring official sends you written notice, pursuant to § 208.615 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.

§ 208.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

§ 208.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

(a) Newly discovered material evidence;

(b) A reversal of the conviction or civil judgment upon which your debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

§ 208.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

Subpart I—Definitions

§ 208.900 Adequate evidence.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

§ 208.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

(a) Interlocking management or ownership;

(b) Identity of interests among family members;

(c) Shared facilities and equipment;

(d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

§ 208.910 Agency.

Agency means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered ''agencies'' for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

§ 208.915 Agent or representative.

Agent or representative means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

§ 208.920 Civil judgment.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

§ 208.925 Conviction.

Conviction means—

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

§ 208.930 Debarment.

Debarment means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

§ 208.935 Debarring official.

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

(1) The agency head; or

(2) An official designated by the agency head.

(b) The U.S. Agency for International Development's debarring official is the Director of the Office of Procurement.

[68 FR 66544, 66584, 66585, Nov. 26, 2003]

§ 208.940 Disqualified.

Disqualified means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

§ 208.945 Excluded or exclusion.

Excluded or exclusion means—

(a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or

(b) The act of excluding a person.

§ 208.950 Excluded Parties List System

Excluded Parties List System (EPLS) means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, ''List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,'' so long as published.

§ 208.955 Indictment.

Indictment means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

§ 208.960 Ineligible or ineligibility.

Ineligible or ineligibility means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

§ 208.965 Legal proceedings.

Legal proceedings means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

§ 208.970 Nonprocurement transaction.

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

(1) Grants.

(2) Cooperative agreements.

(3) Scholarships.

(4) Fellowships.

(5) Contracts of assistance.

(6) Loans.

(7) Loan guarantees.

(8) Subsidies.

(9) Insurances.

(10) Payments for specified uses.

(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

§ 208.975 Notice.

Notice means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 208. 615.)

§ 208.980 Participant.

Participant means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

§ 208.985 Person.

Person means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

§ 208.990 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 208.995 Principal.

Principal means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

§ 208.1000 Respondent.

Respondent means a person against whom an agency has initiated a debarment or suspension action.

§ 208.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

§ 208.1010 Suspending official.

(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 U.S. Agency for International Development's suspending official is the Director of the Office of Procurement.

[68 FR 66544, 66584, 66585, Nov. 26, 2003]

§ 208.1015 Suspension.

Suspension is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

§ 208.1020 Voluntary exclusion or voluntarily excluded.

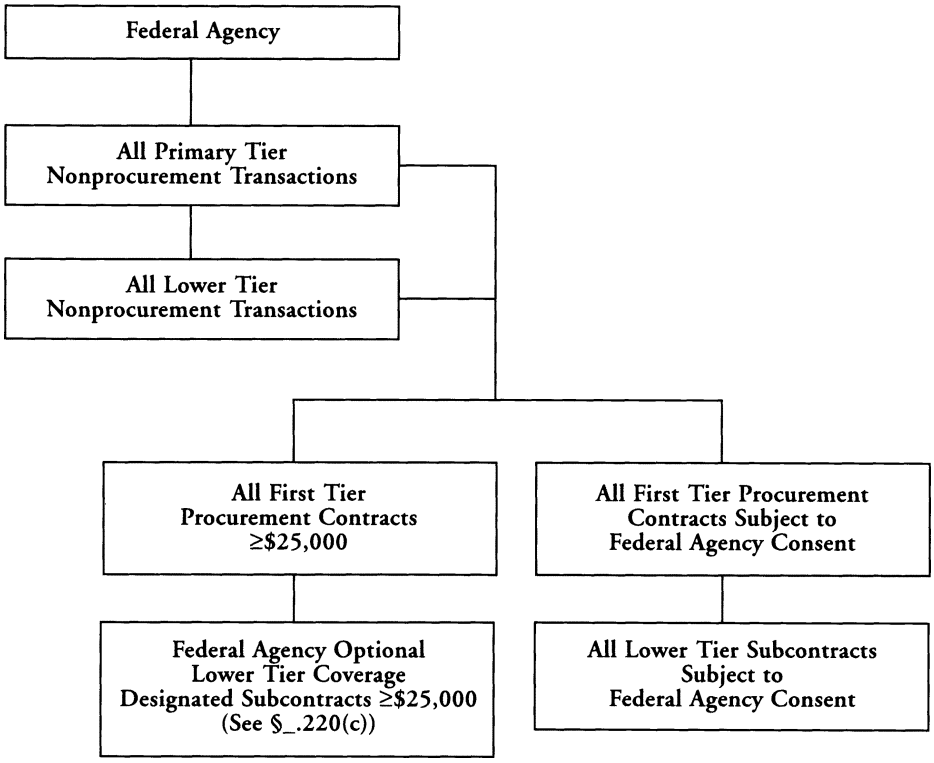
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

Subpart J [Reserved]

APPENDIX TO PART 208—COVERED TRANSACTIONS

COVERED TRANSACTIONS



PART 209—NON-DISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS OF THE AGENCY FOR INTERNATIONAL DEVELOPMENT—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.
209.1 Purpose.
209.2 Application of this part.
209.3 Definitions.
209.4 Discrimination prohibited.
209.5 Assurance required.
209.6 Compliance information.
209.7 Conduct of investigations.
209.8 Procedure for effecting compliance.
209.9 Hearings.
209.10 Decisions and notices.
209.11 Judicial review.
209.12 Effect on other regulations; supervision and coordination.
209.13 Delegation of authority.
APPENDIX A TO PART 209—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS REGULATION APPLIES

AUTHORITY: Sec. 602, 78 Stat. 252, and sec. 621, Foreign Assistance Act of 1961, 75 Stat. 445; 22 U.S.C. 2402.

SOURCE: 30 FR 317, Jan. 9, 1965, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 209 appear at 68 FR 51361, Aug. 26, 2003.

§ 209.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 to the end that no person in the United States shall,

on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development.

§ 209.2 Application of this part.

This part applies to all programs carried on within the United States by recipients of Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development, including the types of Federal financial assistance listed in appendix A of this part. (appendix A may be revised from time to time by notice in the FEDERAL REGISTER.) It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this regulation, even if the application for such assistance is approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred or other assistance extended before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary, (d) any employment practice under any such program of any employer, employment agency, or labor organization, or (e) any procurement of goods or services, including the procurement of training. This part does not bar selection and treatment reasonably related to the foreign assistance objective or such other authorized purpose as the Federal assistance may have. It does not bar selections which are limited to particular groups where the purpose of the Federal financial assistance calls for such a limitation nor does not bar special treatment including special courses of training, orientation or counseling consistent with such purpose.

§ 209.3 Definitions.

For purposes of this part—

(a) The term *Act* means the Civil Rights Act of 1964 (78 Stat. 241).

(b) The term *Administrator* means the Administrator of the Agency for International Development or any person specifically designated by him to perform any function provided for under this part.

(c) The term *applicant* means one who submits an application, request or plan required to be approved by the Administrator, or by a primary recipient as a condition to eligibility for Federal financial assistance, and the term ''application'' means such application, request, or plan.

(d) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(e) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis) Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(f) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(g) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (g)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1) (i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local

government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3) (i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (g)(1), (2), or (3) of this section.

(h) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or any other entity, or any individual in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary or a sovereign foreign government.

(i) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

[30 FR 317, Jan. 9, 1965, as amended at 68 FR 51361, Aug. 26, 2003]

§ 209.4 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance from the Agency for International Development.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this regulation applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program; or

(vii) Deny an individual an opportunity to participate in a program as an employee where a primary objective of the Federal financial assistance is to provide employment.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the

class of individuals to whom, or the situations in which, such services, financial aid, other benefits or facilities will be provided under any such program or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section the services, financial aid, or other benefit provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(6) This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color or national origin. Where previous discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this Regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973]

§ 209.5 Assurance required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The head of the bureau or office administering the Federal financial assistance shall specify the form of the foregoing assurances and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) In the case of real property, structures or improvements thereon, or interests therein, which was acquired withFederal financial assistance, or in

the case where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved, but property is improved withFederal financial assistance, the recipient shall agree to include such a covenant in any subsequent transfer of such property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Agency to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Agency official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In such event if a transferee of real property proposed to mortgage or otherwise encumber the real property as security for financing construction of new or improvement of existing facilities on such property for the purposes for which the property was transferred, the Administrator may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(3) Transfers of surplus property are subject to regulations issued by the Administrator of General Services (41 CFR 101–6.2).

(b) *Assurances from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for a special training project, for student assistance, or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17948, July 5, 1973; 68 FR 51361, Aug. 26, 2003]

§ 209.6 Compliance information.

(a) *Cooperation and assistance.* The Administrator shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Administrator timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Administrator may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the Administrator during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the Administrator finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 209.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The Administrator shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Administrator a written complaint. A complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the Administrator.

(c) *Investigations.* The Administrator will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Administrator will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 209.8.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the Administrator will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 209.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 209.4.* If an applicant fails or refuses to furnish an assurance required under § 209.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Agency for International Development shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph, except that the Agency shall continue assistance during the pendency of such proceedings where such assistance is

due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating, or refusing to grant or to continue Federal financial assistance shall become effective until (1) the head of the bureau or office administering the Federal financial assistance has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Administrator pursuant to paragraph (e) of § 209.10 and (4) the expiration of 30 days after the Administrator has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Agency official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be approprie.

[38 FR 17494, July 5, 1973]

§ 209.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 209.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the Administrator that the matter be scheduled for hearing, or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this section or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 209.8(c) of this part and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Agency for International Development in Washington, DC, at a time fixed by the Administrator unless he determines that the convenience of the applicant or recipient or of the Agency requires that another place be selected. Hearings shall be held before the Administrator or before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient, and the Agency for International Development shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.*

(1) The hearing, decision, and any administrative review thereof shall be

conducted in conformity with 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedure Act), and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Agency for International Development and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal statutes, authorities, or other means by which Federal financial assistance is extended and to which this part applies or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title VI of the Act, the Administrator may, by agreements with such other department or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 209.10.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

§ 209.10 Decisions and notices.

(a) *Decision by a hearing examiner.* If the hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the Administrator for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and the complainant. Where the initial decision is made by the hearing examiner the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the Administrator his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the Administrator may on his own motion within 45 days after the initial decision serve on the applicant or recipient a notice that he will review the decision. Upon the filing of such exceptions or of such notice of review the Administrator shall review the initial decision and issue his own decision thereon including the reasons therefor. The decision of the Administrator shall be mailed promptly to the applicant or recipient and the complainant, if any. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the Administrator.

(b) *Decisions on record or review by the Administrator.* Wherever a record is certified to the Administrator for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the Administrator conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the Administrator shall be given in writing to the applicant or recipient and the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Wherever a hearing is waived pursuant to § 209.9(a) a decision shall be

made by the Administrator on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing officer or the Administrator shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Administrator that it will fully comply with this part.

(f) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (e) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this regulation and provides reasonable assurance that it will fully comply with this regulation.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (e) of this section may at any time request the responsible Agency official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (f)(1) of this section. If the responsible Agency official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Agency official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Agency official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (f)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (e) of this section shall remain in effect.

[30 FR 317, Jan. 9, 1965 as amended at 38 FR 17949, July 5, 1973]

§ 209.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 209.12 Effect on other regulations; supervision and coordination.

(a) All regulations, orders or like directions heretofore issued by any officer of the Agency for International Development which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendment thereof): (1) Executive Order 11246, and regulations issued thereunder, or (2) any other regulation or instruction insofar as it prohibits discrimination on the grounds of

race, color, or national origin in any program or situation to which this part is inapplicable, or prohibits discrimination on any other ground.

(b) *Supervision and coordination.* The Administrator may from time to time assign to officials of other departments or agencies of the government (with the consent of such department or agency) responsibilities in connection with the effectuation of the purposes of title VI of the Act and this part (other than responsibility for final decision as provided in §209.10), including the achievement of effective coordination and maximum uniformity within the Agency for International Development and within the Executive branch of the Government in the application of title VI and this part to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Agency.

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

§209.13 Delegation of authority.

Responsibility for administration and enforcement of this part, with respect to Federal financial assistance administered by another Federal department or agency pursuant to delegation, transfer interagency service agreement, or other arrangement is vested in the head of such department or agency, or his delegate, and subject to such delegations or redelegations as he may make or authorize.

APPENDIX A TO PART 209—FEDERAL FINANCIAL ASSISTANCE TO WHICH THIS REGULATION APPLIES

1. Grants to organizations and institutions to carry on programs of technical cooperation and development in the United States to promote the economic development of less developed friendly countries. (Section 211, Foreign Assistance Act, 22 U.S.C. 2171.)

2. Grants to organizations and institutions to carry on programs of technical cooperation and development in the United States to promote the economic development of the less developed friendly countries of Latin America. (Section 251, Foreign Assistance Act, 22 U.S.C. 2211.)

3. Grants to organizations and institutions to carry out programs in the United States of research into, and evaluation of, economic development in less developed foreign countries. (Section 241, Foreign Assistance Act, 22 U.S.C. 2193.)

[30 FR 317, Jan. 9, 1965, as amended at 38 FR 17949, July 5, 1973]

PART 210—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Subpart A—Purpose and Coverage

Sec.
210.100 What does this part do?
210.105 Does this part apply to me?
210.110 Are any of my Federal assistance awards exempt from this part?
210.115 Does this part affect the Federal contracts that I receive?

Subpart B—Requirements for Recipients Other Than Individuals

210.200 What must I do to comply with this part?
210.205 What must I include in my drug-free workplace statement?
210.210 To whom must I distribute my drug-free workplace statement?
210.215 What must I include in my drug-free awareness program?
210.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
210.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
210.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

210.300 What must I do to comply with this part if I am an individual recipient?
210.301 [Reserved]

Subpart D—Responsibilities of USAID Awarding Officials

210.400 What are my responsibilities as a USAID awarding official?

Subpart E—Violations of This Part and Consequences

210.500 How are violations of this part determined for recipients other than individuals?
210.505 How are violations of this part determined for recipients who are individuals?
210.510 What actions will the Federal Government take against a recipient determined to have violated this part?
210.515 Are there any provisions for exceptions to those actions?

Subpart F—Definitions

210.605 Award.
210.610 Controlled substance.
210.615 Conviction.
210.620 Cooperative agreement.
210.625 Criminal drug statute.
210.630 Debarment
210.635 Drug-free workplace.
210.640 Employee.
210.645 Federal agency or agency.
210.650 Grant.
210.655 Individual.
210.660 Recipient.
210.665 State.
210.670 Suspension.

AUTHORITY: 41 U.S.C. 701, *et seq.*; sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, 3 CFR 1979 Comp., p. 435.

SOURCE: 68 FR 66577, 66586, Nov. 26, 2003, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 210 appear at 68 FR 66586, Nov. 26, 2003.

Subpart A—Purpose and Coverage

§ 210.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 210.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the U.S. Agency for International Development; or

(2) A USAID awarding official. (See definitions of award and recipient in §§ 210.605 and 210.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A USAID awarding official	A, D and E.

§ 210.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Director of the Office of Procurement determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 210.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 210.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 210.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part.

The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 210.205 through 210.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 210.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 210.230).

§ 210.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 210.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 210.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 210.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 210.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 210.205 and an ongoing awareness program as described in § 210.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more ...	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the USAID awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 210.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 210.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must__

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either__

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 210.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each USAID award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces__

(1) To the USAID official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by USAID officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the USAID awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the USAID awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 210.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a USAID award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the USAID awarding official or other designee for each award that you currently have, unless § 210.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

§ 210.301 [Reserved]

Subpart D—Responsibilities of USAID Awarding Officials

§ 210.400 What are my responsibilities as a USAID awarding official?

As a USAID awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of This Part and Consequences

§ 210.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Director of the Office of

Procurement determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 210.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Director of the Office of Procurement determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 210.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 210.500 or § 210.505, the U.S. Agency for International Development may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 22 CFR Part 208, for a period not to exceed five years.

§ 210.515 Are there any provisions for exceptions to those actions?

The USAID Administrator or designee may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the USAID Administrator or designee determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 210.605 Award.

Award means an award of financial assistance by the U.S. Agency for International Development or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule [Agency-specific CFR citation] that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

(c) Notwithstanding paragraph (a)(2) of this section, this paragraph is not applicable to AID.

[68 FR 66577, 66586, Nov. 26, 2003]

§ 210.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 210.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 210.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into

the same kind of relationship as a grant (see definition of grant in § 210.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 210.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 210.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 210.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 210.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 210.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 210.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 210.655 Individual.

Individual means a natural person.

§ 210.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 210.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 210.670 Suspension.

Suspension means an action taken by a Federal agency that immediately

prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PART 211—TRANSFER OF FOOD COMMODITIES FOR FOOD USE IN DISASTER RELIEF, ECONOMIC DEVELOPMENT AND OTHER ASSISTANCE

Sec.

211.1 General purpose and scope; legislation.
211.2 Definitions.
211.3 Cooperating sponsor agreements; program procedure.
211.4 Availability and shipment of commodities.
211.5 Obligations of cooperating sponsor.
211.6 Processing, repackaging, and labeling commodities.
211.7 Arrangements for entry and handling in foreign country.
211.8 Disposition of commodities unfit for authorized use.
211.9 Liability for loss, damage or improper distribution of commodities.
211.10 Records and reporting requirements.
211.11 Suspension, termination, and expiration of program.
211.12 Waiver and amendment authority.
211.13 Participation by religious organizations.
APPENDIX I TO PART 211—OPERATIONAL PLAN

AUTHORITY: 7 U.S.C. 1726a(c).

SOURCE: 57 FR 19766, May 7, 1992, unless otherwise noted.

§211.1 General purpose and scope; legislation.

(a) *Legislation.* The Agricultural Trade Development and Assistance Act of 1954, as amended (Pub. L. 480), was further revised by the Agricultural Development and Trade Act of 1990, Public Law 101–624, 104 Stat. 3632–65 (1990). The legislation implemented by the regulation in this part (as of the date of issuance of this part) includes sections of Public Law 480, as follows: Sections 1, 2, 3, 201, 202, 203, 207, 401, 402, 403, 404, 406, 407, 408, 409, 413 and 414. Pursuant to title II of Public Law 480, A.I.D. may transfer agricultural commodities to address famine or other urgent or extraordinary relief requirements; combat malnutrition, especially in children and mothers; carry out activities that attempt to alleviate the causes of hunger, mortality and morbidity; promote economic and community development; promote sound environmental practices; and carry out feeding programs. Agricultural commodities may be provided to meet emergency food needs through foreign governments and private or public organizations, including intergovernmental organizations. Section 202(a) of Public Law 480 authorizes A.I.D., notwithstanding any other provision of law, to provide agricultural commodities for emergency food needs in such manner and on such terms and conditions as A.I.D. determines appropriate to respond to the emergency. Agricultural commodities also may be provided for non-emergency assistance through private voluntary organizations or cooperatives which are, to the extent practicable, registered with A.I.D., and through intergovernmental organizations.

(b) *Terms and conditions.* This part 211, also known as A.I.D. Regulation 11, provides the standard terms and conditions applicable to title II programs, except those conducted by agencies of the United Nations and the World Food Program. The Operational Plan submitted by a cooperating sponsor may propose, and justify, the waiver of any section of this Regulation that is not required by statute. If A.I.D. approves a waiver, the specific section or subsection waived will be identified in the Transfer Authorization signed by the cooperating sponsor and A.I.D. or in an attachment, prepared by A.I.D., that is appended to the Operational Plan.

§ 211.2 Definitions.

(a) *A.I.D.* means the Agency for International Development or any successor agency, including, when applicable, each USAID. *USAID* means an office of A.I.D. located in a foreign country. *AID/W* means the office of A.I.D. located in Washington, DC.

(b) *Annual Estimate of Requirements* or *AER* (Form A.I.D. 1550–3, Exhibit E, A.I.D. Handbook 9) is a statistical update of the Operational Plan which is signed by the cooperating sponsor requesting commodities under title II estimating the quantities required. When signed by AID/W, the AER together with the Food for Peace Program Agreement between A.I.D. and the cooperating sponsor, the approved Operational Plan, and this Regulation 11 form a donation agreement between A.I.D. and the cooperating sponsor with respect to the commodities included in the AER.

(c) *CCC* means the Commodity Credit Corporation, a corporate agency and instrumentality of the United States within the U.S. Department of Agriculture.

(d) (1) *Cooperating sponsor* means an entity, within or without the United States, governmental or not, such as the foreign government, the American Red Cross, the intergovernmental organization, or the private voluntary organization or cooperative, which enters into an agreement with the U.S. Government for the use of agricultural commodities or funds.

(2) *Governmental cooperating sponsor* means a foreign government which has signed a Transfer Authorization under which agricultural commodities are donated for emergency purposes only. Governmental cooperating sponsors are treated here as a group separate from other cooperating sponsors since they are eligible only for emergency programs and their circumstances are different in such matters as rules governing shipping and in certain other aspects of agreements.

(3) *Nongovernmental cooperating sponsor* means a cooperating sponsor which is a private voluntary organization, a cooperative, the American Red Cross, or other private or public agency. An intergovernmental organization also is treated as a nongovernmental cooperating sponsor in this Regulation 11 unless the text or context indicates otherwise.

(e) *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.

(f) *Diplomatic Posts* means the offices of the Department of State located in foreign countries and may include Embassies, Legations, and Consular offices. Since A.I.D. is responsible for title II programs, references in this Regulation to Diplomatic Posts apply only with respect to those countries where there is no USAID.

(g) *Disaster relief organizations* means organizations which are authorized by AID/W, USAID or a Diplomatic Post to assist disaster victims.

(h) *Disaster victims* means persons who, because of flood, drought, fire, earthquake, other natural or man-made disasters, or extraordinary relief requirements, are in need of food, feed, or other assistance.

(i) *Duty free* means exempt from all customs duties, toll charges, taxes or governmental impositions levied on the act of importation.

(j)(1) *Food for Peace Program Agreement* establishes a nongovernmental organization as a cooperating sponsor for which A.I.D. agrees to authorize future transfers of commodities in accordance with title II of Public Law 480 and Regulation 11 and the cooperating sponsor agrees to accept transfer of commodities in accordance with approved programs under title II and A.I.D. Regulation 11 and related procedures.

(2) *Host Country Food for Peace Program Agreement* means an agreement between the cooperating sponsor and the foreign government of each cooperating country which authorizes the cooperating sponsor to conduct activities there in a manner consistent with the terms and conditions set forth within this Regulation 11.

(3) *Recipient Agency Agreement* means a written agreement between the cooperating sponsor and a recipient agency prior to the transfer to the recipient

agency of commodities, monetized proceeds, or other program income for distribution or implementation of an approved program.

(k) *Free alongside ship* (f.a.s.) includes all costs of transportation and delivery of the goods to the dock. ''Free on board'' (f.o.b.) includes costs for delivering the goods and loading them aboard the carrier at a specific location.

(l) *Institutions* means nonpenal, public or nonprofit private establishments that operate for charitable or welfare purposes where needy persons reside and receive meals including, but not limited to, homes for the aged, mentally and physically handicapped, refugee camps, and leprosy asylums.

(m) *Intergovernmental organizations* means agencies sponsored and supported by two or more nations, one of which is the United States.

(n) *Marine salvage* means the compensation made to those by whose assistance a vessel or its cargo has been saved from impending peril or recovered from actual loss.

(o) *Monetized proceeds* means funds generated from the sale of title II commodities in approved monetization programs. Monetized proceeds should be deposited in a special interest-bearing account for control and monitoring.

(p) *Nonprofit* means that the residue of income over operating expenses accruing in any activity, project, or program is used solely for the operation of such activity, project, or program.

(q) *Operational Plan* is a plan submitted by the cooperating sponsor or potential cooperating sponsor describing the proposed use of commodity and/or monetized proceeds and/or program income. All references in this Regulation to the Operational Plan shall include the AER that relates to such Operational Plan.

(r) *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 or is planning to engage in voluntary, charitable or development assistance activities (other than religious activities).

(s) *Program income* means gross income earned by the cooperating sponsor or recipient agencies from activities supported under the approved program during the program period, including, but not limited to, interest earned on deposits of monetized proceeds, revenue from income generating activities, funds accruing from the sale of containers and nominal voluntary contributions by recipients made on the basis of ability to pay.

(t) *Recipient agencies* means schools, institutions, welfare agencies, disaster relief organizations, and public or private agencies whose food distribution functions or project activities are sponsored by the cooperating sponsor and which receive for distribution to eligible recipients commodities or monetized proceeds or program income for approved project activities. A cooperating sponsor may be a recipient agency.

(u) *Recipients* means persons who receive food assistance or the benefit of monetized proceeds or program income because of their economic or nutritional condition or who are otherwise eligible to receive commodities for their own use or other assistance in accordance with the terms and conditions of the approved Operational Plan or Transfer Authorization.

(v) *Registered private voluntary organization or cooperative* means a nonprofit private voluntary organization or cooperative registered with, and approved by, A.I.D. The term includes foreign as well as U.S. registered nonprofit voluntary organizations and cooperatives. For discussion of registration, see 22 C.F.R. part 203, A.I.D. Regulation 3, Registration of Agencies for Voluntary Foreign Aid. In reviewing and approving proposals, A.I.D., at its discretion, may give preference to registered private voluntary organizations and cooperatives over those that are not and to U.S. private voluntary organizations and cooperatives over those that are foreign.

(w) *Transfer Authorization* or *TA* means the document signed by the cooperating sponsor and A.I.D. which describes commodities and the program

in which they will be used. The TA incorporates A.I.D. Regulation 11 and authorizes CCC to ship the commodities.

(x) *USDA* means the U.S. Department of Agriculture.

(y) *Welfare agencies* means public or private voluntary organizations that provide care, including food assistance, to needy persons who are not residents of institutions.

§ 211.3 Cooperating sponsor agreements; program procedure.

(a) *Food for Peace Program Agreement.* A nongovernmental organization is eligible to be a cooperating sponsor for regular programs under paragraph (d)(2)(i) of this section only after it has entered into a Food For Peace Program Agreement with A.I.D. that incorporates the terms and conditions set forth in Regulation 11.

(b) *Host Country Food for Peace Program Agreement.* Nongovernmental and intergovernmental cooperating sponsors shall, in addition to the Food for Peace Program Agreement, enter into a separate written Host Country Food for Peace Agreement with the foreign government of each country for which title II commodities are transferred to the cooperating sponsor. This agreement shall establish the terms and conditions needed by a nongovernmental cooperating sponsor to conduct a title II program in the country in accordance with the applicable requirements of this part. The cooperating sponsor shall provide USAID or the Diplomatic Post a copy of each executed Host Country Food for Peace Agreement.

Where such written agreement is not appropriate or feasible, USAID or the Diplomatic Post shall assure AID/W, in writing, that the program can be effectively implemented in compliance with this Regulation without such an agreement.

(c) *Recipient Agency Agreement.* Prior to the transfer of commodities, monetized proceeds, or program income to a recipient agency for distribution or implementation of an approved program, the cooperating sponsor shall execute with such agency a written agreement which shall:

(1) Describe the approved uses of commodities, monetized proceeds and program income in a manner consistent with the approved Operational Plan or TA;

(2) Require the recipient agency to pay the cooperating sponsor the value of any commodities, monetized proceeds or program income that are used for purposes not permitted under the Recipient Agency Agreement or that are lost, damaged or misused as a result of the recipient agency's failure to exercise reasonable care with respect to such commodities, monetized proceeds or program income; and

(3) Incorporate by reference or otherwise the terms and conditions set forth in this Regulation 11.

The Operational Plan may indicate those transfers of commodities, monetized proceeds or program income for which the cooperating sponsor and A.I.D. agree that a Recipient Agency Agreement would not be appropriate or feasible. In any case, the cooperating sponsor shall remain responsible for such commodities, monetized proceeds and program income in accordance with the terms of this Regulation 11 and the Operational Plan or TA. The cooperating sponsor shall provide USAID or the Diplomatic Post a copy of each executed Recipient Agency Agreement.

(d) *Program procedure*—(1) *Requests for programs.* A program may be requested by any cooperating sponsor, including private voluntary organizations, cooperatives, foreign governments (for emergencies only), and international organizations.

(2) *Approval of programs.* There are two basic patterns of decision typically employed in approving a request for title II assistance:

(i) *Regular programs.* The cooperating sponsor submits to A.I.D. an Operational Plan or multi-year Operational Plan (see appendix I), describing the program proposed. Also, an AER will be submitted to A.I.D. along with the Operational Plan, estimating the quantities of commodities required for each program proposed. AID/W's approval of and signature on the AER completes this decision process.

(ii) *Individual programs.* The other basic pattern of decision making results in a Transfer Authorization. The TA is used for all emergency government-to-government programs, and for

nongovernmental cooperating sponsor programs which do not fit within the Program Agreement/AER framework. The TA will include by reference Regulation 11.

(3) *Subject to availability*. A.I.D.'s agreement to transfer commodities is subject to the availability of appropriations and agricultural commodities during each United States Government fiscal year to which it applies.

(4) *Timing of decision*. Under Public Law 480, section 207(a), within 45 days of its submission to AID/W, a decision must be made on a proposal submitted by a private voluntary organization or cooperative, concurred in by USAID or the Diplomatic Post. The decision shall detail the reasons for approval or denial, and if denied, conditions to be met for approval. In addition, a USAID or Diplomatic Post must decide whether or not to concur in the proposal within 45 days of receiving it or provide a written explanation to the private voluntary organization or cooperative and AID/W of the reasons USAID or the Diplomatic Post needs more time to consider the proposal.

§211.4 Availability and shipment of commodities.

(a) *Shipment, distribution and use of commodities*. Commodities shall be available for shipment, distribution and use in accordance with the provisions of the approved Operational Plan and AER, or TA and this Regulation 11.

(b) *Transfer of title and delivery*. (1) Unless the approved Operational Plan or TA provides otherwise, title to the commodity shall pass—

(i) For nongovernmental cooperating sponsors, at the point in the United States at which the ocean carrier or its agents take possession of the cargo (generally f.a.s. or f.o.b. vessel U.S. port); or

(ii) For governmental cooperating sponsors, at the destination port of entry, upon completion of discharge by the ocean carrier (non-landlocked countries), or at the destination point of entry, upon completion of delivery by the inland carrier (landlocked countries).

Except as A.I.D. may otherwise agree in writing, the cooperating sponsor shall retain title to commodities, monetized proceeds, and program income transferred to a recipient agency for distribution or use in accordance with the Operational Plan or TA.

(2) Nongovernmental cooperating sponsors shall make the necessary arrangements to accept commodities at the points of availability designated by CCC.

(c) *Processing, handling, transportation and other costs*. (1) Except as othervise provided in the Operational Plan or TA, the United States will pay in accordance with this paragraph (c) processing, handling, transportation, and other incidental costs incurred in making commodities available to cooperating sponsors at U.S. ports or U.S. inland destinations, up to the point at which the ocean carrier takes possession of the cargo.

(2) The United States will finance the transfer of commodities at the lowest combination inland and ocean transportation costs as determined by the United States and in sizes and types of packages announced as applicable. If a nongovernmental cooperating sponsor requests changes to these standards which are made by the United States as an accommodation to the cooperating sponsor and these changes result in costs over those the United States otherwise would have incurred, the cooperating sponsor shall reimburse the United States for these increased costs promptly upon request.

(3) All costs and expenses incurred subsequent to the transfer of title to cooperating sponsors shall be borne by them except as otherwise provided herein. Upon the determination that it is in the interests of the program to do so, the United States may pay or reimburse the following additional costs:

(i) Ocean transportation costs from U.S. ports to the designated ports of entry abroad; or

(ii) Ocean transportation costs from U.S. ports to designated points of entry abroad in the case—

(A) Of landlocked countries,

(B) Where ports cannot be used effectively because of natural or other disturbances,

(C) Where carriers to a specific country are unavailable, or

(D) Where a substantial savings in cost or time can be effected by the utilization of points of entry other than ports; or

(iii) In the case of commodities for urgent and extraordinary relief requirements, including prepositioned commodities, transportation costs from designated points of entry or ports of entry abroad to storage and distribution centers and associated storage and distribution costs.

(d) *Payment or reimbursement of ocean freight costs.* When A.I.D. contracts for ocean carriage, carriers shall be paid by A.I.D., as provided in their contracts of affreightment, upon presentation of Standard Form 1034 and three copies of 1034A (Public Voucher for purchases and services other than personal), together with three copies of the related on-board ocean bill of lading, one copy of which must contain the following certification signed by an authorized representative of the steamship company:

I certify that this document is a true and correct copy of the original on-board ocean bill of lading under which the goods herein described were located on the above-named vessel and that the original and all other copies thereof have been clearly marked as not to be certified for billing.

(Name of steamship co.)

By

(Authorized representative)

Such documents shall be submitted to: Transportation Division, Office of Procurement, (FA/OP/TRANS), Agency for International Development, Washington, DC 20523. Except for duty, taxes and other costs excluded by § 211.7 (a) and (b) of this Regulation 11, nongovernmental cooperating sponsors booking their own vessels will be reimbursed as provided in A.I.D. Regulation 2 (part 202 of this chapter) for ocean freight authorized by the United States upon presentation to AID/W of proof of payment to the ocean carrier. However, freight prepaid bills of lading which indicate firm incurrence of freight costs will be accepted by A.I.D. as evidence of payment to the ocean carrier provided that the nongovernmental cooperating sponsor agrees to ensure that such carrier is actually paid no later than 7 calendar days following receipt of U.S. Government funds by the sponsor or its agent. A.I.D. will reimburse nongovernmental cooperating sponsors only up to a maximum of 2½ percent commission paid to their freight forwarders as a result of booking Public Law 480, title II cargo. Similarly, when A.I.D. books cargo, a maximum of 2½ percent commission may be paid by the contracted carrier. Proof of payment of commissions must be submitted with requests for reimbursement.

(e) *Shipping instructions*—(1) *Shipments booked by A.I.D.* Requests for shipment of commodities shall originate with the cooperating sponsor and shall be submitted to USAID or the Diplomatic Post for clearance and transmittal to AID/W. AID/W shall, through cables or letters to USAID or the Diplomatic Post, provide cooperating sponsors (and, where applicable, private voluntary organization or cooperative headquarters) with names of vessels, expected times of arrival (ETAs), and other pertinent information on shipments booked by A.I.D. As soon as possible but not later than 7 days from the time of exportation of commodities, A.I.D.'s freight forwarding contractor shall send applicable ocean bills of lading by airmail, or by the fastest means available, to USDA (Chief, Processed Commodities Division, Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205), to USAID or the Diplomatic Post (and where applicable to the USAID Controller and nongovernmental cooperating sponsor headquarters and field representative), to AID/W, FA/OP/TRANS (see § 211.4(d)), and to the consignee in sufficient time to advise of the arrival of the shipment.

(2) *Shipments booked by nongovernmental cooperating sponsor.* Requests for shipment of commodities shall originate with the cooperating sponsor and shall be cleared by USAID or the Diplomatic Post before transmittal to the cooperating sponsor's headquarters for concurrence and issuance. USAID or the Diplomatic Post shall promptly clear such requests for shipment of commodities or, if there is reason for delay or disapproval, advise the cooperating sponsor and AID/W within seven (7) days of receipt of requests for shipment. After the cooperating sponsor

headquarters concurs in the request and issues the order, the original will be sent promptly to AID/W which will forward it to CCC for procurement action with a copy to USAID or the Diplomatic Post. Headquarters of cooperating sponsors which book their own shipments shall provide their representatives and USAID or the Diplomatic Post with the names of vessels, ETAs and other pertinent information on shipments booked. At the time of exportation of commodities, the booking agent representing the cooperating sponsor shall send applicable ocean bills of lading by airmail or by the fastest means available to USDA (Chief, Processed Commodities Division, Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205), to USAID or the Diplomatic Post (and where applicable to the USAID Controller and the nongovernmental cooperating sponsor representative), to AID/W, FA/OP/TRANS (see §211.4(d)), and to the consignee in the country of destination in sufficient time to advise of the arrival of the shipment. Nongovernmental cooperating sponsors also will forward cable advice of actual exportation to their program directors in countries within the Caribbean area in view of the short transit time from U.S. port to destination.

(3) Cooperating sponsors awarding USAID-financed ocean transportation bookings of food aid under the Public Law 480, title II program shall follow consistent, transparent, fair and effective procedures. In order to promote these objectives, USAID may formulate, and from time-to-time amend, uniform standard booking guidelines relating to such bookings. Guidelines will be finalized only after consultation with affected cooperating sponsors, freight forwarders and carriers as required by the Agricultural Development and Trade Act of 1990 or other applicable legislation. Copies of the guidelines and any proposed amendments may be obtained from the Transportation Division, Office of Procurement, Agency for International Development, Washington, DC 20523.

(f) *Tolerances*. Delivery by the United States to the cooperating sponsor at point of transfer of title within a tolerance of 5 percent (2 percent in the case of quantities over 10,000 metric tons) plus or minus, of the quantity ordered for shipment shall be regarded as completion of delivery. There shall be no tolerance with respect to the ocean carrier's responsibility to deliver the entire cargo shipped and the United States assumes no obligation for failure by an ocean carrier to complete delivery to port of discharge.

(g) *Conflict of interest*. (1) Pursuant to section 407(c)(4) of Public Law 480, a person may not be an agent, broker, consultant, or other representative of the U.S. Government, an importer, or an importing country in connection with agricultural commodities provided under Public Law 480 during a fiscal year in which such person acts as an agent, broker, consultant or other representative of a person engaged in providing ocean transportation or ocean transportation-related services for such commodities.

(i) For purposes of section 407(c)(4), the term ''transportation-related services'' means lightening, stevedoring, bagging or inland transportation to the destination point.

(ii) The prohibition does not preclude payment by ocean carriers of compensation or brokerage fees on a shipment-by-shipment basis as provided in governing tariffs or charter parties to persons performing freight forwarding or charter broking services under contract to the U.S. Government.

(2) Pursuant to section 407(d)(3) of Public Law 480, freight agents employed by A.I.D. under title I, II or III of Public Law 480 shall not represent any other foreign government during the period of their contract with the United States Government. This restriction applies both to charter brokers and freight forwarders whether they are prime contractors or subcontractors of A.I.D.

(3) This paragraph (g) does not apply to shipments booked by nongovernmental cooperating sponsors or their agents.

[57 FR 19766, May 7, 1992, as amended at 60 FR 36991, July 19, 1995]

§ 211.5 Obligations of cooperating sponsor.

(a) *Operational Plans.* Each cooperating sponsor shall submit a description of the programs it is sponsoring or proposes to sponsor to USAID or the Diplomatic Post for its approval. AID/W will prescribe the format and timing for submittals and provide final approval of the Operational Plan. This Operational Plan will include program purposes and goals; criteria for measuring program effectiveness; a description of the activities for which commodities, monetized proceeds, or program income will be provided or used; and other specific provisions in addition to those set forth in this Regulation. Further, this description will include information from which it may be determined that the distribution of commodities in the recipient country will not result in a substantial disincentive to domestic production and that adequate storage facilities will be available in the recipient country at the time of arrival of the commodity to prevent spoilage or waste of the commodity. For preparation of the Operational Plan, see appendix I to this regulation. If a cooperating sponsor submits a multi-year Operational Plan that is approved by A.I.D., the Operational Plan provided with an AER each subsequent year should cover only those components or features which require updating or the cooperating sponsor proposes to change. A.I.D. will issue guidance each year regarding Operational Plans that must be submitted by cooperating sponsors. Within the limits of the total amount of commodities, monetized proceeds and program income approved by A.I.D. in the Operational Plan, the cooperating sponsor may increase or decrease by not to exceed 10 percent the amount of commodities, monetized proceeds or program income allocated to approved program categories or components of the Operational Plan. Such adjustments must be identified specifically in the annual report submitted by a cooperating sponsor under § 211.10(b) of the Regulation. A cooperating sponsor may not otherwise deviate from the Operational Plan without the prior written approval of A.I.D.

(b) *Program supervision.* Cooperating sponsors shall provide adequate supervisory personnel for the efficient operation of the program, including personnel to:

(1) Plan, organize, implement, control, and evaluate programs involving distribution of commodities or use of monetized proceeds and program income,

(2) Make warehouse inspections, physical inventories, and end-use checks of food or funds, and

(3) Review of books and records maintained by recipient agencies that receive monetized proceeds and/or program income.

Cooperating sponsors shall be represented by a person resident in the country of distribution or other nearby country approved by AID/W, who is appointed by and responsible to the cooperating sponsor for distribution of commodities or use of monetized proceeds or program income in accordance with the provisions of this regulation.

(c) *Audits*—(1) *By nongovernmental cooperating sponsors.* A nongovernmental cooperating sponsor shall arrange for periodic audits to be conducted in accordance with OMB Circular A–133, including the OMB Compliance Supplement and the Statement of Position Regarding Circular A–133 developed by the American Institute of Certified Public Accountants. Nongovernmental recipient agencies shall be treated as subrecipients under OMB Circular A–133, and governmental recipient agencies shall furnish the cooperating sponsor audits in accordance with the standard in paragraph (c)(2) of this section. The cooperating sponsor may satisfy these audit responsibilities with respect to recipient agencies by relying on independent audits performed of recipient agencies or on appropriate procedures performed by the cooperating sponsor's internal audit or program staff, by expanding the scope of the independent financial and compliance audit of the cooperating sponsor to encompass testing of recipient agency charges, or by a combination of these procedures. The Generally Accepted Commodity Accounting Principles issued by Food Aid Management, an association of cooperating sponsors, may be used for commodity accounting.

(2) *By governmental cooperating sponsors.* A governmental cooperating sponsor shall ensure that an audit satisfactory to A.I.D. is conducted annually with respect to donated commodities and monetized proceeds, if commodity sales are authorized under the agreement with A.I.D., including commodities and monetized proceeds transferred to or used by recipient agencies. The audit shall be a financial audit performed by the country's principal government audit agency or another audit agency or firm acceptable to A.I.D. This audit should be conducted in accordance with generally accepted government auditing standards issued by the United States General Accounting Office, or auditing standards that have been prescribed by the laws of the country or adopted by public accountants or an association of public accountants in the country, or Auditing Standards promulgated by the International Organization of Supreme Audit Institutions or International Auditing Practices Committee of the International Federation of Accountants. Both the auditor and the auditing standards to be used by the cooperating sponsor must be acceptable to A.I.D. The cooperating sponsor may satisfy its audit responsibility with respect to recipient agencies by relying on independent audits of the recipient agency or on appropriate procedures performed by internal audit or program staff of the cooperating sponsor, by expanding the scope of the independent financial audit of the cooperating sponsor to encompass testing of recipient agency charges or actions, or by a combination of these procedures. Recipient agencies that receive less than $25,000 of donated commodities and/or monetized proceeds are excluded from the cooperating sponsor's audit responsibility.

(d) *Commodity requirements; AER.* Each cooperating sponsor shall submit to USAID or the Diplomatic Post, within such times and on the AER form prescribed by AID/W, estimates of requirements showing the quantities of commodities required for each program proposed.

(e) *No military distribution.* Except as A.I.D. may otherwise agree in writing, agricultural commodities donated by A.I.D. shall not be distributed, handled or allocated by any military forces.

(f) *Determination of eligibility of recipients.* Cooperating sponsors shall be responsible for determining that the recipients and recipient agencies to whom they distribute commodities are eligible in accordance with the Operational Plan or TA and this Regulation. Cooperating sponsors shall impose upon recipient agencies responsibility for determining that the recipients to whom they distribute commodities or provide assistance with monetized proceeds or program income are eligible. Commodities shall be distributed free of charge except as provided in paragraphs (j) and (k) of this section or as otherwise authorized by AID/W, but in no case will recipients be excluded from receiving commodities because of inability to make a contribution to the cooperating sponsor for any purpose.

(g) *No discrimination.* Cooperating sponsors shall distribute commodities to and conduct operations (with food, monetized proceeds, or program income) only with eligible recipient agencies and eligible recipients without regard to political affiliation, geographic location, ethnic, tribal or religious identity or other factors extraneous to need and the eligibility criteria set forth in the approved Operational Plan or TA, and shall impose similar conditions upon recipient agencies.

(h) *Public recognition.* To the maximum extent practicable, and with the cooperation of the host government, adequate public recognition shall be given in the press, by radio, and other media that the commodities or assistance financed by monetized proceeds or program income have been provided through the friendship of the American people as food for peace. At distribution and feeding centers or other project sites the cooperating sponsor shall, to the extent feasible, display banners, posters, or similar media which shall contain information similar to that prescribed for containers in paragraph (i) of this section. Recipients' individual identification cards shall, insofar as practicable, be imprinted to contain such information.

(i) *Containers*—(1) *Markings.* Unless otherwise specified in the Operational Plan or TA, when commodities are packaged for shipment from the United States, bags and other containers shall be marked with the CCC contract number or other identification, the A.I.D. emblem and the following information stated in English:

(i) Name of commodity;

(ii) Provided through the friendship of the American people as food for peace;

(iii) Not to be sold or exchanged (where applicable).

(2) *Disposal of containers.* Cooperating sponsors may dispose of containers, other than containers provided by carriers, in which commodities are received in countries having approved title II programs, by sale or exchange, or may distribute the containers free of charge to eligible food or fiber recipients for their personal use. If the containers are to be used commercially, the cooperating sponsor must arrange for the removal, obliteration, or cross out of the U.S. Government markings from the containers prior to such use.

(j) *Monetization programs.* Provisions of this Regulation that prohibit or restrict the sale of commodities or require marking or labeling of containers do not apply to the extent the sale of commodities is approved by A.I.D. Cooperating sponsors are not required to monitor, manage, report on or account for the distribution or use of commodities after title to the commodities has passed to buyers or other third parties pursuant to a sale under a monetization program and all sales proceeds have been fully deposited in the special interest-bearing account established by the cooperating sponsor for monetized proceeds. However, the receipt and use of sales proceeds must be monitored, managed, reported and accounted for as provided in this Regulation, with special reference to paragraphs (k) and (l) of this section, and § 211.10. It is not mandatory that commodities approved for monetization be imported and sold free from all duties and taxes, but nongovernmental cooperating sponsors may negotiate agreements with the host government permitting the tax-free import and sale of such commodities. Even where the cooperating sponsor negotiates tax-exempt status, the prices at which the cooperating sponsor sells the commodities to the purchaser should reflect prices that would be obtained in a commercial transaction, *i.e.*, the prices would include the cost of duties and taxes, except as A.I.D. may otherwise agree in writing. Thus, the amounts normally paid for duties and taxes would accrue for the benefit of the cooperating sponsor's approved program. Cooperating sponsors should refer to the ''Monetization Field Manual'' for more comprehensive guidance on setting the sales price. A copy of the Monetization Manual may be obtained from AID/W-FHA/PPE, Washington, DC 20523.

(k) *Use of funds.* (1) Nongovernmental cooperating sponsors and recipient agencies may use monetized proceeds and program income to:

(i) Transport, store, distribute and otherwise enhance the effectiveness of the use of donated commodities and products thereof, including construction or improvement of storage facilities or warehouses, handling, insect and rodent control, payment of personnel employed or used by the cooperating sponsor or recipient agencies in support of approved programs;

(ii) Implement income generating, community development, health, nutrition, cooperative development, agricultural and other developmental activities agreed upon by A.I.D. and the cooperating sponsor;

(iii) Make investments, with the approval of A.I.D., and any interest earned on such investments may be used for purposes described in paragraphs (k)(l) (i) and (ii) of this section;

(iv) Improve their financial and other management systems; and

(v) Pay indirect costs of the cooperating sponsor that are allocable to the monetization program at the indirect cost rate approved by A.I.D. for the cooperating sponsor, the direct and indirect costs of an office maintained by the cooperating sponsor in the country where the monetization program is conducted that are allocable to the title II program there, and the costs of a regional office maintained by a cooperating sponsor that are allocable to the cooperating sponsor's effort to enhance the effectiveness of the use of

commodities provided by A.I.D. under title II.

(2) Monetized proceeds and program income may be used by the cooperating sponsor and recipient agencies only for the purposes described in the Operational Plan or TA, or otherwise approved by A.I.D., in writing, and only for such costs as would be allowable under OMB Circular A–122, as amended, ''Cost Principles for Nonprofit Organizations''. A recipient agency may use not to exceed $500 per year of voluntary contributions for institutional, community or social development or other humanitarian purposes without regard to the Operational Plan or TA or OMB Circular A–122.

(3) Governmental cooperating sponsors shall use monetized proceeds and program income only for emergency purposes as described in the TA with respect to such programs.

(4) Monetized proceeds and program income may not be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.

(5) Except as A.I.D. may otherwise agree in writing, monetized proceeds may not be used to finance the production for export of agricultural commodities, or products thereof, that would compete in the world market with similar agricultural commodities, or products thereof, produced in the United States, if such competition would cause substantial injury to the United States producers, as determined by A.I.D.

(6) (i) The cooperating sponsor shall use commercially reasonable practices in construction activities and in purchasing goods and services with monetized proceeds or program income; maintain a code of standards of conduct regarding conflicts of interest; carry out procurement transactions in a manner to provide open and free competition to the maximum extent practicable; and maintain and make available to A.I.D. in accordance with §211.10 records and documents regarding the procurement of goods and services with monetized proceeds and program income. Cooperating sponsors shall follow their own requirements relating to bid guarantees, performance bonds and payment bonds when program income or monetized proceeds are used to finance construction or the improvement of facilities, but shall consult with USAID or the Diplomatic Post regarding such requirements when the estimated cost of such construction or improvements exceeds $100,000. Title to real and personal property shall be vested in the cooperating sponsor, except as provided in the Operational Plan or TA or as A.I.D. may otherwise agree in writing, subject to the requirements of §211.11 upon termination of the program.

(ii) Monetized proceeds and program income may not be used to acquire, construct, alter or upgrade land, buildings or other real property improvements that are used in whole or in part for sectarian purposes or which are owned or managed by a church or other organization engaged exclusively in religious activity. Notwithstanding the preceding sentence, monetized proceeds or program income may be used to finance repair or rehabilitation of an existing structure owned or managed by a church or organization engaged exclusively in religious activity to the extent necessary to avoid spoilage or loss of donated commodities, provided that the structure is not used in whole or in part for any sectarian purpose while donated commodities are stored in it. The use of monetized proceeds or program income to finance construction of such a structure may be approved in the Operational Plan or TA or by USAID or the Diplomatic Post if the structure is needed and will be used for the storage of donated commodities for a sufficient period of time to warrant the expenditure of monetized proceeds or program income and the structure will not be used for any sectarian purpose during this period.

(l) *Report on funds.* The cooperating sponsor (headquarters, if there is more than one office) shall annually provide AID/W a report on the receipt and disbursement of all monetized proceeds and program income by cooperating sponsors and recipient agencies. This report should include the source of the funds, by country, and how the funds were used. This annual report should be submitted to AID/W by December 31 of each calendar year for the fiscal

year ending September 30 of that calendar year.

(m) *No displacement of sales.* Except in the case of emergency or disaster situations, the donation of commodities furnished for these programs shall not result in increased availability for export by the recipient country of the same or like commodities and shall not interfere with or displace sales in the recipient country which might otherwise take place. A country may be exempt from this proviso if circumstances warrant. USAIDs should seek AID/W guidance on this matter.

(n) *Commodities borrowed or exchanged for programs.* After the date of the program approval by AID/W, but before arrival at the distribution point of the commodities authorized, the cooperating sponsor may, with prior approval of USAID or the Diplomatic Post, borrow the same or similar commodities from available sources to meet program requirements provided that:

(1) Borrowed commodities which are used in accordance with the terms of the Operational Plan or TA will be replaced with commodities transferred by A.I.D. The amount of commodities transferred to replace borrowed commodities shall be established by mutual agreement between the cooperating sponsor and USAID or the Diplomatic Post and will be determined on the basis of equivalent value at the time and place of transfer or on some other justifiable basis proposed by the cooperating sponsor and acceptable to USAID or the Diplomatic Post;

(2) Packaged commodities which are borrowed shall be appropriately identified insofar as practicable in the language of the country of distribution as having been provided through the friendship of the American people as food for peace; and

(3) Suitable publicity shall be given to the exchange of commodities as provided in paragraph (h) of this section and containers for borrowed commodities shall be marked to the extent practicable in accordance with § 211.6(c).

(o) *Commodity transfer between programs.* After the date of program approval by AID/W, but before distribution of the commodities, USAID or the Diplomatic Post (or the cooperating sponsor with prior approval of USAID or the Diplomatic Post) may transfer commodities between approved title II programs to meet emergency disaster requirements or to improve efficiency of operation, such as to meet temporary shortages due to delays in ocean transportation or provide for rapid distribution of stocks in danger of deterioration. Transfers also may be made to disaster organizations for use in meeting exceptional circumstances. Commodity transfers shall be made at no cost to the U.S. Government and with the concurrence of the cooperating sponsor and disaster relief organization concerned. A USAID or Diplomatic Post with funds available, however, may pay the costs of transfers to meet extraordinary relief requirements, and AID/W shall be advised promptly of the details of the transfer. Commodities transferred between programs shall not be replaced by the U.S. Government unless AID/W authorizes such replacement.

(p) *Disposal of excessive stock of commodities.* If commodities are on hand which cannot be utilized in accordance with the approved Operational Plan or the TA, the cooperating sponsor shall promptly advise USAID or the Diplomatic Post of the quantities, location and condition of such commodities, and where possible, shall propose an alternate use of the excess stocks; USAID or the Diplomatic Post shall determine the most appropriate use of the excess stocks, and with prior AID/W concurrence, shall issue instructions for disposition. Transportation costs and other charges attributable to transferring commodities from one program to another within the country shall be the responsibility of the cooperating sponsor, except that in case of disaster or emergency, AID/W may authorize the use of disaster or emergency funds to pay for the costs of such transfers. (For discussion of unfit commodity disposal, see § 211.8.)

(q) *Trilateral exchange programs.* The restrictions in this Regulation regarding the distribution, use or labeling of commodities shall not apply to commodities furnished by CCC in exchange for other commodities obtained from third parties (''exchanged commodities'') to be distributed in a recipient

country under a trilateral exchange program. Except as A.I.D. and the cooperating sponsor may otherwise agree in writing, title to the exchanged commodities will pass to the cooperating sponsor upon delivery to and acceptance by the cooperating sponsor at the point of delivery specified in the Operational Plan or TA. After title passes to the cooperating sponsor the exchanged commodities shall be deemed ''commodities'' covered by this Regulation with respect to all post-delivery obligations of the cooperating sponsor contained in this Regulation, including obligations regarding labeling to the extent practicable, distribution, monitoring, reporting, accounting and use of commodities or monetized proceeds resulting from their sale. In the event of difficulty in satisfying the labeling requirement, the cooperating sponsor will consult with USAID or the Diplomatic Post for guidance.

(r) *Landing*. Governmental cooperating sponsors shall permit donated commodities to be discharged notwithstanding any dispute or question concerning quality, quantity, or other matters relating to the commodity itself. Any such dispute or question shall be resolved in accordance with procedures stated in this Regulation or in the relevant shipping or other contracts, as applicable.

§211.6 Processing, repackaging, and labeling commodities.

(a) *Commercial processing and repackaging*. Cooperating sponsors or their designees may arrange for processing commodities into different end products and for packaging or repackaging commodities prior to distribution. Commodities may be bartered, or monetized proceeds or program income may be used, to offset such costs if provided for in the Operational Plan or TA or approved by USAID or the Diplomatic Post. When commercial facilities are used for processing, packaging or repackaging, cooperating sponsors or their designees shall enter into written agreements for such services and copies of the agreements must be provided to USAID or the Diplomatic Post. Except as AID/W otherwise agrees, the executed agreements shall provide as a minimum that the party providing such services shall:

(1) Fully account to the cooperating sponsor for all commodities delivered to the processor's possession and shall maintain adequate records and submit periodic reports pertaining to the performance of the agreement;

(2) Be liable for the value of all commodities not accounted for as provided in §211.9(e);

(3) Return or dispose of the containers in which the commodity is received from the cooperating sponsor according to instructions from the cooperating sponsor; and

(4) Plainly label carton, sacks, or other containers containing the end product in accordance with paragraph (c) of this section.

(b) *Use of cooperating sponsor facilities*. When cooperating sponsors utilize their own facilities to process, package, or repackage commodities into different end products, and when such products are distributed for consumption off the premises of the cooperating sponsor, the cooperating sponsor shall plainly label the containers as provided in paragraph (c) of this section, and banners, posters, or similar media which shall contain information similar to that prescribed in paragraph (c) of this section, shall be displayed at the distribution center. Recipients' individual identification cards shall to the maximum extent practicable be imprinted to contain such information.

(c) *Labeling*. If, prior to distribution, the cooperating sponsor arranges for packaging or repackaging donated commodities, the cartons, sacks, or other containers in which the commodities are packed shall be plainly labeled with the A.I.D. emblem, and insofar as practicable, with the following information in the language of the country in which the commodities are to be distributed:

(1) Name of commodity;

(2) Provided through the friendship of the American people as food for peace; and

(3) Not to be sold or exchanged (where applicable).

Emblems or other identification of nongovernmental cooperating sponsors also may be added.

(d) *Where commodity containers are not used.* When the usual practice in a country is not to enclose the end product in a container, wrapper, sack, etc., the cooperating sponsor shall, to the extent practicable, display banners, posters, or other media, and imprint on individual recipient identification cards information similar to that prescribed in paragraph (c) of this section.

§ 211.7 Arrangements for entry and handling in foreign country.

(a) *Costs at discharge ports.* Except as otherwise agreed upon by AID/W and provided in the applicable shipping contract or in paragraph (d) and (e) of this section, the cooperating sponsor shall be responsible for all costs, other than those assessed by the delivering carrier either in accordance with its applicable tariff for delivery to the discharge port or the applicable charter or booking contract. The cooperating sponsor shall be responsible for all costs related to

(1) Distributing the commodity to end users, as provided in the approved Operational Plan or TA;

(2) Demurrage, detention, and overtime;

(3) Obtaining independent discharge survey reports as provided in § 211.9 under which the cooperating sponsor will be reimbursed for the costs of obtaining independent survey reports as provided in § 211.9(c)(1)(iv); and

(4) Wharfage, taxes, dues, and port charges assessed and collected by local authorities from the consignee, lighterage (when not a custom of the port), and lightening costs when assessed as a charge separate from the freight rate.

(b) *Duty, taxes, and consular invoices.* Except for commodities which are to be monetized (sold) under an approved Operational Plan or TA, commodities shall be admitted duty free and exempt from all taxes. Consular or legalization invoices shall not be required unless specific provision is made in the Operational Plan or TA. If required, they shall be issued without cost to the cooperating sponsor or to the Government of the United States. The cooperating sponsor shall be responsible for ensuring prompt entry and transit in the foreign country(ies) and for obtaining all necessary import permits, licenses or other appropriate approvals for entry and transit, including phytosanitary, health and inspection certificates.

(c) *Storage facilities and transportation in foreign countries.* The cooperating sponsors shall provide assurance to USAID or the Diplomatic Post that all necessary arrangements for receiving the commodities have been made, and shall assume full responsibility for storage and maintenance of the commodities from time of delivery at port of entry abroad or, when authorized, at other designated points of entry abroad agreed upon between the cooperating sponsor and A.I.D. Before recommending approval of a program to AID/W, USAID or the Diplomatic Post shall obtain, from the cooperating sponsor, assurance that provision has been made for internal transportation, and for storage and handling which are adequate by local commercial standards. The cooperating sponsor shall be responsible for the maintenance of the commodities in such manner as to assure distribution of the commodities in good condition to recipient agencies or eligible recipients.

(d) *Inland transportation in intermediate countries.* In the case of landlocked countries, transportation in the intermediate country to a designated inland point of entry in the recipient country shall be arranged by the cooperating sponsor unless otherwise provided in the Operational Plan or TA. Nongovernmental cooperating sponsors shall handle claims arising from loss or damage in the intermediate country, in accordance with § 211.9(e). Governmental cooperating sponsors shall assign any rights that they may have to any claims that arise in the intermediate country to USAID or the Diplomatic Post which shall pursue and retain the proceeds of such claims.

(e) *Authorization for reimbursement of costs.* If, because of packaging damage, a cooperating sponsor determines that commodities must be repackaged to ensure that the commodities arrive at the distribution point in a wholesome condition, the cooperating sponsor may incur expenses for such repackaging up to $500 and such costs will be reimbursed by CCC. If costs will exceed $500, the authority to repackage and incur

the costs must be approved by USAID or the Diplomatic Post in advance of repackaging unless such prior approval is specifically waived, in writing, by USAID or the Diplomatic Post. For losses in transit, the $500 limitation shall apply to all commodities which are shipped on the same voyage of the same vessel to the same port of destination, irrespective of the kinds of commodities shipped or the number of different bills of lading issued by the carrier. For other losses, the $500 limitation shall apply to each loss situation, e.g., if 700 bags are damaged in a warehouse due to an earthquake, the $500 limitation applies to the total cost of repackaging the 700 bags. Shipments may not be artificially divided in order to avoid the limitation of $500 or for obtaining prior approval to incur repackaging costs.

(f) *Method of reimbursement*. (1) Costs of repackaging required because of damage occurring prior to or during discharge from the ocean carrier should be included, as a separate item, in claims filed against the ocean carrier. (See §211.9(c).) Full reimbursement of such costs up to $500 will be made by CCC upon receipt of invoices or other documents to support such costs. For amounts expended in excess of $500, reimbursement will be made upon receipt of supporting invoices or other documents establishing the costs of repackaging and showing the prior approval of USAID or the Diplomatic Post to incur the costs, unless approval is waived under §211.7(e).

(2) Costs of repackaging required because of damage caused after discharge of the cargo from the ocean carrier will be reimbursed to the cooperating sponsor by CCC (USDA-ASCS Fiscal Division, 14th & Independence Avenue, Washington, DC 20250) upon receipt of supporting invoices or other documentation.

§211.8 Disposition of commodities unfit for authorized use.

(a) *Prior to delivery to cooperating sponsor at discharge port or point of entry*. If the commodity is damaged prior to delivery to a governmental cooperating sponsor at discharge port or point of entry overseas, USAID or the Diplomatic Post shall immediately arrange for inspection by a public health official or other competent authority. A nongovernmental cooperating sponsor shall arrange for such an inspection under these circumstances. Commodity that is determined to be unfit for authorized use shall be disposed of in accordance with the priority set forth in paragraph (b). Expenses incidental to the handling and disposition of the damaged commodity shall be paid by USAID or the Diplomatic Post from the sales proceeds, from CCC Account No. 20FT401 or from the special title II, Public Law 480 Agricultural Commodity Account. The net proceeds of sales shall be deposited with the U.S. Disbursing Officer American Embassy, for the credit of CCC Account No. 20FT401.

(b) *After delivery to cooperating sponsor*. (1) If after arrival in a foreign country it appears that all or part of the commodities, may be unfit for the use authorized in the Operational Plan or TA, the cooperating sponsor shall immediately arrange for inspection of the commodity by a public health official or other competent authority approved by USAID or the Diplomatic Post. If no competent local authority is available, USAID or the Diplomatic Post may determine whether the commodities are unfit, and if so, may direct disposal in accordance with paragraphs (b) (1) through (4) of this section. The cooperating sponsor shall arrange for the recovery for authorized use of that part designated during the inspection as suitable for program use. If, after inspection, the commodity (or any part thereof) is determined to be unfit for authorized use the cooperating sponsor shall notify USAID or the Diplomatic Post of the circumstances pertaining to the loss or damage as prescribed in §211.9(f).

(2) A cooperating sponsor shall dispose of commodities determined to be unfit for authorized use in the order of priority described in paragraphs (b)(2) (i) through (iv) of this section. The concurrence of USAID or the Diplomatic Post should be requested for disposition of commodities valued at $500 or more. If the USAID or Diplomatic Post does not respond to the cooperating sponsor's request for concurrence within 15 days, the cooperating sponsor

may dispose of the commodities in the manner described in its request and inform the USAID or Diplomatic Post of its action taken in accordance with this section.

(i) Sale for the most appropriate use, *i.e.*, animal feed, fertilizer, or industrial use, at the highest obtainable price. When the commodity is sold, all U.S. Government markings shall be obliterated, removed or crossed out.

(ii) Transfer to an approved Food for Peace program for use as livestock feed. AID/W shall be advised promptly of any such transfer so that shipments from the United States to the livestock feeding program can be reduced by an equivalent amount.

(iii) Donation to a governmental or charitable organization for use as animal feed or for other nonfood use.

(iv) If the commodity is unfit for any use or if disposal in accordance with paragraphs (b)(2) (i), (ii) or (iii) of this section is not possible, the commodity shall be destroyed in such manner as to prevent its use for any purpose. Commodities valued at $500 or more shall be destroyed under the observation of a representative of the USAID or Diplomatic Post if practicable. When the cooperating sponsor informs the USAID or Diplomatic Post of its intention to destroy commodities, the cooperating sponsor shall indicate the kind and amount of commodities that will be destroyed, the manner of destruction, the representative(s) of local authorities who will witness the destruction, and the date when the commodities will be destroyed. The date shall be established on the basis of programmatic need, but an effort should be made to provide a reasonable opportunity for a representative of the USAID or Diplomatic Post to attend. The commodities may be destroyed on the date indicated even if there is no representative of the USAID or Diplomatic Post to observe this action.

(3) Expenses incidental to the handling and disposition of the damaged commodity shall be paid by the cooperating sponsor unless it is determined by USAID or the Diplomatic Post that the damage could not have been prevented by the proper exercise of the cooperating sponsor's responsibility under the terms of the Operational Plan or TA. Actual expenses incurred, including third party costs, in selling the commodities may be deducted from the sales proceeds and, except for monetization programs, the net proceeds shall be deposited with the U.S. Disbursing Officer, American Embassy, with instructions to credit the deposit to CCC Account No. 20FT401. In monetization programs, net proceeds shall be deposited in the special account used for the approved program.

(4) The cooperating sponsor shall furnish USAID or the Diplomatic Post a written report in accordance with § 211.9(f), and the report shall enclose a certification by a public health official or other competent authority of

(i) The exact quantity of the damaged commodity disposed of because it was determined to be unfit for any use and

(ii) The manner in which the commodities were destroyed.

§ 211.9 Liability for loss damage or improper distribution of commodities.

(Where the instructions in this § 211.9 state that the cooperating sponsor should contact USDA or CCC, the contact office is: Kansas City ASCS Commodity Office (KCCO), P.O. Box 419205, Kansas City, Missouri 64141–6205. For Section 211.9 (a) and (b) contact: KCCO, Chief, Processed Commodities Division. For § 211.9(c) contact: KCCO, Chief, Claims and Collections Division, Kansas City, Missouri 64141–6105.)

(a) *Fault of cooperating sponsor prior to loading on ocean vessel.* A cooperating sponsor and A.I.D. shall agree on a schedule for shipping commodities. A nongovernmental cooperating sponsor that books cargo for ocean transportation must notify USDA immediately if the vessel does not arrive at the U.S. port of export in accordance with the agreed shipping schedule. USDA will determine whether the commodity shall be

(1) Moved to another available outlet;

(2) Stored at the port for delivery to the nongovernmental cooperating sponsor when a vessel is available for loading; or

(3) Disposed of as USDA may deem proper.

When CCC incurs additional expenses because the nongovernmental cooperating sponsor, or its agent, fails to meet the agreed shipping schedule or to make necessary arrangements to accept commodities at the points of delivery designated by CCC, and CCC determines that the expenses were incurred because of the fault or negligence of the nongovernmental cooperating sponsor, the cooperating sponsor shall reimburse CCC for such expenses or take such action as directed by CCC.

(b) *Fault of others prior to loading on ocean vessel.* A nongovernmental cooperating sponsor shall immediately notify CCC if there is a loss of or damage to commodities, between the time title is transferred to the cooperating sponsor and the time the commodities are loaded on board the vessel, that is caused by the act or omission of a third party, such as a warehouseman or carrier, who is or may be legally liable for the loss or damage. The cooperating sponsor also shall promptly assign to CCC any claim it has against the third party and forward to CCC all documents relating to the loss or damage and the claim. CCC shall have the right to initiate, prosecute, and retain the proceeds all claims for such loss or damage.

(c) *Ocean carrier loss and damage*—(1) *Survey and outturn reports.* (i) Nongovernmental cooperating sponsors shall arrange for an independent cargo surveyor to attend the discharge of the cargo and to count or weigh the cargo and examine its condition, unless USAID or the Diplomatic Post determines that such examination is not feasible, or if CCC has made other provision for such examinations and reports. The surveyor shall prepare a report of its findings showing the quantity and condition of the commodities discharged. The report also shall show the probable cause of any damage noted, and set forth the time and place when the examination was made. If practicable, the examination of the cargo shall be conducted jointly by the surveyor, the consignee, and the ocean carrier, and the survey report shall be signed by all parties. Customs receipts, port authority reports, shortlanding certificates, cargo boat notes, stevedore's tallies, etc., where applicable, shall be obtained and furnished with the report of the surveyor. Whenever a damaged commodity appears unfit for its intended use, the cooperating sponsor shall obtain

(A) A certification by a public health official or similar competent authority regarding the condition of the commodity; and

(B) A certificate of disposition if the commodity is determined to be unfit for its intended use. These certificates shall be obtained as soon as possible after discharge of the cargo. If the cooperating sponsor can provide a narrative chronology or other commentary to assist in the adjudication of ocean transportation claims, this information should be forwarded as follows: cooperating sponsors shall prepare such a statement in any case where the loss is estimated to be in excess of $5,000; all documentation shall be in English or supported by an English translation and shall be forwarded as set forth in paragraphs (c)(1)(iii) and (iv) of this section; and the cost of an English translation shall be incorporated into the survey fee. The cooperating sponsor may, at its option, also engage the independent surveyor to supervise clearance and delivery of the cargo from customs or port areas to the cooperating sponsor or its agent and to issue delivery survey reports thereon.

(ii) In the event of cargo loss or damage, a nongovernmental cooperating sponsor shall provide the names and addresses of individuals who were present at the time of discharge and during survey and who can verify the quantity lost or damaged. In the case of bulk grain shipments, the cooperating sponsor shall obtain the services of an independent surveyor to:

(A) Observe discharge of the cargo;

(B) Report on discharging method (including whether a scale was used, its type and calibration and other factors affecting its accuracy, or an explanation of why a scale was not used and how weight was determined);

(C) Furnish information as to whether cargo was discharged in accordance with port customs;

(D) Provide actual or estimated (if scales not used) quantity of cargo lost

during discharge and specify how such losses occurred;

(E) Obtain copies of port and/or ship records including scale weights, where applicable, to show quantity discharged;

(F) Verify that upon conclusion of discharge, cargo holds are empty;

(G) Provide to USDA information as to quantity, type and cause of lost or damaged cargo;

(H) Furnish daily tally totals and any other pertinent information about the bagging of the bulk cargo when cargo is bagged or stacked by vessel interests; and

(I) Notify the cooperating sponsor immediately if additional services are necessary to protect cargo interests or if the surveyor has reason to believe that the correct quantity was not discharged.

The cooperating sponsor, in the case of damage to bulk grain shipments, shall obtain and provide the same documentation regarding quality of cargo as set forth in § 211.8(a) and paragraph (c)(1)(i) of this section. In the case of shipments arriving in container vans, cooperating sponsors shall require the independent surveyor to list the container van numbers and seal numbers shown on the container vans, and indicate whether the seals were intact at the time the container vans were opened, and whether the container vans were in any way damaged. To the extent possible, the independent surveyor should observe discharge of container vans from the vessel to ascertain whether any damage to the container van occurred and arrange for surveying the contents of any damaged container vans as they are opened.

(iii) Cooperating sponsors shall send to USDA copies of all reports and documents pertaining to the discharge of commodities. For those surveys arranged by CCC, the cooperating sponsors may obtain a copy of the report from the local USAID Food for Peace Officer.

(iv) CCC will reimburse a nongovernmental cooperating sponsor for the costs incurred by it in obtaining the services of an independent surveyor to conduct examinations of the cargo and render the report set forth above. Reimbursement by CCC will be made upon receipt by CCC of the survey report and the surveyor's invoice or other documents that establish the survey cost. However, CCC will not reimburse a nongovernmental cooperating sponsor for the costs of only a delivery survey, in the absence of a discharge survey, or for any other survey not taken contemporaneously with the discharge of the vessel, unless such deviation from the documentation requirements of paragraph (c)(1) of this section is justified to the satisfaction of CCC.

(v) CCC normally will contract for the survey of cargo on shipments furnished under Transfer Authorizations, including shipments for which A.I.D. contracts for the ocean transportation services. Survey contracts normally will be let on a competitive bid basis. However, if a USAID or Diplomatic Post desires that CCC limit its consideration to only certain selected surveyors, USAID or the Diplomatic Post shall furnish AID/W a list of eligible surveyors for forwarding to CCC. Surveyors may be omitted from the list, for instance, based on foreign relations considerations, conflicts of interest, and/or lack of demonstrated capability to carry out surveying responsibilities properly as set forth in the requirements of CCC. Upon receipt of written justification for removal of a particular survey firm, CCC will consider removal of such firm and advise the USAID via AID/W of the final determination. AID/W will furnish CCC's surveying requirements to a USAID or Diplomatic Post upon request. If CCC is unable to find a surveyor at a port to which a shipment has been consigned, CCC may request AID/W to contact USAID or the Diplomatic Post to arrange for a survey. The surveyor's bill for such services shall be submitted to USAID or the Diplomatic Post for review. After the billing has been approved, USAID or the Diplomatic Post either may pay the bill using funds in CCC account 20FT401, if available, or forward the bill to AID/W for transmittal to CCC for payment. If USAID or the Diplomatic Post pays the bill, AID/W shall be advised of the amount paid, and CCC will reimburse USAID or the Diplomatic Post.

(2) *Claims against ocean carriers.* (i) Whether or not title to commodities

has transferred from CCC to the cooperating sponsor, if A.I.D. contracted for the ocean transportation, CCC shall have the right to initiate, prosecute, and retain the proceeds of all claims against ocean carriers for cargo loss and/or damage arising out of shipments of commodities transferred or delivered by CCC hereunder.

(ii)(A) Unless otherwise provided in the Operational Plan or TA, nongovernmental cooperating sponsors shall file notice of any cargo loss and/or damage with the ocean carrier immediately upon discovery of any such loss and/or damage, promptly initiate claims against the ocean carrier for cargo loss and/or damage, take all necessary action to obtain restitution for losses within any applicable periods of limitations, and transmit to CCC copies of all such claims. However, the nongovernmental cooperating sponsor need not file a claim when the cargo loss and/or damage is not in excess of $100, or in any case when the loss and/or damage is between $100 and $300 and it is determined by the nongovernmental cooperating sponsor that the cost of filing and collecting the claim will exceed the amount of the claim. The nongovernmental cooperating sponsor shall transmit to CCC copies of all claims filed with the ocean carriers for cargo loss and/or damage, as well as information and/or documentation on shipments when no claim is to be filed. When General Average has been declared, no action will be taken by the nongovernmental cooperating sponsor to file or collect claims for loss or damage to commodities. (See paragraph (c)(2)(iii) of this section.)

(B) The value of commodities misused, lost or damaged shall be determined on the basis of the domestic market price at the time and place the misuse, loss or damage occurred, or, in case it is not feasible to obtain or determine such market price, the f.o.b. or f.a.s. commercial export price of the commodity at the time and place of export, plus ocean freight charges and other costs incurred by the U.S. Government in making delivery to the cooperating sponsor. When value is determined on a cost basis, nongovernmental cooperating sponsors may add to the value any provable costs they have incurred prior to delivery by the ocean carrier. In preparing the claim statement, these costs shall be clearly segregated from costs incurred by the U.S. Government. With respect to claims other than ocean carrier loss or damage claims, at the request of the cooperating sponsor or upon the recommendation of USAID or the Diplomatic Post, AID/W may determine that such value may be established on some other justifiable basis. When replacement is made, the value of commodities misused, lost or damaged shall be their value at the time and place the misuse, loss, or damage occurred and the value of the replacement commodities shall be their value at the time and place replacement is made.

(C) Amounts collected by nongovernmental cooperating sponsors on claims against ocean carriers not in excess of $200 may be retained by the nongovernmental cooperating sponsor. On claims involving loss and/or damage having a value in excess of $200, nongovernmental cooperating sponsors may retain from collections received by them, the larger of:

(*1*) The amount of $200 plus 10 percent of the difference between $200 and the total amount collected on the claim, up to a maximum of $500, or

(*2*) Actual administrative expenses incurred in collection of the claim if approved by CCC.

Collection costs shall not be deemed to include attorneys fees, fees of collection agencies, and the like. In no event will collection costs in excess of the amount collected on the claim be paid by CCC. The nongovernmental cooperating sponsors may also retain from claim recoveries remaining after allowable deductions for administrative expenses of collection, the amount of any special charges, such as handling, packing, and insurance costs, which the nongovernmental cooperating sponsor has incurred on the lost and/or damaged commodity and which are included in the claims and paid by the liable party.

(D) A nongovernmental cooperating sponsor may redetermine claims on the basis of additional documentation or information, not considered when the claims were originally filed when such documentation or information clearly

changes the ocean carrier's liability. Approval of such changes by CCC is not required regardless of amount. However, copies of redetermined claims and supporting documentation or information shall be furnished to CCC.

(E) A nongovernmental cooperating sponsor may negotiate compromise settlements of claims regardless of the amount thereof, except that proposed compromise settlements of claims having a value in excess of $5,000 shall not be accepted until such action has been approved in writing by CCC. When a claim is compromised, the nongovernmental cooperating sponsor may retain from the amount collected, the amounts authorized in paragraph (c)(2)(ii)(C) and in addition, an amount representing such percentage of the special charges described in paragraph (c)(2)(ii)(C) as the compromised amount is to the full amount of the claim. When a claim is not in excess of $600, the nongovernmental cooperating sponsor may terminate collection activity on the claim according to the standards set forth in the Federal Claims Collection Standards, 4 CFR 104.3. Approval of such termination by CCC is not required, but the nongovernmental cooperating sponsor shall notify CCC when collection activity on a claim is terminated.

(F) All amounts collected in excess of the amounts authorized herein to be retained shall be remitted to CCC. For the purpose of determining the amount to be retained by the nongovernmental cooperating sponsor from the proceeds of claims filed against ocean carriers, the word ''claim'' shall refer to the loss and/or damage to commodities which are shipped on the same voyage of the same vessel to the same port destination, irrespective of the kinds of commodities shipped or the number of different bills of lading issued by the carrier. If a nongovernmental cooperating sponsor is unable to collect a claim or negotiate an acceptable compromise settlement within the applicable period of limitation or any extension thereof granted in writing by the liable party or parties, the rights of the nongovernmental cooperating sponsor to the claim shall be assigned to CCC in sufficient time to permit the filing of legal action prior to the expiration of the period of limitation or any extension thereof. Nongovernmental cooperating sponsors shall promptly assign their claim rights to CCC upon request. In the event CCC collects or settles the claim after the rights of the nongovernmental cooperating sponsor to the claim have been assigned CCC, CCC shall, except as shown below, pay to the nongovernmental cooperating sponsor the amount the agency or organization would have been entitled to retain had they collected the same amount. However, the additional 10 percent on amounts collected in excess of $200 will be payable only if CCC determines that reasonable efforts were made to collect the claim prior to the assignment, or if payment is deemed to be commensurate with the extra efforts exerted in further documenting claims. In addition, if CCC determines that the documentation requirements of paragraph (c)(1) have not been fulfilled and the lack of such documentation has not been justified to the satisfaction of CCC, CCC reserves the right to deny payment of all allowances to the nongovernmental cooperating sponsor.

(G) When nongovernmental cooperating sponsors fail to file claims, or permit claims to become time-barred, or fail to provide for the right of CCC to assert such claims, as provided in this § 211.9, and it is determined by CCC that such failure was due to the fault or negligence of the nongovernmental cooperating sponsor, the agency or organization shall be liable to the United States for the cost and freight (C&F) value of the commodities lost to the program.

(iii) If a cargo loss has been incurred on a nongovernmental cooperating sponsor shipment, and general average has been declared, the nongovernmental cooperating sponsor shall furnish to CCC with a duplicate copy to AID/W—

(A) Copies of booking confirmations and the applicable on-board bill(s) of lading,

(B) The related outturn or survey report(s),

(C) Evidence showing the amount of ocean transportation charges paid to the carrier(s), and

(D) An assignment to CCC of the cooperating sponsor's right to the claim(s) for such loss.

CCC assumes responsibility for general average and marine salvage.

(iv) A.I.D. will initiate and prosecute claims against ocean carriers and defend claims by such carriers, arising from or relating to affreightment contracts booked by A.I.D. where the claims involve entitlement to freight and related costs from the U.S. Government. Proceeds of such claims received by A.I.D. shall be returned to CCC pursuant to agreed procedures.

(d) *Fault of cooperating sponsor in country of distribution.* If a commodity, monetized proceeds or program income is used for a purpose not permitted under the Operational Plan or TA or this Regulation, or if a cooperating sponsor causes loss or damage to a commodity, monetized proceeds or program income through any act or omission or failure to provide proper storage, care and handling, the cooperating sponsor shall pay to the United States the value of the commodities, monetized proceeds or program income, lost, damaged, or misused, unless A.I.D. determines that such improper distribution or use, or such loss or damage, could not have been prevented by proper exercise of the cooperating sponsor's responsibility under the Operational Plan or TA and this Regulation. In determining whether there was a proper exercise of the cooperating sponsor's responsibility, A.I.D. shall consider normal commercial practices in the country of distribution and the problems associated with carrying out programs in developing countries. Payment by the cooperating sponsor shall be made in accordance with paragraph (g) of this section, except that the USAID or Diplomatic Post may agree to permit a cooperating sponsor to replace commodities lost, damaged, or misused with similar commodities of equal value.

(e) *Fault of others in country of distribution and in intermediate country.* (1) In addition to survey and/or outturn reports to determine ocean carrier loss and damage, the cooperating sponsor shall, in the case of landlocked countries, arrange for an independent survey at the point of entry into the recipient country and to make a report as set forth in paragraph (c)(1) of this section. CCC will reimburse the cooperating sponsor for the costs of a survey as set forth in paragraph (c)(1)(iv).

(2) If a cooperating sponsor acquires any right against a person or governmental or nongovernmental organization based on an event for which the person or organization is responsible that resulted in the damage, loss or misuse of any commodity, monetized proceeds or program income, the cooperating sponsor shall file a claim against the liable party or parties for the value of the commodities, monetized proceeds or program income lost damaged or misused and shall make every reasonable effort to collect the claim. A copy of the claim and related documents shall be provided to USAID or the Diplomatic Post. Cooperating sponsors who fail to file or pursue such claims shall be liable to A.I.D. for the value of the commodities or monetized proceeds or program income lost, damaged, or misused: Provided, however, that the cooperating sponsor may elect not to file a claim if the loss is less than $500 and such action is not detrimental to the program. Cooperating sponsors may retain $150 of any amount collected on an individual claim. In addition, cooperating sponsors may, with the written approval of USAID or the Diplomatic Post, retain either special costs such as reasonable legal fees that they have incurred in the collection of a claim, or pay such legal fees with monetized proceeds or program income. Any proposed settlement for less than the full amount of the claim must be approved by USAID or the Diplomatic Post prior to acceptance. When the cooperating sponsor has exhausted all reasonable attempts to collect a claim, it shall request USAID or the Diplomatic Post to provide further instructions in accordance with paragraph (e)(4).

(3) *Calculation of the amount of a claim against others.* A claim is the right a cooperating sponsor has against a third party as a result of an event for which the third party is responsible that caused the loss, damage or misuse of commodities, monetized proceeds or program income. The amount of the

claim is based on the value of the commodities, monetized proceeds or program income lost, damaged or misused as a result of the event. An individual claim may not be broken down artificially to enlarge the amount the cooperating sponsor may retain as an administrative allowance on collection of the claim. For example, if a cooperating sponsor has a contract with a carrier to transport commodities, and losses occur during a single shipment of commodities from points A to B, the cooperating sponsor has one claim against the carrier, and the amount of the claim will be based on the total value of the commodities lost during the shipment from A to B even though some of the loss might have occurred on each of several trucks or by subcontractors used by the carrier to satisfy its contract responsibility to transport the commodities.

(4) Reasonable attempts to collect the claim shall not be less than the follow-up of initial billings with three progressively stronger demands at not more than 30-day intervals. If these efforts fail to elicit a satisfactory response, legal action in the judicial system of the cooperating country should be pursued unless:

(i) Liability of the third party is not provable,

(ii) The cost of pursuing the claim would exceed the amount of the claim,

(iii) The third party would not have enough assets to satisfy the claim after a judicial decision favorable to the cooperating sponsor,

(iv) Maintaining legal action in the country's judicial system would seriously impair the cooperating sponsor's ability to conduct an effective program in the country, or

(v) It is inappropriate for reasons relating to the judiciary or judicial system of the country.

A cooperating sponsor's decision not to take legal action, and reasons therefore, must be submitted in writing to USAID or the Diplomatic Post for review and approval, and USAID or the Diplomatic Post may require the cooperating sponsor to obtain and submit the opinion of competent legal counsel to support its decision. A cooperating sponsor also may request approval to terminate legal action after it has commenced if it is apparent that any of the exceptions described above becomes applicable or if it is otherwise appropriate to terminate legal action prior to judgment. In each instance, USAID or the Diplomatic Post must provide the cooperating sponsor a written explanation of its decision within 45 days from the date the request is received or inform the cooperating sponsor in writing regarding the reason(s) the USAID or Diplomatic Post needs more time to make a decision. If USAID or the Diplomatic Post approves a cooperating sponsor's decision not to take further action on the claim for reasons described in paragraphs (e)(4)(iv) or (v) of this section, the cooperating sponsor shall assign the claim to A.I.D. and shall provide to A.I.D. all documentation relating to the claim. When USAID or the Diplomatic Post takes an assignment of a claim or claims from a cooperating sponsor, the USAID or Diplomatic Post shall consult AID/W regarding the appropriate action to take on the assigned claim(s), unless standing guidance is in effect.

(5) As an alternative to legal action in the judicial system of the country with regard to claims against a public entity of the government of the cooperating country, the cooperating sponsor and the cooperating country may agree to settle disputed claims by an appropriate administrative procedure and/or arbitration. This alternative may be established in the Host Country Food for Peace Program Agreement required under § 211.3(b), or by a separate formal understanding, and must be submitted to USAID or the Diplomatic Post for review and approval. Resolution of disputed claims by any administrative procedure or arbitration agreed to by the cooperating sponsor and the cooperating country should be final and binding on the parties.

(f) *Reporting losses to USAID or the Diplomatic Post.* (1) The cooperating sponsor shall provide the USAID or Diplomatic Post a quarterly report regarding any loss, damage or misuse of commodities, monetized proceeds or program income. The report must be provided within 30 days after the close of the calendar quarter and shall contain the following information except

for commodity losses less than $500: who had possession of the commodities, monetized proceeds or program income; who, if anyone, might be responsible for the loss, damage or misuse; the kind and quantity of commodities; the size and type of containers; the time and place of loss, damage or misuse; the current location of the commodities; the program number; CCC contract number, if known, and if not known, other identifying numbers printed on the commodity containers; the action taken by the cooperating sponsor with respect to recovery or disposal; and the estimated value of the loss, damage or misuse. If any of this information is not available, the cooperating sponsor shall explain why it is not. The report simply may identify separately commodity losses valued at less than $500 and indicate the estimated value of the commodities lost damaged or misused and the action taken by the cooperating sponsor with respect to recovery or disposal, except that the cooperating sponsor shall inform the USAID or Diplomatic Post if it has reason to believe there is a pattern or trend in the loss, damage or misuse of such commodities and provide the information described above for losses of $500 or more together with such other information available to it. USAID or the Diplomatic Post may require additional information about any commodities lost, damaged or misused. Information in the quarterly report may be provided in tabular form to the extent possible, and the report shall enclose a copy of any claim made by the cooperating sponsor during the reporting period.

(2) If any commodity, monetized proceeds or program income is lost or misused under circumstances which give a cooperating sponsor reason to believe that the loss or misuse has occurred as a result of criminal activity, the cooperating sponsor shall promptly report these circumstances to the A.I.D. Inspector General through AID/W, USAID or the Diplomatic Post, and subsequently to the appropriate authorities of the cooperating country unless instructed not to do so by A.I.D. The cooperating sponsor also shall cooperate fully with any subsequent investigation by the Inspector General and/or authorities of the cooperating country.

(g) *Handling claims proceeds.* Claims against ocean carriers shall be collected in U.S. dollars (or in the currency in which freight is paid, or a pro rata share of each) and shall be remitted (less amounts authorized to be retained) by nongovernmental cooperating sponsors to CCC. With respect to commodities, claims against nongovernmental cooperating sponsors shall be paid to CCC or AID/W in U.S. dollars; amounts paid by other cooperating sponsors and third parties in the country of distribution shall be deposited with the U.S. Disbursing Officer, American Embassy, preferably in U.S. dollars with instructions to credit the deposit to CCC Account No. 12X4336, or in local currency with instructions to credit the deposit to Treasury sales account 20FT401. Any conversion required for these deposits shall be at the highest rate of exchange legally obtainable on the date of deposit unless A.I.D. agrees otherwise in writing. With respect to monetized proceeds and program income, amounts recovered should be deposited into the special interest-bearing account established for the monetized proceeds and may be used for purposes of the approved program.

(h) *General average.* CCC shall—

(1) Be responsible for settling general average and marine salvage claims;

(2) Retain the authority to make or authorize any disposition of commodities which have not commenced ocean transit or of which the ocean transit is interrupted, and receive and retain any monetary proceeds resulting from such disposition;

(3) In the event of a declaration of general average, initiate, prosecute, and retain all proceeds of cargo loss and damage claims against ocean carriers; and

(4) Receive and retain any allowance in general average. CCC will pay any general average or marine salvage claims determined to be due.

§ 211.10 Records and reporting requirements.

(a) *Records.* Cooperating sponsors and recipient agencies shall maintain records and documents in a manner

which accurately reflects the operation of the program and all transactions pertaining to the receipt, storage, distribution, sale, inspection and use of commodities and to receipt and disbursement of any monetized proceeds and program income. Such records shall be retained for a period of 3 years from the close of the U.S. fiscal year to which they pertain, or longer, upon request by A.I.D. for cause, such as in the case of litigation of a claim or an audit concerning such records. The cooperating sponsor shall transfer to A.I.D. any records, or copies thereof, requested by A.I.D.

(b) *Reports.* Cooperating sponsors shall submit two copies of audits performed in accordance to § 211.5(c). In addition, cooperating sponsors shall submit to USAID or the Diplomatic Post, and to AID/W such reports as A.I.D. may reasonably request. The following is a list of the principal types of reports that are to be submitted at least annually:

(1) Periodic summary reports showing receipt, distribution, and inventory of commodities and proposed schedules of shipments or calls forward.

(2) Reports relating to the generation of monetized proceeds and program income and the use of such funds for purposes specified in the Operational Plan or TA. See § 211.5(l).

(3) Reports relating to progress and problems in the implementation of the program.

(4) Reports shall be submitted in sufficient detail to enable USAID or the Diplomatic Post to assess and to make recommendations as to the ability of the cooperating sponsors to effectively plan, manage, control and evaluate the Food for Peace programs under their administration.

(5) At the time that an emergency program under Public Law 480, title II is initiated, whether by a governmental or nongovernmental cooperating sponsor, USAID or the Diplomatic Post should

(i) Make a determination regarding the ability of the cooperating sponsor to perform the record-keeping required by this § 211.10, and

(ii) In those instances in which those specific record-keeping requirements cannot be followed, due to emergency circumstances, specify exactly which essential information will be recorded in order to account fully for title II commodities and monetized proceeds.

(c) *Inspection and audit.* Cooperating sponsors and recipient agencies shall cooperate with and assist U.S. Government representatives to enable them at any reasonable time to:

(1) Examine activities and records of the cooperating sponsor, recipient agencies, processors, or others, pertaining to the receipt, storage, distribution, processing, repackaging, sale and use of commodities by recipients;

(2) Inspect commodities in storage, or the facilities used in the handling or storage of commodities;

(3) Examine and audit books and records, including financial books and records and reports pertaining to storage, transportation, processing, repackaging, distribution, sale and use of commodities and pertaining to the deposit and use of any monetized proceeds and program income;

(4) Review the overall effectiveness of the program as it relates to the objectives set forth in the Operational Plan or TA; and

(5) Examine or audit the procedure and methods used in carrying out the requirements of this Regulation.

Inspections and audits of title II emergency programs will take into account the circumstances under which such programs are carried out.

§ 211.11 Suspension, termination, and expiration of program.

(a) *Termination or suspension by A.I.D.* All or any part of the assistance provided under the program, including commodities in transit, may be terminated or suspended by A.I.D. at its discretion if AID/W determines that a cooperating sponsor has failed to comply with the provisions of the approved Operational Plan or TA, or of this Regulation, or that the continuation of such assistance is no longer necessary or desirable. If AID/W believes that circumstances permit, AID/W will provide a nongovernmental cooperating sponsor written notice of A.I.D.'s intention to terminate or suspend the cooperating sponsor's program, together with an explanation of the reason(s) for A.I.D.'s action, at least 30 days prior to

the date indicated in the notice that the program will be terminated or suspended. Comments provided by the nongovernmental cooperating sponsor prior to the effective date of the termination or suspension shall be considered by AID/W in determining whether to rescind the notice. When a program is terminated or suspended, title to commodities which have been transferred to the cooperating sponsor, or monetized proceeds, program income and real or personal property procured with monetized proceeds or program income shall, at the written request of USAID, the Diplomatic Post or AID/W, be transferred to the U.S. Government by the cooperating sponsor or shall otherwise be transferred by the cooperating sponsor as directed by A.I.D. Any then excess commodities on hand at the time the program is terminated shall be disposed of in accordance with §211.5 (o) and (p) or as otherwise instructed by USAID or the Diplomatic Post. If it is determined that any commodity authorized to be supplied under the Operational Plan or TA is no longer available for Food for Peace programs, such authorization shall terminate with respect to any commodities which, as of the date of such determination have not been delivered f.o.b. or f.a.s. vessel, provided that every effort will be made to give adequate advance notice to protect cooperating sponsors against unnecessarily booking vessels.

(b) *Expiration of program.* Upon expiration of the approved program under circumstances other than those described in paragraph (a), the cooperating sponsor shall deposit with the U.S. Disbursing Officer, American Embassy, with instructions to credit the deposit to CCC Account No. 20FT401, any remaining monetized proceeds or program income, or the cooperating sponsor shall obtain approval from AID/W for the use of such monetized proceeds or program income, or real or personal property procured with such proceeds or income, for purposes consistent with those authorized for support from A.I.D.

§211.12 Waiver and amendment authority.

The Assistant Administrator for Food and Humanitarian Assistance, A.I.D., may waive, withdraw, or amend, at any time, any or all of the provisions of this Regulation 11 if such provision is not statutory and it is determined to be in the best interest of the U.S. Government to do so. Any cooperating sponsor which has failed to comply with the provisions of this Regulation or any instructions or procedures issued in connection herewith, or any agreements entered into pursuant hereto may at the discretion of A.I.D. be suspended or disqualified from further participation in any distribution program. Reinstatement may be made at the option of A.I.D. Disqualification shall not prevent A.I.D. from taking other action through other available means when considered necessary.

§211.13 Participation by religious organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[69 FR 61724, Oct. 20, 2004]

APPENDIX I TO PART 211—OPERATIONAL PLAN

A. General Outline of Operational Plans for Title II Activities

In addition to any other requirement of law or regulation, the Operational Plan will include information outlined below to the extent it is applicable to the specific activity.

1. Program Goals.

Describe program goals and criteria for measuring progress toward reaching the goals. Each program should be designed to achieve measurable objectives within a specified period of time.

2. Program Description.

a. Describe the characteristics, extent and severity of problems that the program will address.

b. Provide a clear concise statement of specific objectives for each program and of criteria for measuring progress towards reaching the objectives. If there are several objectives, indicate priorities.

c. Describe the target population by program, including economic/nutrition-related

characteristics, sufficiently to permit a determination of recipient eligibility for title II commodities. Describe the educational and employment characteristics of the target group, if relevant to program objectives; the rationale for selection of the target group, the rationale for the selection of the geographical areas where programs will be carried out; the calculation of coverage and the percent of total target population reached.

d. Describe the intervention including:

(1) *Ration composition*. A description of rations, rationale for size and composition, assessment of effectiveness (dilution, sharing, acceptance).

(2) *Complementary program components and inputs*. Identify existing or potential complementary program components, *i.e.*, education, growth monitoring, training, etc., that are necessary to achieve program impact, including determination of financial costs and sources of funding.

(3) *Monetization*. Describe to whom the commodities will be sold; the sales price (which shall not be less than the value of the food commodities f.a.s. or f.o.b.); arrangements for deposit of the monetization proceeds in a special (segregated), interest bearing account, pending use of the proceeds plus interest for the program; and the capability of the cooperating sponsor and recipient agencies to use and account for monetized proceeds properly as well as technical assistance the cooperating sponsor intends to obtain or provide if necessary in order to ensure that there are adequate financial and other management systems for the program proposed.

(4) *Intervention strategy*. Describe how the commodities, monetization proceeds, program income and other program components will address the problems. Indicate the recipient agencies to which commodities, monetized proceeds or program income will be transferred, and identify those recipient agencies which will not be required to execute Recipient Agency Agreements, and provide a brief explanation of the reasons.

(5) *Linkages with other development activities, such as health or agricultural extension services*. Describe specific areas of collaboration relative to program purposes.

(6) *Monitoring and evaluation*. Include a description of the evaluation plan, including information to be collected for purposes of assessing program operations and impact. Describe the monitoring system for collection, analysis and utilization of information. Include a schedule for carrying out the evaluation as well as a plan for conducting audits (Regulation 11, section 211.5(c)).

(7) *Program period*. The Operational Plan should cover enough time for a program to become fully operational and to permit evaluation of its effectiveness, including specific measurement of progress in achieving the stated program goals. Normally this will be a multi-year time frame, such as three to five years. Plans for and considerations involved in phasing-out U.S.G. support, and any phasing-over to non-U.S.G. support, should be discussed.

3. *Program funding*. Provide details of host government, cooperating sponsor and other non-USG support for the proposed program, with specific budgetary information on how these funds are to be used (e.g. complementary inputs, transport, administration). Where relevant, discussion of arrangements which will be made covering voluntary contributions.

4. *Publicity*. Describe how the requirements for public recognition, container marking, and use of funds set forth in Regulation 11, §§211.5i(h), (i) and (k) and in 211.6 (a) and (b), will be met.

5. *Logistics*. Provide a logistics plan that demonstrates the adequacy and availability in recipient country of port facilities, transportation and storage facilities to handle the flow of commodities to recipients to prevent spoilage or waste. A further affirmation must be made at the time of exportation of the commodity from the United States.

6. *Disincentives*. Furnish sufficient information concerning the plan of distribution and the target group of recipients so that a determination can be made as to whether the proposed food distribution would result in substantial disincentive to domestic food production. It is not necessary to provide a disincentive analysis if A.I.D. or USDA has completed such an analysis for another program that is relevant to the program proposed by the cooperating sponsor.

7. *Accountability*. Describe the method to be used to supervise, monitor, and account for the distribution or sale of commodities and the use of monetized proceeds and program income.

8. *Import duty*. Provide information to show approval of foreign government to import the donated commodities duty free.

9. *Voluntary agency regular programs*. An Operational Plan is required for all regular, *i.e.*, non-emergency, title II nongovernmental cooperating sponsor programs as part of their program submission, along with the Annual Estimate of Requirements (AER), to USAID or the Diplomatic Post and AID/W. When new multi-year Operational Plans are required, they should be prepared and submitted in advance of the year in which they are to begin, in order to permit adequate time for substantive review and approval. In any event, nongovernmental cooperating sponsor Operational Plans should be submitted to AID/W no later than the Mission Action Plan covering the following fiscal year's program. Once an Operational Plan has been approved, only an updating will be required on an annual basis, unless there has been a significant change from the approved

plan's program directives, methodology, design or magnitudes. Updates should be submitted each year for review with the AERs.

B. Operational Plans for Emergency Programs

The response to emergency situations using title II resources does not usually permit the same degree of detail and certainty of analysis that is expected in planning title II non-emergency programs. However, Operational Plans are required for all nongovernmental cooperating sponsors' emergency programs, along with the AER. An Operational Plan for an emergency program must cover the same basic elements, set forth above, as for a nonemergency program. Thus, all of the above basic issues set forth in the Operational Plan format must be addressed when proposing title II emergency programs as well as regular nonemergency programs.

C. USAID/Diplomatic Post Responsibilities

A USAID or Diplomatic Post is expected to comment on the substance and adequacy of a nongovernmental cooperating sponsor's Operational Plan when submitted to AID/W along with a program request, and to address the plan's relationship to and consistency with the Mission's Country Development Strategy Statement.

D. Required Approval for Program Change

Cooperating sponsors agree not to deviate from the program as described in the Operational Plan and other program documents approved by A.I.D., without the prior written approval of A.I.D.

E. Emergency Assistance Program Requests

Any cooperating sponsor (governmental or nongovernmental) may initiate an emergency assistance proposal under Public Law 480, title II. Requests are received by a USAID or Diplomatic Post and reviewed and approved before forwarding to AID/W with appropriate recommendations.

a. Nongovernmental emergency program requests can be cabled by USAID or the Diplomatic Post for AID/W review based on information provided and using procedures established for regular programs as described in Regulation 11, §211.5(a): AER and Operational Plan.

b. A foreign government or international organization (other than World Food Program) emergency request normally requires more Mission involvement in program design and management. However, as in the case of nongovernmental programs, the approval will be based on a cabled program summary based on the program plan outlined in (2) above. On approval, AID/W will prepare a Transfer Authorization (TA) to be signed by the recipient government specifying terms of the program and reporting requirements. Additional guidance in preparing government-to-government or international organizations emergency requests is in chapter 9 and Exhibit A of A.I.D. Handbook 9. The TA serves as (1) the Food for Peace Agreement between the U.S. Government and the cooperating sponsor, (2) the project authorization document, and (3) the authority for the CCC to ship commodities. (Under Pub. L. 480, section 207(a), not later than 15 days after receipt of a call forward from a field mission for commodities, the order shall be transmitted to the CCC.)

F. Local Currency Programs (Public Law 480, Title II Section 203)

Detailed guidance for preparing, approving, implementing and administering these programs is provided in chapters 6, 7, and 11 of A.I.D. Handbook 9.

G. Problems Conducting Programs In Developing Countries

Describe the problems that can be anticipated in implementing the program in the recipient country as a result of its being a developing country.

H. Waivers

A cooperating sponsor should provide a justification for the waiver of any specific section or sections of Regulation 11 that it believes necessary for the program.

PART 212—PUBLIC INFORMATION

Subpart A—General

Sec.
212.1 Statement of policy.

Subpart B—Publication in the Federal Register

212.11 Materials to be published.
212.12 Effect of nonpublication.
212.13 Incorporation by reference.

Subpart C—Availability of Information for Public Inspection and Copying

212.21 Public records.
212.22 Protection of personal privacy.
212.23 Current index.
212.24 Effect of noncompliance.
212.25 Procedures for obtaining materials under this subpart.

Subpart D—Access to Agency Records

212.31 Availability of agency records.
212.32 Identification of records.
212.33 Procedure for making requests.
212.34 Procedures for responding to requests for records.
212.35 Schedule of fees and methods of payment for services rendered.

212.36 Denial of request for access to records.
212.37 Procedures for agency consideration of appeals.
212.38 Predisclosure notification procedures for confidential commercial information.

Subpart E—Exemptions From Disclosure

212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.
212.42 Exemption from 5 U.S.C. 552.

Subpart F—Opening of Records for Nonofficial Research Purposes.

212.51 General Policy.

AUTHORITY: 22 U.S.C. 2381(a).

SOURCE: 61 FR 43002, Aug. 20, 1996, unless otherwise noted.

Subpart A—General

§ 212.1 Statement of policy.

(a) It is the policy of the United States Agency for International Development (hereinafter ''USAID'' or ''the Agency'') that information about its objectives and operations be freely available to the public in accordance with the provisions of the Freedom of Information Act (''FOIA''), 5 U.S.C. 552, as amended; the President's Memorandum for Heads of Departments and Agencies regarding the FOIA, 29 Weekly Comp. Pres. Doc. 1999 (October 4, 1993); and the Attorney General's Memorandum of the same title and date. The Director, Office of Administrative Services, Bureau for Management, or his/her designee, is responsible on behalf of the Agency for administration of the provisions of the regulations set forth in this part.

(b) In addition, concerning the International Cooperation and Development Agency (''IDCA''), pursuant to executive order and delegations of authority USAID is responsible not only for management of its own affairs but also for those of IDCA. The policy of IDCA in the FOIA area has been determined by USAID to be identical to that of USAID, as stated in this section. Therefore, all policies and procedures set forth in this part apply equally to IDCA as to USAID; and it is intended that references in this part to ''USAID'' or ''the Agency'' shall, wherever appropriate, include or mean a reference to IDCA. Accordingly, all IDCA FOIA-related matters shall be referred to and processed by USAID staff under this part as though they were USAID matters.

(c) All records of USAID shall be made available to the public upon compliance with the procedures established in § 212.33, except to the extent a determination is made to withhold a record exemptible under 5 U.S.C. 552(b). Such a determination shall be made pursuant to procedures set forth in § 212.36, 212.37 and 212.38.

(d) The term ''record'' as used in this part includes all books, papers, maps, photographs, or other documentary material or copies thereof, regardless of physical form or characteristics, made in or received by USAID (including its missions or offices abroad), and preserved as evidence of its organization, functions, policies, decisions, procedures, operations, or other activities. The term does not include copies of the records of other U.S. Government agencies, foreign governments, international organizations, or non-governmental entities which do not evidence organization, functions, policies, decisions, procedures, operations, or activities of USAID.

Subpart B—Publication in the Federal Register

§ 212.11 Materials to be published.

(a) USAID separately states and currently publishes in the FEDERAL REGISTER for the information and guidance of the public:

(1) Descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

(2) Statements of the general course and method by which its functions are channelled and determined, including the nature and requirements for all formal and informal procedures available;

(3) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by USAID; and

(5) Every amendment, revision or repeal of the material listed in this section.

(b) USAID Public Notice No. 1 and the USAID Regulations published in chapter II of Title 22 and in subtitle A, Chapter 7 of Title 41 of the Code of Federal Regulations implement the provisions of this section.

§ 212.12 Effect of nonpublication.

The materials referenced in § 212.11 shall not be binding upon or otherwise adversely affect a person unless either

(a) The materials were in fact published in the FEDERAL REGISTER or

(b) The person otherwise had actual and timely notice of the content of such materials.

§ 212.13 Incorporation by reference.

For purposes of this subpart B, USAID matters which are reasonably available to the class of persons affected thereby are deemed to be published in the FEDERAL REGISTER when they have been incorporated by reference therein with the approval of the Director of the Federal Register.

Subpart C—Availability of Information for Public Inspection and Copying

§ 212.21 Public records.

In accordance with this subpart, USAID makes the following information and materials available for public inspection and copying:

(a) All final opinions (including concurring and dissenting options), and all orders made in the adjudication of the cases:

(b) those statements of policy and interpretations which have been adopted by the Agency and are not published in the FEDERAL REGISTER; and

(c) Administrative staff manuals and instructions to staff that affect any member of the public.

§ 212.22 Protection of personal privacy.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, USAID may delete identifying details when USAID makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. USAID will, in each such case, explain in writing the justification for the deletion.

§ 212.23 Current index.

USAID maintains and makes available for public inspection and copying a current index providing identifying information for the public as to any matter which has been issued, adopted, or promulgated after July 4, 1967, and which is required by § 212.21 to be made available or published. Publication of an index is deemed both unnecessary and impractical. However, copies of the index are available, upon request, for a fee based on the direct cost of duplication.

§ 212.24 Effect of noncompliance.

No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited as precedent by USAID against any private party unless it has been indexed and either made available or published as provided by this subpart, or unless that private party shall have actual and timely notice of the terms thereof.

§ 212.25 Procedures for obtaining materials under this subpart.

(a) The materials required to be made available for public inspection and copying in accordance with this subpart are available to members of the public at USAID's Public Reading Room, Room 1113, 1621 North Kent Street, Rosslyn, Virginia 22209, which is open from 9 a.m. to 5 p.m., Monday through Friday, except on holidays. All such materials are available in electronic form (disks) only; to a reasonable degree, assistance will be provided in use of necessary equipment.

(b) Requests for materials which are available under this subpart should follow the procedures under § 212.33(a) of this part.

(c) The direct costs of any necessary duplication will be charged in accordance with the fee schedule set forth in § 212.35.

(d) USAID Missions and offices in countries abroad are not responsible for the maintenance of the index and materials available under this subpart. However, insofar as they do have these materials, they will make them available to citizens of the United States who are present in their respective countries upon application made either or in person in writing to the USAID Director, or other principal USAID officer, c/o American Embassy in the applicable country.

Subpart D—Access to Agency Records

§ 212.31 Availability of agency records.

Upon receiving a request which reasonably describes a USAID record, and which is made in accordance with the provisions of this subpart, USAID will make such records, except the following, promptly available to the requesting party:

(a) Matters published in the FEDERAL REGISTER pursuant to subpart B;

(b) Matters made available to the public pursuant to subpart C; and

(c) Matters exempt from disclosure pursuant to § 212.41 or § 241.42 of this part.

§ 212.32 Identification of records.

The request for a record by a member of the public must contain a reasonably specific description of the particular record sought so that a USAID officer who is familiar with the subject matter of the request may be able to locate the record with a reasonable amount of effort. A description that includes as much information as possible, such as the subject matter, format, approximate date and, where pertinent, the name of the country or person involved, will facilitate the search for the requested record.

§ 212.33 Procedure for making requests.

(a) Requests for records, other than records available at the Public Reading Room identified in § 212.24(a), may be made by a member of the public in writing only to the Chief, Customer Outreach and Oversight Staff, Room 1113, SA–16, Agency for International Development, Department of State, 320 21st Street, N.W., Washington, D.C. 20523–1608. The request and the envelope must be plainly marked ''FOIA Request.'' Requests may be made orally, that is, in person, only for records and materials available at the Public Reading Room.

(b) Requests for records may be made directly to a USAID mission or office abroad only by a citizen of the United States who is present in that country and must be by written application to the USAID Director (or other principal USAID officer), care of the American Embassy in that country. Any such written request and its envelope must be plainly marked ''FOIA Request.''

(c) Only signed original (as opposed to electronically transmitted) requests are acceptable for procedures pursuant to paragraphs (a) and (b) of this section. Telephoned requests, or in-person requests other than to the Public Reading Room, cannot be accepted. If a written request not properly marked ''FOIA Request'' on both the letter and envelope is thereby delayed in reaching the Chief, Office of Customer Outreach and Oversight Staff, such request will not be deemed received by USAID until actually received by that official. In the event of such a delay, the person making the request will be furnished a notice of the effective date of receipt.

§ 212.34 Procedures for responding to requests for records.

(a) Upon receipt by the Chief, Office of Customer Outreach and Oversight Staff, of a reasonably specific request made pursuant to § 212.33 of this part, a maximum of ten working days will normally be taken to determine to what extent the Agency can provide the information requested. Upon the making of that determination, the person making the request will be promptly so informed. Copies of the releasable documents will be made available promptly thereafter upon receipt of applicable fees and charges as set forth in § 212.35.

(b)(1) In unusual circumstances, USAID may not be able to determine the availability of the requested documents within ten working days, in

which event the person making the request will be informed by written notice of the delay, the reasons for the delay and the date on which a determination may be expected. In this context, the term ''unusual circumstances'' refers to the following situations:

(i) When there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) When there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request; or

(iii) When there is a need for consultation (which will be conducted with all practicable speed) with another agency having a substantial interest in the determination of the request or among two or more components of the Agency, each having substantial subject-matter interest therein.

(2) The maximum time in making a determination of availability, in the event of such unusual circumstances, will be twenty working days from receipt of the request. In the event that only part of the permissible ten working days extension is used, then USAID reserves the right, if necessary, to use any remainder of such time for the determination of an appeal, if one is made.

(c) If a request is made to USAID for material that is controlled or held by another agency, the person making the request will be immediately notified that USAID does not have or control the requested material and he/she will be advised of the name of the controlling agency and of the address from which the material may be requested, unless the other agency has, by public regulation, delegated the release authority to USAID. If release authority has been delegated, USAID will follow the procedures authorized by the delegation in determining whether to release the information. If a request for material is referred to USAID from another agency, the time period for determination of release of the information will not start until the request is received by the Chief, Office of Customer Outreach and Oversight Staff; and the person making the request will be immediately notified of the referral and of the date the request was received in USAID. USAID will not accept referral of requests unless and until the Chief, Customer Outreach and Oversight Staff, or his/her designee, determines that the material requested is actually within the scope and control of the release authority of USAID.

(d) If only a part of a record is exempt from disclosure, then any reasonably segregable portion of such record will be furnished after deletion of the portions which are exempt, provided that the segregable portion constitutes an intelligible record which is not distorted out of context or contradictory to the substance of the entire record before segregation.

§ 212.35 Schedule of fees and method of payment for services rendered.

(a) *Definitions*. (1) *Direct costs* means those expenditures which the Agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents in order to respond to a FOIA request.

(2) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Line-by-line search will not be done when duplicating an entire document would prove the less expensive and quicker method of complying with a request. (''Search'' for this purpose is distinguished from ''review'' (see paragraph (a)(4) of this section).

(3) *Duplication* refers to the process of making a copy of a document available to the FOIA requester. Copies can take the form of paper copy, microfilm or audiovisual materials (among others) and will be in a form that is reasonably usable by requesters.

(4) *Review* refers to the process of examining documents located in response to a commercial use request (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all

that is necessary to redact those documents of exempt material and otherwise preparing them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that is related to commerce, trade, or the profit interest of the requester or of the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Agency will determine the use to which a requester will put the documents requested. Where the Agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Agency may seek additional clarification before assigning the request to a specific category.

(6) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education which operates a program or programs of scholarly research.

(7) *Non-commercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis as that term is referenced in paragraph (a)(5) of this section and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(8) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'' who make their products available for purchase or subscription by the general public). These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they may be regarded as working for a news organization if they can demonstrate a sound basis for expecting publication through such an organization, even though not actually employed by it. A publication contract would be the clearest evidence, but the Agency may also look to the past publication record of the requester in making this determination.

(b) *Fees to be charged.* The following specific fees shall be applicable with respect to services rendered to members of the public under this part:

(1) *Commercial use requesters.* Fees are intended to cover the full estimated direct costs of researching for, reviewing for release, and duplicating the records requested. *Search costs* are computed based on the following formula: hours spent by Agency personnel, whatever their grade and location, and rounded up to the nearest full hour, and including locality pay for Washington-based personnel only, at the basic annual rate then payable to U.S. Government employees at the GS–9/Step 4 level, times 1.17 (to factor in related benefits) and divided by 2080 (hours per work year). *Review costs* are computed based on the same formula but, instead, using the rate then payable to employees at the GS–13/Step 4 level. *Duplicating costs* are $0.20 per page. Search costs will be assessed even though no records may be found or even if, after review, there is no disclosure of records.

(2) *Educational and non-commercial scientific institution requester.* The Agency will provide documents to requesters in this category for the cost of duplication alone ($0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that a request is being made under the auspices of a qualifying institution and that the records are sought in furtherance of scholarly research, if the request is

from an educational institution or scientific research, if the request is from a non-commercial scientific institution. Requesters eligible for free search must (as with all FOIA requesters) reasonably describe the records sought.

(3) *Requesters who are representatives of the news media.* The Agency will provide documents to requesters in this category for the cost of reproduction alone ($0.20 per page), excluding charges for the first 100 pages. To be eligible for inclusion in this category a requester must meet the criteria in paragraph (a)(8) of this section, and his/her request must not be made for commercial use. In reference to this class of requesters, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Requesters eligible for free search must also reasonably describe the records sought.

(4) *All other requesters.* The Agency will charge requesters who do not fit into any of the categories in paragraphs (b) (1), (2), and (3) of this section fees which recover the full direct cost of search, and for reproducing records that are responsive to the request, except that the first 100 pages and the first two hours of search time shall be furnished without charge. The hourly rates outlined in paragraph (b)(1) of this section will prevail. Requesters must reasonably describe the records sought. Moreover, requests from subjects for records filed in the Agency's Privacy Act System of Records will continue to be treated under the fee provisions of the Privacy Act of 1975 except that the first 100 pages of reproduction will be furnished without charge.

(c) *Non-payment of fees.* (1) The Agency will begin assessing interest charges on the thirty-first day following the day on which the requester is advised of the fee charge. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(2) Where a requester has previously failed to copy a fee charged in a timely fashion (*i.e.*, within thirty days of the billing date), the Agency will require the requester to pay the full amount owed plus any applicable interest as provided in paragraph (c)(1) of this section, and to make an advance payment of the full amount of the remaining estimated fee before the Agency begins to process a new request or continues processing a then-pending request from the requester.

(3) When the Agency acts under paragraph (c) (1) or (2) of this section the administrative time limits prescribed in subsection (a)(6) of the FOIA (*i.e.*, ten working days from receipt of initial request and twenty working days from receipt of appeals from initial denial plus permissible extensions of these time limits) will begin only after the Agency has received fee payments described in this section.

(d) *Advance payments or confirmation.* Where USAID estimates or determines that allowable charges to a requester are likely to exceed $250, USAID will require a requester to make an advance payment of the entire estimated charges before continuing to process the request. Where the estimated charges are in the $25–$250 range, then USAID in its discretion, before processing the request, may require either—

(1) An advance deposit of the entire estimated charges or (2) Written confirmation of the requester's willingness, when billed, to pay such charges.

(e) *Waiving or reducing fee.* In accordance with section (4)(A)(ii) of the FOIA, the Agency will furnish documents without charge or at reduced charges if disclosure of the information is ''in the public interest'' in that such disclosure is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. A requester may at any time, up to a period not to exceed thirty days from the final USAID decision concerning his/her request, request such waiver or reduction of fee by letter addressed to the Chief, Customer Outreach and Oversight Staff; such request shall address the above criteria for waiver. Such request will initially be decided by the Chief, Customer Outreach and Oversight Staff, or his/her designee; such decision will normally be made, and the requester so advised, within ten working days of its receipt. The requester, if dissatisfied

with that decision, may appeal pursuant to the same procedures as apply under § 212.36 and § 212.37 of this part.

(f) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the FOIA, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together so that, except for commercial use requesters, the Agency will not begin to assess fees until it has provided such free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, the Agency will determine the cost of only ten minutes of search time and only five pages of reproduction. If this cost is equal to or less than the cost of processing the payment instrument—a figure which the Agency will from time to time review and determine—then there will be no charge to the requester.

(g) *Other provisions*—(1) *Charges for unsuccessful search.* The Agency will assess charges for time spent searching even if the Agency fails to locate the records or if records located are determined to be exempt from disclosure.

(2) *Aggregating requesters.* When the Agency reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Agency will aggregate any such requesters and charge accordingly.

(3) *Effect of the Debt Collection Act of 1982* (Public Law 97–365). The Agency will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

(4) *Remittances.* (i) Remittances will be in U.S. Dollars in the form of either a personal check or bank draft drawn on a bank in the United States or a money order.

(ii) Remittances shall be made payable to the order of the U.S. Treasury and mailed to the Chief, Customer Outreach and Oversight Staff, at the address set forth in § 212.33(a) of this part.

§ 212.36 Denial of request for access to records.

(a) If it is determined that the Agency cannot comply with all or part of a request for records, the person making the request shall be immediately notified of the determination, the reasons for the determination, the name and title of each officer responsible for the denial, and the right of the person to appeal the adverse determination.

(b) The denial of a request for records may be made, initially, only by the Chief, Customer Outreach and Oversight Staff, or his/her designee.

(c) (1) Any person who has been denied access to records pursuant to this section may appeal the relevant decision not later than thirty days after the date of the notification of denial or, in the case of a partial denial, not later than thirty days after the date the releasable documents are actually furnished to the person making the request, whichever is later. The appeal shall be in writing addressed to the Agency's FOIA Appeals Officer, who is:

The Director, Office of Administrative Services, Bureau for Management, Room 803, SA–2, Agency for International Development, 21st and Virginia Ave., N.W., Washington, D.C., 20523–0217.

(2) In order for the Agency to make a timely response to the appeal, both the text of the appeal and its envelope must be plainly marked ''FOIA Appeal''. The appeal must contain a reasonable description of the record sought and withheld, a copy of the initial decision to deny access and any other information that will enable the Appeals Officer to make the final decision.

§ 212.37 Procedures for agency consideration of appeals.

(a) Upon receipt of the appeal by the Appeals Officer, a maximum of twenty working days will normally be taken to decide the appeal. In unusual circumstances, as defined in § 212.34, the twenty working days may be extended by ten working days or by the number

of days not used in the original denial of the request.

(b) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 212.35. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decisions and of the provisions for judicial review of the Agency's denial of the request.

(c) In the event a determination is not issued within the applicable time limit and the person making the request therefore chooses to sue the Agency, the Agency-level determination process shall nonetheless continue.

(d) If an appeal not properly marked ''FOIA Appeal'' on the text of the appeal and/or envelope is thereby delayed in reaching the Appeals Officer, it will not be deemed received by the Appeals Officer until actually received by him/her. In such event, the person making the appeal will be furnished notice of the effective date of receipt.

§ 212.38 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Agency shall not be disclosed pursuant to a FOIA request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the Agency by a submitter that arguably contain material exempt from release under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the Agency. The term ''submitter'' includes, but is not limited to, corporations, state governments and foreign governments.

(b) *Notice to submitters.* Whenever the Agency receives a FOIA request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter of such information is entitled to receive notice of that request, then the Agency shall promptly notify the submitter that it has received the request, unless such a notice is not required pursuant to paragraph (g) of this section. The notice shall be in writing and shall either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known address. Where notice is required to be given to a voluminous number of submitters, in lieu of such a mailing the notice may be posted or published in a manner and place reasonably calculated to provide notice to the submitters.

(c) *When notice is required; related matters.* (1) For confidential commercial information submitted prior to January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

(i) The records are less than ten years old and the information has been designated by the submitter as confidential commercial information; or

(ii) The Agency has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm to the submitter thereof.

(2) For confidential commercial information submitted to the Agency on or after January 1, 1988, the Agency shall provide a submitter with notice of its receipt of a FOIA request whenever:

(i) The submitter has designated the information as confidential commercial information pursuant to the requirements of this section; or

(ii) The Agency has reason to believe that the disclosure of the information could reasonably be expected to cause substantial competitive harm to the submitter.

(3) Notice of a request for confidential commercial information falling within paragraph (c)(2)(i) of this section shall be required for a period of not more than ten years after the date

of submission unless the submitter provides reasonable justification for a designation period of greater duration.

(4) A submitter shall use good-faith efforts to designate by appropriate markings, either at the time a record is submitted to the Agency or within a reasonable period of time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the submitter, its agent or designee that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public.

(5) Whenever the Agency provides notice to the submitter in accordance with paragraph (c) of this section, the Agency shall at the same time provide written notice to the requester that it is affording the submitter a reasonable period of time within which to object to the disclosure, and that, therefore, the Agency may be required to enlarge the time within which it otherwise would respond to the request.

(d) *Opportunity to object to disclosure.* To the extent permitted by law, the notice required by paragraph (c) of this section shall afford a submitter a reasonable period of time within which the submitter or its authorized representative may provide the Agency with a written objection to the disclosure of the confidential commercial information and demonstrate why the submitter believes that the records contain confidential commercial information whose disclosure would, probably, cause substantial competitive injury to the submitter. Except where a certification already has been made in conformance with the requirements of paragraph (c)(4) of this section, the objection shall be accompanied by certification made by the submitter, its agent or designee, that to the best of the submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that theretofore has not been disclosed to the public. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Agency shall give careful consideration to objections made by a submitter pursuant to paragraph (d) of this section prior to making any administrative determination of the issue. Whenever the Agency decides to disclose information despite the objection of a submitter, the Agency shall forward to the submitter a written notice which shall include:

(i) A statement of the reasons for which a submitter's disclosure objections were not sustained; and

(ii) A description of the information to be disclosed.

(2) To the extent permitted by law, the notice required to be given by paragraph (e)(1) of this section shall be provided to the submitter a reasonable number of days prior to the specific disclosure date.

(3) Whenever the Agency provides notice to the submitter in accordance with paragraphs (e) (1) and (2) of this section, the Agency shall at the same time notify the requester

(i) That such a notice has been given and

(ii) Of the proposed date for disclosure.

(f) *Notice of lawsuit.* When a requester brings suit seeking to compel the disclosure of information for which notice is required pursuant to paragraph (c) of this section, the Agency shall promptly notify the submitter that such suit has been filed.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) The Agency determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by an Agency rule that;

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the Agency that are to be released under the FOIA; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information

could reasonably be expected to cause substantial competitive harm;

(4) For purposes of paragraph (c) of this section, the information requested was not designated by the submitter as exempt from disclosure when the submitter had an opportunity to make such designation at the time of submission of the information or within a reasonable time thereafter, unless;

(i) The Agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(ii) The designation made by the submitter appears obviously frivolous; except that, in such case, the Agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Subpart E—Exemptions From Disclosure

§ 212.41 Exemptions from publication and disclosure requirements of subparts B, C, and D.

None of the provisions of subparts B, C, and D which provide for publication and disclosure of certain information and records shall be applicable to matters that are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(b) Related solely to the internal personnel rules and practices of the Agency;

(c) Specifically exempted from disclosure by statute;

(d) Trade secrets and commercial or financial information obtained from a person and privileged and confidential;

(e) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Would reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedure for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and

(i) Geological and geophysical information and data (including maps) concerning wells.

§ 212.42 Exemption from 5 U.S.C. 552.

Whenever a request is made which involves access to records described in paragraph (g) of § 212.41 and the investigation or proceedings involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Agency may, during only such time as that circumstances continues, treat

the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

Subpart F—Opening of Records for Nonofficial Research Purposes

§ 212.51 General policy.

(a) The Agency will open its records on an equitable basis to all individuals engaged in private research as soon as such action may be taken without adversely affecting the national security, the maintenance of friendly relations with other nations, the efficient operation of the Agency, or the administrative feasibility of servicing requests for access to such records.

(b) Access for research purposes to the classified foreign policy records in the Agency's custody will be governed by the regulations of the Department of State with respect thereto, as set forth in part 6, chapter II of title II of the Code of Federal Regulations. Application for such access may be made to the Chief, Customer Outreach and Oversight Staff, at the address listed in § 212.33(a) of this part. That officer, or his/her designee, in consultation with the Director, Historical Office, Department of State, or his/her designee, will determine the action to be taken and will so advise the researcher.

PART 213—CLAIMS COLLECTION

Subpart A—General

Sec.
213.1 Purpose and scope.
213.2 Definitions.
213.3 Loans, guarantees, sovereign and interagency claims.
213.4 Other remedies.
213.5 Fraud claims.
213.6 Subdivision of claims not authorized.
213.7 Omission not a defense.

Subpart B—Collection

213.8 Collection—general.
213.9 Written notice.
213.10 Review requirements.
213.11 Aggressive collection actions; documentation.
213.12 Interest, penalty and administrative costs.
213.13 Interest and charges pending waiver or review.
213.14 Contracting for collection services.
213.15 Use of credit reporting bureaus.
213.16 Use and disclosure of mailing addresses.
213.17 Liquidation of collateral.
213.18 Suspension or revocation of eligibility for loans and loan guarantees, licenses or privileges.
213.19 Installment payments.

Subpart C—Administrative Offset

213.20 Administrative offset of non-employee debts.
213.21 Employee salary offset—general.
213.22 Salary offset when USAID is the creditor agency.
213.23 Salary offset when USAID is not the creditor agency.

Subpart D—Compromise of Debts

213.24 General.
213.25 Standards for compromise.
213.26 Payment of compromised claims.
213.27 Joint and several liability.
213.28 Execution of releases.

Subpart E—Suspension or Termination of Collection Action

213.29 Suspension—general.
213.30 Standards for suspension.
213.31 Termination—general.
213.32 Standards for termination.
213.33 Permitted actions after termination of collection activity.
213.34 Debts that have been discharged in bankruptcy.

Subpart F—Discharge of Indebtedness and Reporting Requirements

213.35 Discharging indebtedness—general.
213.36 Reporting to IRS.

Subpart G—Referrals to the Department of Justice

213.37 Referrals to the Department of Justice.

Subpart H—Mandatory Transfer of Delinquent Debt to Financial Management Service (FMS) of the Department of Treasury

213.38 Mandatory transfer of debts to FMS—general.
213.39 Exceptions to mandatory transfer.

AUTHORITY: Section 621(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2381(a).

SOURCE: 67 FR 47258, July 18, 2002, unless otherwise noted.

Subpart A—General

§213.1 Purpose and scope.

This part prescribes standards and procedures for the United States Agency for International Development's (USAID) collection and disposal of claims. These standards and procedures are applicable to all claims and debts for which a statute, regulation or contract does not prescribe different standards or procedures. This part covers USAID's collection, compromise, suspension, termination, and referral of claims to the Department of Justice.

§213.2 Definitions.

(a) *Administrative offset* means the withholding of money payable by the United States to, or held by the United States for, a person to satisfy a debt the person owes the Government.

(b) *Administrative wage garnishment* means the process by which federal agencies require a private sector employer to withhold up to 15% of an employee's disposable pay to satisfy a delinquent debt owed to the federal government. A court order is not required.

(c) *Agency* means the United States Agency for International Development (USAID).

(d) *Claim* means an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency. As used in this part, the terms debt and claim are synonymous.

(e) *CFO* means the Chief Financial Officer of USAID or a USAID employee or official designated to act on the CFO's behalf.

(f) *Creditor agency* means the Federal agency to which the debt is owed, including a debt collection center when acting on behalf of a creditor agency in matters pertaining to the collection of a debt.

(g) *Debtor* means an individual, organization, association, corporation, or a State or local government indebted to the United States or a person or entity with legal responsibility for assuming the debtor's obligation.

(h) *Delinquent claim* means any claim that has not been paid by the date specified in the agency's bill for collection or demand letter for payment or which has not been satisfied in accordance with a repayment agreement.

(i) *Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld (other than deductions to execute garnishment orders) in accordance with 5 CFR parts 581 and 582. Among the legally required deductions that must be applied first to determine disposable pay are levies pursuant to the Internal Revenue Code (Title 26, United States Code) and deductions described in 5 CFR 581.105 (b) through (f). These deductions include, but are not limited to: Social security withholdings; Federal, State and local tax withholdings; health insurance premiums; retirement contributions; and life insurance premiums.

(j) *Employee* means a current employee of the Federal Government including a current member of the Armed Forces or a Reserve of the Armed Forces.

(k) *Employee salary offset* means the administrative collection of a debt by deductions at one or more officially established pay intervals from the current pay account of an employee without the employee's consent.

(l) *Person* means an individual, firm, partnership, corporation, association and, except for purposes of administrative offsets under subpart C and interest, penalty and administrative costs under subpart B of this part, includes State and local governments and Indian tribes and components of tribal governments.

(m) *Recoupment* is a special method for adjusting debts arising under the same transaction or occurrence. For example, obligations arising under the same contract generally are subject to recoupment.

(n) *Waiver* means the cancellation, remission, forgiveness or non-recovery of a debt or debt-related charge as permitted or required by law.

(o) *Withholding order* means any order for withholding or garnishment of pay issued by USAID or a judicial or administrative body. For the purposes of

this part, wage garnishment order and garnishment order have the same meaning as withholding order.

§ 213.3 Loans, guarantees, sovereign and interagency claims.

This part does not apply to:

(a) Claims arising out of loans for which compromise and collection authority is conferred by section 635(g)(2) of the Foreign Assistance Act of 1961, as amended;

(b) Claims arising from investment guaranty operations for which settlement and arbitration authority is conferred by section 635(I) of the Foreign Assistance Act of 1961, as amended;

(c) Claims against any foreign country or any political subdivision thereof, or any public international organization;

(d) Claims where the CFO determines that the achievement of the purposes of the Foreign Assistance Act of 1961, as amended, or any other provision of law administered by USAID require a different course of action; and

(e) Claims owed USAID by other Federal agencies. Such debts will be resolved by negotiation between the agencies.

§ 213.4 Other remedies.

(a) This part does not supersede or require omission or duplication of administrative proceedings required by contract, statute, regulation or other Agency procedures, e.g., resolution of audit findings under grants or contracts, informal grant appeals, formal appeals, or review under a procurement contract.

(b) The remedies and sanctions available to the Agency under this part for collecting debts are not intended to be exclusive. The Agency may impose, where authorized, other appropriate sanctions upon a debtor for inexcusable, prolonged or repeated failure to pay a debt. For example, the Agency may stop doing business with a grantee, contractor, borrower or lender; convert the method of payment under a grant or contract from an advance payment to a reimbursement method; or revoke a grantee's or contractor's letter-of-credit.

§ 213.5 Fraud claims.

(a) The CFO will refer claims involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim to the USAID Office of Inspector General (OIG). The OIG has the responsibility for investigating or referring the matter, where appropriate, to the Department of Justice (DOJ), and/or returning it to the CFO for further action.

(b) The CFO will not administratively compromise, terminate, suspend or otherwise dispose of debts involving fraud, the presentation of a false claim or misrepresentation on the part of the debtor or any party having an interest in the claim without the approval of DOJ.

§ 213.6 Subdivision of claims not authorized.

A claim will not be subdivided to avoid the $100,000 limit on the Agency's authority to compromise, suspend, or terminate a debt. A debtor's liability arising from a particular transaction or contract is a single claim.

§ 213.7 Omission not a defense.

Failure by USAID to comply with any provision of this part is not available to a debtor as a defense against payment of a debt.

Subpart B—Collection

§ 213.8 Collection—general.

(a) The CFO takes action to collect all debts owed the United States arising out of USAID activities and to reduce debt delinquencies. Collection actions may include sending written demands to the debtor's last known address. Written demand may be preceded by other appropriate action, including immediate referral to DOJ for litigation, when such action is necessary to protect the Government's interest. The CFO may contact the debtor by telephone, in person and/or in writing to demand prompt payment, to discuss the debtor's position regarding the existence, amount or repayment of the debt, to inform the debtor of its rights

(e.g., to apply for waiver of the indebtedness or to have an administrative review) and of the basis for the debt and the consequences of nonpayment or delay in payment.

(b) The CFO maintains an administrative file for each debt and/or debtor which documents the basis for the debt, all administrative collection actions regarding the debt (including communications to and from the debtor) and its final disposition. Information on an individual may be disclosed only for purposes that are consistent with this part, the Privacy Act of 1974 and other applicable law.

§ 213.9 Written notice.

(a) When the billing official determines that a debt is owed USAID, he or she provides a written notice in the form of a Bill for Collection or demand letter to the debtor. Unless otherwise provided by agreement, contract or order, the written notice informs the debtor of:

(1) The amount, nature and basis of the debt;

(2) The right of the debtor to inspect and copy records related to the debt;

(3) The right of the debtor to discuss and propose a repayment agreement;

(4) Any rights available to the debtor to dispute the validity of the debt or to have recovery of the debt waived (citing the available review or waiver authority, the conditions for review or waiver, and the effects of the review or waiver request on the collection of the debt);

(5) The date on which payment is due which will be not more than 30 days from the date of the bill for collection or demand letter;

(6) The instructions for making electronic payment;

(7) The debt is considered delinquent if it is not paid on the due date;

(8) The imposition of interest charges and, except for State and local governments and Indian tribes, penalty charges and administrative costs that may be assessed against a delinquent debt;

(9) The intention of USAID to use non-centralized administrative offset to collect the debt if appropriate and, if not, the referral of the debt 90 days after the Bill for Collection or demand letter to the Financial Management Service in the Department of Treasury who will collect their administrative costs from the debtor in addition to the amount owed USAID and use all means available to the Federal Government for debt collection including administrative wage garnishment, use of collection agencies and reporting the indebtedness to a credit reporting bureau (see § 213.14);

(10) The address, telephone number, and name of the person available to discuss the debt;

(11) The possibility of referral to the Department of Justice for litigation if the debt cannot be collected administratively.

(b) USAID will respond promptly to communications from the debtor. Response generally will be within 30 days of receipt of communication from the debtor.

§ 213.10 Review requirements.

(a) For purposes of this section, whenever USAID is required to afford a debtor a review within the agency, USAID shall provide the debtor with a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity.

(b) Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although USAID will carefully document all significant matters discussed at the hearing.

(c) This section does not require an oral hearing with respect to debt collection systems in which a determination of indebtedness rarely involves issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes.

(d) In those cases when an oral hearing is not required by this section, USAID shall accord the debtor a ''paper hearing,'' that is, a determination of the request for reconsideration based upon a review of the written record.

§ 213.11 Aggressive collection actions; documentation.

(a) USAID takes actions and effective follow-up on a timely basis to collect all claims of the United States for money and property arising out of USAID's activities. USAID cooperates with other Federal agencies in their debt collection activities.

(b) All administrative collection actions are documented in the claim file, and the basis for any compromise, termination or suspension of collection actions is set out in detail. This documentation, including the Claims Collection Litigation Report required in § 213.34, is retained in the appropriate debt file.

§ 213.12 Interest, penalty and administrative costs.

(a) *Interest.* USAID will assess interest on all delinquent debts unless prohibited by statute, regulation or contract.

(1) Interest begins to accrue on all debts from the payment due date established in the initial notice to the debtor. USAID will assess an annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.*, the Treasury tax and loan account rate) unless a different rate is necessary to protect the interest of the Government. USAID will notify the debtor of the basis for its finding that a different rate is necessary to protect the interest of the Government.

(2) The rate of interest, as initially assessed, remains fixed for the duration of the indebtedness. If a debtor defaults on a repayment agreement, interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(3) Interest will not be assessed on interest charges, administrative costs or late payment penalties. However, where a debtor defaults on a previous repayment agreement and interest, administrative costs and penalties charges have been waived under the defaulted agreement, these charges can be reinstated and added to the debt principal under any new agreement and interest charged on the entire amount of the debt.

(b) *Administrative costs of collecting overdue debts.* The costs of the Agency's administrative handling of overdue debts including charges assessed by Treasury in cross-servicing USAID debts, based on either actual or average cost incurred, will be charged on all debts except those owed by State and local governments and Indian tribes. These costs include both direct and indirect costs.

(c) *Penalties.* As provided by 31 U.S.C. 3717(e)(2), a penalty charge will be assessed on all debts, except those owned by State and local governments and Indian tribes, more than 90 days delinquent. The penalty charge will be at a rate not to exceed 6% per annum and will be assessed monthly.

(d) *Allocation of payments.* A partial payment by a debtor will be applied first to outstanding administrative costs, second to penalty assessments, third to accrued interest and then to the outstanding debt principal.

(e) *Waivers.* (1) USAID will waive the collection of interest and administrative charges on the portion of the debt that is paid within 30 days after the date on which interest begins to accrue. The CFO may extend this 30-day period on a case-by-case basis where he determines that such action is in the best interest of the Government. A decision to extend or not to extend the payment period is final and is not subject to further review.

(2) The CFO may (without regard to the amount of the debt) waive collection of all or part of accrued interest, penalty or administrative costs, where he determines that—

(i) Waiver is justified under the criteria of § 213.24;

(ii) The debt or the charges resulted from the Agency's error, action or inaction, and without fault by the debtor; or

(iii) Collection of these charges would be against equity and good conscience or not in the best interest of the United States.

(3) A decision to waive interest, penalty charges or administrative costs may be made at any time.

§ 213.13 Interest and charges pending waiver or review.

Interest, penalty charges and administrative costs will continue to accrue on a debt during administrative appeal, either formal or informal, and during waiver consideration by the Agency; except, that interest, penalty charges and administrative costs will not be assessed where a statute or a regulation specifically prohibits collection of the debt during the period of the administrative appeal or the Agency review.

§ 213.14 Contracting for collection services.

USAID has entered into a cross-servicing agreement with the Financial Management Service (FMS) of the Department of Treasury. FMS is authorized to take all appropriate action to enforce collection of accounts referred to FMS in accordance with applicable statutory and regulatory requirements. The FMS fee ranges from 3% to 18% of the funds collected and will be collected from the debtor along with the original amount of the indebtedness. After referral, FMS will be solely responsible for the maintenance of the delinquent debtor records in its possessions and for ensuring that accounts are updated as necessary. In the event that a referred debtor disputes the validity of the debt or any terms and conditions related to any debt not reduced to judgment, FMS may return the disputed debt to USAID for its determination of debt validity. FMS may take any of the following collection actions on USAID's behalf:

(a) Send demand letters on U. S. Treasury letterhead and telephone debtors;

(b) Refer accounts to credit bureaus;

(c) Skiptracing;

(d) Purchase credit reports to assist in the collection effort;

(e) Refer accounts for offset, including tax refund, Federal employee salary, administrative wage garnishment, and general administrative offset under the Treasury Offset Program.

(f) Refer accounts to private collection agencies;

(g) Refer accounts to DOJ for litigation;

(h) Report written off/discharged debts to IRS on the appropriate Form 1099;

(i) Take any additional steps necessary to enforce recovery; and

(j) Terminate collection action, as appropriate.

§ 213.15 Use of credit reporting bureaus.

Delinquent debts owed to USAID are reported to appropriate credit reporting bureaus through the cross-servicing agreement with FMS.

(a) The following information is provided to the credit reporting bureaus:

(1) A statement that the claim is valid and is overdue;

(2) The name, address, taxpayer identification number and any other information necessary to establish the identity of the debtor;

(3) The amount, status and history of the debt; and

(4) The program or pertinent activity under which the debt arose.

(b) Before referring claims to FMS and disclosing debt information to credit reporting bureaus, USAID will have:

(1) Taken reasonable action to locate the debtor if a current address is not available; and

(2) If a current address is available, notified the debtor in writing that:

(i) The designated USAID official has reviewed the claim and has determined that it is valid and overdue;

(ii) That 90 days after the initial billing or demand letter if the debt is not paid, USAID intends to refer the debt to FMS and disclose to a credit reporting agency the information authorized for disclosure by this subpart; and

(iii) The debtor can request a complete explanation of the claim, can dispute the information in USAID's records concerning the claim, and can file for an administrative review, waiver or reconsideration of the claim, where applicable.

(c) Before information is submitted to a credit reporting bureau, USAID will provide a written statement to FMS that all required actions have been taken. Additionally, FMS will, thereafter, ensure that accounts are updated as necessary during the period

that FMS holds the account information.

(d) If a debtor disputes the validity of the debt, the credit reporting bureau will refer the matter to the appropriate USAID official. The credit reporting bureau will exclude the debt from its reports until USAID certifies in writing that the debt is valid.

§ 213.16 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a debt, the CFO may obtain a debtor's current mailing address from the Internal Revenue Service.

(b) Addresses obtained from the Internal Revenue Service will be used by the Agency, its officers, employees, agents or contractors and other Federal agencies only to collect or dispose of debts, and may be disclosed to other agencies and to collection agencies only for collection purposes.

§ 213.17 Liquidation of collateral.

Where the CFO holds a security instrument with a power of sale or has physical possession of collateral, he may liquidate the security or collateral and apply the proceeds to the overdue debt. USAID will exercise this right where the debtor fails to pay within a reasonable time after demand, unless the cost of disposing of the collateral is disproportionate to its value or special circumstances require judicial foreclosure. However, collection from other businesses, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance company unless expressly required by contract or statute. The CFO will give the debtor reasonable notice of the sale and an accounting of any surplus proceeds and will comply with any other requirements of law or contract.

§ 213.18 Suspension or revocation of eligibility for loans and loan guarantees, licenses or privileges.

Unless waived by the CFO, USAID will not extend financial assistance in the form of a loan or loan guarantee to any person delinquent on a nontax debt owed to a Federal agency. USAID may also suspend or revoke licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay a claim. Additionally, the CFO may suspend or disqualify any contractor, lender, broker, borrower, grantee or other debtor from doing business with USAID or engaging in programs USAID sponsors or funds if a debtor fails to pay its debts to the Government within a reasonable time. Debtors will be notified before such action is taken and applicable suspension or debarment procedures will be used. The CFO will report the failure of any surety to honor its obligations to the Treasury Department for action under 31 CFR 332.18.

§ 213.19 Installment payments.

(a) Whenever feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalty and administrative costs, as required by § 213.11, will be collected in a single payment. However, where the CFO determines that a debtor is financially unable to pay the indebtedness in a single payment or that an alternative payment mechanism is in the best interest of the United States, the CFO may approve repayment of the debt in installments. The debtor has the burden of establishing that it is financially unable to pay the debt in a single payment or that an alternative payment mechanism is warranted. If the CFO agrees to accept payment by installments, the CFO may require a debtor to execute a written agreement which specifies all the terms of the repayment arrangement and which contains a provision accelerating the debt in the event of default. The size and frequency of installment payments will bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment payments will be sufficient in size and frequency to liquidate the debt in not more than 3 years, unless the CFO determines that a longer period is required. Installment payments of less than $50 per month generally will not be accepted, but may be accepted where the debtor's financial or other circumstances justify.

(b) If a debtor owes more than one debt and designates how a voluntary installment payment is to be applied

among the debts, that designation will be approved if the CFO determines that the designation is in the best interest of the United States. If the debtor does not designate how the payment is to be applied, the CFO will apply the payment to the various debts in accordance with the best interest of the United States, paying special attention to applicable statutes of limitations.

Subpart C—Administrative Offset

§ 213.20 Administrative offset of non-employee debts.

This subpart provides for USAID's collection of debts by administrative offset under the Federal Claims Collection Standards, other statutory authorities and offsets or recoupments under common law. It does not apply to offsets against employee salaries covered by §§ 213.21, 213.22 and 213.23 of this subpart. USAID will collect debts by administrative offsets where it determines that such collections are feasible and are not otherwise prohibited by statute or contract. USAID will decide, on a case-by-case basis, whether collection by administrative offset is feasible and that its use furthers and protects the interest of the United States.

(a) *Standards*. (1) The CFO collects debts by administrative offset only after the debtor has been sent written notice in the form of a Bill for Collection or demand letter outlining the type and amount of the debt, the intention of the agency to use administrative offset to collect the debt, and explaining the debtor's rights under 31 U.S.C. 3716.

(2) Offsets may be initiated only after the debtor has been given:

(i) The opportunity to inspect and copy agency records related to the debt;

(ii) The opportunity for a review within the agency of the determination of indebtedness;

(iii) The opportunity to make a written agreement to repay the debt.

(3) The provisions of paragraphs (a)(1) and (2) of this section may be omitted when:

(i) The offset is in the nature of a recoupement;

(ii) The debt arises under a contract as set forth in Cecile Industries, Inc. v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993) (notice and other procedural protections set forth in 31 U.S.C. 3716(a) do not supplant or restrict established procedures for contractual offsets accommodated by the Contracts Disputes Act); or

(iii) In the case of non-centralized administrative offsets conducted under paragraph (g) of this section, USAID first learns of the existence of the amount owed by the debtor when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity for review. When prior notice and an opportunity for review are omitted, USAID shall give the debtor such notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the USAID.

(4) When USAID previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, USAID need not duplicate such notice and review opportunities before administrative offset may be initiated.

(b) *Interagency offset*. The CFO may offset a debt owed to another Federal agency from amounts due or payable by USAID to the debtor, or may request another Federal agency to offset a debt owed to USAID. The CFO through the FMS cross-servicing arrangement may request the Internal Revenue Service to offset an overdue debt from a Federal income tax refund due. The FMS may also garnishment the salary of a private sector employee where reasonable attempts to obtain payment have failed. Interagency offsets from employee's salaries will be made in accordance with the procedures contained in §§ 213.22 and 213.23.

(c) *Statutory bar to offset*. Administrative offset will not be made more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not have been known through the exercise of reasonable care

by the officer responsible for discovering or collecting the debt. For purposes of offset, the right to collect a debt accrues when the appropriate USAID official determines that a debt exists (e.g., contracting officer, grant award official, etc.), when it is affirmed by an administrative appeal or a court having jurisdiction, or when a debtor defaults on a payment agreement, whichever is latest. An offset occurs when money payable to the debtor is first withheld or when USAID requests offset from money held by another agency.

(d) *Alternative repayment.* The CFO may, at the CFO's discretion, enter into a repayment agreement with the debtor in lieu of offset. In deciding whether to accept payment of the debt by an alternative repayment agreement, the CFO may consider such factors as the amount of the debt, the length of the proposed repayment period, past Agency dealings with the debtor, documentation submitted by the debtor indicating that an offset will cause undue financial hardship, and the debtor's financial ability to adhere to the terms of a repayment agreement. The CFO may require financial documentation from the debtor before considering the repayment arrangement.

(e) *Review of administrative determination of debt's validity.* (1) A debt will not be offset while a debtor is seeking either formal or informal review of the validity of the debt under this section or under another statute, regulation or contract. However, interest, penalty and administrative costs will continue to accrue during this period, unless otherwise waived by the CFO. The CFO may initiate offset as soon as practical after completion of review or after a debtor waives the opportunity to request review.

(2) The debtor must provide a written request for review of the decision to offset the debt no later than 15 days after the date of the notice of the offset unless a different time is specifically prescribed. The debtor's request must state the basis for the request for review.

(3) The CFO may grant an extension of time for filing a request for review if the debtor shows good cause for the late filing. A debtor who fails timely to file or to request an extension waives the right to review.

(4) The CFO will issue, no later than 60 days after the filing of the request, a written final decision based on the evidence, record and applicable law.

(f) *Multiple debts.* Where moneys are available for offset against multiple debts of a debtor, it will be applied in accordance with the best interest of the Government as determined by the CFO on a case-by-case basis.

(g) *Non-centralized administrative offset.* (1) Generally, non-centralized administrative offsets are ad hoc case-by-case offsets that creditor agencies conduct, at the agency's discretion, internally or in cooperation with the agency certifying or authorizing payments to the debtor. Unless otherwise prohibited by law, when centralized administrative offset is not available or appropriate, past due, legally enforceable nontax delinquent debts may be collected through non-centralized administrative offset. In these cases, a creditor agency may make a request directly to a payment authorizing agency to offset a payment due a debtor to collect a delinquent debt.

(2) Before requesting a payment authorizing agency to conduct a non-centralized administrative offset, USAID's regulations provides that such offsets may occur only after:

(i) The debtor has been provided due process as set forth in paragraph (a) of this section; and

(ii) The payment authorizing agency has received written certification from the creditor agency that the debtor owes the past due, legally enforceable delinquent debt in the amount stated, and that the creditor agency has fully complied with its regulations concerning administrative offset.

(3) USAID as a payment authorizing agency will comply with offset requests by creditor agencies to collect debts owed to the United States, unless the offset would not be in the best interests of the United States with respect to USAID's program, or would otherwise be contrary to law.

(4) When collecting multiple debts by non-centralized administrative offset, USAID will apply the recovered amounts to those debts in accordance

with the best interests of the United States, as determined by the facts and circumstances of the particular case, particularly the applicable statute of limitations.

(h) *Requests to OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund.* Upon providing OPM written certification that a debtor has been afforded the procedures provided in paragraph (a) of this section, USAID may request OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) in accordance with regulations codified at 5 CFR 831.1801 through 831.1808. Upon receipt of such a request, OPM will identify and ''flag'' a debtor's account in anticipation of the time when the debtor requests, or becomes eligible to receive, payments from the Fund. This will satisfy any requirement that offset be initiated prior to the expiration of the time limitations referenced in paragraph (a)(4) of this section.

§ 213.21 Employee salary offset—general.

(a) *Purpose.* This section establishes USAID's policies and procedures for recovery of debts owed to the United States by installment collection from the current pay account of an employee.

(b) *Scope.* The provisions of this section apply to collection by salary offset under 5 U.S.C. 5514 of debts owed USAID and debts owed to other Federal agencies by USAID employees. USAID will make every effort reasonably and lawfully possible to administratively collect amounts owed by employees prior to initiating collection by salary offset. An amount advanced to an employee for per diem or mileage allowances in accordance with 5 U.S.C. 5705, but not used for allowable travel expenses, is recoverable from the employee by salary offset without regard to the due process provisions in § 213.22. This section does not apply to debts where collection by salary offset is explicitly provided for or prohibited by another statute.

(c) *References.* The following statutes and regulations apply to USAID's recovery of debts due the United States by salary offset:

(1) 5 U.S.C. 5514, as amended, governing the installment collection of debts;

(2) 31 U.S.C. 3716, governing the liquidation of debts by administrative offset;

(3) 5 CFR part 550, subpart K, setting forth the minimum requirements for executive agency regulations on salary offset; and

(4) 31 CFR parts 900 through 904, the Federal Claims Collection Standards.

§ 213.22 Salary offset when USAID is the creditor agency.

(a) *Due process requirements—Entitlement to notice, hearing, written response and decision.* (1) Prior to initiating collection action through salary offset, USAID will first provide the employee with the opportunity to pay in full the amount owed, unless such notification will compromise the Government's ultimate ability to collect the debt.

(2) Except as provided in paragraph (b) of this section, each employee from whom the Agency proposes to collect a debt by salary offset under this section is entitled to receive a written notice as described in paragraph (c) of this section.

(3) Each employee owing a debt to the United States that will be collected by salary offset is entitled to request a hearing on the debt. This request must be filed as prescribed in paragraph (d) of this section. The Agency will make appropriate hearing arrangements that are consistent with law and regulations. Where a hearing is held, the employee is entitled to a written decision on the following issues:

(i) The determination of the Agency concerning the existence or amount of the debt; and

(ii) The repayment schedule, if it was not established by written agreement between the employee and the Agency.

(b) *Exceptions to due process requirements—pay and allowances.* The procedural requirements of paragraph (a) of this section are not applicable to overpayments of pay or allowances caused by the following:

(1) Any adjustment of pay arising out of an employee's election of coverage

or a change in coverage under a Federal benefits program (such as health insurance) requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, if the amount to be recovered was accumulated over more than four pay periods the full procedures prescribed under paragraph (d) of this section will be extended to the employee;

(2) Routine intra-agency adjustment in pay or allowances that is made to correct an overpayment of pay attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred with the 4 pay periods preceding the adjustment and, at the time of such adjustment, or as soon thereafter as practical, the employee is provided written notice of the nature and amount of the adjustment; or

(3) Any adjustment to collect a debt amounting to $50 or less, if at the time of such adjustment, or as soon thereafter as practical, the employee is provided written notice of the nature and amount of the adjustment.

(c) *Notification before deductions begin.* Except as provided in paragraph (b) of this section, deductions will not be made unless the employee is first provided with a minimum of 30 calendar days written notice. Notice will be sent by mail and must include the following:

(1) The Agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The Agency's intention to collect the debt by means of deductions from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date and duration of the intended deductions. (The proposed beginning date for salary offset cannot be earlier than 30 days after the date of notice, unless this would compromise the Government's ultimate ability to resolve the debt);

(4) An explanation of the requirements concerning interest, penalty and administrative costs;

(5) The employee's right to inspect and copy all records relating to the debt or to request and receive a copy of such records;

(6) If not previously provided, the employee's right to enter into a written agreement for a repayment schedule differing from that proposed by the Agency where the terms of the proposed repayment schedule are acceptable to the Agency. (Such an agreement must be in writing and signed by both the employee and the appropriate USAID official and will be included in the debt file);

(7) The right to a hearing conducted by a hearing official not under the control of USAID, if a request is filed;

(8) The method and time for requesting a hearing;

(9) That the filing of a request for hearing within 15 days of receipt of the original notification will stay the assessment of interest, penalty and administrative costs and the commencement of collection proceedings;

(10) That a final decision on the hearing (if requested) will be issued at the earliest practical date, but no later than 60 days after the filing of the request, unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That any knowingly false or frivolous statements, representations or evidence may subject the employee to—

(i) Disciplinary procedures under 5 U.S.C. chapter 75 or any other applicable statutes or regulations;

(ii) Criminal penalties under 18 U.S.C. 286, 287, 1001 and 1002 or other applicable statutory authority; or

(iii) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority;

(12) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are applicable contractual or statutory provisions to the contrary, amounts paid or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(d) *Request for hearing.* An employee may request a hearing by filing a written, signed request directly with the Deputy Chief Financial Office, M/FM, United States Agency for International

Development, Ronald Reagan Building, 1300 Pennsylvania Avenue NW., Washington, DC 20523–4601. The request must state the basis upon which the employee disputes the proposed collection of the debt. The request must be signed by the employee and be received by USAID within 15 days of the employee's receipt of the notification of proposed deductions. The employee should submit in writing all facts, evidence and witnesses that support his/her position to the Deputy Chief Financial Officer within 15 days of the date of the request for a hearing. The Deputy Chief Financial Officer will arrange for the services of a hearing official not under the control of USAID and will provide the hearing official with all documents relating to the claim.

(e) *Requests for hearing made after time expires.* Late requests for a hearing may be accepted if the employee can show that the delay in filing the request for a hearing was due to circumstances beyond the employee's control.

(f) *Form of hearing, written response and final decision.* (1) Normally, a hearing will consist of the hearing official making a decision based upon a review of the claims file and any materials submitted by the debtor. However, in instances where the hearing official determines that the validity of the debt turns on an issue of veracity or credibility which cannot be resolved through review of documentary evidence, the hearing official at his discretion may afford the debtor an opportunity for an oral hearing. Such oral hearings will consist of an informal conference before a hearing official in which the employee and the Agency will be given the opportunity to present evidence, witnesses and argument. If desired, the employee may be represented by an individual of his/her choice. The Agency shall maintain a summary record of oral hearings provided under the procedures in this section.

(2) Written decisions provided after a request for hearing will, at a minimum, state the facts evidencing the nature and origin of the alleged debt; and the hearing official's analysis, findings and conclusions.

(3) The decision of the hearing official is final and binding on the parties.

(g) *Request for waiver.* In certain instances, an employee may have a statutory right to request a waiver of overpayment of pay or allowances, e.g., 5 U.S.C. 5584 or 5 U.S.C. 5724(i). When an employee requests waiver consideration under a right authorized by statute, further collection on the debt will be suspended until a final administrative decision is made on the waiver request. However, where it appears that the Government's ability to recover the debt may be adversely affected because of the employee's resignation, termination or other action, suspension of recovery is not required. During the period of the suspension, interest, penalty charges and administrative costs will not be assessed against the debt. The Agency will not duplicate, for purposes of salary offset, any of the procedures already provided the debtor under a request for waiver.

(h) *Method and source of collection.* A debt will be collected in a lump sum or by installment deductions at established pay intervals from an employee's current pay account, unless the employee and the Agency agree to alternative arrangements for payment. The alternative payment schedule must be in writing, signed by both the employee and the CFO and will be documented in the Agency's files.

(i) *Limitation on amount of deduction.* The size and frequency of installment deductions generally will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period may not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payments will be in amounts sufficient to liquidate the debt in three years or less. Installment payments of less than $50 normally will be accepted only in the most unusual circumstances.

(j) *Duration of deduction.* If the employee is financially unable to pay a debt in a lump sum or the amount of the debt exceeds 15 percent of disposable pay, collection will be made in installments. Installment deductions will

be made over the period of active duty or employment except as provided in paragraph (a)(1) of this section.

(k) *When deductions may begin.* (1) Deductions to liquidate an employee's debt will begin on the date stated in the Agency's Bill for Collection or demand letter notice of intention to collect from the employee's current pay unless the debt has been repaid or the employee has filed a timely request for hearing on issues for which a hearing is appropriate.

(2) If the employee has filed a timely request for hearing with the Agency, deductions will begin after the hearing official has provided the employee with a final written decision indicating the amount owed the Government. Following the decision by the hearing official, the employee will be given 30 days to repay the amount owed prior to collection through salary offset, unless otherwise provided by the hearing official.

(l) *Liquidation from final check.* If the employee retires, resigns, or the period of employment ends before collection of the debt is completed, the remainder of the debt will be offset from subsequent payments of any nature due the employee (e.g., final salary payment, lump-sum leave, etc.).

(m) *Recovery from other payments due a separated employee.* If the debt cannot be liquidated by offset from any final payment due the employee on the date of separation, USAID will liquidate the debt, where appropriate, by administrative offset from later payments of any kind due the former employee (e.g., retirement pay). Such administrative offset will be taken in accordance with the procedures set forth in § 213.20.

(n) *Interest, penalty and administrative cost.* USAID will assess interest, penalties and administrative costs on debts collected under the procedures in this section. Interest, penalty and administrative costs will continue to accrue during the period that the debtor is seeking either formal or informal review of the debt or requesting a waiver. The following guidelines apply to the assessment of these costs on debts collected by salary offset:

(1) Interest will be assessed on all debts not collected by the payment due date specified in the bill for collection or demand letter. USAID will waive the collection of interest and administrative charges on the portion of the debt that is paid within 30 days after the date on which interest begins to accrue.

(2) Administrative costs will be assessed if the debt is referred to Treasury for cross-servicing.

(3) Deductions by administrative offset normally begin prior to the time for assessment of a penalty. Therefore, a penalty charge will not be assessed unless deductions occur more than 90 days from the due date in the bill for collection or demand letter.

(o) *Non-waiver of right by payment.* An employee's payment under protest of all or any portion of a debt does not waive any rights that the employee may have under either the procedures in this section or any other provision of law.

(p) *Refunds.* USAID will promptly refund to the employee amounts paid or deducted pursuant to this section, the recovery of which is subsequently waived or otherwise found not owing to the United States. Refunds do not bear interest unless specifically authorized by law.

(q) *Time limit for commencing recovery by salary setoff.* USAID will not initiate salary offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the right to collect the debt were not known and could not have been known through the exercise of reasonable care by the Government official responsible for discovering and collecting such debts.

§ 213.23 Salary offset when USAID is not the creditor agency.

(a) USAID will use salary offset against one of its employees that is indebted to another agency if requested to do so by that agency. Such a request must be accompanied by a certification by the requesting agency that the person owes the debt (including the amount) and that the procedural requirements of 5 U.S.C. 5514 and 5 CFR part 550, subpart K, have been met. The creditor agency must also advise USAID of the number of installments

to be collected, the amount of each installment, and the commencement date of the first installment, if a date other than the next established pay period.

(b) Requests for salary offset must be sent to the Chief Financial Officer, Office of Financial Management (M/FM), United States Agency for International Development, Ronald Reagan Building , 1300 Pennsylvania Avenue NW., Washington, DC 20523–4601.

(c) *Processing of the claim by USAID*—(1) *Incomplete claims*. If USAID receives an improperly completed request, the requesting (creditor) agency will be requested to supply the required information before any salary offset can be taken.

(2) *Complete claims*. If the claim procedures in paragraph (a) of this section have been properly completed, deduction will begin on the next established pay period. USAID will not review the merits of the creditor agency's determinations with respect to the amount or validity of the debt as stated in the debt claim form. USAID will not assess a handling or any other related charge to cover the cost of its processing the claim.

(d) *Employees separating from USAID before a debt to another agency is collected*—(1) *Employees separating from Government service*. If an employee begins separation action before USAID collects the total debt due the creditor agency, the following actions will be taken:

(i) To the extent possible, the balance owed the creditor agency will be liquidated from subsequent payments of any nature due the employee from USAID in accordance with § 213.22;

(ii) If the total amount of the debt cannot be recovered, USAID will certify to the creditor agency and the employee the total amount of USAID's collection; and

(iii) If USAID is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, the Foreign Service Retirement Fund, or other similar payments, it will provide such information to the creditor agency so that it can file a certified claim against the payments.

(2) *Employees who transfer to another Federal agency*. If an USAID employee transfers to another Federal agency before USAID collects the total amount due the creditor agency, USAID will certify the total amount of the collection made on the debt. It is the responsibility of the creditor agency to ensure that the collection is resumed by the new employing agency.

Subpart D—Compromise of Debts

§ 213.24 General.

USAID may compromise claims for money or property where the principal balance of a claim, exclusive of interest, penalty and administrative costs, does not exceed $100,000. Where the claim exceeds $100,000, the authority to accept the compromise rests solely with DOJ. The CFO may reject an offer of compromise in any amount. Where the claim exceeds $100,000 and USAID recommends acceptance of a compromise offer, it will refer the claim with its recommendation to DOJ for approval. The referral will be in the form of the Claims Collection Litigation Report (CCLR) and will outline the basis for USAID's recommendation. USAID refers compromise offers for claims in excess of $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530, unless otherwise provided by Department of Justice delegations or procedures

§ 213.25 Standards for compromise.

(a) USAID may compromise a claim pursuant to this section if USAID cannot collect the full amount because the debtor does not have the financial ability to pay the full amount of the debt within a reasonable time, or the debtor refuses to pay the claim in full and the Government does not have the ability to enforce collection in full within a reasonable time by enforced collection proceedings. In evaluating the acceptability of the offer, the CFO may consider, among other factors, the following:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor;

(5) The availability of assets or income which may be realized by enforced collection proceedings; or

(6) The applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection.

(b) USAID may compromise a claim, or recommend acceptance of a compromise to DOJ, where there is significant doubt concerning the Government's ability to prove its case in court for the full amount of the claim, either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases will fairly reflect the probability of prevailing on the legal issues involved, considering fully the availability of witnesses and other evidentiary data required to support the Government's claim. In determining the litigative risks involved, USAID will give proportionate weight to the likely amount of court costs and attorney fees the Government may incur if it is unsuccessful in litigation.

(c) USAID may compromise a claim, or recommend acceptance of a compromise to DOJ, if the cost of collection does not justify the enforced collection of the full amount of the debt. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, taking into consideration the time it will take to effect collection. Costs of collection may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collection justifies enforced collection of the full amount, USAID may consider the positive effect that enforced collection of the claim may have on the collection of other similar claims.

(d) To assess the merits of a compromise offer, USAID may obtain a current financial statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income and expense.

(e) Statutory penalties, forfeitures or debts established as an aid to enforcement and to compel compliance may be compromised where the CFO determines that the Agency's enforcement policy, in terms of deterrence and securing compliance (both present and future), will be adequately served by accepting the offer.

§ 213.26 Payment of compromised claims.

The CFO normally will not approve a debtor's request to pay a compromised claim in installments. However, where the CFO determines that payment of a compromise by installments is necessary to effect collection, a debtor's request to pay in installments may be approved.

§ 213.27 Joint and several liability.

When two or more debtors are jointly and severally liable, collection action will not be withheld against one debtor until the other or others pay their proportionate share. The amount of a compromise with one debtor is not precedent in determining compromises from other debtors who have been determined to be jointly and severally liable on the claim.

§ 213.28 Execution of releases.

Upon receipt of full payment of a claim or the amount compromised, USAID will prepare and execute a release on behalf of the United States. In the event a mutual release is not executed when a debt is compromised, unless prohibited by law, the debtor is still deemed to have waived any and all claims and causes of action against USAID and its officials related to the transaction giving rise to the compromised debt.

Subpart E—Suspension or Termination of Collection Action

§ 213.29 Suspension—general.

The CFO may suspend or terminate the Agency's collection actions on a debt where the outstanding debt principal does not exceed $100,000. Unless otherwise provided by DOJ delegations or procedures, the CFO refers requests for suspension of debts exceeding $100,000 to the Commercial Litigation Branch, Civil Division, Department of

Justice, for approval. If prior to referral to DOJ, USAID determines that a debt is plainly erroneous or clearly without legal merit, the agency may terminate collection activity regardless of the amount involved without obtaining DOJ concurrence. The CFO may waive the assessment of interest, penalty charges and administrative costs during the period of the suspension. Suspension will be for an established time period and generally will be reviewed at least every six months to ensure the continued propriety of the suspension.

§ 213.30 Standards for suspension.

(a) The CFO may suspend collection action on a debt when:

(1) The debtor cannot be located;

(2) The debtor's financial condition is expected to improve; or

(3) The debtor has requested a waiver or review of the debt.

(b) Based on the current financial condition of the debtor, the CFO may suspend collection activity on a debt when the debtor's future prospects justify retention of the claim for periodic review, and:

(1) The applicable statute of limitations has not expired; or

(2) Future collection can be effected by offset, notwithstanding the 10-year statute of limitations for administrative offsets; or

(3) The debtor agrees to pay interest on the debt and suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date.

(c) The CFO will suspend collection activity during the time required for waiver consideration or administrative review prior to agency collection of a debt if the statute under which the request is sought prohibits USAID from collecting the debt during that time. The CFO will ordinarily suspend collection action during the pendency of his consideration of a waiver request or administrative review where statute and regulation preclude refund of amounts collected by the Agency should the debtor prevail.

(d) The CFO may suspend collection activities on debts of $100,000 or less during the pendency of a permissive waiver or administrative review when there is no statutory requirement where he determines that:

(1) There is a reasonable possibility that waiver will be granted and the debtor may be found not owing the debt (in whole or in part);

(2) The Government's interest is protected, if suspension is granted, by the reasonable assurance that the debt can be recovered if the debtor does not prevail; or

(3) Collection of the debt will cause undue hardship to the debtor.

(e) The CFO will decline to suspend collection where he determines that the request for waiver or administrative review is frivolous or was made primarily to delay collection.

§ 213.31 Termination—general.

The CFO may terminate collection actions including accrued interest, penalty and administrative costs, where the debt principal does not exceed $100,000. If the debt exceeds $100,000, USAID obtains the approval of DOJ in order to terminate further collection actions. Unless otherwise provided for by DOJ regulations or procedures, requests to terminate collection on debts in excess of $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval.

§ 213.32 Standards for termination.

A debt may be terminated where the CFO determines that:

(a) The Government cannot collect or enforce collection of any significant sum from the debtor, having due regard for available judicial remedies, the debtor's ability to pay, and the exemptions available to the debtor under State and Federal law;

(b) The debtor cannot be located, there is no security remaining to be liquidated, and the prospects of collecting by offset are too remote to justify retention of the claim;

(c) The cost of further collection action is likely to exceed the amount recoverable;

(d) The claim is determined to be legally without merit or enforcement of the debt is barred by any applicable statute of limitations;

(e) The evidence necessary to prove the claim cannot be produced or the

necessary witnesses are unavailable and efforts to induce voluntary payment have failed; or

(f) The debt against the debtor has been discharged in bankruptcy.

§ 213.33 Permitted actions after termination of collection activity.

Termination of collection activity ceases active collection of the debt. Termination does not preclude the agency from retaining a record of the account for purposes of:

(a) Selling the debt if the CFO determines that such sale is in the best interests of USAID;

(b) Pursuing collection at a subsequent date in the event there is a change in the debtor's status or a new collection tool becomes available;

(c) Offsetting against future income or assets not available at the time of termination of collection activity; or

(d) Screening future applicants for prior indebtedness.

§ 213.34 Debts that have been discharged in bankruptcy.

USAID generally terminates collection activity on a debt that has been discharged in bankruptcy regardless of the amount. USAID may continue collection activity, however, subject to the provisions of the Bankruptcy Code for any payments provided under a plan of reorganization. The CFO will seek legal advice by the General Counsel's office if he believes that any claims or offsets may have survived the discharge of a debtor.

Subpart F—Discharge of Indebtedness and Reporting Requirements

§ 213.35 Discharging indebtedness—general.

Before discharging a delinquent debt (also referred to as a close out of the debt), USAID will make a determination that collection action is no longer warranted and request that litigation counsel release any liens of record securing the debt. Discharge of indebtedness is distinct from termination or suspension of collection activity and is governed by the Internal Revenue Code. When collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date in accordance with the standards set forth in this part. When a debt is discharged in full or in part, further collection action is prohibited and USAID must terminate debt collection action.

§ 213.36 Reporting to IRS.

Upon discharge of an indebtedness, USAID will report the discharge to the IRS in accordance with the requirements of 26 U.S.C. 6050P and 26 CFR 1.6050P–1. USAID may request FMS to file such a discharge report to the IRS on the agency's behalf.

Subpart G—Referrals to the Department of Justice

§ 213.37 Referrals to the Department of Justice.

(a) The CFO, through the FMS cross-servicing agreement and by direct action, refers to DOJ for litigation all claims on which aggressive collection actions have been taken but which could not be collected, compromised, suspended or terminated. Referrals are made as early as possible, consistent with aggressive agency collection action, and within the period for bringing a timely suit against the debtor. Unless otherwise provided by DOJ regulations or procedures, USAID refers for litigation debts of more than $2,500 but less than $1,000,000 to the Department of Justice's Nationwide Central Intake Facility as required by the Claims Collection Litigation Report (CCLR) instructions. Debts of over $1,000,000 shall be referred to the Civil Division at the Department of Justice.

(b) The CFO will clearly indicate on the CCLR the actions the DOJ should take on the referred claim.

Subpart H—Mandatory Transfer of Delinquent Debt to Financial Management Service (FMS) of the Department of Treasury

§ 213.38 Mandatory transfer of debts to FMS—general.

(a) USAID's procedures call for transfer of legally enforceable debt to FMS 90 days after the Bill for Collection or

demand letter is issued. A debt is legally enforceable if there has been a final agency determination that the debt, in the amount stated, is due and there are no legal bars to collection action. A debt is not considered legally enforceable for purposes of mandatory transfer to FMS if a debt is the subject of a pending administrative review process required by statute or regulation and collection action during the review process is prohibited.

(b) Except as set forth in paragraph (a) of this section, USAID will transfer any debt covered by this part that is more than 180 days delinquent to FMS for debt collection services. A debt is considered 180 days delinquent for purposes of this section if it is 180 days past due and is legally enforceable.

§213.39 Exceptions to mandatory transfer.

USAID is not required to transfer a debt to FMS pursuant to §213.37(b) during such period of time that the debt:

(a) Is in litigation or foreclosure;

(b) Is scheduled for sale;

(c) Is at a private collection contractor;

(d) Is at a debt collection center if the debt has been referred to a Treasury-designated debt collection center;

(e) Is being collected by internal offset; or

(f) Is covered by an exemption granted by Treasury

PART 214—ADVISORY COMMITTEE MANAGEMENT

Subpart A—General

Sec.

214.1 Purpose.
214.2 Definition of advisory committee.
214.3 A.I.D. Advisory Committee Management Officer.

Subpart B—Establishment of Advisory Committees

214.11 Establishment and chartering requirements.
214.12 Considerations in membership selection.
214.13 Responsibilities within A.I.D.
214.14 Charter revision.
214.15 Changes in membership.

Subpart C—Termination and Renewal of Advisory Committees

214.21 Termination and renewal provisions.
214.22 Responsibilities within A.I.D.

Subpart D—Operation of Advisory Committees

214.31 A.I.D. Advisory Committee Representative.
214.32 Calling of advisory committee meetings.
214.33 Notice of meetings.
214.34 Public participation.
214.35 Minutes of meetings.
214.36 Records of advisory committees.
214.37 Public access to committee records.
214.38 Submission of reports to the Library of Congress.

Subpart E—Administration of Advisory Committees

214.41 Support services.
214.42 Uniform pay guidelines.
214.43 Agency records.
214.44 Annual review and reports.

Subpart F—Administrative Remedies

214.51 Administrative review of denial for public access to records.
214.52 Administrative review of other alleged non-compliance.

AUTHORITY: Section 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381); sec. 8(a), Federal Advisory Committee Act, Pub. L. 92–463; and Executive Order 11769.

SOURCE: 40 FR 33205, Aug. 7, 1975, unless otherwise noted.

Subpart A—General

§214.1 Purpose.

The regulations in this part prescribe administrative guidelines and management controls for A.I.D. advisory committees. Federal Advisory Committees are governed by the provisions of the Federal Advisory Committee Act, Pub. L. 92–463 (effective January 5, 1973, hereinafter referred to as the Act); Executive Order No. 11769 (February 21, 1974) entitled ''Committee Management;'' OMB Circular A–63 (March 27, 1974, as amended).

§214.2 Definition of advisory committee.

(a) The term *advisory committee* is defined in section 3(2) of the Act.

(b) In general, this definition includes any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or sub-group thereof, which is formed or utilized by the Agency for obtaining advice or recommendations, and which is not composed wholly of full-time Federal employees.

§ 214.3 A.I.D. Advisory Committee Management Officer.

The Advisory Committee Management Officer is responsible to the Administrator for the establishment of uniform administrative guidelines and management controls which must be consistent with directives of the Director of the OMB under sections 7 and 10 of the Act.

Subpart B—Establishment of Advisory Committees

§ 214.11 Establishment and chartering requirements.

Provisions governing the establishment and chartering of Advisory Committees are contained in section 9 of the Act and paragraph 6 of OMB Circular A–63. In summary, these requirements include the following:

(a) Where establishment of an Advisory Committee is not specifically authorized by statute or by the President, the need for a new A.I.D. advisory committee is determined by the A.I.D. Administrator, in accordance with the guidelines set forth in section 5(b) of the Act. The determination also includes a certification that creation of the Committee is in the public interest and a description of the nature and purpose of the Committee.

(b) After written consultation to the OMB Secretariat and notification that the establishment of the Committee would be in accord with the Act, A.I.D. publishes the Administrator's Determination in the FEDERAL REGISTER at least fifteen (15) days prior to the filing of the Committee's Charter.

(c) Each advisory committee established or used by A.I.D. is required to file a charter with the A.I.D. Administrator, the House International Relations Committee, and the Senate Foreign Relations Committee, before meeting or taking any action.

(d) Advisory committee charters shall include the following information:

(1) Committee's official title;

(2) Committee's objectives and scope of activity;

(3) Period of time necessary for the committee to carry out its purposes;

(4) Agency official to whom the committee reports;

(5) Agency responsible for providing necessary support for the committee;

(6) Description of duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(7) Estimated annual operating costs in dollars and man-years for the committee;

(8) Estimated number and frequency of committee meetings;

(9) Committee's termination date; and

(10) Date the charter is filed.

(e) A copy of the charter is required to be sent to the Library of Congress, Exchange and Gift Division, Federal Advisory Committee Desk, Washington, DC 20540.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54777, Nov. 26, 1975]

§ 214.12 Considerations in membership selection.

Membership is to be fairly balanced in terms of points of view represented and functions to be performed. Appropriate attention is also given to factors of sex, race, creed, national origin, and religion.

§ 214.13 Responsibilities within A.I.D.

(a) The A.I.D. Office or Bureau seeking establishment of a new A.I.D. advisory committee:

(1) Justifies the need for the advisory committee to the satisfaction of the A.I.D. Advisory Committee Management Officer, the A.I.D. Administrator, and the OMB Secretariat.

(2) Prepares, clears with the Advisory Committee Management Officer and the General Counsel, and submits to the Administrator all documentation necessary to establish or use the advisory committee.

(b) The Advisory Committee Management Officer with assistance as appropriate from the General Counsel and the Office of Legislative Affairs:

(1) Appraises the need for the proposed advisory committee;

(2) Assures that the requirements of the Act and OMB guidelines have been followed;

(3) If satisfied with paragraphs (b) (1) and (2) of this section, clears the proposal for submission to the Administrator and obtains OMB concurrence in Agency actions to establish advisory committees;

(4) Maintains the agency file of approved charters and formal determinations;

(5) Publishes approved charters in the Agency's internal directives system;

(6) Reviews proposed committee membership for compliance with legal requirements, including conflict of interest;

(7) Assures publication of the Administrator's formal determinations in the FEDERAL REGISTER; and

(8) Transmits approved advisory committee charters to the House International Relations Committee, the Senate Foreign Relations Committee, and the Library of Congress.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54778, Nov. 26, 1975]

§ 214.14 Charter revision.

(a) Sponsoring A.I.D. Bureaus and Offices initiate revisions to advisory committee charters, as necessary, to reflect current information regarding scope, duties, etc.

(b) Charter revision requires clearances by the advisory committee, the A.I.D. Advisory Committee Management Officer and the General Counsel; consultation with OMB; approval by the A.I.D. Administrator, and notification of the change to the FEDERAL REGISTER, Congressional committees, and the Library of Congress.

§ 214.15 Changes in membership.

Changes in membership of advisory committees are proposed by the Bureau of Office through which the committee reports, are cleared by the Advisory Committee Management Officer and the Office of the General Counsel, and are approved by the A.I.D. Administrator.

Subpart C—Termination and Renewal of Advisory Committees

§ 214.21 Termination and renewal provisions.

Provisions governing the termination and renewal of advisory committees are contained in section 14 of the Act and paragraph 7 of OMB Circular A–63, as amended. As related to A.I.D.-established non-statutory committees, these provisions mean that:

(a) Each such committee which was in existence on January 5, 1973, shall terminate by January 5, 1975, unless it is renewed by the A.I.D. Administrator prior to the latter date.

(b) Each such committee established after January 5, 1973, shall terminate not later than two years after its establishment, unless it is renewed by the A.I.D. Administrator prior to its termination date.

(c) Any committee which is renewed shall continue for not more than two years unless, prior to the expiration of that period, it is renewed.

(d) Renewal requires advance approval of the Administrator in accordance with section 5(c) which requires application of the criteria set forth in section 5(b) of the Act; notification to the OMB Secretariat not more than sixty (60) days nor less than thirty (30) days before the expiration date, and concurrence by the Secretariat; publication of a notice of the renewal; and the filing of a new advisory committee charter with the appropriate House and Senate Committees and to the Library of Congress.

(e) Notification to the OMB Secretariat shall include:

(1) The A.I.D. Administrator's determination that renewal is necessary and is in the public interest;

(2) The reasons for his determination;

(3) The Agency's plan to attain or maintain balanced membership of the committee; and

(4) An explanation of why the committee's functions cannot be performed by the Agency or by an existing advisory committee.

§ 214.22 Responsibilities within A.I.D.

Responsibilities within A.I.D. for the renewal of advisory committees are as follows:

(a) The Office or Bureau through which the advisory committee reports: prepares, clears with the Advisory Committee Management Officer and the General Counsel, and submits to the Administrator all documentation necessary for committee renewal sixty-five (65) days prior to the expiration date of the Committee.

(b) The Office of General Counsel assists in the preparation of charters; reviews and clears the proposal for conformity with the Act and other requirements; and assures publication of the Administrator's determination of renewal in the FEDERAL REGISTER.

(c) The Office of Legislative Affairs transmits approved advisory committee charters to the House and Senate Committees and to the Library of Congress.

Subpart D—Operation of Advisory Committees

§ 214.31 A.I.D. Advisory Committee Representative.

(a) For each advisory committee used by A.I.D., the Administrator designates an A.I.D., employee to serve as the A.I.D. Advisory Committee Representative.

(b) The designated A.I.D. employee performs functions required by section 10 of the Act and assigned herein. Such functions include:

(1) Calling, or giving advance approval to, advisory committee meetings;

(2) Approving an agenda for each meeting;

(3) Making recommendations on proposals to close meetings, or parts of meetings, to the public; and clearing such recommendation with the Advisory Committee Management Officer and the General Counsel for decisions by the Administrator;

(4) Assuring that advance notices of each meeting (whether open or closed) are published in the FEDERAL REGISTER, provided through other means such as press releases and direct mail, and provided to the Advisory Committee Management Officer.

(5) Assuring that open meetings are accessible to the public;

(6) As specified by the Administrator, chairing or attending each meeting;

(7) Determining the number of committee members necessary to be present at any meeting for the transaction of committee business;

(8) Adjourning any meeting, whenever he determines adjournment to be in the public interest;

(9) Assuring that minutes are kept of each advisory committee meeting and of the meetings of sub-committees and sub-groups, and that such minutes are certified for accuracy by the chairman or presiding officer of the committee; and

(10) Assuring that, subject to section 552 of title 5 United States Code, the documents of the advisory committee are made available for public inspection and copying.

(11) Maintaining a current list of members of the advisory committee, and furnishing membership information to the A.I.D. Advisory Committee Management Officer on request.

§ 214.32 Calling of advisory committee meetings.

(a) No advisory committee is to hold any meetings except at the call, or with the advance approval, of the designated A.I.D. Advisory Committee Representative.

(b) Each advisory committee meeting is conducted in accordance with an agenda approved by the designated A.I.D. Advisory Committee Representative.

(1) The agenda lists the matters to be considered at the meeting and indicates whether any portion of the meeting is to be closed to the public in accordance with subsection (c) of section 552(b) of title 5, United States Code.

(2) Copies of the agenda are distributed to members of the committee prior to the date of the meeting and are included in the official records of the Advisory Committee.

[40 FR 33205, Aug. 7, 1975, as amended at 42 FR 26975, May 26, 1977]

§ 214.33 Notice of meetings.

(a) Notice of each advisory committee meeting (whether the meeting is open or closed) shall be published in the FEDERAL REGISTER at least fifteen (15) days before the date of the meeting, and should also be provided through other means such as newspaper advertisements, press releases, and direct mail.

(1) Exceptions to the requirement for public notice are granted only for reasons of national security as determined by the Director, OMB and are requested and justified by the Administrator, A.I.D. at least thirty (30) days prior to the meeting.

(2) Exceptions to the fifteen (15) day advance publication requirement are granted in emergency situations as determined by the Administrator, A.I.D. In such situations, the facts on which exception is based are to be included in the Notice of the meeting.

(3) Requests for exceptions under paragraphs (a) (1) and (2) of this section are prepared by the Advisory Committee Representative and are cleared by the Advisory Committee Management Officer and the General Counsel prior to submission to the Administrator.

(b) Notices include the name of the advisory committee; the time of the meeting; the purposes of the meeting; a statement regarding the extent to which the public will be permitted to attend and, if any portion is closed, why such closure or partial closure is necessary, including citation of the appropriate exemption permitted under subsection (c) of 5 U.S.C. 552b. Thus, A.I.D. Notices of Advisory Committee meetings normally state that the meeting is open to the public and include the place of the meeting; and instructions for gaining access to open meetings which are held in a ''secured'' building.

(c) Both formal and informal notices are prepared by the A.I.D. Advisory Committee Representative; formal notices to be published in the FEDERAL REGISTER are cleared with the Advisory Committee Management Officer and are sent to the Office of the General Counsel at least thirty-two (32) days before the scheduled meeting date.

(d) Copies of all public notices are provided to the Advisory Committee Management Officer.

[40 FR 33205, Aug. 7, 1975, as amended at 40 FR 54778, Nov. 26, 1975; 42 FR 26975, May 26, 1977]

§ 214.34 Public participation.

(a) Each advisory committee meeting is to be open to the public except where:

(1) The Director, OMB, has determined that public notice of a meeting would be inconsistent with national security; or

(2) The Administrator, AID, has formally determined that a meeting, or portion of a meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.

(b) Advisory committee requests to close all or part of a meeting or a series of meetings are to include the reasons for proposed closure, citing specific exceptions involved under subsection (c) of section 552b of Title 5, United States Code. Such requests are submitted by the AID Advisory Committee Representative, through the Advisory Committee Management Officer and the General Counsel to the Administrator at least forty (40) days before the scheduled date of the meeting.

(c) The Administrator's determination is to be in writing and is to contain a brief statement of the reasons for closing the meeting (or portion thereof). The determination itself is to be made available to the public on request.

(d) When all or part of an advisory committee meeting is closed and detailed minutes are not to be made available in their entirety to the public, the Committee shall prepare and make available to the public within thirty (30) days of the close of the meeting a summary of its activities and related matters which are informative to the public consistent with the policy of 5 U.S.C. 552(b). Notice of availability of such a summary shall be incorporated in the notice of the meeting published in the FEDERAL REGISTER.

(e) To facilitate public participation in advisory committee meetings which

are to be open or partially open to the public:

(1) Meetings are to be held at a reasonable time and at a place that is accessible to members of the public.

(2) The size of the meeting room is to be large enough to accommodate the Advisory Committee, its staff, and those members of the public who might be expected to attend.

(3) Any member of the public is permitted to file a written statement with the committee, before or after the meeting.

(4) Interested persons may be permitted to present oral statements at the meeting in accordance with procedures established by the committee, and to the extent time available for the meeting permits.

(5) Other participation by members of the public is not permitted, except in accordance with procedures established by the committee.

[40 FR 33205, Aug. 7, 1975, as amended at 42 FR 26975, May 26, 1977]

§ 214.35 Minutes of meetings.

(a) Minutes are to be kept of each meeting of each advisory committee and its formal and informal sub-groups.

(b) The chairman or presiding officer designates a member or other person to keep the minutes.

(c) The minutes are to include:

(1) The time and place of the meeting;

(2) A list of members, staff, and A.I.D. employees attending;

(3) A complete summary of matters discussed and conclusions reached;

(4) Copies of all reports received, issued, or approved;

(5) The extent to which the meeting was open to the public; and

(6) The extent of public participation, including a list of those who presented oral or written statements and a estimate of the number of those who attended the meeting.

(d) The chairman or presiding officer of the advisory committee is to certify to the accuracy of the minutes. The certification is to indicate that ''the minutes are an accurate and complete summary of the matters discussed and conclusions reached at the meeting held on (date(s)).''

§ 214.36 Records of advisory committees.

(a) The A.I.D. Advisory Committee Representative is to maintain the records of the advisory committee in a location known to the A.I.D. Advisory Committee Management Officer.

(b) Such records are to include the reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, and other documents which were made available to, or prepared for or by, the advisory committee.

(c) Advisory committee records are maintained and disposed of according to procedures prescribed in the Agency's Handbook 21—*Communications,* Part III, Records Filing and Disposition Manual.

§ 214.37 Public access to committee records.

Records maintained in accordance with § 214.36 are subject to the Freedom of Information Act, 5 U.S.C. 552 *et seq.* and, thus, are available for public inspection and copying pursuant to A.I.D. Regulation 12—Public Information (22 CFR part 212), subject to the general oversight of the A.I.D. Advisory Committee Management Officer.

(Sec. 621, Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381); sec. 8(a) Federal Advisory Committee Pub. L. 92–463; E.O. 11686)

[40 FR 54778, Nov. 26, 1975]

§ 214.38 Submission of reports to the Library of Congress.

(a) Each advisory committee is to file with the Library of Congress eight copies of each of its reports, except where the report falls within an exemption listed in 5 U.S.C. 552(b) or relates to a meeting which was closed for reasons of national security.

(b) The A.I.D. Advisory Committee Representative provides copies of committee reports to the Office of Legislative Affairs for transmittal to the Library of Congress; and sends a copy to the A.I.D. Advisory Committee Management Officer for inclusion in the Agency's central file on advisory committees.

(c) As appropriate, the A.I.D. Advisory Commmittee Representative may also send copies of background papers

and other advisory committee documents to Office of Legislative Affairs for transmittal to the Library of Congress.

Subpart E—Administration of Advisory Committees

§ 214.41 Support services.

(a) A.I.D. provides support services for advisory committees which are established by or report to the Agency, unless the establishing authority provides otherwise.

(b) Within A.I.D., support services are provided by and charged to the allotment of the A.I.D. office or bureau through which the advisory committee reports, and are coordinated by the designated A.I.D. Advisory Committee Representative.

(c) Support services include staff, quarters, supplies, and funds.

§ 214.42 Uniform pay guidelines.

(a) A.I.D. follows OMB/CSC guidelines in section 11 of OMB Circular A–63 in establishing rates of pay for advisory committee members, staffs, and consultants.

(b) In summary, A.I.D. policy regarding compensation for advisory committee members is as follows:

(1) Advisory committee members who are not employed by the U.S. Government ordinarily serve without compensation. However, they may be reimbursed for travel and related expenses of invitational travel under the provisions of A.I.D. travel regulations.

(2) If committee members are appointed as A.I.D. consultants or experts, their compensation shall be fixed in accordance with CSC guidelines and regulations, and the general agreement between CSC and A.I.D.

(3) Expenses of committee members are charged to the allotments of the A.I.D. office or bureau through which the advisory committee reports.

§ 214.43 Agency records.

(a) The A.I.D. Advisory Committee Management Office maintains the Agency's Official central files on the nature functions, and operations of each A.I.D. advisory committee. Central files contain the following information with respect to each A.I.D. advisory committee:

(1) Original copy of Advisory Committee Charter filed with the Administrator;

(2) Official records copy of formal determinations by the A.I.D. Administrator with respect to the establishment renewal, operation, and termination of the committee;

(3) Annual reports of committee activity;

(4) Designations of Advisory Committee Representatives;

(5) Location of the official files of the Advisory Committee.

(b) Each A.I.D. Advisory Committee Representative maintains individual advisory committee files at a location known to the A.I.D. Advisory Committee Management Officer. These files contain the following information:

(1) Copies of documents establishing, renewing, and terminating the committee;

(2) Copies of committee charters filed with the A.I.D. Administrator;

(3) Fiscal records which fully disclose the disposition of any funds made available to the committee;

(4) Advisory committee records described above in § 214.36(b) (*i.e.*, the reports, transcripts, minutes, appendices, and other documents which were made available to, or prepared for or by, the committee).

(c) The A.I.D. Advisory Committee Management Officer, the A.I.D. Auditor General, the OMB Secretariat, and the Comptroller General shall have access to these records.

(d) Personnel documentation required by CSC and Agency regulations shall be maintained in the official personnel records of the Office of Personnel and Manpower.

§ 214.44 Annual review and reports.

(a) A.I.D. conducts an annual comprehensive review of advisory committees under instructions provided by OMB Circular A–63, section 10, as amended and submits required data to OMB on the prescribed format, by November 30 of each year.

(b) A.I.D. reports monthly to OMB on committee terminations or other significant changes in continuing A.I.D. Advisory Committees.

(c) A.I.D. also provides information to the General Services Administration (GSA) for an annual report to Congress. The Agency report is due on February 1 of each year; includes only those advisory committees established by or reporting to A.I.D.; and is submitted on a form prescribed by GSA.

(d) Within A.I.D., the Advisory Committee Management Officer collects required information from the A.I.D. Advisory Committee Representatives; appraises advisory committee activities for the Administrator; and prepares the Agency's reports for the Administrator.

Subpart F—Administrative Remedies

§ 214.51 Administrative review of denial for public access to records.

Any person whose request for access to an advisory committee document is denied may seek administrative review in accordance with § 212.36(c) of A.I.D. Regulation 12, 22 CFR 212.36(c).

§ 214.52 Administrative review of other alleged non-compliance.

With regard to other alleged non-compliance with the Act, OMB Circular A–63, or this regulation, the following procedures are to be used:

(a) Advisory committee members or other aggrieved individuals or organizations must file a written complaint which contains specific information regarding the alleged non-compliance.

(b) The written complaint must be addressed to the Administrator or Deputy Administrator, Agency for International Development, 21st and Virginia Avenue, NW., Washington, DC 20523.

(c) The complaint must be filed within thirty (30) days after the date of the alleged non-compliance.

(d) The complaint will be considered by the Administrator or Deputy Administrator with the advice and assistance of the General Counsel and the A.I.D. Advisory Committee Management Office.

(e) Written notice of the disposition of the complaint shall be provided to the complainant within thirty (30) days of the date the complaint was received by the Agency.

PART 215—REGULATIONS FOR IMPLEMENTATION OF PRIVACY ACT OF 1974

Sec.
215.1 Purpose and scope.
215.2 Definitions.
215.3 Procedures for requests pertaining to individual records in a system of records.
215.4 Times, places, and requirements for indentification of individuals making requests.
215.5 Access to requested information by individuals.
215.6 Special procedures: Medical records.
215.7 Request for correction or amendment of record.
215.8 Agency review of request for amendment of record.
215.9 Appeal of initial adverse agency determination.
215.10 Disclosure of record to person other than the individual to whom it pertains.
215.11 Fees.
215.12 Penalties and remedies.
215.13 General exemptions.
215.14 Specific exemptions.

AUTHORITY: Sec. 621, Foreign Assistance Act of 1961, as amended, (22 U.S.C. 2381; 75 Stat. 445); secs. 3,4, Administrative Procedure Act (5 U.S.C. 553; 60 Stat. 237); Privacy Act of 1974 (Pub. L. 93–579; 5 U.S.C. 552a; 88 Stat. 1896).

SOURCE: 57 FR 38277, Aug. 24, 1992, unless otherwise noted.

§ 215.1 Purpose and scope.

(a) It is the purpose and objective of the International Development Cooperation Agency and the Agency for International Development to collect information, revise personal data collection forms or processes, and maintain Agency records in a manner that will prevent an unwarranted invasion of privacy of those individuals who are the subject of Agency records.

(b) These regulations establish the procedures by which an individual may obtain notification of the existence of Agency records pertaining to that individual, gain access to those records, request an amendment or correction to the records, and appeal adverse decisions to requests for amendment or correction of Agency records.

(c) The Agency separately states and publishes in the FEDERAL REGISTER a public notice of the existence and character of systems maintained by the Agency, pursuant to the provisions of

sections (e)(4) and (e)(11) of the Privacy Act of 1974 (5 U.S.C. 552a; 88 Stat. 1896).

§215.2 Definitions.

(a) *Act* means the Privacy Act of 1974 (5 U.S.C. 552a; 88 Stat. 1896);

(b) *Agency* means the International Development Cooperation Agency or the Agency for International Development, its offices, bureaus, divisions, and posts abroad;

(c) *Amend* shall include the amendment of a record;

(d) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(e) *Maintain* includes maintain, collect, use or disseminate;

(f) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(g) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(h) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(i) *System of records* means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

§215.3 Procedures for requests pertaining to individual records in a system of records.

(a) Requests for notification of access to or amendment of Agency records contained in a system of records pertaining to an individual may be made in person or by mail as follows: For the International Development Cooperation Agency-Assistant Director for Administration, International Development Cooperation Agency, Room 4889 New State, 2201 C Street, NW., Washington, DC 20523 Attention: Privacy Liaison Officer. For the Agency for International Development-Privacy Liaison Officer, Agency for International Development, Room 4889 New State, 2201 C Street, NW., Washington, DC 20523.

(b) Such request should include information necessary to identify the record, e.g., the individual's full name, date of birth, place of birth, present mailing address, or system of record identification name and number, if known, and, to facilitate the retrieval of records contained in those systems of records which are retrieved by social security numbers, the social security number of the individual to whom the record pertains.

(c) With respect to a system of records which may be maintained by the Agency in offices outside the United States, an individual may inquire whether he or she is the subject of an Agency record or may request access to or amendment of such records by appearing in person or by writing to the Privacy Liaison Officer, Agency for International Development, at the overseas missions.

(d) The Assistant Director for Administration for requests to I.D.C.A. or the appropriate Privacy Liaison Officer for request to A.I.D., or their designees shall, within ten (10) working days of receipt of the request, furnish in writing to the requesting individual notice of the existence or nonexistence of any records described in the request.

§215.4 Times, places, and requirements for identification of individuals making requests.

(a) Individuals making personal requests for notification, access or contest may do so at the place designated in paragraph (a) of §215.3, which is open 9 a.m. to 5 p.m. daily, except Saturdays, Sundays, and legal public holidays.

(b) Individuals making personal requests for notification, access or contest at offices outside the United States may do so at the overseas missions during the regular business hours of those offices.

(c) An individual requesting such information in person shall provide such personal identification as is reasonable under the circumstances to verify the individual's identity; e.g. driver's license, employee identification card or medicare card. (The identification should contain a photograph of the individual.)

(d) An individual requesting such information by mail shall include in his or her request a signed notarized statement to verify his or her identity and which stipulates that the individual understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is punishable by a fine up to $5,000, as provided in section (i)(3) of the Act.

(e) Verification of identity as set forth in paragraphs (c) and (d) of this section shall not be required of individuals seeking access to records otherwise available to members of the public under the Freedom of Information Act (5 U.S.C. 552; 88 Stat. 1561).

(f) An individual who wishes to be accompanied by another person when reviewing a record shall furnish the Agency with a written statement authorizing discussion of his or her record in the presence of the accompanying person. Such statement need not contain any reasons for the access or for the accompanying person's presence.

§ 215.5 Access to requested information by individuals.

(a) Upon receipt of a request by an individual made in accordance with the provisions of § 215.3, such individual shall be granted access to any record pertaining to him or her which is contained in a system of records maintained by the Agency subject to exemptions discussed in §§ 215.13 and 215.14.

(b) Notwithstanding the provisions of paragraph (a) of this section, access will not be allowed an individual to information or records compiled by the Agency in reasonable anticipation of a civil or criminal action or proceeding.

(c) Whenever possible, access to requested records will be granted;

(1) Where the request is presented in person and the record is readily available, promptly upon receipt of the request for access, determination that access to the record may be granted, verification of the identity of the individual seeking access, and, where applicable, receipt of consent to discuss the record with a person accompanying the individual;

(2) Where the request is made by mail, the record will, whenever possible, be provided within ten (10) working days of receipt of the request.

(d) Where access to a record cannot reasonably be granted as provided in paragraphs (c)(1) and (2) of this section, the Agency will acknowledge in writing receipt of the request for access and indicate a reasonable time within which access to the record can be granted.

(e) Where no reasonable means exist for an individual to have access to his or her record in person, a copy of the record must be provided through the mail.

§ 215.6 Special procedures: Medical records.

If the Assistant Director for Administration or the Privacy Liaison Officer, determines that the release directly to the individual of medical records maintained by the Agency could have an adverse effect upon such individual, the Director/Officer will attempt to arrange an alternative acceptable to both the individual and Agency (such as the release of said information to a doctor named by the individual) in granting access to such record.

§ 215.7 Request for correction or amendment of record.

(a) An individual may request the Agency to correct or amend a record pertaining to him or her which the individual believes is not accurate, relevant, timely or complete.

(b) Such request must be in writing and must be presented, in person or by mail to the addresses listed in § 215.3(a).

(c) Such requests must set forth the following information:

(1) Identification of the system of records in which the particular record is maintained;

(2) The portion(s) of the record to be amended or corrected;

(3) The desired amendment or correction; and

(4) The reasons for the amendment or correction.

The request must be accompanied by evidence, documentation, or other information in support of the request.

(d) Assistance in preparing a request to amend a record may be obtained from the officials listed in §215.3(a).

§215.8 Agency review of request for amendment of record.

(a) The Agency will examine the information requested to be amended to determine its accuracy, timeliness, completeness, and its relevancy and necessity to accomplish a purpose of the Agency required to be accomplished by statute or by executive order.

(b) Within ten (10) working days after the receipt by the Assistant Director for Administration or the Privacy Liaison Officer, of a request made in accordance with this section, the Assistant Director for Administration or the Privacy Liaison Officer shall acknowledge in writing such receipt and shall, after examination in accordance with the provisions of paragraph (a) of this section, promptly either:

(1) Make any amendment of any portion thereof which the individual believes is not accurate, relevant, timely or complete, and notify the individual of the amendment made; or

(2) Inform the individual of the Agency's refusal to amend the record in accordance with the request, the reason(s) for the refusal, and the procedures established by the Agency for the individual to request a review of that refusal.

(c) If the Agency agrees with the individual's request to amend a record, in addition to proceeding as set forth in paragraph (b)(1) of this section, it shall promptly advise all previous recipients of the record of the fact that the amendment was made and the substance of the amendment where an accounting of disclosures has been made.

(d) If unusual circumstances prevent the completion of Agency action on the request to amend within 30 days after the receipt thereof by the Assistant Director for Administration or the Privacy Liaison Officer, the individual will be promptly advised of the delay, the reasons for the delay, and of the date by which the review is expected to be completed.

(e) If the Agency, after its initial examination of the record and the request for Amendment, disagrees with all or any part of the individual's request to amend it shall:

(1) To the extent the Agency agrees with any part of the individual's request to amend, proceed as described in paragraphs (b)(1) and (c) of this section;

(2) Advise the individual of its refusal and the reason(s) therefor;

(3) Inform the individual that he or she may request a further review by the Director or the Administrator, or their designees; and

(4) Describe the procedures for requesting such review, including the name and address of the official to whom the request should be directed.

(f) No part of these regulations shall be construed to permit:

(1) The alteration of evidence presented in the course of judicial, quasi-judicial or quasi-legislative proceedings;

(2) Collateral attack upon any matter which has been the subject of judicial or quasi-judicial action; or

(3) An amendment or correction which would be in violation of an existing statute, executive order or regulation.

§215.9 Appeal of initial adverse agency determination.

(a) An individual who disagrees with the denial or partial denial of his or her request to amend a record may file a request for review of such refusal within 60 days after the date of notification of the denial or partial denial.

(b) The request for review must be in writing and may be presented in person or by mail to:

Director, International Development Cooperation Agency, 2201 C Street, NW., Washington, DC 20523. Attention: Privacy Review Request.

Director, Office of External Affairs, Agency for International Development, 2201 C Street, NW., Washington, DC 20523. Attention: Privacy Review Request.

Both the envelope and the letter should be clearly marked: Attention: Privacy Review Request. Such request should

include any documentation, information or statements advanced for the amendment of the record, and a copy of the initial adverse determination.

(c) Upon receipt of the request for review, the Director or the Assistant Administrator, or an officer of the Agency designated in writing by the Director or Administrator, shall undertake an independent review of the initial determination.

(d) If someone other than the Director or the Assistant Administrator is designated to conduct the review, he or she shall be an officer who is organizationally independent of or senior to the officer or employee who made the initial determination.

(e) In conducting the review, the reviewing official, may at his or her option, request such additional information as is deemed necessary to establish that the record contains only that information which is accurate, timely, complete and necessary to assure fairness in any determination which may be made about the individual on the basis of the record.

(f) Within 30 days after receipt of the request for review, the Director, the Assistant Administrator, or the official designated to conduct the review, shall advise the individual of the Agency's final decision. If unusual circumstances prevent the completion of the review within the 30-day period, the Agency shall, prior to the expiration of the 30-day period, advise the individual in writing of the circumstances preventing the completion of such review and inform him or her of the date by which the review is expected to be completed.

(g) If the reviewing official determines that the record should be amended in accordance with the individual's request, the Agency shall:

(1) Amend the record accordingly;

(2) Advise the individual of the amendment; and

(3) Where an accounting of disclosures has been made, advise all previous recipients of the fact that the amendment was made and the nature of the amendment.

(h) If, after conducting the review, the reviewing official refuses to amend the record, in whole or in part, in accordance with the individual's request, Agency shall advise the individual:

(1) Of its refusal and the reasons therefor;

(2) Of the individual's right to file a concise statement of his or her reasons for disagreeing with the Agency's decision;

(3) Of the procedures for filing a statement of disagreement;

(4) That any such statement will be sent to anyone to whom the record is subsequently disclosed, together with a brief statement by the Agency summarizing its reasons for refusing to amend the record;

(5) That to the extent an accounting of disclose was maintained, prior recipients of the disputed record will be provided a copy of any statement of disagreement and of the Agency's statement summarizing its reasons for refusing to amend the record; and

(6) Of the individual's right to seek judicial review of the Agency's refusal to amend a record as provided for in section (g)(1)(a) of the Act.

§ 215.10 Disclosure of record to person other than the individual to whom it pertains.

(a) Subject to the conditions of paragraphs (b) and (c) of this section, the Agency shall not disclose any record which is contained in a system of records by any means of communication to any person or other agency who is not the individual to whom the record pertains.

(b) Upon written request or with prior written consent of the individual to whom the record pertains, the Agency may disclose any such record to a person or to another agency as requested or authorized.

(c) Notwithstanding the absence of written consent from the individual to whom the record pertains, the Agency may disclose any such record provided such disclosure is:

(1) To those officers and employees of the Agency who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use as defined in § 215.2;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 of the United States Code;

(5) To a recipient who has provided the Agency with adequate advance written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his or her designee, to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity authorized by law: Provided, The head of the agency or instrumentality has made a prior written request to the Assistant Administrator of Administration or the Privacy Liaison Officer, specifying the particular record and the law enforcement activity for which it is sought;

(8) To a responsible person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification will be transmitted to the last known address of such individual;

(9) To either House of Congress, or, to the extent of a matter within its jurisdiction, any committee or subcommittee, or joint committee of Congress, or subcommittee of such joint committee;

(10) To the Comptroller General, or any of his/her authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to an order of a court of competent jurisdiction or;

(12) To a consumer reporting agency in accordance with section 3711(f) of title 31.

§ 215.11 Fees.

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual.

(b) No fees shall be charged or collected for the following: Search for and retrieval of the records; review of the records; copying at the initiative of the Agency without a request from the individual; the first 100 pages; and first-class postage. However if special handling or other than first-class mail is requested or required, the costs shall be added to the basic fee.

(c) The copying fees prescribed in paragraph (a) of this section are:

Ten (10) cents per page. Twenty (20) cents per page of computer printout.

(d) Payment may be in the form of a check, bank draft on a bank in the United States, or postal money order payable to the Treasurer of the United States.

(e) A receipt for fees paid will be given only upon request.

(f) A copying fee totaling $15.00 or less shall be waived but the copying fees for contemporaneous requests by the same individual shall be aggregated to determine the total fee.

(g) A fee may be reduced or waived by the Privacy Liaison Officer.

§ 215.12 Penalties and remedies.

The provisions of the Act relating to penalties and remedies are summarized below:

(a) An individual may bring a civil action against the Agency when the Agency:

(1) Makes a determination not to amend a record in accordance with the individual's request;

(2) Refuses to comply with an individual's request pursuant to 5 U.S.C. 552a (d)(1);

(3) Fails to maintain a record concerning an individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and as a result thereof

a determination is made which is adverse to the individual; or

(4) Fails to comply with any other provision of section (d) of the Act in such a way as to have an adverse effect on an individual.

(b) The court may order the correction or amendment of the records, may enjoin the Agency from withholding the records, may order the Agency to produce any records improperly withheld, and may assess attorney's fees and costs.

(c) Where a court of competent jurisdiction makes a determination that the Agency action was willful or intentional with respect to 5 U.S.C. 552a (g)(1) (c) or (d), the United States shall be liable for actual damages of no less than $1,000, the costs of the action, and attorneys' fees.

(d) Criminal penalties may be imposed against an officer or employee of the Agency who willfully discloses material which he or she knows is prohibited from disclosure, or who maintains a system of records without complying with the notice requirements.

(e) Criminal penalties may be imposed against any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. The offenses enumerated in paragraphs (d) and (e) of this section are misdemeanors, with fines not to exceed $5,000.

§ 215.13 General exemptions.

(a) Pursuant to 5 U.S.C. 552a (j)(2), the Director or the Administrator may, where there is a compelling reason to do so, exempt a system of records within the Agency from any part of the Act, except subsections (b), (c) (1) and (2), (e)(4)(A) through (F), (e) (6), (7), (9), (10), and (11), and (i) thereof, if the system of records is maintained by the Agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of:

(1) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(2) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(3) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(b) Each notice of a system of records that is the subject of an exemption under this section will include a statement that the system has been exempted, the reasons therefore, and a reference to the FEDERAL REGISTER, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (j)(2) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(1) *Criminal Law Enforcement Records.* This system of records is to be exempted from sections (c) (3) and (4); (d); (e) (1), (2), and (3); (e) (4) (G), (H), and (I); (e) (5) and (8); (f), (g) and (h) of the Act. These exemptions are necessary to insure the proper functioning of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of the law enforcement procedures, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary bases of possible enforcement actions, to prevent interference with law enforcement proceeding, to avoid the disclosure of investigative techniques, and to avoid the endangering the law enforcement personnel.

(2) [Reserved]

§ 215.14 Specific exemptions.

(a) Pursuant to 5 U.S.C. 552a(k), the Director or the Administrator may, where there is a compelling reason to do so, exempt a system of records, from any of the provisions of subsections (c)

(3); (d); (e)(1); (e)(4) (G), (H), and (I); and (f) of the Act if a system of records is:

(1) Subject to the provisions of 5 U.S.C. 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of the Act: Provided, however, That if any individual is denied any right, privilege, or benefit to which he or she would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) Maintained in connection with providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056;

(4) Required by statute to be maintained and used solely as statistical records;

(5) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(b) Each notice of a system of records that is the subject of an exemption under 5 U.S.C. 552a(k) will include a statement that the system has been exempted, the reasons therefore, and a reference to the FEDERAL REGISTER, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (k) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(1) *Criminal Law Enforcement Records.* If the 5 U.S.C. 552a(j)(2) exemption claimed under paragraph (c) of § 215.13 and on the notice of systems of records to be published in the FEDERAL REGISTER on this same date is held to be invalid, then this system is determined to be exempt, under 5 U.S.C. 552(a)(k)(1) and (2) of the Act, from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). The reasons for asserting the exemptions are to protect the materials required by executive order to be kept secret in the interest of the national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain necessary information, to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel.

(2) *Personnel Security and Suitability Investigatory Records.* This system is exempt under U.S.C. 552a (k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of

investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering those sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted.

(3) *Litigation Records.* This system is exempt under 5 U.S.C. 552(k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information.

(4) *Employee Equal Employment Opportunity Complaint Investigatory Records.* This system is exempt under 5 U.S.C. 552a (k)(1) and (k)(2) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources.

(5) The following systems of records are exempt under 5 U.S.C. 552a (k)(5) from the provision of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f):

(i) Employee Conduct and Discipline Records.

(ii) Employee Relations Records.

This exemption is claimed for these systems of records to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted. The existence and general character of the information exempted will be made known to the individual to whom it pertains.

PART 216—ENVIRONMENTAL PROCEDURES

Sec.
216.1 Introduction.
216.2 Applicability of procedures.
216.3 Procedures.
216.4 Private applicants.
216.5 Endangered species.
216.6 Environmental assessments.
216.7 Environmental impact statements.
216.8 Public hearings.
216.9 Bilateral and multi-lateral studies and concise reviews of environmental issues.
216.10 Records and reports.

AUTHORITY: 42 U.S.C.4332; 22 U.S.C. 2381.

SOURCE: 41 FR 26913, June 30, 1976, unless otherwise noted.

§ 216.1 Introduction.

(a) *Purpose.* In accordance with sections 118(b) and 621 of the Foreign Assistance Act of 1961, as amended, (the FAA) the following general procedures shall be used by A.I.D. to ensure that environmental factors and values are integrated into the A.I.D. decision making process. These procedures also assign responsibility within the Agency for assessing the environmental effects of A.I.D.'s actions. These procedures are consistent with Executive Order 12114, issued January 4, 1979, entitled Environmental Effects Abroad of Major Federal Actions, and the purposes of the National Environmental Policy Act of 1970, as amended (42

U.S.C. 4371 *et seq.*) (NEPA). They are intended to implement the requirements of NEPA as they effect the A.I.D. program.

(b) *Environmental policy*. In the conduct of its mandate to help upgrade the quality of life of the poor in developing countries, A.I.D. conducts a broad range of activities. These activities address such basic problems as hunger, malnutrition, overpopulation, disease, disaster, deterioration of the environment and the natural resource base, illiteracy as well as the lack of adequate housing and transportation. Pursuant to the FAA, A.I.D. provides development assistance in the form of technical advisory services, research, training, construction and commodity support. In addition, A.I.D. conducts programs under the Agricultural Trade Development and Assistance Act of 1954 (Pub. L. 480) that are designed to combat hunger, malnutrition and to facilitate economic development. Assistance programs are carried out under the foreign policy guidance of the Secretary of State and in cooperation with the governments of sovereign states. Within this framework, it is A.I.D. policy to:

(1) Ensure that the environmental consequences of A.I.D.-financed activities are identified and considered by A.I.D. and the host country prior to a final decision to proceed and that appropriate environmental safeguards are adopted;

(2) Assist developing countries to strengthen their capabilities to appreciate and effectively evaluate the potential environmental effects of proposed development strategies and projects, and to select, implement and manage effective environmental programs;

(3) Identify impacts resulting from A.I.D.'s actions upon the environment, including those aspects of the biosphere which are the common and cultural heritage of all mankind; and

(4) Define environmental limiting factors that constrain development and identify and carry out activities that assist in restoring the renewable resource base on which sustained development depends.

(c) *Definitions*—(1) *CEQ regulations*. Regulations promulgated by the President's Council on Environmental Quality (CEQ) (FEDERAL REGISTER, Volume 43, Number 230, November 29, 1978) under the authority of NEPA and Executive Order 11514, entitled Protection and Enhancement of Environmental Quality (March 5, 1970) as amended by Executive Order 11991 (May 24, 1977).

(2) *Initial Environmental Examination*. An Initial Environmental Examination is the first review of the reasonably foreseeable effects of a proposed action on the environment. Its function is to provide a brief statement of the factual basis for a Threshold Decision as to whether an Environmental Assessment or an Environmental Impact Statement will be required.

(3) *Threshold Decision*. A formal Agency decision which determines, based on an Initial Environmental Examination, whether a proposed Agency action is a major action significantly affecting the environment.

(4) *Environmental Assessment*. A detailed study of the reasonably forseeable significant effects, both beneficial and adverse, of a proposed action on the environment of a foreign country or countries.

(5) *Environmental Impact Statement*. A detailed study of the reasonably foreseeable environmental impacts, both positive and negative, of a proposed A.I.D. action and its reasonable alternatives on the United States, the global environment or areas outside the jurisdiction of any nation as described in §216.7 of these procedures. It is a specific document having a definite format and content, as provided in NEPA and the CEQ Regulations. The required form and content of an Environmental Impact Statement is further described in §216.7 infra.

(6) *Project Identification Document (PID)*. An internal A.I.D. document which initially identifies and describes a proposed project.

(7) *Program Assistance Initial Proposal (PAIP)*. An internal A.I.D. document used to initiate and identify proposed non-project assistance, including commodity import programs. It is analogous to the PID.

(8) *Project Paper (PP)*. An internal A.I.D. document which provides a definitive description and appraisal of

the project and particularly the plan or implementation.

(9) *Program Assistance Approval Document (PAAD)*. An internal A.I.D. document approving non-project assistance. It is analogous to the PP.

(10) *Environment*. The term environment, as used in these procedures with respect to effects occurring outside the United States, means the natural and physical environment. With respect to effects occurring within the United States see § 216.7(b).

(11) *Significant effect*. With respect to effects on the environment outside the United States, a proposed action has a significant effect on the environment if it does significant harm to the environment.

(12) *Minor donor*. For purposes of these procedures, A.I.D. is a minor donor to a multidonor project when A.I.D. does not control the planning or design of the multidonor project and either (i) A.I.D.'s total contribution to the project is both less than $1,000,000 and less than 25 percent of the estimated project cost, or (ii) A.I.D.'s total contribution is more than $1,000,000 but less than 25 percent of the estimated project cost and the environmental procedures of the donor in control of the planning of design of the project are followed, but only if the A.I.D. Environmental Coordinator determines that such procedures are adequate.

[45 FR 70244, Oct. 23, 1980]

§ 216.2 Applicability of procedures.

(a) *Scope*. Except as provided in § 216.2(b), these procedures apply to all new projects, programs or activities authorized or approved by A.I.D. and to substantive amendments or extensions of ongoing projects, programs, or activities.

(b) *Exemptions*. (1) Projects, programs or activities involving the following are exempt from these procedures:

(i) International disaster assistance;

(ii) Other emergency circumstances; and

(iii) Circumstances involving exceptional foreign policy sensitivities.

(2) A formal written determination, including a statement of the justification therefore, is required for each project, program or activity for which an exemption is made under paragraphs (b)(1) (ii) and (iii) of this section, but is not required for projects, programs or activities under paragraph (b)(1)(i) of this section. The determination shall be made either by the Assistant Administrator having responsibility for the program, project or activity, or by the Administrator, where authority to approve financing has been reserved by the Administrator. The determination shall be made after consultation with CEQ regarding the environmental consequences of the proposed program, project or activity.

(c) *Categorical exclusions*. (1) The following criteria have been applied in determining the classes of actions including in § 216.2(c)(2) for which an Initial Environmental Examination, Environmental Assessment and Environmental Impact Statement generally are not required;

(i) The action does not have an effect on the natural or physicial environment;

(ii) A.I.D. does not have knowledge of or control over, and the objective of A.I.D. in furnishing assistance does not require, either prior to approval of financing or prior to implementation of specific activities, knowledge of or control over, the details of the specific activities that have an effect on the physicial and natural environment for which financing is provided by A.I.D.;

(iii) Research activities which may have an affect on the physicial and natural environment but will not have a significant effect as a result of limited scope, carefully controlled nature and effective monitoring.

(2) The following classes of actions are not subject to the procedures set forth in § 216.3, except to the extent provided herein;

(i) Education, technical assistance, or training programs except to the extent such programs include activities directly affecting the environment (such as construction of facilities, etc.);

(ii) Controlled experimentation exclusively for the purpose of research and field evaluation which are confined to small areas and carefully monitored;

(iii) Analyses, studies, academic or research workshops and meetings;

(iv) Projects in which A.I.D. is a minor donor to a multidonor project

and there is no potential significant effects upon the environment of the United States, areas outside any nation's jurisdiction or endangered or threatened species or their critical habitat;

(v) Document and information transfers;

(vi) Contributions to international, regional or national organizations by the United States which are not for the purpose of carrying out a specifically identifiable project or projects;

(vii) Institution building grants to research and educational institutions in the United States such as those provided for under section 122(d) and title XII of chapter 2 of part I of the FAA (22 USCA 2151 p. (b) 2220a. (1979));

(viii) Programs involving nutrition, health care or population and family planning services except to the extent designed to include activities directly affecting the environment (such as construction of facilities, water supply systems, waste water treatment, etc.)

(ix) Assistance provided under a Commodity Import Program when, prior to approval, A.I.D. does not have knowledge of the specific commodities to be financed and when the objective in furnishing such assistance requires neither knowledge, at the time the assistance is authorized, nor control, during implementation, of the commodities or their use in the host country.

(x) Support for intermediate credit institutions when the objective is to assist in the capitalization of the institution or part thereof and when such support does not involve reservation of the right to review and approve individual loans made by the institution;

(xi) Programs of maternal or child feeding conducted under title II of Pub. L. 480;

(xii) Food for development programs conducted by food recipient countries under title III of Pub. L. 480, when achieving A.I.D.'s objectives in such programs does not require knowledge of or control over the details of the specific activities conducted by the foreign country under such program;

(xiii) Matching, general support and institutional support grants provided to private voluntary organizations (PVOs) to assist in financing programs where A.I.D.'s objective in providing such financing does not require knowledge of or control over the details of the specific activities conducted by the PVO;

(xiv) Studies, projects or programs intended to develop the capability of recipient countries to engage in development planning, except to the extent designed to result in activities directly affecting the environment (such as construction of facilities, etc.); and

(xv) Activities which involve the application of design criteria or standards developed and approved by A.I.D.

(3) The originator of a project, program or activity shall determine the extent to which it is within the classes of actions described in paragraph (c)(2) of this section. This determination shall be made in writing and be submitted with the PID, PAIP or comparable document. This determination, which must include a brief statement supporting application of the exclusion shall be reviewed by the Bureau Environmental Officer in the same manner as a Threshold Decision under §216.3(a)(2) of these procedures. Notwithstanding paragraph (c)(2) of this section, the procedures set forth in §216.3 shall apply to any project, program or activity included in the classes of actions listed in paragraph (c)(2) of this section, or any aspect or component thereof, if at any time in the design, review or approval of the activity it is determined that the project, program or activity, or aspect or component thereof, is subject to the control of A.I.D. and may have a significant effect on the environment.

(d) *Classes of actions normally having a significant effect on the environment.* (1) The following classes of actions have been determined generally to have a significant effect on the environment and an Environmental Assessment or Environmental Impact Statement, as appropriate, will be required:

(i) Programs of river basin development;

(ii) Irrigation or water management projects, including dams and impoundments;

(iii) Agricultural land leveling;

(iv) Drainage projects;

(v) Large scale agricultural mechanization;

(vi) New lands development;

(vii) Resettlement projects;

(viii) Penetration road building or road improvement projects;

(ix) Powerplants;

(x) Industrial plants;

(xi) Potable water and sewerage projects other than those that are small-scale.

(2) An Initial Environmental Examination normally will not be necessary for activities within the classes described in § 216.2(d), except when the originator of the project believes that the project will not have a significant effect on the environment. In such cases, the activity may be subjected to the procedures set forth in § 216.3.

(e) *Pesticides*. The exemptions of paragraph (b)(1) of this section and the categorical exclusions of paragraph (c)(2) of this section are not applicable to assistance for the procurement or use of pesticides.

[45 FR 70244, Oct. 23, 1980]

§ 216.3 Procedures.

(a) *General procedures*—(1) *Preparation of the Initial Environmental Examination*. Except as otherwise provided, an Initial Environmental Examination is not required for activities identified in § 216.2(b)(1), (c) (2), and (d). For all other A.I.D. activities described in § 216.2(a) an Initial Environmental Examination will be prepared by the originator of an action. Except as indicated in this section, it should be prepared with the PID or PAIP. For projects including the procurement or use of pesticides, the procedures set forth in paragraph (b) of this section will be followed, in addition to the procedures in this paragraph. Activities which cannot be identified in sufficient detail to permit the completion of an Initial Environmental Examination with the PID or PAIP, shall be described by including with the PID or PAIP: (i) An explanation indicating why the Initial Environmental Examination cannot be completed; (ii) an estimate of the amount of time required to complete the Initial Environmental Examination; and (iii) a recommendation that a Threshold Decision be deferred until the Initial Environmental Examination is completed. The responsible Assistant Administrator will act on the request for deferral concurrently with action on the PID or PAIP and will designate a time for completion of the Initial Environmental Examination. In all instances, except as provided in paragraph (a)(7) of this section, this completion date will be in sufficient time to allow for the completion of an Environmental Assessment or Environmental Impact Statement, if required, before a final decision is made to provide A.I.D. funding for the action.

(2) *Threshold decision*. (i) The Initial Environmental Examination will include a Threshold Decision made by the officer in the originating office who signs the PID or PAIP. If the Initial Environmental Examination is completed prior to or at the same time as the PID or PAIP, the Threshold Decision will be reviewed by the Bureau Environmental Officer concurrently with approval of the PID or PAIP. The Bureau Environmental Officer will either concur in the Threshold Decision or request reconsideration by the officer who made the Threshold Decision, stating the reasons for the request. Differences of opinion between these officers shall be submitted for resolution to the Assistant Administrator at the same time that the PID is submitted for approval.

(ii) An Initial Environmental Examination, completed subsequent to approval of the PID or PAIP, will be forwarded immediately together with the Threshold Determination to the Bureau Environmental Officer for action as described in this section.

(iii) A Positive Threshold Decision shall result from a finding that the proposed action will have a significant effect on the environment. An Environmental Impact Statement shall be prepared if required pursuant to § 216.7. If an impact statement is not required, an Environmental Assessment will be prepared in accordance with § 216.6. The cognizant Bureau or Office will record a Negative Determination if the proposed action will not have a significant effect on the environment.

(3) *Negative Declaration*. The Assistant Administrator, or the Administrator in actions for which the approval of the Administrator is required for the authorization of financing, may

make a Negative Declaration, in writing, that the Agency will not develop an Environmental Assessment or an Environmental Impact Statement regarding an action found to have a significant effect on the environment when (i) a substantial number of Environmental Assessments or Environmental Impact Statements relating to similar activities have been prepared in the past, if relevant to the proposed action, (ii) the Agency has previously prepared a programmatic Statement or Assessment covering the activity in question which has been considered in the development of such activity, or (iii) the Agency has developed design criteria for such an action which, if applied in the design of the action, will avoid a significant effect on the environment.

(4) *Scope of Environmental Assessment or Impact Statement*—(i) *Procedure and Content*. After a Positive Threshold Decision has been made, or a determination is made under the pesticide procedures set forth in paragraph (b) of this section that an Environmental Assessment or Environmental Impact Statement is required, the originator of the action shall commence the process of identifying the significant issues relating to the proposed action and of determining the scope of the issues to be addressed in the Environmental Assessment or Environmental Impact Statement. The originator of an action within the classes of actions described in §216.2(d) shall commence this scoping process as soon as practicable. Persons having expertise relevant to the environmental aspects of the proposed action shall also participate in this scoping process. (Participants may include but are not limited to representatives of host governments, public and private institutions, the A.I.D. Mission staff and contractors.) This process shall result in a written statement which shall include the following matters:

(*a*) A determination of the scope and significance of issues to be analyzed in the Environmental Assessment or Impact Statement, including direct and indirect effects of the project on the environment.

(*b*) Identification and elimination from detailed study of the issues that are not significant or have been covered by earlier environmental review, or approved design considerations, narrowing the discussion of these issues to a brief presentation of why they will not have a significant effect on the environment.

(*c*) A description of (*1*) the timing of the preparation of environmental analyses, including phasing if appropriate, (*2*) variations required in the format of the Environmental Assessment, and (*3*) the tentative planning and decision making schedule; and

(*d*) A description of how the analysis will be conducted and the disciplines that will participate in the analysis.

(ii) These written statements shall be reviewed and approved by the Bureau Environmental Officer.

(iii) *Circulation of scoping statement*. To assist in the preparation of an Environmental Assessment, the Bureau Environmental Office may circulate copies of the written statement, together with a request for written comments, within thirty days, to selected federal agencies if that Officer believes comments by such federal agencies will be useful in the preparation of an Environmental Assessment. Comments received from reviewing federal agencies will be considered in the preparation of the Environmental Assessment and in the formulation of the design and implementation of the project, and will, together with the scoping statement, will be included in the project file.

(iv) *Change in Threshold Decision*. If it becomes evident that the action will not have a significant effect on the environment (*i.e.*, will not cause significant harm to the environment), the Positive Threshold Decision may be withdrawn with the concurrence of the Bureau Environmental Officer. In the case of an action included in §216.2(d)(2), the request for withdrawal shall be made to the Bureau Environmental Officer.

(5) *Preparation of Environmental Assessments and Environmental Impact Statement*. If the PID or PAIP is approved, and the Threshold Decision is positive, or the action is included in §216.2(d), the originator of the action will be responsible for the preparation of an Environmental Assessment or Environmental Impact Statement as

required. Draft Environmental Impact Statements will be circulated for review and comment as part of the review of Project Papers and as outlined further in § 216.7 of those procedures. Except as provided in paragraph (a)(7) of this section, final approval of the PP or PAAD and the method of implementation will include consideration of the Environmental Assessment of final Environmental Impact Statement.

(6) *Processing and review within A.I.D.* (i) Initial Environmental Examinations, Environmental Assessments and final Environmental Impact Statements will be processed pursuant to standard A.I.D. procedures for project approval documents. Except as provided in paragraph (a)(7) of this section, Environmental Assessments and final Environmental Impact Statements will be reviewed as an integral part of the Project Paper or equivalent document. In addition to these procedures, Environmental Assessments will be reviewed and cleared by the Bureau Environmental Officer. They may also be reviewed by the Agency's Environmental Coordinator who will monitor the Environmental Assessment process.

(ii) When project approval authority is delegated to field posts, Environmental Assessments shall be reviewed and cleared by the Bureau Environmental Officer prior to the approval of such actions.

(iii) Draft and final Environmental Impact Statements will be reviewed and cleared by the Environmental Coordinator and the Office of the General Counsel.

(7) *Environmental review after authorization of financing.* (i) Environmental review may be performed after authorization of a project, program or activity only with respect to subprojects or significant aspects of the project, program or activity that are unidentified at the time of authorization. Environmental review shall be completed prior to authorization for all subprojects and aspects of a project, program or activity that are identified.

(ii) Environmental review should occur at the earliest time in design or implementation at which a meaningful review can be undertaken, but in no event later than when previously unidentified subprojects or aspects of projects, programs or activities are identified and planned. To the extent possible, adequate information to undertake deferred environmental review should be obtained before funds are obligated for unidentified subprojects or aspects of projects, programs or activities. (Funds may be obligated for the other aspects for which environmental review has been completed.) To avoid an irreversible commitment of resources prior to the conclusion of environmental review, the obligation of funds can be made incrementally as subprojects or aspects of projects, programs or activities are identified; or if necessary while planning continues, including environmental review, the agreement or other document obligating funds may contain appropriate convenants or conditions precedent to disbursement for unidentified subprojects or aspects of projects, programs or activities.

(iii) When environmetal review must be deferred beyond the time some of the funds are to be disbursed (e.g. long lead times for the delivery of goods or services), the project agreement or other document obligating funds shall contain a covenant or covenants requiring environmental review, including an Environmental Assessment or Environmental Impact Statement, when appropriate, to be completed and taken into account prior to implementation of those subprojects or aspects of the project, program or activity for which environmental review is deferred. Such convenants shall ensure that implementation plans will be modified in accordance with environmental review if the parties decide that modifications are necessary.

(iv) When environmental review will not be completed for an entire project, program or activity prior to authorization, the Initial Environmental Examination and Threshold Decision required under paragraphs (a)(1) and (2) of this section shall identify those aspects of the project, program or activity for which environmental review will be completed prior to the time financing is authorized. It shall also include those subprojects or aspects for which environmental review will be deferred, stating the reasons for deferral

and the time when environmental review will be completed. Further, it shall state how an irreversible commitment of funds will be avoided until environmental review is completed. The A.I.D. officer responsible for making environmental decisions for such projects, programs or activities shall also be identified (the same officer who has decision making authority for the other aspects of implementation). This deferral shall be reviewed and approved by the officer making the Threshold Decision and the officer who authorizes the project, program or activity. Such approval may be made only after consultation with the Office of General Counsel for the purpose of establishing the manner in which conditions precedent to disbursement or covenants in project and other agreements will avoid an irreversible commitment of resources before environmental review is completed.

(8) *Monitoring*. To the extent feasible and relevant, projects and programs for which Environmental Impact Statements or Environmental Assessments have been prepared should be designed to include measurement of any changes in environmental quality, positive or negative, during their implementation. This will require recording of baseline data at the start. To the extent that available data permit, originating offices of A.I.D. will formulate systems in collaboration with recipient nations, to monitor such impacts during the life of A.I.D.'s involvement. Monitoring implementation of projects, programs and activities shall take into account environmental impacts to the same extent as other aspects of such projects, programs and activities. If during implementation of any project, program or activity, whether or not an Environmental Assessment or Environmental Impact Statement was originally required, it appears to the Mission Director, or officer responsible for the project, program or activity, that it is having or will have a significant effect on the environment that was not previously studied in an Environmental Assessment or Environmental Impact Statement, the procedures contained in this part shall be followed including, as appropriate, a Threshold Decision, Scoping and an Environmental Assessment or Environmental Impact Statement.

(9) *Revisions*. If, after a Threshold Decision is made resulting in a Negative Determination, a project is revised or new information becomes available which indicates that a proposed action might be ''major'' and its effects ''significant'', the Negative Determination will be reviewed and revised by the cognizant Bureau and an Environmental Assessment or Environmental Impact Statement will be prepared, if appropriate. Environmental Assessments and Environmental Impact Statements will be amended and processed appropriately if there are major changes in the project or program, or if significant new information becomes available which relates to the impact of the project, program or activity on the environment that was not considered at the time the Environmental Assessment or Environmental Impact Statement was approved. When on-going programs are revised to incorporate a change in scope or nature, a determination will be made as to whether such change may have an environmental impact not previously assessed. If so, the procedures outlined in this part will be followed.

(10) *Other approval documents*. These procedures refer to certain A.I.D. documents such as PIDs, PAIPs, PPs and PAADs as the A.I.D. internal instruments for approval of projects, programs or activities. From time to time, certain special procedures, such as those in §216.4, may not require the use of the aforementioned documents. In these situations, these environmental procedures shall apply to those special approval procedures, unless otherwise exempt, at approval times and levels comparable to projects, programs and activities in which the aforementioned documents are used.

(b) *Pesticide procedures*—(1) *Project Assistance*. Except as provided in paragraph (b)(2) of this section, all proposed projects involving assistance for the procurement or use, or both, of pesticides shall be subject to the procedures prescribed in paragraphs (b)(1) (i) through (v) of this section. These procedures shall also apply, to the extent permitted by agreements entered into by A.I.D. before the effective date of

these pesticide procedures, to such projects that have been authorized but for which pesticides have not been procured as of the effective date of these pesticide procedures.

(i) When a project includes assistance for procurement or use, or both, of pesticides registered for the same or similar uses by USEPA without restriction, the Initial Environmental Examination for the project shall include a separate section evaluating the economic, social and environmental risks and benefits of the planned pesticide use to determine whether the use may result in significant environmental impact. Factors to be considered in such an evaluation shall include, but not be limited to the following:

(a) The USEPA registration status of the requested pesticide;

(b) The basis for selection of the requested pesticide;

(c) The extent to which the proposed pesticide use is part of an integrated pest management program;

(d) The proposed method or methods of application, including availability of appropriate application and safety equipment;

(e) Any acute and long-term toxicological hazards, either human or environmental, associated with the proposed use and measures available to minimize such hazards;

(f) The effectiveness of the requested pesticide for the proposed use;

(g) Compatibility of the proposed pesticide with target and nontarget ecosystems;

(h) The conditions under which the pesticide is to be used, including climate, flora, fauna, geography, hydrology, and soils;

(i) The availability and effectiveness of other pesticides or nonchemical control methods;

(j) The requesting country's ability to regulate or control the distribution, storage, use and disposal of the requested pesticide;

(k) The provisions made for training of users and applicators; and

(l) The provisions made for monitoring the use and effectiveness of the pesticide.

In those cases where the evaluation of the proposed pesticide use in the Initial Environmental Examination indicates that the use will significantly effect the human environment, the Threshold Decision will include a recommendation for the preparation of an Environmental Assessment or Environmental Impact Statement, as appropriate. In the event a decision is made to approve the planned pesticide use, the Project Paper shall include to the extent practicable, provisions designed to mitigate potential adverse effects of the pesticide. When the pesticide evaluation section of the Initial Environmental Examination does not indicate a potentially unreasonable risk arising from the pesticide use, an Environmental Assessment or Environmental Impact Statement shall nevertheless be prepared if the environmental effects of the project otherwise require further assessment.

(ii) When a project includes assistance for the procurement or use, or both, of any pesticide registered for the same or similar uses in the United States but the proposed use is restricted by the USEPA on the basis of user hazard, the procedures set forth in paragraph (b)(1)(i) of this section will be followed. In addition, the Initial Environmental Examination will include an evaluation of the user hazards associated with the proposed USEPA restricted uses to ensure that the implementation plan which is contained in the Project Paper incorporates provisions for making the recipient government aware of these risks and providing, if necessary, such technical assistance as may be required to mitigate these risks. If the proposed pesticide use is also restricted on a basis other than user hazard, the procedures in paragraph (b)(1)(iii) of this section shall be followed in lieu of the procedures in this section.

(iii) If the project includes assistance for the procurement or use, or both of:

(*a*) Any pesticide other than one registered for the same or similar uses by USEPA without restriction or for restricted use on the basis of user hazard; or

(*b*) Any pesticide for which a notice of rebuttable presumption against reregistration, notice of intent to cancel, or notice of intent to suspend has been issued by USEPA.

The Threshold Decision will provide for the preparation of an Environmental Assessment or Environmental Impact Statement, as appropriate (§216.6(a)). The EA or EIS shall include, but not be limited to, an analysis of the factors identified in paragraph (b)(1)(i) of this section.

(iv) Notwithstanding the provisions of paragraphs (b)(1) (i) through (iii) of this section, if the project includes assistance for the procurement or use, or both, of a pesticide against which USEPA has initiated a regulatory action for cause, or for which it has issued a notice of rebuttable presumption against reregistration, the nature of the action or notice, including the relevant technical and scientific factors will be discussed with the requesting government and considered in the IEE and, if prepared, in the EA or EIS. If USEPA initiates any of the regulatory actions above against a pesticide subsequent to its evaluation in an IEE, EA or EIS, the nature of the action will be discussed with the recipient government and considered in an amended IEE or amended EA or EIS, as appropriate.

(v) If the project includes assistance for the procurement or use, or both of pesticides but the specific pesticides to be procured or used cannot be identified at the time the IEE is prepared, the procedures outlined in paragraphs (b) (i) through (iv) of this section will be followed when the specific pesticides are identified and before procurement or use is authorized. Where identification of the pesticides to be procured or used does not occur until after Project Paper approval, neither the procurement nor the use of the pesticides shall be undertaken unless approved, in writing, by the Assistant Administrator (or in the case of projects authorized at the Mission level, the Mission Director) who approved the Project Paper.

(2) *Exceptions to pesticide procedures.* The procedures set forth in paragraph (b)(1) of this section shall not apply to the following projects including assistance for the procurement or use, or both, of pesticides.

(i) Projects under emergency conditions.

Emergency conditions shall be deemed to exist when it is determined by the Administrator, A.I.D., in writing that:

(a) A pest outbreak has occurred or is imminent; and

(*b*) Significant health problems (either human or animal) or significant economic problems will occur without the prompt use of the proposed pesticide; and

(*c*) Insufficient time is available before the pesticide must be used to evaluate the proposed use in accordance with the provisions of this regulation.

(ii) Projects where A.I.D. is a minor donor, as defined in §216.1(c)(12) of this part, to a multi-donor project.

(iii) Projects including assistance for procurement or use, or both, of pesticides for research or limited field evaluation purposes by or under the supervision of project personnel. In such instances, however, A.I.D. will ensure that the manufacturers of the pesticides provide toxicological and environmental data necessary to safeguard the health or research personnel and the quality of the local environment in which the pesticides will be used. Furthermore, treated crops will not be used for human or animal consumption unless appropriate tolerances have been established by EPA or recommended by FAO/WHO, and the rates and frequency of application, together with the prescribed preharvest intervals, do not result in residues exceeding such tolerances. This prohibition does not apply to the feeding of such crops to animals for research purposes.

(3) *Non-project assistance.* In a very few limited number of circumstances A.I.D. may provide non-project assistance for the procurement and use of pesticides. Assistance in such cases shall be provided if the A.I.D. Administrator determines in writing that (i) emergency conditions, as defined in paragraph (b)(2)(i) of this section exists; or (ii) that compelling circumstances exist such that failure to provide the proposed assistance would seriously impede the attainment of U.S. foreign policy objectives or the objectives of the foreign assistance program. In the latter case, a decision to provide the assistance will be based to the maximum extent practicable,

upon a consideration of the factors set forth in paragraph (b)(1)(i) of this section and, to the extent available, the history of efficacy and safety covering the past use of the pesticide the in recipient country.

[43 FR 20491, May 12, 1978, as amended at 45 FR 70245, Oct. 23, 1980]

§ 216.4 Private applicants.

Programs, projects or activities for which financing from A.I.D. is sought by private applicants, such as PVOs and educational and research institutions, are subject to these procedures. Except as provided in § 216.2 (b), (c) or (d), preliminary proposals for financing submitted by private applicants shall be accompanied by an Initial Environmental Examination or adequate information to permit preparation of an Initial Environmental Examination. The Threshold Decision shall be made by the Mission Director for the country to which the proposal relates, if the preliminary proposal is submitted to the A.I.D. Mission, or shall be made by the officer in A.I.D. who approves the preliminary proposal. In either case, the concurrence of the Bureau Environmental Officer is required in the same manner as in § 216.3(a)(2), except for PVO projects approved in A.I.D. Missions with total life of project costs less than $500,000. Thereafter, the same procedures set forth in § 216.3 including as appropriate scoping and Environmental Assessments or Environmental Impact Statements, shall be applicable to programs, projects or activities submitted by private applicants. The final proposal submitted for financing shall be treated, for purposes of these procedures, as a Project Paper. The Bureau Environmental Officer shall advise private applicants of studies or other information foreseeably required for action by A.I.D.

[45 FR 70247, Oct. 23, 1980]

§ 216.5 Endangered species.

It is A.I.D. policy to conduct its assistance programs in a manner that is sensitive to the protection of endangered or threatened species and their critical habitats. The Initial Environmental Examination for each project, program or activity having an effect on the environment shall specifically determine whether the project, program or activity will have an effect on an endangered or threatened species, or critical habitat. If the proposed project, program or activity will have the effect of jeopardizing an endangered or threatened species or of adversely modifying its critical habitat, the Threshold Decision shall be a Positive Determination and an Environmental Assessment or Environmental Impact Statement completed as appropriate, which shall discuss alternatives or modifications to avoid or mitigate such impact on the species or its habitat.

[45 FR 70247, Oct. 23, 1980]

§ 216.6 Environmental assessments.

(a) *General purpose.* The purpose of the Environmental Assessment is to provide Agency and host country decision makers with a full discussion of significant environmental effects of a proposed action. It includes alternatives which would avoid or minimize adverse effects or enhance the quality of the environment so that the expected benefits of development objectives can be weighed against any adverse impacts upon the human environment or any irreversible or irretrievable commitment of resources.

(b) *Collaboration with affected nation on preparation.* Collaboration in obtaining data, conducting analyses and considering alternatives will help build an awareness of development associated environmental problems in less developed countries as well as assist in building an indigenous institutional capability to deal nationally with such problems. Missions, Bureaus and Offices will collaborate with affected countries to the maximum extent possible, in the development of any Environmental Assessments and consideration of environmental consequences as set forth therein.

(c) *Content and form.* The Environmental Assessment shall be based upon the scoping statement and shall address the following elements, as appropriate:

(1) *Summary.* The summary shall stress the major conclusions, areas of controversy, if any, and the issues to be resolved.

(2) *Purpose*. The Environmental Assessment shall briefly specify the underlying purpose and need to which the Agency is responding in proposing the alternatives including the proposed action.

(3) *Alternatives including the proposed action*. This section should present the environmental impacts of the proposal and its alternatives in comparative form, thereby sharpening the issues and providing a clear basis for choice among options by the decision maker. This section should explore and evaluate reasonable alternatives and briefly discuss the reasons for eliminating those alternatives which were not included in the detailed study; devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; include the alternative of no action; identify the Agency's preferred alternative or alternatives, if one or more exists; include appropriate mitigation measures not already included in the proposed action or alternatives.

(4) *Affected environment*. The Environmental Assessment shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in the Environmental Assessment shall be commensurate with the significance of the impact with less important material summarized, consolidated or simply referenced.

(5) *Environmental consequences*. This section forms the analytic basis for the comparisons under paragraph (c)(3) of this section. It will include the environmental impacts of the alternatives including the proposed action; any adverse effects that cannot be avoided should the proposed action be implemented; the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. It should not duplicate discussions in paragraph (c)(3) of this section. This section of the Environmental Assessment should include discussions of direct effects and their significance; indirect effects and their significance; possible conflicts between the proposed action and land use plans, policies and controls for the areas concerned; energy requirements and conservation potential of various alternatives and mitigation measures; natural or depletable resource requirements and conservation potential of various requirements and mitigation measures; urban quality; historic and cultural resources and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures; and means to mitigate adverse environmental impacts.

(6) *List of preparers*. The Environmental Assessment shall list the names and qualifications (expertise, experience, professional discipline) of the persons primarily responsible for preparing the Environmental Assessment or significant background papers.

(7) *Appendix*. An appendix may be prepared.

(d) *Program assessment*. Program Assessments may be appropriate in order to assess the environmental effects of a number of individual actions and their cumulative environmental impact in a given country or geographic area, or the environmental impacts that are generic or common to a class of agency actions, or other activities which are not country-specific. In these cases, a single, programmatic assessment will be prepared in A.I.D./Washington and circulated to appropriate overseas Missions, host governments, and to interested parties within the United States. To the extent practicable, the form and content of the programmatic Environmental Assessment will be the same as for project Assessments. Subsequent Environmental Assessments on major individual actions will only be necessary where such follow-on or subsequent activities may have significant environmental impacts on specific countries where such impacts have not been adequately evaluated in the programmatic Environmental Assessment. Other programmatic evaluations of classes of actions may be conducted in an effort to establish additional categorical exclusions or design standards

or criteria for such classes that will eliminate or minimize adverse effects of such actions, enhance the environmental effect of such action or reduce the amount of paperwork or time involved in these procedures. Programmatic evaluations conducted for the purpose of establishing additional categorical exclusions under § 216.2(c) or design considerations that will eliminate significant effects for classes of actions shall be made available for public comment before the categorical exclusions or design standards or criteria are adopted by A.I.D. Notice of the availability of such document shall be published in the FEDERAL REGISTER. Additional categorical exclusions shall be adopted by A.I.D. upon the approval of the Administrator, and design consideration in accordance with usual agency procedures.

(e) *Consultation and review.* (1) When Environmental Assessments are prepared on activities carried out within or focused on specific developing countries, consultation will be held between A.I.D. staff and the host government both in the early stages of preparation and on the results and significance of the completed Assessment before the project is authorized.

(2) Missions will encourage the host government to make the Environmental Assessment available to the general public of the recipient country. If Environmental Assessments are prepared on activities which are not country-specific, the Assessment will be circulated by the Environmental Coordinator to A.I.D.'s Overseas Missions and interested governments for information, guidance and comment and will be made available in the U.S. to interested parties.

(f) *Effect in other countries.* In a situation where an analysis indicates that potential effects may extend beyond the national boundaries of a recipient country and adjacent foreign nations may be affected, A.I.D. will urge the recipient country to consult with such countries in advance of project approval and to negotiate mutually acceptable accommodations.

(g) *Classified material.* Environmental Assessments will not normally include classified or administratively controlled material. However, there may be situations where environmental aspects cannot be adequately discussed without the inclusion of such material. The handling and disclosure of classified or administratively controlled material shall be governed by 22 CFR part 9. Those portions of an Environmental Assessment which are not classified or administratively controlled will be made available to persons outside the Agency as provided for in 22 CFR part 212.

[45 FR 70247, Oct. 23, 1980]

§ 216.7 Environmental impact statements.

(a) *Applicability.* An Environmental Impact Statement shall be prepared when agency actions significantly affect:

(1) The global environment or areas outside the jurisdiction of any nation (e.g., the oceans);

(2) The environment of the United States; or

(3) Other aspects of the environment at the discretion of the Administrator.

(b) *Effects on the United States: Content and form.* An Environmental Impact Statement relating to paragraph (a)(2) of this section shall comply with the CEQ Regulations. With respect to effects on the United States, the terms environment and significant effect wherever used in these procedures have the same meaning as in the CEQ Regulations rather than as defined in § 216.1(c) (12) and (13) of these procedures.

(c) *Other effects: Content and form.* An Environmental Impact Statement relating to paragraphs (a)(1) and (a)(3) of this section will generally follow the CEQ Regulations, but will take into account the special considerations and concerns of A.I.D. Circulation of such Environmental Impact Statements in draft form will precede approval of a Project Paper or equivalent and comments from such circulation will be considered before final project authorization as outlined in § 216.3 of these procedures. The draft Environmental Impact Statement will also be circulated by the Missions to affected foreign governments for information and comment. Draft Environmental Impact Statements generally will be made

available for comment to Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved, and to public and private organizations and individuals for not less than forty-five (45) days. Notice of availability of the draft Environmental Impact Statements will be published in the FEDERAL REGISTER. Cognizant Bureaus and Offices will submit these drafts for circulation through the Environmental Coordinator who will have the responsibility for coordinating all such communications with persons outside A.I.D. Any comments received by the Environmental Coordinator will be forwarded to the originating Bureau or Office for consideration in final policy decisions and the preparation of a final Environmental Impact Statement. All such comments will be attached to the final Statement, and those relevant comments not adequately discussed in the draft Environmental Impact Statement will be appropriately dealt with in the final Environmental Impact Statement. Copies of the final Environmental Impact Statement, with comments attached, will be sent by the Environmental Coordinator to CEQ and to all other Federal, state, and local agencies and private organizations that made substantive comments on the draft, including affected foreign governments. Where emergency circumstances or considerations of foreign policy make it necessary to take an action without observing the provisions of §1506.10 of the CEQ Regulations, or when there are overriding considerations of expense to the United States or foreign governments, the originating Office will advise the Environmental Coordinator who will consult with Department of State and CEQ concerning appropriate modification of review procedures.

[45 FR 70249, Oct. 23, 1980]

§216.8 Public hearings.

(a) In most instances AID will be able to gain the benefit of public participation in the impact statement process through circulation of draft statements and notice of public availability in CEQ publications. However, in some cases the Administrator may wish to hold public hearings on draft Environmental Impact Statements. In deciding whether or not a public hearing is appropriate, Bureaus in conjunction with the Environmental Coordinator should consider:

(1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved;

(2) The degree of interest in the proposal as evidenced by requests from the public and from Federal, state and local authorities, and private organizations and individuals, that a hearing be held;

(3) The complexity of the issue and likelihood that information will be presented at the hearing which will be of assistance to the Agency; and

(4) The extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action.

(b) If public hearings are held, draft Environmental Impact Statements to be discussed should be made available to the public at least fifteen (15) days prior to the time of the public hearings, and a notice will be placed in the FEDERAL REGISTER giving the subject, time and place of the proposed hearings.

[41 FR 26913, June 30, 1976. Redesignated at 45 FR 70249, Oct. 23, 1980]

§216.9 Bilateral and multilateral studies and concise reviews of environmental issues.

Notwithstanding anything to the contrary in these procedures, the Administrator may approve the use of either of the following documents as a substitute for an Environmental Assessment (but not a substitute for an Environmental Impact Statement) required under these procedures:

(a) Bilateral or multilateral environmental studies, relevant or related to the proposed action, prepared by the United States and one or more foreign countries or by an international body or organization in which the United States is a member or participant; or

(b) Concise reviews of the environmental issues involved including summary environmental analyses or other appropriate documents.

[45 FR 70249, Oct. 23, 1980]

§ 216.10 Records and reports.

Each Agency Bureau will maintain a current list of activities for which Environmental Assessments and Environmental Impact Statements are being prepared and for which Negative Determinations and Declarations have been made. Copies of final Initial Environmental Examinations, scoping statements, Assessments and Impact Statements will be available to interested Federal agencies upon request. The cognizant Bureau will maintain a permanent file (which may be part of its normal project files) of Environmental Impact Statements, Environmental Assessments, final Initial Environmental Examinations, scoping statements, Determinations and Declarations which will be available to the public under the Freedom of Information Act. Interested persons can obtain information or status reports regarding Environmental Assessments and Environmental Impact Statements through the A.I.D. Environmental Coordinator.

[45 FR 70249, Oct. 23, 1980]

PART 217—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Sec.
217.1 Purpose.
217.2 Application.
217.3 Definitions.
217.4 Discrimination prohibited.
217.5 Assurances required.
217.6 Remedial action, voluntary action, and self-evaluation.
217.7 Designation of responsible employee and adoption of grievance procedures.
217.8 Notice.
217.9 Administrative requirements for small recipients.
217.10 Effect of state or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

217.11 Discrimination prohibited.
217.12 Reasonable accommodation.
217.13 Employment criteria.
217.14 Preemployment inquiries.
217.15–217.20 [Reserved]

Subpart C—Accessibility

217.21 Discrimination prohibited.
217.22 Existing facilities.
217.23 New construction.
217.24–217.40 [Reserved]

Subpart D—Postsecondary Education

217.41 Application of this subpart.
217.42 Admissions and recruitment.
217.43 Treatment of students; general.
217.44 Academic adjustments.
217.45 Housing.
217.46 Financial and employment assistance to students.
217.47 Nonacademic services.
217.48–217.60 [Reserved]

Subpart E—Procedures

217.61 Procedures.
217.62–217.99 [Reserved]
APPENDIX A TO PART 217—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

AUTHORITY: 29 U.S.C. 794, unless otherwise noted.

SOURCE: 45 FR 66415, Oct. 6, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 217 appear at 68 FR 51362, Aug. 26, 2003.

Subpart A—General Provisions

§ 217.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity within the United States receiving Federal financial assistance.

§ 217.2 Application.

This part applies to all programs or activities carried on within the United States by recipients of Federal financial assistance pursuant to any authority held or delegated by the Administrator of the Agency for International Development, including the types of Federal financial assistance listed in appendix A of this part. (appendix A may be revised from time to time by

notice in the FEDERAL REGISTER). It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this regulation, even if the application for such assistance is approved prior to such effective date. This part does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred or other assistance extended before the effective date of this part, (c) any assistance to any individual who is the ultimate beneficiary, and (d) any procurement of goods or services, including the procurement of training. This part does not bar selection and treatment reasonably related to the foreign assistance objective or such other authorized purpose as the Federal assistance may have. It does not bar selections which are limited to particular groups where the purpose of the Federal financial assistance calls for such a limitation nor does it bar special treatment including special courses of training, orientation or counseling consistent with such purpose.

§217.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1979, Pub. L. 95–602.

(b) *Section 504* means section 504 of the Act.

(c) *Agency* means the Agency for International Development.

(d) The term *Administrator* means the Administrator of the Agency for International Development or any person specifically designated by him to perform any function provided for under this part.

(e) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance and any sovereign foreign government.

(f) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by an Agency official or by a recipient as a condition to becoming a recipient.

(g) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than the fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(h) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(i) *Handicapped person.* (1) ''Handicapped persons'' means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (i)(1) of this section the phrase:

(i) *Physical or mental impairment* includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism. Such term does not include alcoholism or drug abuse, where by reason of such condition the individual is prevented from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (C) has none of the impairments defined in paragraph (i)(2)(i) of this section but is treated by a recipient as having such an impairment.

(j) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(k) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

(l) *Program or activity* means all of the operations of any entity described in paragraphs (l)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (l)(1), (2), or (3) of this section.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§ 217.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefits, or service to beneficiaries of the recipient's program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or service that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§217.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Administrator, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Agency.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures

on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Agency the covenant shall also include a condition coupled with a right to be reserved by the Agency to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Administrator may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 217.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Administrator finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Administrator deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Administrator, where appropriate, may require either or both recipients to take remedial action.

(3) The Administrator may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons presently in the program or activity but not receiving full benefits or equal and integrated treatment within the program or (iii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effect of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate with the assistance of interested persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirement of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Administrator upon request: (i) A list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 217.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 217.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504, and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 217.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 217.9 Administrative requirements for small recipients.

The Administrator may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 217.7 and 217.8 in whole or in part, when the Administrator finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 217.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive

services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 217.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 217.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipients workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to made reasonable accommodation to

the physical or mental limitations of the employee or applicant.

§ 217.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Administrator to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).

§ 217.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 217.6(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 217.6(b) or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped. *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentially as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 217.15–217.20 [Reserved]

Subpart C—Accessibility

§ 217.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities

within the United States are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 217.22 Existing facilities.

(a) *Accessibility*. A recipient shall operate each program or activity to which this part applies so that when each part is viewed in its entirety it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, alteration of existing facilities, assignment of aids to beneficiaries, and construction of new facilities in conformance with the requirements of § 217.23, or any other methods that may result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph(s) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Time period*. A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under § 217.22(a) and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(e) *Notice*. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

[45 FR 66415, Oct. 6, 1980, as amended at 68 FR 51362, Aug. 26, 2003]

§ 217.23 New construction.

(a) *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration*. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards*. (1) Effective as

of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 66415, Oct. 6, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

§§ 217.24–217.40 [Reserved]

Subpart D—Postsecondary Education

§ 217.41 Application of this subpart.

Subpart D applies within the United States to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of such programs or activities within the United States.

§ 217.42 Admissions and recruitment.

(a) *General*. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions*. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitation upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Administrator to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as to best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception*. When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 217.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 217.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 217.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

§ 217.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence

of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 217.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 217.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 217.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 217.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap.

The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interest and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 217.48–217.60 [Reserved]

Subpart E—Procedures

§ 217.61 Procedures.

The procedural provisons applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§209.6–209.13 of this title.

§§ 217.62–217.99 [Reserved]

APPENDIX A TO PART 217—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

1. Grants to research and educational institutions in the United States to strengthen their capacity to develop and carry out programs concerned with the economic and social development of developing countries. (Section 122(d), Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151(d).)

2. Grants to land grant and other qualified agricultural universities and colleges in the United States to develop their capabilities to assist developing countries in agricultural teaching, research and extension services. (Section 297, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2220(b).)

3. Grants to private and voluntary agencies, non-profit organizations, educational institutions, and other qualified organizations for programs in the United States to promote the economic and social development of developing countries. (Section 103—106, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151a—2151d.)

PART 218—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Sec.
218.01 What is the purpose of age discrimination regulations?
218.02 To what programs or activities do these regulations apply?
218.03 Definitions.

Subpart B—Standards for Determining Age Discrimination

218.11 Standards.

Subpart C—Duties of Agency Recipients

218.21 General responsibilities.
218.22 Notice to subrecipients.
218.23 Self-evaluation.
218.24 Information requirements.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

218.31 Compliance reviews.
218.32 Complaints.
218.33 Mediation.
218.34 Investigation.
218.35 Prohibition against intimidation or retaliation.
218.36 Compliance procedure.
218.37 Hearings, decisions, post-termination proceedings.
218.38 Remedial action by recipients.
218.39 Alternate funds disbursal procedure.
APPENDIX A TO PART 218—LIST OF FEDERAL FINANCIAL ASSISTANCE
APPENDIX B TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE
APPENDIX C TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

AUTHORITY: Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*; 45 CFR part 90; 22 U.S.C. 2658, unless otherwise noted.

SOURCE: 45 FR 62980, Sept. 23, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 218 appear at 68 FR 51363, Aug. 26, 2003.

Subpart A—General

§ 218.01 What is the purpose of the age discrimination regulations?

The purpose of these regulations is to set out the policies and procedures for the three foreign affairs agencies (State, USICA and AID) under the Age

Discrimination Act of 1975 and the government-wide age discrimination regulations at 45 CFR part 90 (published at 44 FR 33768, June 12, 1979). The Act and the government-wide regulations prohibit discrimination on the basis of age in programs or activities in the United States receiving Federal financial assistance. The Act and the government-wide regulations permit federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and the government-wide regulations.

§ 218.02 To what programs or activities do these regulations apply?

These regulations apply to each foreign affairs agency recipient and to each program or activity in the United States operated by the recipient which receives Federal financial assistance provided by any of these agencies.

§ 218.03 Definitions.

(a) The following terms used in this part are defined in the government-wide regulations (45 CFR 90.4, 44 FR 33768):

Act
Action
Age
Age distinction
Age-related term
Federal financial assistance
Recipient (including subrecipients)
United States

(b) As used in this part,

(1) *Agency* means the Department of State, the U.S. International Communication Agency, and the Agency for International Development.

(2) *Secretary* means the Secretary of State, the Director of the U.S. International Communication Agency, and the Administrator of the Agency for International Development, or the designee of such officer.

(3) *Subrecipient* means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(4) *Program or activity* means all of the operations of any entity described in paragraphs (b)(4)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity which is established by two or more of the entities described in paragraph (b)(4)(i), (ii), or (iii) of this section.

[45 FR 62980, Sept. 23, 1980, as amended at 68 FR 51363, Aug. 26, 2003]

Subpart B—Standards for Determining Age Discrimination

§ 218.11 Standards.

The standards each agency uses to determine whether an age distinction or age-related term is prohibited are set out in part 90 (primarily subpart B) of 45 CFR.

Subpart C—Duties of Agency Recipients

§ 218.21 General responsibilities.

Each agency recipient has primary responsibility to ensure that its programs or activities are in compliance with the Act, the government-wide regulations, and these regulations.

§ 218.22 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from an agency to subrecipients, the recipient shall provide the subrecipients written notice to their obligations under these regulations.

§ 218.23 Self-evaluation.

(a) Each recipient employing the equivalent of 15 or more full-time employees shall complete a one-time written self-evaluation of its compliance under the act within 18 months of the effective date of these regulations.

(b) In its self-evaluation each recipient shall identify each age distinction it uses and justify each age distinction it imposes on the program or activity receiving Federal financial assistance from an agency.

(c) Each recipient shall take corrective action whenever a self-evaluation indicates a violation of these regulations.

(d) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of three years following its completion.

§ 218.24 Information requirements.

Each recipient shall:

(a) Make available upon request to the agency information necessary to determine whether the recipient is complying with the regulations.

(b) Permit reasonable access by the agency to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether a recipient is in compliance with these regulations.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 218.31 Compliance reviews.

(a) The agency may conduct compliance reviews and pre-award reviews of recipients that will permit it to investigate and correct violations of these regulations. The agency may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review or preaward review indicates a violation of this part, the agency will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, the agency will arrange for enforcement as described in § 143.36

§ 218.32 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with an agency, alleging discrimination prohibited by these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, the agency may extend this time limit.

(b) The agency will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights under the complaint procedure, including the right to have a representative at all stages of the complaint process.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact the agency for information and assistance regarding the complaint resolution process.

(c) The agency will return to the complainant any complaint outside the jurisdiction of these regulations and will state the reason(s) why it is outside the jurisdiction of these regulations.

§ 218.33 Mediation.

(a) *Referral of complaints for mediation.* The agency will refer to the Federal Mediation and Conciliation Service all complaints that:

(1) fall within the jurisdiction of these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extend necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator, before the agency will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it. The mediator shall send a copy of the agreement to the agency. The agency shall take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) The agency will use the mediation process for a maximum of 60 days after receiving a compliant. Mediation ends if:

(1) Sixty days elapse from the time the agency receives the complaints; *or*

(2) Prior to the end of that 60-day period, an agreement is reached; *or*

(3) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(f) The mediator shall return unresolved complaints to the agency.

§ 218.34 Investigation.

(a) *Informal investigation.* (1) The agency will investigate complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of the initial investigation, the agency will use informal fact finding methods, including joint or separate discussions with the complainant and recipient to establish the facts, and, if possible, settle the complaint on terms that are mutually agreeable. The agency may seek the assistance of any involved State agency.

(3) The agency will put any agreement in writing and have it signed by the parties and an authorized official of the agency.

(4) The settlement shall not affect the operation of any other enforcement efforts of the agency, including compliance reviews and other individual complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal investigation.* If the agency cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, the agency will attempt to obtain voluntary compliance. If the agency cannot obtain voluntary compliance, it will begin enforcement as described in § 218.36.

§ 218.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.

§ 218.36 Compliance procedure.

(a) An agency may enforce the Act and these regulations through:

(1) Termination of a recipient's Federal financial assistance from the agency under the program or activity involved where the recipient has violated the Act and these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. Therefore, cases which are settled in mediation or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from the agency.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations by the Act and these regulations.

(ii) Use of any requirement of or referral to any Federal, state, or local government agency which will have the effect of correcting a violation of the Act or these regulations.

(b) The agency will limit any termination under paragraph (a)(1) of this section to the particular recipient and particular program or activity the agency finds in violation of these regulations. The agency will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from the agency.

(c) The agency will take no action under paragraph (a) of this section until:

(1) The agency head has advised the recipient of its failure to comply with these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have lapsed after the agency head has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The agency head shall file a report whenever any action is taken under paragraph (a) of this section.

(d) The agency head also may defer granting new Federal financial assistance from the agency to a recipient when a hearing under paragraph (a)(1) of this section is initiated.

(1) New Federal financial assistance from the agency includes all assistance for which the agency requires an application or approval, including renewal of continuation of existing activities, or authorization of the new activities, during the deferral period. New Federal financial assistance from the agency does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under paragraph (a)(1) of this section.

(2) The agency will not begin a deferral until the recipient has received a notice of opportunity for a hearing under paragraph (a)(1) of this section. The agency will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the agency head. The agency will not continue a deferral for more than 30 days after the close of a hearing unless the hearing results in a finding against the recipient.

§ 218.37 Hearings, decisions, post-termination proceedings.

Certain procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to enforcement of this part. They are 22 CFR part 209.

§ 218.38 Remedial action by recipient.

Where the agency head finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action that the agency head may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, the agency head may require both recipients to take remedial action.

§ 218.39 Alternate funds disbursal procedure.

(a) When an agency withholds funds from a recipient under these regulations, the agency head may disburse the withheld funds directly to an alternate recipient, any public or non-profit private organization or agency, or State or political subdivision of the State.

(b) The agency head will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

APPENDIX A TO PART 218—LIST OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE DEPARTMENT OF STATE SUBJECT TO AGE DISCRIMINATION REGULATIONS

Resettlement of Refugees in the United States Under the Migration and Refugee Assistant Act of 1962, as amended (22 U.S.C. 2601 *et seq.*).

Diplomat in Residence Program of the Foreign Service Institute Under Title VII of the Foreign Service Act of 1946, as amended (22 U.S.C. 1041 *et seq.*).

Assignments under section 576 of the Foreign Service Act of 1946, as amended (22 U.S.C. 966).

APPENDIX B TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY THE UNITED STATES INTERNATIONAL COMMUNICATION AGENCY SUBJECT TO AGE DISCRIMINATION REGULATIONS

Educational and Cultural Exchanges under the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. 1431–1479).

APPENDIX C TO PART 218—LIST OF TYPES OF FEDERAL FINANCIAL ASSISTANCE

FEDERAL FINANCIAL ASSISTANCE ADMINISTERED BY AID SUBJECT TO AGE DISCRIMINATION REGULATIONS

1. Grants to research and educational institutions in the United States to strengthen their capacity to develop and carry out programs concerned with the economic and social development of developing countries. (Section 122(d), Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151(d)).

2. Grants to land grant and other qualified agricultural universities and colleges in the United States to develop their capabilities to assist developing countries in agricultural teaching, research and extension services. (Section 297, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2220(b)).

3. Grants to private and voluntary agencies, non-profit organization, educational institutions, and other qualified organizations for programs in the United States to promote the economic and social development of developing countries. (Sections 103–106, Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151a–2151d).

PART 219—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY INTERNATIONAL DEVELOPMENT COOPERATION AGENCY, AGENCY FOR INTERNATIONAL DEVELOPMENT

Sec.

219.101 Purpose.
219.102 Application.
219.103 Definitions.
219.104–219.109 [Reserved]
219.110 Self-evaluation.
219.111 Notice.
219.112–219.129 [Reserved]
219.130 General prohibitions against discrimination.
219.131–219.139 [Reserved]
219.140 Employment.
219.141–219.148 [Reserved]
219.149 Program accessibility: Discrimination prohibited.
219.150 Program accessibility: Existing facilities.
219.151 Program accessibility: New construction and alterations.
219.152–219.159 [Reserved]
219.160 Communications.
219.161–219.169 [Reserved]
219.170 Compliance procedures.
219.171–219.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4576, Feb. 5, 1986, unless otherwise noted.

§ 219.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 219.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 219.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified handicapped person means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §219.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4576, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§219.104–219.109 [Reserved]

§219.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§219.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§219.112–219.129 [Reserved]

§219.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualfied handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or

activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 219.131–219.139 [Reserved]

§ 219.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 219.141–219.148 [Reserved]

§ 219.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 219.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 219.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 219.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens

but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is nor required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4576, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§ 219.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 219.152–219.159 [Reserved]

§ 219.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices

for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 219.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 219.161–219.169 [Reserved]

§ 219.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Office of Equal Opportunity Programs shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Office of Equal Opportunity Programs, Agency for International Development, International Development Cooperation Agency, Room 1224, SA–1, Washington, DC.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 219.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4576, Feb. 5, 1986, as amended at 51 FR 4576, Feb. 5, 1986]

§§ 219.171–219.999 [Reserved]

PART 221—ISRAEL LOAN GUARANTEE STANDARD TERMS AND CONDITIONS

Subpart A—Definitions

Sec.
221.01 Definitions.

Subpart B—The Guarantee

221.11 The Guarantee.
221.12 Guarantee eligibility.
221.13 Non-impairment of the Guarantee.
221.14 Transferability of Guarantee; Note Register.
221.15 Fiscal Agent obligations.

Subpart C—Procedure for Obtaining Compensation

221.21 Event of Default; Application for Compensation; payment.
221.22 No acceleration of Eligible Notes.
221.23 Payment to A.I.D. of excess amounts received by a Noteholder.
221.24 Subrogation of A.I.D.

Subpart D—Covenants

221.31 Prosecution of claims.
221.32 Change in agreements.

Subpart E—Administration

221.41 Arbitration.
221.42 Notice.
221.43 Governing law.
APPENDIX A TO PART 221—APPLICATION FOR COMPENSATION

AUTHORITY: 22 U.S.C. 2186.

SOURCE: 58 FR 14148, Mar. 16, 1993, unless otherwise noted.

Subpart A—Definitions

§ 221.01 Definitions.

Wherever used in these standard terms and conditions:

(a) *A.I.D.* means the United States Agency for International Development or its successor with respect to the guarantee authorities contained in title III, chapter 2 of part I of the Foreign Assistance Act of 1961, as amended (the ''Act'').

(b) *Eligible Note(s)* means [a] Notes[s] meeting the eligibility criteria set out in § 221.12 hereof.

(c) *Noteholder* means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

(d) *Borrower* means the Government of Israel, on behalf of the State of Israel.

(e) *Defaulted payment* means, as of any date,

(1) In respect of any current coupon Eligible Note, any interest amount and/or principal amount not paid when due, and

(2) In respect of any zero-coupon Eligible Note, any maturity amount not paid when due.

(f) *Further guaranteed payments* means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

(g) *Loss of investment* respecting any Eligible Note means an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

(h) *Application for compensation* means an executed application in the form of appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with A.I.D. pursuant to § 221.21 of this part.

(i) *Applicant* means a Noteholder who files an Application for Compensation with A.I.D., either directly or through the Fiscal Agent acting on behalf of a Noteholder.

(j) *Date of application* means the effective date of an Application for Compensation filed with A.I.D. pursuant to § 221.21 of this part.

(k) *Business day* means any day other than a day on which banks in New York, New York are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

(l) *Guarantee payment date* means a Business Day not more than three (3) Business Days after the related Date of Application.

(m) *Person* means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

Subpart B—The Guarantee

§ 221.11 The Guarantee.

Subject to these terms and conditions, the United States of America, acting through A.I.D., agrees to pay to, or upon the instructions of, any Noteholder on each Guarantee Payment Date compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder, for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder.

This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 221.12 Guarantee eligibility.

(a) Eligible Notes only may be guaranteed hereunder. Notes in order to achieve Eligible Note status must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower; and they must contain a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of A.I.D. by either a manual signature or a facsimile signature of an authorized representative of A.I.D., together with a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by A.I.D. in a Fiscal Agency Agreement (the ''Fiscal Agent'').

(b) A.I.D. shall designate, in a certificate delivered to the Fiscal Agent, the Person(s) whose signature shall be binding on A.I.D. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on A.I.D. that a Note has been duly executed on behalf of the Borrower and delivered.

§ 221.13 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall not be affected or impaired by any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, A.I.D., the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee. This non-impairment of the guarantee provision shall not, however, be operative with respect to any amount with respect to any loss arising out of fraud or misrepresentation for which the claiming

Noteholder, is responsible or of which it had knowledge at the time it became a Noteholder.

§ 221.14 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. A.I.D. shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and A.I.D. shall not be affected by notice to the contrary.

§ 221.15 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by A.I.D. as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

Subpart C—Procedure for Obtaining Compensation

§ 221.21 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with A.I.D. an Application for Compensation in the form provided in exhibit A. A.I.D. shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than three (3) Business Days after the Date of Application. In the event that A.I.D. receives any other notice of an Event of Default, A.I.D. may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with A.I.D. an Application for Compensation in respect of such amount.

§ 221.22 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration by A.I.D., the Noteholder or any other party.

§ 221.23 Payment to A.I.D. of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of A.I.D. paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to A.I.D.

§ 221.24 Subrogation of A.I.D.

In the event of payment by A.I.D. to a Noteholder under this Guarantee, A.I.D. shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

Subpart D—Covenants

§ 221.31 Prosecution of claims.

After payment by A.I.D. to an Applicant pursuant to § 221.21, A.I.D. shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and A.I.D. shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 221.32 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of A.I.D.

Subpart E—Administration

§ 221.41 Arbitration.

Any controversy or claim between A.I.D. and any noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the

award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 221.42 Notice.

Any communication to A.I.D. pursuant to this Guarantee shall be in writing in the English language, shall refer to the Israel Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by A.I.D. at the Office of Housing and Urban Programs, Bureau for Private Enterprise, Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 221.43 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 221—APPLICATION FOR COMPENSATION

[_____]

Agency for International Development, International Development Cooperation Agency, Washington, DC 20523.

Ref: Guarantee dated as of _____, 19___:

Gentlemen:

You are hereby advised that payment of $_____ (consisting of $_____ of principal, $_____ of interest and $_____ in Further Guaranteed Payments, as defined in § 221.01(f) of the Standard Terms and Conditions of the above-mentioned Guarantee) [(consisting of $_____ maturity amount and $_____ in Further Guaranteed Payments, as defined in § 221.01(f) of the Standard Terms and Conditions of the above-mentioned Guarantee)][1] was due on _____, 19 ___, on $_____ principal [maturity][1] amount of Notes held by the undersigned of the Government of Israel, on behalf of the State of Israel (the ''Borrower''). Of such amount $_____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 221.21 of said Guarantee, for payment of $_____, representing $_____, the principal amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $_____, the interest amount on such Note(s) that was due and payable by the Borrower on _____ and that remains unpaid, [$_____, the maturity amount of such Note that was due and payable on _____ and that remains unpaid][2] and $_____ in Further Guaranteed Payments,[3] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of _____% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder.]

[Name of Applicant]

By _____

Name _____

Title _____

Dated _____

[1] Alternate language for zero-coupon Eligible Notes.

[2] Alternate language for zero-coupon Eligible Notes.

[3] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

PART 223—ADMINISTRATIVE ENFORCEMENT PROCEDURES OF POST-EMPLOYMENT RESTRICTIONS

Sec.
223.1 General.
223.2 Report of violations.
223.3 Initiation of proceeding.
223.4 Examiner.
223.5 Agency representative.
223.6 Time, date and place of hearing.
223.7 Rights of parties at hearing.
223.8 Initial decision.
223.9 Appeal.
223.10 Final decision.
223.11 Appropriate action.

AUTHORITY: 18 U.S.C. 207.

SOURCE: 46 FR 55957, Nov. 13, 1981, unless otherwise noted.

§ 223.1 General.

The following procedures are hereby established with respect to the administrative enforcement of restrictions on post-employment activities (18 U.S.C.

207 (a), (b) or (c)) and implementing regulations published by the Office of Government Ethics (5 CFR part 737).

§ 223.2 Report of violations.

On receipt of information regarding a possible violation of the statutory or regulatory post-employment restrictions by a former employee and after determining that such information does not appear to be frivolous, the General Counsel shall provide such information to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. Any investigation or administrative action shall be coordinated with the Department of Justice to avoid prejudicing possible criminal proceedings. If the Department of Justice informs the Agency that it does not intend to institute criminal proceedings, such coordination shall no longer be required and the General Counsel is free to decide whether to pursue administrative action.

§ 223.3 Initiation of proceeding.

Whenever the General Counsel has reasonable cause to believe that a former Government employee has violated the statutory or regulatory post-employment restrictions, he or she shall initiate an administrative action by providing the former Government employee with written notice of intention to institute administrative action. Notice must include:

(a) A statement of allegations and the basis thereof sufficiently detailed to enable the former Government employee to prepare an adequate defense;

(b) Notification of the right to respond to the allegations in writing and/or to request a hearing, together with an explanation of the method by which a hearing may be requested; and

(c) A statement that, in the absence of a request for a hearing, the General Counsel shall issue a final decision based upon the evidence gathered to date, including any written reply made by the former Government employee.

§ 223.4 Examiner.

When a former Government employee after receiving adequate notice requests a hearing, a presiding official (hereinafter referred to as ''examiner'') shall be appointed by the Administrator to make an initial decision. The examiner shall be a responsible person who is impartial and who has not participated in any manner in the decision to initiate the proceeding. The hearing officer shall be an individual with suitable experience and training to conduct the hearing, reach a determination and render an initial decision in an equitable manner.

§ 223.5 Agency representative.

The General Counsel shall appoint an agency representative to present evidence and otherwise participate in the hearing.

§ 223.6 Time, date and place of hearing.

The examiner shall establish a reasonable time, date and place to conduct the hearing. In establishing a date, the examiner shall give due regard to the former employee's need for:

(a) Adequate time to prepare a defense properly, and

(b) An expeditious resolution of allegations that may be damaging to his or her reputation.

§ 223.7 Rights of parties at hearing.

A hearing shall include, at a minimum, the following rights for both parties:

(a) To represent oneself or to be represented by counsel;

(b) To examine or cross-examine witnesses;

(c) To submit evidence (including the use of interrogatories);

(d) To present oral arguments; and

(e) To receive a transcript of recording of the proceedings on request.

In any hearing, the agency has the burden of proof and must establish substantial evidence of a violation.

§ 223.8 Initial decision.

The examiner shall issue an initial decision based exclusively on matters of record in the proceedings and shall set forth all findings of fact and conclusions of law relevant to the matters at issue.

§ 223.9 Appeal.

Within twenty days of the date of initial decision, either party may appeal

the decision to the Administrator. The opposing party shall have ten days after receipt of a copy of the appeal to reply.

§ 223.10 Final decision.

(a) In cases where the former employee failed to request a hearing after receiving adequate notice, the General Counsel shall decide the matter on its merits based upon the evidence gathered to date, including any written reply of the former employee.

(b) In cases of appeal under § 223.9, the Administrator shall accept, reject or modify the initial decision based solely on the record of the proceedings or those portions cited by the parties to limit the issues.

§ 223.11 Appropriate action.

The Administrator may take appropriate action in the case of any individual who is found in violation of the statutory or regulatory post employment restrictions after a final decision by:

(a) Prohibiting the individual from making, on behalf of any other person (except the United States), any formal or informal appearance before, or with the intent to influence, any oral or written communication to, the Agency on any matter of business for a period not to exceed five years, which may be accomplished by directing Agency employees to refuse to participate in such appearance or to accept any such communication; and

(b) Taking other appropriate disciplinary action.

PART 224—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.

224.1 Basis and purpose.
224.2 Definitions.
224.3 Basis for civil penalties and assessments.
224.4 Investigation.
224.5 Review by the reviewing official.
224.6 Prerequisites for issuing a complaint.
224.7 Complaint.
224.8 Service of complaint.
224.9 Answer.
224.10 Default upon failure to file an answer.
224.11 Referral of complaint and answer to the ALJ.
224.12 Notice of hearing.
224.13 Parties to the hearing.
224.14 Separation of functions.
224.15 Ex parte contacts.
224.16 Disqualification of reviewing official or ALJ.
224.17 Rights of parties.
224.18 Authority of the ALJ.
224.19 Prehearing conferences.
224.20 Disclosure of documents.
224.21 Discovery.
224.22 Exchange of witness lists, statements, and exhibits.
224.23 Subpoenas for attendance at hearing.
224.24 Protective order.
224.25 Fees.
224.26 Form, filing and service of papers.
224.27 Computation of time.
224.28 Motions.
224.29 Sanctions.
224.30 The hearing and burden of proof.
224.31 Determining the amount of penalties and assessments.
224.32 Location of hearing.
224.33 Witnesses.
224.34 Evidence.
224.35 The record.
224.36 Post-hearing briefs.
224.37 Initial decision.
224.38 Reconsideration of initial decision.
224.39 Appeal to A.I.D. Administrator.
224.40 Stays ordered by the Department of Justice.
224.41 Stay pending appeal.
224.42 Judicial review.
224.43 Collection of civil penalties and assessments.
224.44 Right to administrative offset.
224.45 Deposit in Treasury of United States.
224.46 Compromise or settlement.
224.47 Limitations.

AUTHORITY: 22 U.S.C. 2381; 31 U.S.C. 3801–3812.

SOURCE: 52 FR 45313, Nov. 27, 1987, unless otherwise noted.

§ 224.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the Statute requires each authority head to promulgate regulations necessary to implement to provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent

claims or written statements to the Agency for International Development or to its agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 224.2 Definitions.

A.I.D. means the Agency for International Development.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Benefit means, in the context of ''statement,'' anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to A.I.D. for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from A.I.D. or to a party to a contract with A.I.D.—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to A.I.D. which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 224.7.

Defendant means any person alleged in a complaint under § 224.7 to be liable for a civil penalty or assessment under § 224.3.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 224.10 or § 224.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General for A.I.D. or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization and includes the plural of that term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or the District of Columbia or the Commonwealth of Puerto Rico.

Reviewing official means the General Counsel of A.I.D. or his designee who is:

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of A.I.D. in which the investigating official is employed; and

(c) Is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, A.I.D., or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 224.3 Basis for civil penalties and assessments.

(a) *Claims* (1) Any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to A.I.D., a recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of A.I.D. or such recipient or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement had a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy and may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to A.I.D. when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of A.I.D.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 224.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued, and shall identify the records of documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefore, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 224.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 224.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 224.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 224.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 224.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 224.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 224.7 only if:

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 224.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 224.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those

claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 224.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 224.8.

(b) The complaint shall state:

(1) Allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 224.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 224.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his representative.

§ 224.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 224.11. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 224.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in

§ 224.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 224.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 224.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 224.38.

(h) The defendant may appeal to the A.I.D. Administrator the decision denying a motion to reopen by filing a notice of appeal with the A.I.D. Administrator within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the A.I.D. Administrator decides the issue.

(i) If the defendant files a timely notice of appeal with the A.I.D. Administrator, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(j) The A.I.D. Administrator shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the A.I.D. Administrator decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the A.I.D. Administrator shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the A.I.D. Administrator decides that the defendant's failure to file a timely answer is not excused, the A.I.D. Administrator shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the A.I.D. Administrator issues such decision.

§ 224.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 224.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 224.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 224.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and A.I.D.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these

proceedings to the extent authorized by the provisions of that Act.

§ 224.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of A.I.D. who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the A.I.D. Administrator, except as a witness or representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in A.I.D., including in the offices of either the investigating official or the reviewing official.

§ 224.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 224.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that the reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the A.I.D. Administrator may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 224.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 224.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ may:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Adminster oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 224.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ shall issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 224.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendent may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 224.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 224.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 224.9.

§ 224.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and § 224.22 and § 224.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery*. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service a party may file an opposition to the motion and/or a motion for protective order as provided in § 224.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 224.24.

(e) *Deposition*. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 224.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 224.22 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 224.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 224.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual

may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 224.8. A subpoena on a party or upon an individual under the control of a party may be served by first-class mail.

(f) A party or individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 224.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or, with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 224.25 Fees.

The party requesting a subpoena shall pay the cost of the fee and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of A.I.D., a check for witness fees and mileage need not accompany the subpoena.

§ 224.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than

those required to be served as prescribed in § 224.8, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 224.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 224.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other times as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 224.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 224.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine

whether the defendant is liable for a civil penalty or assessment under § 224.3, and if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) A.I.D. shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 224.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the A.I.D. Administrator, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the A.I.D. Administrator in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the A.I.D. Administrator from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 224.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 224.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 224.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 224.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence, where appropriate, e g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from ALJ

at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the A.I.D. Administrator.

(c) The record of the hearing may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 224.24.

§ 224.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing briefs, at a time not exceeding 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 224.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portion thereof, violate § 224.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 224.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the A.I.D. Administrator. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the A.I.D. Administrator, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 224.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the A.I.D. Administrator in accordance with § 224.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the A.I.D. Administrator and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the A.I.D. Administrator in accordance with § 224.39.

§ 224.39 Appeal to A.I.D. Administrator.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the A.I.D. Administrator by filing a notice of appeal with the A.I.D. Administrator in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 224.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The A.I.D. Administrator may extend the initial 30 day period for an additional 30 days if the defendant files with the A.I.D. Administrator a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the A.I.D. Administrator, and the time for filing motions for reconsideration under § 224.38 has expired, the ALJ shall forward the record of the proceeding to the A.I.D. Administrator.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the A.I.D. Administrator.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the A.I.D. Administrator shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the A.I.D. Administrator that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the A.I.D. Administrator shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The A.I.D. Administrator may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in an initial decision.

(k) The A.I.D. Administrator shall promptly serve each party to the appeal with a copy of his/her decision and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the A.I.D. Administrator serves the defendant with a copy of his/her decision, a determination that a defendant is liable under § 224.3 is final and is not subject to judicial review.

§ 224.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the A.I.D. Administrator a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the A.I.D. Administrator shall stay the process immediately. The A.I.D. Administrator may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 224.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the A.I.D. Administrator.

(b) No administrative stay is available following a final decision of the A.I.D. Administrator.

§ 224.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the A.I.D. Administrator imposing penalties or assessments under this part and specifies the procedures for such review.

§ 224.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 224.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 224.42 or § 224.43, or any amount agreed upon in a compromise or settlement under § 224.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under the subsection against a refund of an overpayment of Federal taxes, then or later owning by the United States to the defendant.

§ 224.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 224.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The A.I.D. Administrator has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during pendency of any review under § 224.42 or during the pendency of any action to collect penalties and assessments under § 224.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 224.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the A.I.D. Administrator, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the A.I.D. Administrator, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 224.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 224.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 224.10(b) shall be deemed notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 225—PROTECTION OF HUMAN SUBJECTS

Sec.

225.101 To what does this policy apply?
225.102 Definitions.
225.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.
225.104–225.106 [Reserved]
225.107 IRB membership.
225.108 IRB functions and operations.
225.109 IRB review of research.
225.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.
225.111 Criteria for IRB approval of research.
225.112 Review by institution.
225.113 Suspension or termination of IRB approval of research.
225.114 Cooperative research.
225.115 IRB records.
225.116 General requirements for informed consent.
225.117 Documentation of informed consent.
225.118 Applications and proposals lacking definite plans for involvement of human subjects.
225.119 Research undertaken without the intention of involving human subjects.

225.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.
225.121 [Reserved]
225.122 Use of Federal funds.
225.123 Early termination of research support: Evaluation of applications and proposals.
225.124 Conditions.

AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 300v–1(b), unless otherwise noted.

SOURCE: 56 FR 28012, 28020, June 18, 1991, unless otherwise noted.

§ 225.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(1) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in § 225.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a federal department or agency but is subject to regulation as defined in § 225.102(e) must be reviewed and approved, in compliance with §§ 225.101, 225.102, and §§ 225.107 through 225.117 of this policy, by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or (ii) federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Protection from Research Risks, Department of Health and Human Services (HHS), and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures.[1]

[56 FR 28012, 28020, June 18, 1991; 56 FR 29756, June 28, 1991]

§ 225.102 Definitions.

(a) *Department or agency head* means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including federal, state, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or

[1] Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A–D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR part 46.101(b) do not apply to research involving prisoners, fetuses, pregnant women, or human in vitro fertilization, subparts B and C. The exemption at 45 CFR part 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains—

(1) data through intervention or interaction with the individual, or

(2) identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. ''Private information'' includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (*i.e.*, the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

§ 225.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Protection from Research Risks, HHS, and approved for federalwide use by that office. When the existence of an HHS-approved assurance is accepted in

lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Protection from Research Risks, HHS.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under § 225.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with § 225.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Protection from Research Risks, HHS.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved,

the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under § 225.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by § 225.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by § 225.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

(Approved by the Office of Management and Budget under control number 9999–0020)

[56 FR 28012, 28020, June 18, 1991; 56 FR 29756, June 28, 1991]

§§ 225.104–225.106 [Reserved]

§ 225.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 225.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in § 225.103(b)(4) and, to the extent required by, § 225.103(b)(5).

(b) Except when an expedited review procedure is used (see § 225.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

§ 225.109 IRB Review of Research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with § 225.116. The IRB may require that information, in addition to that specifically mentioned in § 225.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 225.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

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§ 225.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the FEDERAL REGISTER. A copy of the list is available from the Office for Protection from Research Risks, National Institutes of Health, HHS, Bethesda, Maryland 20892.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in § 225.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

§ 225.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by § 225.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 225.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 225.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 225.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 225.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

§ 225.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described is § 225.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in § 225.103(b)(4) and § 225.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by § 225.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 225.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4)The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

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§ 225.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 225.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator

shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 225.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 225.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under § 225.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

§ 225.119 Research undertaken without the intention of involving human subjects.

In the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

§ 225.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.

The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application

or proposal, or enter into negotiations to develop an approvable one.

§ 225.121 [Reserved]

§ 225.122 Use of Federal funds.

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§ 225.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragarph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§ 225.124 Conditions.

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

PART 226—ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON-GOVERNMENTAL ORGANIZATIONS

Subpart A—General

Sec.
226.1 Purpose and applicability.
226.2 Definitions.
226.3 Effect on other issuances.
226.4 Deviations.
226.5 Subawards.

Subpart B—Pre-award Requirements

226.10 Purpose.
226.11 Pre-award policies.
226.12 Forms for applying for Federal assistance.
226.13 Debarment and suspension.
226.14 Special award conditions.
226.15 Metric system of measurement.
226.16 Resource Conservation and Recovery Act.
226.17 Certifications and representations.

Subpart C—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

226.20 Purpose of financial and program management.
226.21 Standards for financial management systems.
226.22 Payment.
226.23 Cost sharing or matching.
226.24 Program income.
226.25 Revision of budget and program plans.
226.26 Non-Federal audits.
226.27 Allowable costs.
226.28 Period of availability of funds.

PROPERTY STANDARDS

226.30 Purpose of property standards.
226.31 Insurance coverage.
226.32 Real property.
226.33 Federally-owned and exempt property.
226.34 Equipment.
226.35 Supplies and other expendable equipment.
226.36 Intangible property.
226.37 Property trust relationship.

PROCUREMENT STANDARDS

226.40 Purpose of procurement standards.
226.41 Recipient responsibilities.
226.42 Codes of conduct.
226.43 Competition.
226.44 Procurement procedures.
226.45 Cost and price analysis.
226.46 Procurement records.
226.47 Contract administration.
226.48 Contract provisions.

226.49 USAID-Specific procurement requirements.

REPORTS AND RECORDS

226.50 Purpose of reports and records.
226.51 Monitoring and reporting program performance.
226.52 Financial reporting.
226.53 Retention and access requirements for records.

SUSPENSION, TERMINATION AND ENFORCEMENT

226.60 Purpose of suspension, termination and enforcement.
226.61 Suspension and termination.
226.62 Enforcement.

Subpart D—After-the-Award Requirements

226.70 Purpose.
226.71 Closeout procedures.
226.72 Subsequent adjustments and continuing responsibilities.
226.73 Collection of amounts due.

Subpart E—Special Provisions for Awards to Commercial Organizations

226.80 Scope of subpart.
226.81 Prohibition against profit.
226.82 Program income.

Subpart F—Miscellaneous

226.90 Disputes.

Subpart G—USAID-Specific Requirements

226.1001 Eligibility rules for goods and services. [Reserved]
226.1002 Local cost financing. [Reserved]
226.1003 Air transportation. [Reserved]
226.1004 Ocean shipment of goods. [Reserved]

APPENDIX A TO PART 226—CONTRACT PROVISIONS

AUTHORITY: 22 U.S.C. 2381(a).

SOURCE: 60 FR 3744, Jan. 19, 1995, unless otherwise noted.

Subpart A—General

§ 226.1 Purpose and applicability.

Except as otherwise authorized by statute, this part establishes uniform administrative requirements for grants and cooperative agreements awarded by USAID to U.S. institutions of higher education, hospitals, and other nonprofit organizations, and to U.S. commercial organizations; and to subawards thereunder. USAID shall not impose additional or inconsistent requirements, except as provided in Sections 226.4, and 226.14, or unless specifically required by Federal statute or executive order. Non-profit and commercial organizations that implement Federal programs for the States are also subject to State requirements. This part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

[60 FR 3744, Jan. 19, 1995, as amended at 69 FR 61724, Oct. 20, 2004]

§ 226.2 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

(1) Earnings during a given period from services performed by the recipient, and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Agreement Officer means a person with the authority to enter into, administer, terminate and/or closeout assistance agreements subject to this part, and make related determinations and findings on behalf of USAID. An Agreement Officer can only act within the scope of a duly authorized warrant or other valid delegation of authority. The term ''Agreement Officer'' includes persons warranted as ''Grant Officers.'' It also includes certain authorized representatives of the Agreement Officer acting within the limits of their authority as delegated by the Agreement Officer.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants, cooperative agreements and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: Technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which the Agreement Officer determines that all applicable administrative actions and all required work of the award have been completed by the recipient and USAID.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which USAID sponsorship ends.

Disallowed costs means those charges to an award that the USAID Agreement Officer determines to be unallowable, in accordance with the applicable Federal costs principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of USAID that, as determined by the head of the Agency, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal awarding agency means the Federal agency that provides an award to the recipient.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and

other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applies and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §§ 226.24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in USAID regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, supplies, intangible property and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving a grant or cooperative agreement directly from USAID to carry out a project or program. The term includes the following types of U.S. organizations: public and private institutions of higher education; public and private hospitals; quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers; and commercial organizations. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful

materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of ''award'' in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (''subject inventions''), as defined in 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.''

Suspension means an action by USAID that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award. Suspension of an award is a separate action from suspension under USAID regulations implementing E.O.s 12549 and 12689, ''Debarment and Suspension.'' See 22 CFR Part 208.

Termination means the cancellation of USAID sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by USAID that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

USAID means the United States Agency for International Development.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 226.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision § 226.4.

§ 226.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the

requirements of this part shall be permitted only in unusual circumstances. USAID may apply more restrictive requirements to a class of recipients when approved by OMB. USAID may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the USAID Deputy Assistant Administrator for Management.

§ 226.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients if such subrecipients are organizations which, if receiving awards directly from USAID, would fall within the definition of recipients. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,'' as amended.

Subpart B—Pre-award Requirements

§ 226.10 Purpose.

Sections 226.11 through 226.17 prescribe forms and instructions and other pre-award matters to be used in applying for USAID awards.

§ 226.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance USAID shall decide on the appropriate award instrument (*i.e.*, grant cooperative agreement or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, ''substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* USAID shall notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 226.12 Forms for applying for Federal assistance.

(a) USAID shall comply with the applicable report clearance requirements of 5 CFR part 1320, ''Controlling Paperwork Burdens on the Public,'' with regard to all forms used in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by USAID.

(c) For Federal programs covered by E.O. 12372, ''Intergovernmental Review of Federal Programs,'' the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the Catalog of Federal Domestic Assistance. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Federal awarding agencies that do not use the SF–424 form should indicate whether the application is subject to review by the State under E.O. 12372.

§ 226.13 Debarment and suspension.

USAID and recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.s 12549 and 12689, ''Debarment and Suspension,'' 22 CFR Part 208. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 226.14 Special award conditions.

If an applicant or recipient: Has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this part, has not conformed to the terms and conditions of a previous award, or is not otherwise responsible, the USAID Agreement Officer may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: The nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions will be promptly removed once the conditions that prompted them have been corrected.

§ 226.15 Metric system of measurement.

(a) The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce.

(b) Wherever measurements are required or authorized, they shall be made, computed, and recorded in metric system units of measurement, unless otherwise authorized by the agreement officer in writing when it has been found that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets. Where the metric system is not the predominant standard for a particular application, measurements may be expressed in both the metric and the traditional equivalent units, provided the metric units are listed first.

§ 226.16 Resource Conservation and Recovery Act.

Under the Act, any U.S. State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with Section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education and hospitals that receive direct Federal awards or other Federal funds shall given preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 226.17 Certifications and representations.

Unless prohibited by statute or codified regulation, USAID may at some future date, allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart C—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 226.20 Purpose of financial and program management.

Sections 226.21 through 226.28 prescribe standards for financial management systems, methods for making payments and rules for: Satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of costs and establishing funds availability.

§ 226.21 Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 226.52.

While USAID requires reporting on an accrual basis, if the recipient maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to all Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, ''Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.''

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records, including cost accounting records, that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, USAID, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) USAID may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

§ 226.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients will be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(ii) financial management systems that meet the standards for fund control and accountability as established in Section 226.21.

(2) Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances will be consolidated to cover anticipated cash needs for all awards made by USAID to the recipient.

(1) Advance payment mechanisms include, but are not limited to, USAID

Letter of Credit, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients will be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, ''Request for Advance or Reimbursement,'' or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special USAID instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. USAID may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, USAID shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit a request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and USAID has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the USAID Agreement Officer may provide cash on a working capital advance basis. Under this procedure, USAID shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle, normally 30 days. Thereafter, USAID shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment will not be used for recipients unwilling or unable to provide timely advances to their subrecipients to meet the subrecipients' actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments. This paragraph is not applicable to such earnings which are generated as foreign currencies.

(h) Unless otherwise required by statute, USAID will not withhold payments for proper charges made by recipients at any time during the project period unless:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements, or

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Managing Federal Credit Programs.'' Under such conditions, USAID may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, or as otherwise provided in USAID regulations or implementing guidance governing endowment funds, USAID does not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless:

(1) The recipient receives less than $120,000 in Federal awards per year,

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances, or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) Except as otherwise provided in the terms and conditions of the award in accordance with USAID regulations or other implementing guidance, for those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. USAID shall not require more than an original and two copies of these forms.

(1) The SF–270, Request for Advance or Reimbursement, is the standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. USAID has the option of using this form for construction programs in lieu of the SF–271, ''Outlay Report and Request for Reimbursement for Construction Programs.''

(2) The SF–271, Outlay Report and Request for Reimbursement for Construction Programs, is the standard form to be used for requesting reimbursement for construction programs. However, USAID may substitute the SF–270 when it determines that it provides adequate information to meet Federal needs.

§ 226.23 Cost sharing or matching.

(a) All contributions, including cash and third party inkind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If USAID authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation, or

(2) The current fair market value. However, when there is sufficient justification, the USAID Agreement Officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent

with those paid for similar work in the recipient's organizations. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if:

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching, or

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the USAID Agreement Officer has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees,

(2) The basis for determining the valuation for personal services, material, equipment, buildings and land shall be documented.

§ 226.24 Program income.

(a) Recipients shall apply the standards set forth in this section to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with USAID regulations, other implementing guidance, or the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed by USAID and the recipient to the project or program, and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When the agreement authorizes the disposition of program income as

described in paragraph (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) If the terms and conditions of the award do not specify how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the terms and conditions of the award provide another alternative, or the recipient is subject to special award conditions, as indicated in § 226.14. Recipients which are commercial organizations may not apply paragraph (b)(1) of this section, in accordance with § 226.82 of this part.

(e) Unless the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) Costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award and they comply with the cost principles applicable to the award funds.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 226.30 through 226.37).

(h) Unless the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 226.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon USAID requirements as reflected in the terms and conditions of the agreement. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the USAID Agreement Officer for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

(6) The inclusion, unless waived in the agreement by USAID, of costs that require prior approval in accordance with OMB Circular A–21, ''Cost Principles for Institutions of Higher Education,'' OMB Circular A–122, ''Cost Principles for Non-Profit Organizations,'' or 45 CFR part 74, Appendix E, ''Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,'' or 48 CFR part 31, ''Contract Cost Principles and Procedures,'' as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved budget of the award, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) USAID may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122, except for requirements listed in paragraphs (c)(1) and (c)(4) of this section. Such waivers may authorize recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the USAID Agreement Officer. All pre-award costs are incurred at the recipient's risk (*i.e.*, USAID is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months. For one-time extensions, the recipient must notify the USAID Agreement Officer in writing, with the supporting reasons and revised expiration date, at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The recipient may initiate a one-time extension unless one or more of the following conditions apply:

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) Except for awards under Section 226.14 and Subpart E of this part, for awards that support research, unless USAID provides otherwise in the award or in its regulations or other implementing guidance, the prior approval requirements described in paragraphs (e) (1) through (3) of this section are automatically waived (*i.e.*, recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) USAID may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the USAID Agreement Officer. USAID shall not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to non-construction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the USAID Agreement Officer for budget revisions whenever:

(1) The revision results from changes in the scope or the objective of the project or program,

(2) The need arises for additional Federal funds to complete the project, or

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with the applicable cost principles listed in § 226.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When USAID makes an award that provides support for both construction and nonconstruction work, the USAID Agreement Officer may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify the USAID Agreement Officer in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application

for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the USAID Agreement Officer indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the USAID Agreement Officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the USAID Agreement Officer shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 226.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of USAID or the prime recipient as incorporated in the award document.

[60 FR 3744, Jan. 19, 1995, as amended at 62 FR 45939, 45941, Aug. 29, 1997]

§ 226.27 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined by the Agreement Officer in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, ''Cost Principles for State and Local Governments.'' The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.'' The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, ''Cost Principles for Educational Institutions.'' The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.'' The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 226.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the USAID Agreement Officer.

PROPERTY STANDARDS

§ 226.30 Purpose of property standards.

Sections 226.31 through 226.37 set forth uniform standards governing management and or disposition of property furnished by the Federal Government or whose cost was charged to a project supported by a Federal award. USAID shall not impose additional requirements unless specifically required by statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 226.31 through 226.37.

§ 226.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided

to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 226.32 Real property.

(a) Unless the agreement provides otherwise, title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Agreement Officer.

(b) The recipient shall obtain written approval from the Agreement Officer for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (*i.e.*, awards) or programs that have purposes consistent with those authorized for support by USAID.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Agreement Officer. The Agreement Officer will give one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by USAID and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 226.33 Federally-owned and exempt property.

(a) *Federally-owned property*. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to USAID. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to USAID for further Federal agency utilization.

(2) If USAID has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless USAID has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, ''Improving Mathematics and Science Education in Support of the National Education Goals.'') Appropriate instructions shall be issued to the recipient by USAID.

(b) *Exempt property*. When statutory authority exists, USAID has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions USAID considers appropriate. Such property is ''exempt property'' (see definition in § 226.2). Should USAID not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 226.34 Equipment.

(a) Unless the agreement provides otherwise, title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this part.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of USAID. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by USAID, then

(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by USAID; second preference shall be given to projects or programs sponsored by other Federal agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by USAID. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of USAID.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient, the Federal Government, or other specified entity.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates USAID for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency with whose funds the equipment was purchased.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established

which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for USAID-financed equipment, the recipient shall request disposition instructions from the Agreement Officer. USAID shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within USAID, the availability of the equipment shall be reported to the General Services Administration to determine whether a requirement for the equipment exists in other Federal agencies. The USAID Agreement Officer shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse USAID an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient will be reimbursed by USAID for such costs incurred in its disposition.

(h) USAID reserves the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards:

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) USAID shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned equipment. If USAID fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(3) When USAID exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 226.35 Supplies and other expendable equipment.

(a) Title to supplies and other expendable equipment shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as

the Federal Government retains an interest in the supplies.

§ 226.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. USAID reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of USAID. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 226.34(g).

[60 FR 3744, Jan. 19, 1995, as amended at 65 FR 14407, 14410, Mar. 16, 2000]

§ 226.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries

of the project or program under which the property was acquired or improved. Recipients shall record liens or other appropriate notices of record to indicate that personal or real property has been acquired, improved or constructed with Federal funds and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 226.40 Purpose of procurement standards.

Sections 226.41 through 226.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by USAID upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 226.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to USAID, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 226.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 226.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly establish all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 226.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These

procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items,

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government, and

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of ''brand name or equal'' descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of USAID awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises. To permit USAID, in accordance with the small business provisions of the Foreign Assistance Act of 1961, as amended, to give United States small business firms an opportunity to participate in supplying commodities and services procured under the award, the recipient shall to the maximum extent possible provide the following information to the Office of Small Disadvantaged Business Utilization (OSDBU/MRC), USAID Washington, DC 20523, at least 45 days prior to placing any order or contract in excess of the small purchase threshold:

(i) Brief general description and quantity of goods or services;

(ii) Closing date for receiving quotations, proposals or bids; and

(iii) Address where solicitations or specifications can be obtained.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The ''cost-plus-a-percentage-of-cost'' or ''percentage of construction cost'' methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such

matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, ''Debarment and Suspension.''

(e) Recipients shall, on request, make available for USAID, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403(11) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a ''brand name'' product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 226.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 226.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection,

(b) Justification for lack of competition when competitive bids or offers are not obtained, and

(c) Basis for award cost or price.

§ 226.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 226.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the USAID Agreement Officer may accept the bonding policy and requirements of

the recipient, provided that USAID determines that the Federal Government's interest is adequately protected. In making this determination for contract or subcontracts to be performed overseas, the Agreement Officer shall take into consideration any established local practices relating to security. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of its bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, USAID, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable. Whenever a provision is required to be inserted in a contract under an agreement, the recipient shall insert a statement in the contract that in all instances where the U.S. Government or USAID is mentioned, the recipient's name shall be substituted.

§ 226.49 USAID-Specific procurement requirements

Procurement requirements which are applicable to USAID because of statute and regulation are in Subpart G.

REPORTS AND RECORDS

§ 226.50 Purpose of reports and records.

Sections 226.51 through 226.53 establish the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 226.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in Section 226.26.

(b) The terms and conditions of the agreement will prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph 226.51(f), performance reports will not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 days after the reporting period. USAID may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) Performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall submit the original and two copies of performance reports.

(f) Recipients shall immediately notify USAID of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) USAID may make site visits, as needed.

(h) USAID shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 226.52 Financial reporting.

(a) The following forms are used for obtaining financial information from recipients.

(1) SF–269 or SF–269A, Financial Status Report.

(i) USAID will require recipients to use either the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. The type of form required will be established in the award. USAID may, however, have the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The type of reporting required will be established in the agreement. If USAID requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) USAID will determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. The frequency of reports will be established in the agreement. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) Recipients shall submit the SF–269 or SF–269A (an original and two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by USAID upon request of the recipient.

(2) SF–272, Report of Federal Cash Transactions.

(i) When funds are advanced to recipients USAID shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a. USAID shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) USAID may require forecasts of Federal cash requirements in the ''Remarks'' section of the report.

(iii) When practical and deemed necessary, USAID may require recipients to report in the ''Remarks'' section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and

two copies of the SF–272 15 calendar days following the end of each quarter. USAID may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) USAID may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in USAID's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or,

(C) When the electronic payment mechanisms provide adequate data.

(b) When USAID needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, USAID shall issue instructions to require recipients to submit such information under the ''Remarks'' section of the reports.

(2) When USAID determines that a recipient's accounting system does not meet the standards in Section 226.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. USAID, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) USAID may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(4) USAID may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§ 226.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. USAID shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by USAID. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by USAID, the 3-year retention requirements is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph 226.53(g).

(c) Copies of original records may be substituted for the original records if authorized by USAID.

(d) USAID shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, USAID may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) USAID, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, USAID will not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when USAID can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to USAID.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

SUSPENSION, TERMINATION AND ENFORCEMENT

§ 226.60 Purpose of suspension, termination and enforcement.

Sections 226.61 and 226.62 set forth uniform suspension, termination and enforcement procedures.

§ 226.61 Suspension and termination.

(a) Awards may be terminated (or, with respect to paragraphs (a) (1) and (3) of this section, suspended) in whole or in part if any of the circumstances stated in paragraphs (a)(1) through (4) of this section apply.

(1) By USAID, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By USAID with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) If at any time USAID determines that continuation of all or part of the funding for a program should be suspended or terminated because such assistance would not be in the national interest of the United States or would be in violation of an applicable law, then USAID may, following notice to the recipient, suspend or terminate the award in whole or in part and prohibit the recipient from incurring additional obligations chargeable to the award other than those costs specified in the notice of suspension. If a suspension is effected and the situation causing the suspension continues for 60 days or more, then USAID may terminate the award in whole or in part on written notice to the recipient and cancel any portion of the award which has not been disbursed or irrevocably committed to third parties.

(4) By the recipient upon sending to USAID written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if USAID determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the grant was made, it may terminate the award in its entirety under paragraph (a)(1), (a)(2) or (a)(3) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in paragraph 226.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 226.62 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, USAID may, in addition to imposing any of the special conditions outlined in § 226.14, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by USAID.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* The recipient may appeal, in accordance with Subpart F, any action taken by USAID on which a dispute exists and a decision by the Agreement Officer has been obtained. There is no right to a hearing on such an appeal.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless USAID expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable, and

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and USAID's implementing regulations (see 22 CFR Part 208).

Subpart D—After-the-Award Requirements

§ 226.70 Purpose.

Sections 226.71 through 226.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 226.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. USAID may approve extensions when requested by the recipient.

(b) Unless USAID authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) USAID will make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that USAID has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, USAID shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 226.31 through 226.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, USAID retains the right to recover an appropriate amount after fully considering the recommendations

on disallowed costs resulting from the final audit.

§ 226.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of USAID to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in §§ 226.26.

(4) Property management requirements in §§ 226.31 through 226.37.

(5) Records retention as required in § 226.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of USAID and the recipient, provided the responsibilities of the recipient referred to in paragraph 226.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 226.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. USAID reserves the right to require refund by the recipient of any amount which USAID determines to have been expended for purposes not in accordance with the terms and condition of the award, including but not limited to costs which are not allowable in accordance with the applicable Federal cost principles or other terms and conditions of the award. If not paid within a reasonable period after the demand for payment, USAID may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the recipient, or

(3) Taking other action permitted by law.

(b) Except as otherwise provided by law, USAID will charge interest on an overdue debt in accordance with 4 CFR Chapter II, ''Federal Claims Collection Standards.''

Subpart E—Additional Provisions For Awards to Commercial Organizations

§ 226.80 Scope of subpart.

This subpart contains additional provisions that apply to awards to commercial organizations. These provisions supplement and make exceptions for awards to commercial organizations from other provisions of this part.

§ 226.81 Prohibition against profit.

No funds shall be paid as profit to any recipient that is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs.

§ 226.82 Program income.

The additional costs alternative described in § 226.24(b)(1) may not be applied to program income earned by a commercial organization.

Subpart F—Miscellaneous

§ 226.90 Disputes.

(a) Any dispute under or relating to a grant or agreement shall be decided by the USAID Agreement Officer. The Agreement Officer shall furnish the recipient a written copy of the decision.

(b) Decisions of the USAID Agreement Officer shall be final unless, within 30 days of receipt of the decision, the grantee appeals the decision to USAID's Deputy Assistant Administrator for Management, USAID, Washington, DC 20523. Appeals must be in writing with a copy concurrently furnished to the Agreement Officer.

(c) In order to facilitate review on the record by the Deputy Assistant Administrator for Management, the recipient shall be given an opportunity to submit written evidence in support of its appeal. No hearing will be provided.

(d) Decisions by the Deputy Assistant Administrator for Management shall be final.

Subpart G—USAID-Specific Requirements

§ 226.1001 Eligibility rules for goods and services. [Reserved]

§ 226.1002 Local cost financing. [Reserved]

§ 226.1003 Air transportation. [Reserved]

§ 226.1004 Ocean shipment of goods. [Reserved]

APPENDIX A TO PART 226—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*— All contracts to be performed in the United States, or to be performed with employees who were recruited in the United States, shall contain a provision requiring compliance with E.O. 11246, ''Equal Employment Opportunity,'' as amended by E.O. 11375, ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR Chapter 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,'' to the extent required by the foregoing.

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 276c)*— All contracts and subawards in excess of $2,000 for construction or repair to be performed in the United States awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*— When required by Federal program legislation, all construction, alteration, and/or repair contracts to be performed in the United States awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction''). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*— Where applicable, all contracts awarded by recipients in excess of $2000 for construction contracts to be performed in the United States and in excess of $2500 for other such contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*— Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,'' and any implementing regulations issued by the awarding agency.

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the *Federal Water Pollution Control Act* (33 U.S.C. 1251 *et seq.*), as amended— Contracts and subawards of amounts in excess of $100,000 to be performed in the United States shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued

pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*— Contractors who apply or bid for an award exceeding $100,000 shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*— Certain contracts shall not be made to parties listed on the nonprocurement portion of the General Services Administration's ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' in accordance with E.O.s 12549 and 12689, ''Debarment and Suspension.'' This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principals.

9. Contracts which require performance outside the United States shall contain a provision requiring Worker's Compensation Insurance (42 U.S.C. 1651, *et seq.*). As a general rule, Department of Labor waivers will be obtained for persons employed outside the United States who are not United States citizens or residents provided adequate protection will be given such persons. The recipient should refer questions on this subject to the USAID Agreement Officer.

PART 227—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
227.100 Conditions on use of funds.
227.105 Definitions.
227.110 Certification and disclosure.

Subpart B—Activities by Own Employees

227.200 Agency and legislative liaison.
227.205 Professional and technical services.
227.210 Reporting.

Subpart C—Activities by Other Than Own Employees

227.300 Professional and technical services.

Subpart D—Penalties and Enforcement

227.400 Penalties.
227.405 Penalty procedures.
227.410 Enforcement.

Subpart E—Exemptions

227.500 Secretary of Defense.

Subpart F—Agency Reports

227.600 Semi-annual compilation.
227.605 Inspector General report.
APPENDIX A TO PART 227—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 227—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 101–121 (31 U.S.C. 1352); Sec. 621, Foreign Assistance Act of 1961, as amended, 75 Stat. 445 (22 U.S.C. 2381).

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6749, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 227.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative

agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 227.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 227.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 227.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 227.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 227.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 227.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 227.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 227.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 227.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent

the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 227.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 227.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 227.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 227.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 227.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 227—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States

to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 227—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter _____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known:*

Congressional District, *if known:*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known:*

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable:* _____

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

Federal Use Only:

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Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 228—RULES ON SOURCE, ORIGIN AND NATIONALITY FOR COMMODITIES AND SERVICES FINANCED BY USAID

Subpart A—Definitions and Scope of This Part

Sec.
228.01 Definitions.
228.02 Scope and application.
228.03 Identification of principal geographic code numbers.

Subpart B—Conditions Governing Source and Nationality of Commodity Procurement Transactions for USAID Financing

228.10 Purpose.
228.11 Source and origin of commodities.
228.12 Long-term leases.
228.13 Special source rules requiring procurement from the United States.
228.14 Nationality of suppliers of commodities.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

228.20 Purpose.
228.21 Ocean transportation.
228.22 Air transportation.
228.23 Eligibility of marine insurance.
228.24 Other delivery services.
228.25 Incidental services.

Subpart D—Conditions Governing the Nationality of Suppliers of Services for USAID Financing

228.30 Purpose.
228.31 Individuals and privately owned commercial firms.
228.32 Nonprofit organizations.
228.33 Foreign government-owned organizations.
228.34 Joint ventures.
228.35 Construction services from foreign-owned local firms.
228.36 Ineligible suppliers.
228.37 Nationality of employees under contracts or subcontracts for services.
228.38 Miscellaneous service transactions.
228.39 Special source rules for construction and engineering services.

Subpart E—Conditions Governing Source and Nationality of Local Procurement Transactions for USAID Financing

228.40 Local procurement.

Subpart F—Waivers

228.50 General.
228.51 Commodities.
228.52 Suppliers of commodities.
228.53 Suppliers of services—privately owned commercial suppliers and nonprofit organizations.
228.54 Suppliers of services—foreign government-owned organizations.
228.55 Delivery services.
228.56 Authority to approve waivers.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended, E.O. 12163, Sept. 29, 1979, 44 FR 56673: 3 CFR 1979 Comp., p. 435.

SOURCE: 61 FR 53616, Oct. 15, 1996, unless otherwise noted.

Subpart A—Definitions and Scope of This Part

§ 228.01 Definitions.

As used in this part, the following terms shall have the following meanings:

(a) *Commodity* means any material, article, supply, goods, or equipment.

(b) *Commodity-related services* means delivery services and/or incidental services.

(c) *Component* means any good that goes directly into the production of a produced commodity.

(d) *Cooperating country* means the country receiving the USAID assistance subject to this part 228.

(e) *Delivery* means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an importer of any such service.

(f) *Delivery service* means any service customarily performed in a commercial export transaction which is necessary to effect a physical transfer of commodities to the cooperating country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. ''Delivery services'' may also include work and materials necessary to meet USAID marking requirements.

(g) *Implementing document* means any document, such as a contract, grant,

letter of commitment, etc., issued by USAID which authorizes the use of USAID funds for the procurement of services or commodities and/or commodity related services, and which specifies conditions which apply to such procurement.

(h) *Incidental services* means the installation or erection of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment.

(i) *Mission* means the USAID Mission or representative in a cooperating country.

(j) *Origin* means the country where a commodity is mined, grown or produced. A commodity is produced when, through manufacturing, processing, or substantial and major assembling of components, a commercially recognized new commodity results that is significantly different in basic characteristics or in purpose of utility from its components.

(k) *Services* means the performance of identifiable tasks, rather than the delivery of an end item of supply.

(l) *Source* means the country from which a commodity is shipped to the cooperating country, or the cooperating country if the commodity is located therein at the time of the purchase. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, ''source'' means the country from which the commodity was shipped to the free port or bonded warehouse.

(m) *State* means the District of Columbia or any State, commonwealth, territory or possession of the United States.

(n) *Supplier* means any person or organization, governmental or otherwise, who furnishes services, commodities and/or commodity related services financed by USAID.

(o) *United States* means the United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

(p) *USAID* means the U.S. Agency for International Development or any successor agency, including when applicable, each USAID Mission abroad.

(q) *USAID Geographic Code* means a code in the USAID Geographic Code Book which designates a country, a group of countries, or an otherwise defined area. The principal USAID geographic codes are described in § 228.03.

(r) *USAID/W* means the USAID in Washington, DC 20523, including any office thereof.

§ 228.02 Scope and application.

This part is applicable to goods and services financed directly with program funds under the Foreign Assistance Act of 1961, as amended, unless otherwise provided by statute or regulation. If different conditions apply to a USAID-financed procurement, by statute or regulation, those conditions shall be incorporated in the implementing document and shall prevail in the event of any conflict with this part 228. The implementing documents will indicate the authorized source of procurement. The terms and conditions applicable to a procurement of goods or services shall be those in effect on the date of the issuance of a contract for goods or services by USAID or by the cooperating country.

§ 228.03 Identification of principal geographic code numbers.

The USAID Geographic Code Book sets forth the official description of all geographic codes used by USAID in authorizing or implementing documents, to designate authorized source countries or areas. The following are summaries of the principal codes:

(a) Code 000—*The United States:* The United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S.-associated sovereignty, including commonwealths, territories and possessions.

(b) Code 899—Any area or country, except the cooperating country itself and the following foreign policy restricted countries: Cuba, Iraq, Iran, Laos, Libya, North Korea, and Syria.

(c) Code 935—Any area or country including the cooperating country, but excluding the foreign policy restricted countries.

(d) Code 941—The United States and any independent country (except foreign policy restricted countries) except the cooperating country itself and the

following: Albania, Andorra, Angola, Armenia, Austria, Australia, Azerbaijan, Bahamas, Bahrain, Belgium, Bosnia and Herzegovina, Bulgaria, Belarus, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia,* Malta, Moldova, Monaco, Mongolia, Montenegro*, Netherlands, New Zealand, Norway, People's Republic of China, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Serbia*, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan*, Tajikistan, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, Uzbekistan, and Vatican City.

[61 FR 53616, Oct. 15, 1996; 61 FR 54849, Oct. 22, 1996, as amended at 68 FR 23892, May 6, 2003]

Subpart B—Conditions Governing Source and Nationality of Commodity Procurement Transactions for USAID Financing

§ 228.10 Purpose.

Sections 228.11 through 228.14 set forth the rules governing the eligible source of commodities and nationality of commodity suppliers for USAID financing. These rules may be waived in accordance with the provisions in subpart F of this part.

§ 228.11 Source and origin of commodities.

(a) The source and origin of a commodity as defined in § 228.01 shall be a country or countries authorized in the implementing document by name or by reference to a USAID geographic code.

(b) Any component from a foreign policy restricted country makes the commodity ineligible for USAID financing.

(c) When the commodity being purchased is a kit (e.g., scientific instruments, tools, or medical supplies packaged as a single unit), the kit will be considered a produced commodity.

(d) When spare parts for vehicles or equipment are purchased, each separate shipment will be considered a produced commodity, rather than each individual spare or replacement part. The parts must be packed in and shipped from an eligible country.

(e) *Systems determination*. When a system consisting of more than one produced commodity is procured as a single separately priced item, USAID may determine that the system itself shall be considered a produced commodity. When a determination is made to treat a system as a produced commodity, component commodities which originate from other than an authorized source country may be shipped directly to, and the system assembled in, the cooperating country, unless USAID specifically determines that assembly and shipment take place in an authorized source country. Transportation costs must still meet the requirements in subpart C of this part in order for them to be eligible for USAID financing. USAID, or the importer in the case of a Commodity Import Program, shall inform the supplier of any system determination.

(f) In order to be eligible for USAID financing, when items are considered produced commodities under paragraphs (c), (d), or (e) of this section, the total cost (to the system supplier) of the commodities making up the kit, spare parts, or system which were manufactured in countries not included in the authorized geographic code may not exceed 50 percent of the lowest price (not including ocean transportation and marine insurance) at which the supplier makes the final product available for export sale.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 38751, July 20, 1998]

§ 228.12 Long-term leases.

Any commodity obtained under a long-term lease agreement is subject to the source and origin requirements of this subpart B. For purposes of this subpart B, a long-term lease is defined as a single lease of more than 180 days, or repetitive or intermittent leases under a single activity or program within a one-year period totalling more

*Has the status of a ''Geopolitical Entity'', rather than as independent country.

than 180 days, for the same type of commodity.

§ 228.13 Special source rules requiring procurement from the United States.

(a) Agricultural commodities and products thereof must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the United States in fulfillment of the objectives of a particular assistance program under which such commodity procurement is to be financed. (22 U.S.C. 2354)

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing. Also, any vehicle to be financed by USAID under a long-term lease or where the sale is to be guaranteed by USAID must be manufactured in the United States. (22 U.S.C. 2396) For purposes of this section, motor vehicles are defined as self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles and utility vehicles. Excluded from this definition are industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks) and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above).

(c) Pharmaceutical products must be manufactured in the United States in order to be eligible for USAID financing. USAID shall not finance any pharmaceutical product manufactured outside the United States if the manufacture of such product in the United States would involve the use of, or be covered by, a valid patent of the United States unless such manufacture is expressly authorized by the owner of such patent. (22 U.S.C. 2356)

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 72181, Dec. 31, 1998]

§ 228.14 Nationality of suppliers of commodities.

(a) The rules on nationality of suppliers of commodities relate only to the suppliers, and not to the commodities they supply. The nationality of the supplier is an additional eligibility criterion to the rules on source, origin and componentry.

(b) A supplier providing commodities must fit one of the following categories for the transaction to be eligible for USAID financing:

(1) An individual who is a citizen or a lawfully admitted permanent resident of a country or area included in the authorized geographic source code, except as provided in paragraph (c) of this section;

(2) A corporation or partnership organized under the laws of a country or area included in the authorized geographic source code and with a place of business in such country;

(3) A controlled foreign corporation (within the meaning of section 957 *et seq.* of the Internal Revenue Code) as attested by current information on file with the Internal Revenue Service of the United States (on IRS Form 959, 2952, 3646, or on substitute or successor forms) submitted by shareholders of the corporation; or

(4) A joint venture or unincorporated association consisting entirely of individuals, corporations, or partnerships which are eligible under either paragraph (b) (1), (2) or (3) of this section.

(c) Citizens of any country or area, or firms or organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of commodities. Limited exceptions to this rule are:

(1) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship; and

(2) The USAID Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

§ 228.20 Purpose.

Sections 228.21 through 228.25 set forth the rules governing the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules may be waived in accordance with the provisions in subpart F of this part. Waivers granted pursuant to subpart F for individual shipments requiring ocean transportation which are not based on a determination of non-availability shall not reduce the requirement that the applicable percentage of USAID cargoes be transported on U.S.-flag vessels pursuant to the Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b). The rules on delivery services apply whether or not USAID is also financing the commodities being transported. In order to be identified and eligible as incidental services, such services must be connected with a USAID-financed commodity procurement.

§ 228.21 Ocean transportation.

(a) The Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b)(1), is applicable to ocean shipment of goods subject to this part. USAID's policy on implementation of the Cargo Preference Act is in USAID's Automated Directives System, Chapter 315.

(b) In addition to cargo preference requirements, ocean shipments of USAID-financed goods must meet the requirements in paragraph (c) of this section in order for the freight cost to be eligible for USAID financing.

(c) The eligibility of ocean transportation services is determined by the flag registry of the vessel.

(1) When the authorized source for procurement is Geographic Code 000 (U.S.A.), USAID will finance ocean transportation only on U.S. flag vessels.

(2) When the authorized source for procurement is Geographic Code 941 (selected Free World), USAID will finance ocean transportation on vessels under flag registry of any country in Code 935.

(3) When commodities whose eligibility is restricted to Geographic Code 000 are purchased under agreements which authorize Geographic Code 941 for the procurement of all other commodities, USAID will finance the ocean transportation in accordance with paragraph (c)(2) of this section.

(4) USAID will finance costs incurred on vessels under flag registry of any Geographic Code 935 country if the costs are part of the total cost on a through bill of lading that is paid to a carrier for initial carriage on a vessel which is eligible in accordance with paragraphs (c)(1), (2) or (3) of this section; provided that for shipments originating on a U.S. flag vessel with transshipment to a non-U.S. flag vessel, the supplier must obtain a determination that direct serve on a U.S. flag vessel is not available from USAID's Office of Procurement, Transportation Division, 1300 Pennsylvania Avenue NW., Washington, DC 20523–7900.

[61 FR 53616, Oct. 15, 1996, as amended at 63 FR 38751, July 20, 1998]

§ 228.22 Air transportation.

(a) The eligibility of air transportation is determined by the flag registry of the aircraft. The term ''U.S. flag air carrier'' means one of a class of air carriers holding a certificate under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371) authorizing operations between the United States or its territories and one or more foreign countries.

(b) For air transport financed under USAID grants, there is a U.S. Government statute that requires the use of U.S. flag air carriers for all international air travel and transportation, unless such service is not available. When U.S. flag air carriers are not available, any Geographic Code 935 flag air carrier may be used.

(c) Different requirements may be authorized in the implementing document if the transaction is financed under a USAID loan.

(d) The Comptroller General's memorandum (B–138942), dated March 31, 1981, entitled ''Revised Guidelines for

Implementation of the Fly America Act'', established criteria for determining when U.S. flag air carriers are unavailable. See 48 CFR 47.403–1, or USAID Optional Standard Provision on ''Air Travel and Transportation'' for grants and cooperative agreements.

(e) While the Comptroller General's memorandum does not establish specific criteria for determining when freight service is unavailable, it is USAID's policy that such service is not available when the following criteria are met:

(1) When no U.S. flag air carrier provides scheduled air freight service from the airport serving the shipment's point of origin and a non-U.S. flag carrier does;

(2) When the U.S. flag air carrier(s) serving the shipment's point of origin decline to issue a through air waybill for transportation at the shipment's final destination airport;

(3) When use of a U.S.-flag air carrier would result in delivery to final destination at least seven days later than delivery by means of a non-U.S. carrier;

(4) When the total weight of the consignment exceeds the maximum weight per shipment which the U.S. flag air carrier will accept and transport as a single shipment and a non-U.S. flag air carrier will accept and transport the entire consignment as a single shipment;

(5) When the dimensions (length, width, or height) of one or more of the items of a consignment exceed the limitations of the U.S. flag aircraft's cargo door opening, but do not exceed the acceptable dimensions for shipment on an available non-U.S. flag scheduled air carrier.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

§ 228.23 Eligibility of marine insurance.

The eligibility of marine insurance is determined by the country in which it is ''placed''. Insurance is ''placed'' in a country if payment of the insurance premium is made to, and the insurance policy is issued by, an insurance company office located in that country. Eligible countries for placement are governed by the authorized geographic code. However, if Geographic Code 941 is authorized, the cooperating country is also eligible to provide such services, unless the implementing document specified otherwise based on the following:

(a) If a cooperating country discriminates against marine insurance companies authorized to do business in any State of the United States, then all USAID-financed goods for that country must be insured in the United States against marine risk. The term ''authorized to do business in any State of the United States'' means that foreign-owned insurance companies licensed to do business in the United States (by any State) are treated the same as comparable U.S.-owned companies.

(b) The prima facie test of discrimination is that a cooperating country takes actions which hinder private importers in USAID-financed transactions from making cost, insurance and freight (C.I.F.) or cost and insurance (C.&I.) contracts with United States commodity suppliers, or which hinder importers in instructing such suppliers to place marine insurance with companies authorized to do business in the United States.

(c) When discrimination is found to exist and the cooperating country fails to correct the discriminatory practice, USAID requires that all commodities procured with USAID funds be insured in the United States against marine loss. The decision of any cooperating country to insure all public sector procurements locally with a government-owned insurance agency is not considered discrimination.

§ 228.24 Other delivery services.

No source or nationality rules apply to other delivery services, such as export packing, loading, commodity inspection services, and services of a freight forwarder. Such services are eligible in connection with a commodity which is financed by USAID.

§ 228.25 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment. However, citizens or firms of any country not included in

USAID Geographic Code 935 are ineligible to supply incidental services, except that individuals lawfully admitted for permanent residence in the U.S. are eligible regardless of their citizenship.

[61 FR 53616, Oct. 15, 1996; 61 FR 54849, Oct. 22, 1996]

Subpart D—Conditions Governing the Nationality of Suppliers of Services for USAID Financing

§ 228.30 Purpose.

Sections 228.31 through 228.37 set forth the nationality rules governing the eligibility for USAID financing of suppliers of services which are not commodity-related. These rules may be waived in accordance with the provisions in subpart F of this part.

§ 228.31 Individuals and privately owned commercial firms.

(a) In order to be eligible for USAID financing as a supplier of services, whether as a contractor or subcontractor at any tier, an individual must meet the requirements of paragraph (a)(1) of this section (except that individual personal services contractors are not subject to this requirement), and a privately owned commercial firm must meet the requirements in paragraph (a)(2) of this section. In the case of the categories described in paragraphs (a)(2) (i) and (ii) of this section, the certification requirements in paragraph (b) of this section must be met.

(1) An individual must be a citizen of and have a principal place of business in a country or area included in the authorized geographic code, or a non-U.S. citizen lawfully admitted for permanent residence in the United States whose principal place of business is in the United States;

(2) A privately owned commercial (*i.e.*, for profit) corporation or partnership must be incorporated or legally organized under the laws of a country or area included in the authorized geographic code, have its principal place of business in a country or area included in the authorized geographic code, and meet the criteria set forth in either paragraph (a)(2)(i) or (ii) of this section:

(i) The corporation or partnership is more than 50 percent beneficially owned by individuals who are citizens of a country or area included in the authorized geographic code or non-U.S. citizens lawfully admitted for permanent residence in the United States. In the case of corporations, ''more than 50 percent beneficially owned'' means that more than 50 percent of each class of stock is owned by such individuals; in the case of partnerships, ''more than 50 percent beneficially owned'' means that more than 50 percent of each category of partnership interest (e.g., general, limited) is owned by such individuals.

(With respect to stock or interest held by companies, funds or institutions, the ultimate beneficial ownership by individuals is controlling.)

(ii) The corporation or partnership:

(A) Has been incorporated or legally organized in the United States for more than 3 years prior to the issuance date of the invitation for bids or requests for proposals,

(B) Has performed within the United States administrative and technical, professional, or construction services, similar in complexity, type and value to the services being contracted (under a contract, or contracts, for services) and derived revenue therefrom in each of the 3 years prior to the date described in paragraph (a)(2)(ii)(A) of this section,

(C) Employs United States citizens and non-U.S. citizens lawfully admitted for permanent residence in the United States in more than half its permanent full-time positions in the United States and more than half of its principal management positions, and

(D) Has the existing technical and financial capability in the United States to perform the contract.

(b) A duly authorized officer of a firm or nonprofit organization shall certify that the participating firm or nonprofit organization meets either the requirements of paragraph (a)(2) (i) or (ii) of this section or § 228.32. In the case of corporations, the certifying officer shall be the corporate secretary. With respect to the requirements of paragraph (a)(2)(i) of this section, the certifying officer may presume citizenship on the basis of the stockholders' record

address, provided the certifying officer certifies, regarding any stockholder (including any corporate fund or institutional stockholder) whose holdings are material to the corporation's eligibility, that the certifying officer knows of no fact which might rebut that presumption.

§ 228.32 Nonprofit organizations.

(a) Nonprofit organizations, such as educational institutions, foundations, and associations, must meet the criteria listed in this section and the certification requirement in § 228.31(b) to be eligible as suppliers of services, whether as contractors or subcontractors at any tier. Any such institution must:

(1) Be organized under the laws of a country or area included in the authorized geographic code;

(2) Be controlled and managed by a governing body, a majority of whose members are citizens of countries or areas included in the authorized geographic code; and

(3) Have its principal facilities and offices in a country or area included in the authorized geographic code.

(b) International agricultural research centers and such other international research centers as may be, from time to time, formally listed as such by the USAID Assistant Administrator, Global Bureau, are considered to be of U.S. nationality.

§ 228.33 Foreign government-owned organizations.

Firms operated as commercial companies or other organizations (including nonprofit organizations other than public educational institutions) which are wholly or partially owned by foreign governments or agencies thereof are not eligible for financing by USAID as contractors or subcontractors, except if their eligibility has been established by a waiver approved by USAID in accordance with § 228.54. This does not apply to foreign government ministries or agencies.

§ 228.34 Joint ventures.

A joint venture or unincorporated association is eligible only if each of its members is eligible in accordance with §§ 228.31, 228.32, or 228.33.

§ 228.35 Construction services from foreign-owned local firms.

(a) When the estimated cost of a contract for construction services is $5 million or less and only local firms will be solicited, a local corporation or partnership which does not meet the test in § 228.31(a)(2)(i) for eligibility based on ownership by citizens of the cooperating country (*i.e.*, it is a foreign-owned local firm) will be eligible if it is determined by USAID to be an integral part of the local economy. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating country on a continuing basis for not less than three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are resident in the cooperating country;

(4) Most of its operating equipment and physical plant are in the cooperating country.

§ 228.36 Ineligible suppliers.

Citizens of any country or area not included in Geographic Code 935, and firms and organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of services, or as agents in connection with the supply of services. The limited exceptions to this rule are:

(a) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship, and

(b) The Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

§ 228.37 Nationality of employees under contracts or subcontracts for services.

(a) The rules set forth in §§ 228.31 through 228.36 do not apply to the employees of contractors or subcontractors. Such employees must, however, be citizens of countries included in Geographic Code 935 or, if they are not, have been lawfully admitted for permanent residence in the United States.

(b) When the contractor on a USAID-financed construction project is a United States firm, at least half of the supervisors and other specified key personnel working at the project site must be citizens or permanent legal residents of the United States. Exceptions may be authorized by the USAID Mission Director in writing if special circumstances exist which make compliance impractical.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997]

§ 228.38 Miscellaneous service transactions.

This section sets forth rules governing certain miscellaneous services.

(a) *Commissions.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to the payment of commissions by suppliers. A commission is defined as any payment or allowance by a supplier to any person for the contribution which that person has made to securing the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

(b) *Bonds and guarantees.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to sureties, insurance companies or banks who issue bonds or guarantees under USAID-financed contracts.

(c) *Liability insurance under construction contracts.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to firms providing liability insurance under construction contracts.

§ 228.39 Special source rules for construction and engineering services.

Advanced developing countries, eligible under Geographic Code 941, which have attained a competitive capability in international markets for construction services or engineering services are not eligible to furnish USAID-financed construction and engineering services. There is no waiver of this provision. (22 U.S.C. 2354)

Subpart E—Conditions Governing Source and Nationality of Local Procurement Transactions for USAID Financing

§ 228.40 Local procurement.

Local procurement in the cooperating country involves the use of appropriated funds to finance the procurement of goods and services supplied by local businesses, dealers or producers, with payment normally being in the currency of the cooperating country. Unless otherwise specified in an implementing document, or a waiver is approved by USAID in accordance with subpart F of this part, local procurement is eligible for USAID financing only in the following situations:

(a) Locally available commodities of U.S. origin, which are otherwise eligible for financing, if the value of the transaction is estimated not to exceed the local currency equivalent of $100,000 (exclusive of transportation costs).

(b) Commodities of Geographic Code 935 origin if the value of the transaction does not exceed $5,000.

(c) Professional services contracts estimated not to exceed the local currency equivalent of $250,000.

(d) Construction services contracts, including construction materials required under the contract, estimated not to exceed the local currency equivalent of $5,000,000.

(e) Under a fixed-price construction contract of any value, the prime contractor may procure locally produced goods and services under subcontracts.

(f) The following commodities and services which are only available locally:

(1) Utilities, including fuel for heating and cooking, waste disposal and trash collection;

(2) Communications—telephone, telex, facsimile, postal and courier services;

(3) Rental costs for housing and office space;

(4) Petroleum, oils and lubricants for operating vehicles and equipment;

(5) Newspapers, periodicals and books published in the cooperating country;

(6) Other commodities and services (and related expenses) that, by their nature or as a practical matter, can only be acquired, performed, or incurred in the cooperating country, e.g., vehicle maintenance, hotel accommodations, etc.

Subpart F—Waivers

§ 228.50 General.

USAID may expand the authorized source in order to accomplish project or program objectives by processing a waiver. When a waiver is processed to include a new country, area, or geographic code, procurement is not limited to the added source(s), but may be from any country included in the authorized geographic code. All waivers must be in writing.

§ 228.51 Commodities.

(a) *Waiver criteria.* Any waiver must be based upon one of the criteria listed in this section. Waivers to Geographic Code 899 or Code 935 which are justified under paragraph (a)(2) or (3) of this section may only be authorized on a case-by-case basis. A waiver may be authorized when:

(1) A commodity required for assistance is of a type that is not produced in or available for purchase in the United States; in addition, for waivers to any country or Geographic code beyond Code 941 and the cooperating country, the commodity is of a type that is not produced in or available for purchase in any country in Code 941 or the cooperating country.

(2) It is necessary to permit procurement in a country not otherwise eligible in order to meet unforeseen circumstances, such as emergency situations.

(3) It is necessary to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.

(4) For waivers to authorize procurement from Geographic Code 941 or the cooperating country:

(i) For assistance other than commodity import programs, when the lowest available delivered price from the United States is reasonably estimated to be 50 percent or more higher than the delivered price from a country or area included in Geographic Code 941 or the cooperating country.

(ii) For assistance other than commodity import programs, when the estimated cost of U.S. construction materials (including transportation and handling charges) is at least 50 percent higher than the cost of locally produced materials.

(iii) For commodity import programs or similar sector assistance, an acute shortage exists in the United States for a commodity generally available elsewhere.

(iv) Persuasive political considerations.

(v) Procurement in the cooperating country would best promote the objectives of the foreign assistance program.

(vi) Such other circumstances as are determined to be critical to the success of project objectives.

(b) *Additonal requirements.* A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, or pharmaceuticals (see § 228.13, ''Special source rules requiring procurement from the United States,'') must also meet requirements established in USAID directives on commodity eligibility. (USAID's Automated Directives System Chapter 312.)

(c) Any individual transaction not exceeding $5,000 (not including transportation) does not require a waiver. In no event, however, shall procurement be from a non-Code 935 source.

[61 FR 53616, Oct. 15, 1996; 62 FR 314, Jan. 3, 1997, as amended at 63 FR 38751, July 20, 1998]

§ 228.52 Suppliers of commodities.

Geographic code changes authorized by waiver with respect to the source of commodities automatically apply to the nationality of their suppliers. A waiver to effect a change in the geographic code only with respect to the nationality of the supplier of commodities, but not in the source of the commodities, may be sought if the situation requires it based on the appropriate criteria in § 228.51.

§ 228.53 Suppliers of services—privately owned commercial suppliers and nonprofit organizations.

Waiver criteria. Any waiver must be based upon one of the criteria listed in this section. Waivers to Geographic Code 899 or Code 935 which are justified under paragraph (b) or (c) of this section may only be authorized on a case-by-case basis. A waiver may be authorized when:

(a) Services required for assistance are of a type that are not available for purchase in the United States; in addition, for waivers to any country or Geographic Code beyond Code 941 and the cooperating country, the services are of a type that are not available for purchase in any country in Code 941 or the cooperating country.

(b) It is necessary to permit procurement in a country not otherwise eligible in order to meet unforeseen circumstances, such as emergency situations.

(c) It is necessary to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.

(d) For waivers to authorize procurement from Geographic Code 941 or the cooperating country:

(1) There is an emergency requirement for which non-USAID funds are not available and the requirement can be met in time only from suppliers in a country or area not included in the authorized geographic code.

(2) No suppliers from countries or areas included in the authorized geographic code are able to provide the required services.

(3) Persuasive political considerations.

(4) Procurement of locally available services would best promote the objectives of the foreign assistance program.

(5) Such other circumstances as are determined to be critical to the achievement of project objectives.

[61 FR 53616, Oct. 15, 1996, as amended at 63 FR 38752, July 20, 1998]

§ 228.54 Suppliers of services—foreign government-owned organizations.

A waiver to make foreign government-owned organizations, described in § 228.33, eligible for financing by USAID must be justified on the basis of the following criteria:

(a) The competition for obtaining a contract will be limited to cooperating country firms/organizations meeting the criteria set forth in §§ 228.31 or 228.32.

(b) The competition for obtaining a contract will be open to firms from countries or areas included in the authorized geographic code and eligible under the provisions of §§ 228.31 or 228.32, and it has been demonstrated that no U.S. firm is interested in competing for the contract.

(c) Services are not available from any other source.

(d) Foreign policy interests of the United States outweigh any competitive disadvantage at which United States firms might be placed or any conflict of interest that might arise by permitting a foreign government-owned organization to compete for the contract.

§ 228.55 Delivery services.

(a) Ocean transportation. A waiver to expand the flag eligibility requirements to allow the use of vessels under flag registry of the cooperating country, or Geographic Code 899 or 935 countries may be authorized under the circumstances provided for in this section. Any waiver granted under this section for a particular shipment which is not based on a determination of non-availability does not reduce the pool of cargo from which the applicable percentage required to be shipped on U.S.-flag vessels under the Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b), is determined. A waiver to expand the flag registry of any

Code 935 country may be authorized when:

(1) It is necessary to assure adequate competition in the shipping market in order to obtain competitive pricing, particularly in the case of bulk cargoes and large cargoes carried by liners;

(2) Eligible vessels provide liner service, only by transshipment, for commodities that cannot be containerized, and vessels under flag registry of countries to be authorized by the waiver provide liner service without transshipment;

(3) Eligible vessels are not available, and cargo is ready and available for shipment, provided it is reasonably evident that delaying shipment would increase costs or significantly delay receipt of the cargo;

(4) Eligible vessels are found unsuitable for loading, carriage, or unloading methods required, or for the available port handling facilities;

(5) Eligible vessels do not provide liner service from the port of loading stated in the procurement's port of export delivery terms, provided the port is named in a manner consistent with normal trade practices; or

(6) Eligible vessels decline to accept an offered consignment.

(b) Air transportation. The preferences for use of United States flag air carriers or for use of United States, other Geographic Code 941 countries, or cooperating country flag air carriers are not subject to waiver. Other free world air carriers may be used only as provided in § 228.22.

§ 228.56 Authority to approve waivers.

The authority to approve waivers of established policies on source, origin and nationality are delegated authorities within USAID, as set forth in the Automated Directives System Chapter 103 and any redelegations. USAID contractors or recipients of assistance agreements shall request any necessary waivers through the USAID contract or agreement officer.

PART 229—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.
229.100 Purpose and effective date.
229.105 Definitions.
229.110 Remedial and affirmative action and self-evaluation.
229.115 Assurance required.
229.120 Transfers of property.
229.125 Effect of other requirements.
229.130 Effect of employment opportunities.
229.135 Designation of responsible employee and adoption of grievance procedures.
229.140 Dissemination of policy.

Subpart B—Coverage

229.200 Application.
229.205 Educational institutions and other entities controlled by religious organizations.
229.210 Military and merchant marine educational institutions.
229.215 Membership practices of certain organizations.
229.220 Admissions.
229.225 Educational institutions eligible to submit transition plans.
229.230 Transition plans.
229.235 Statutory amendments.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

229.300 Admission.
229.305 Preference in admission.
229.310 Recruitment.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

229.400 Education programs or activities.
229.405 Housing.
229.410 Comparable facilities.
229.415 Access to course offerings.
229.420 Access to schools operated by LEAs.
229.425 Counseling and use of appraisal and counseling materials.
229.430 Financial assistance.
229.435 Employment assistance to students.
229.440 Health and insurance benefits and services.
229.445 Marital or parental status.
229.450 Athletics.

229.455 Textbooks and curricular material.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

229.500 Employment.
229.505 Employment criteria.
229.510 Recruitment.
229.515 Compensation.
229.520 Job classification and structure.
229.525 Fringe benefits.
229.530 Marital or parental status.
229.535 Effect of state or local law or other requirements.
229.540 Advertising.
229.545 Pre-employment inquiries.
229.550 Sex as a bona fide occupational qualification.

Subpart F—Procedures

229.600 Notice of covered programs.
229.605 Enforcement procedures.

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52879, unless otherwise noted.

Subpart A—Introduction

§ 229.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

§ 229.105 Definitions.

As used in these Title IX regulations, the term:

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

Designated agency official means Director, Office of Equal Opportunity Programs.

Educational institution means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to

use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth at §§ 229.100 through 229.605.

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

[65 FR 52865, 52879, Aug. 30, 2000]

§ 229.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action*. In the absence of a finding of discrimination on the

basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ 229.115 Assurance required.

(a) *General.* Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 229.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ 229.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ 229.205 through 229.235(a).

§ 229.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 229.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 229.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 229.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and

these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 229.300 through 229.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 229.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B—Coverage

§ 229.200 Application.

Except as provided in §§ 229.205 through 229.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 229.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 229.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 229.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of

students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 229.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 229.225 and 229.230, and §§ 229.300 through 229.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 229.300 through .310.* Except as provided in paragraphs (d) and (e) of this section, §§ 229.300 through 229.310 apply to each recipient. A recipient to which §§ 229.300 through 229.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 229.300 through 229.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 229.300 through 229.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 229.300 through 229.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 229.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 229.300 through 229.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 229.300 through 229.310.

§ 229.230 Transition plans.

(a) *Submission of plans.* An institution to which § 229.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and

indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination*. No policy or practice of a recipient to which § 229.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 229.300 through 229.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion*. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 229.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 229.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 229.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 229.300 through §§ 229.310 apply, except as provided in §§ 229.225 and §§ 229.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 229.300 through 229.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 229.300 through 229.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 229.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner

and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 229.305 Preference in admission.

A recipient to which §§ 229.300 through 229.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 229.300 through 229.310.

§ 229.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 229.300 through 229.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 229.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 229.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 229.300 through 229.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 229.300 through 229.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 229.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 229.400 through 229.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 229.300 through 229.310 do not apply, or an entity, not a recipient, to which §§ 229.300 through 229.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 229.400 through 229.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a*

foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient*. (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 229.405 Housing.

(a) *Generally*. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient*. (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing*. (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 229.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 229.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§ 229.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 229.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 229.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other

services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 229.450.

§ 229.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 229.500 through 229.550.

§ 229.440 Health and insurance benefits and services.

Subject to § 229.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 229.500 through 229.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 229.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy,

or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 229.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 229.450 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but

the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

§ 229.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 229.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 229.500 through 229.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application.* The provisions of §§ 229.500 through 229.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 229.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for

any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§229.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§229.500 through 229.550.

§229.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§229.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in §229.550.

§229.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §229.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§229.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant

for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to §229235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§229.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§229.500 through 229.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§229.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§229.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§229.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§229.500 through 229.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Procedures

§229.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

§ 229.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 22 CFR part 209.

[65 FR 52879, Aug. 30, 2000]

PART 230—ISRAEL LOAN GUARANTEES ISSUED UNDER THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT OF 2003, PUB. L. 108–11—STANDARD TERMS AND CONDITIONS

Sec.

230.01 Purpose.
230.02 Definitions.
230.03 The Guarantee.
230.04 Guarantee eligibility.
230.05 Non-impairment of the Guarantee.
230.06 Transferability of Guarantee; Note Register.
230.07 Fiscal Agent obligations.
230.08 Event of Default; Application for Compensation; payment.
230.09 No acceleration of Eligible Notes.
230.10 Payment to USAID of Excess Amounts Received by a Noteholder.
230.11 Subrogation of USAID.
230.12 Prosecution of claims.
230.13 Change in agreements.
230.14 Arbitration.
230.15 Notice.
230.16 Governing law.
APPENDIX A TO PART 230—APPLICATION FOR COMPENSATION

AUTHORITY: Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. 108–11, chapter 5, title I, ''Loan Guarantees to Israel.''

SOURCE: 68 FR 53878, Sept. 15, 2003, unless otherwise noted.

§ 230.01 Purpose.

The purpose of this regulation is to prescribe the procedures and standard terms and conditions applicable to loan guarantees issued for the benefit of the Government of Israel on behalf of the State of Israel (''Borrower''), pursuant to the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. 108–11. The loan guarantees will apply to sums borrowed from time to time between the date hereof and September 30, 2006, not exceeding an aggregate total of nine billion United States Dollars ($9,000,000,000) in principal amount. The loan guarantees shall insure the Borrower's repayment of 100% of principal and interest due under such loans. The full faith and credit of the United States of America is pledged for the full payment and performance of such guarantee obligations. The loan guarantees will be issued pursuant to a Loan Guarantee Commitment Agreement between the Borrower and the United States Government dated August 18, 2003.

§ 230.02 Definitions.

Wherever used in these standard terms and conditions:

(a) *USAID* means the United States Agency for International Development or its successor.

(b) *Eligible Note(s)* means [a] Note[s] meeting the eligibility criteria set out in § 230.04 hereof.

(c) *Noteholder* means the owner of an Eligible Note who is registered as such on the Note Register of Eligible Notes required to be maintained by the Fiscal Agent.

(d) *Borrower* means the Government of Israel, on behalf of the State of Israel.

(e) *Defaulted Payment* means, as of any date and in respect of any Eligible Note, any Interest Amount and/or Principal Amount not paid when due.

(f) *Further Guaranteed Payments* means the amount of any loss suffered by a Noteholder by reason of the Borrower's failure to comply on a timely basis with any obligation it may have under an Eligible Note to indemnify and hold harmless a Noteholder from taxes or governmental charges or any expense arising out of taxes or any other governmental charges relating to the Eligible Note in the country of the Borrower.

(g) *Interest Amount* means for any Eligible Note the amount of interest accrued on the Principal Amount of such Eligible Note at the applicable Interest Rate.

(h) *Principal Amount* means the principal amount of any Eligible Notes issued by the Borrower. For purposes of determining the principal amount of any Eligible Notes issued by the Borrower, the principal amount of each Eligible Note shall be:

(1) In the case of any Eligible Note issued having a notional amount, but no principal balance, the original issue price (excluding any transaction costs) thereof; and

(2) In the case of any Eligible Note issued with a principal balance, the stated principal amount thereof.

(i) *Interest Rate* means the interest rate borne by an Eligible Note.

(j) *Loss of Investment respecting any Eligible Note* means an amount in Dollars equal to the total of the:

(1) Defaulted Payment unpaid as of the Date of Application,

(2) Further Guaranteed Payments unpaid as of the Date of Application, and

(3) Interest accrued and unpaid at the Interest Rate(s) specified in the Eligible Note(s) on the Defaulted Payment and Further Guaranteed Payments, in each case from the date of default with respect to such payment to and including the date on which full payment thereof is made to the Noteholder.

(k) *Application for Compensation* means an executed application in the form of Appendix A to this part which a Noteholder, or the Fiscal Agent on behalf of a Noteholder, files with USAID pursuant to § 230.08 of this part.

(l) *Applicant* means a Noteholder who files an Application for Compensation with USAID, either directly or through the Fiscal Agent acting on behalf of a Noteholder.

(m) *Date of Application* means the date on which an Application for Compensation is actually received by USAID pursuant to § 230.15 of this part.

(n) *Business Day* means any day other than a day on which banks in New York, NY are closed or authorized to be closed or a day which is observed as a federal holiday in Washington, DC, by the United States Government.

(o) *Guarantee* means the guarantee of USAID pursuant to this part 230 and the Emergency Wartime Supplemental Appropriations Act of 2003, Public Law 108–11.

(p) *Guarantee Payment Date* means a Business Day not more than three (3) Business Days after the related Date of Application.

(q) *Person* means any legal person, including any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

(r) *Note[s]* means any debt securities issued by the Borrower.

(s) *Fiscal Agency Agreement* means the agreement among USAID, the Borrower and the Fiscal Agent pursuant to which the Fiscal Agent agrees to provide fiscal agency services in respect of the Note[s], a copy of which Fiscal Agency Agreement shall be made available to Noteholders upon request to the Fiscal Agent.

(t) *Fiscal Agent* means the bank or trust company or its duly appointed successor under the Fiscal Agency Agreement which has been appointed by the Borrower with the consent of USAID to perform certain fiscal agency services for specified Eligible Note[s] pursuant to the terms of the Fiscal Agency Agreement.

§ 230.03 The Guarantee.

Subject to these terms and conditions, the United States of America, acting through USAID, guarantees to Noteholders the Borrower's repayment of 100 percent of principal and interest due on Eligible Notes. Under this Guarantee, USAID agrees to pay to any Noteholder compensation in Dollars equal to such Noteholder's Loss of Investment under its Eligible Note; provided, however, that no such payment shall be made to any Noteholder for any such loss arising out of fraud or misrepresentation for which such Noteholder is responsible or of which it had knowledge at the time it became such Noteholder. This Guarantee shall apply to each Eligible Note registered on the Note Register required to be maintained by the Fiscal Agent.

§ 230.04 Guarantee eligibility.

(a) Eligible Notes only are guaranteed hereunder. Notes in order to achieve Eligible Note status:

(1) Must be signed on behalf of the Borrower, manually or in facsimile, by a duly authorized representative of the Borrower;

(2) Must contain a certificate of authentication manually executed by a Fiscal Agent whose appointment by the Borrower is consented to by USAID in the Fiscal Agency Agreement; and

(3) Shall be approved and authenticated by USAID by either:

(i) The affixing by USAID on the Notes of a guarantee legend incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID or

(ii) the delivery by USAID to the Fiscal Agent of a guarantee certificate incorporating these Standard Terms and Conditions signed on behalf of USAID by either a manual signature or a facsimile signature of an authorized representative of USAID.

(b) The authorized USAID representatives for purposes of this regulation whose signature(s) shall be binding on USAID shall include the USAID Chief and Deputy Chief Financial Officer, Assistant Administrator and Deputy, Bureau for Economic Growth, Agriculture and Trade, Director and Deputy Director, Office of Development Credit, and such other individual(s) designated in a certificate executed by an authorized USAID Representative and delivered to the Fiscal Agent. The certificate of authentication of the Fiscal Agent issued pursuant to the Fiscal Agency Agreement shall, when manually executed by the Fiscal Agent, be conclusive evidence binding on USAID that an Eligible Note has been duly executed on behalf of the Borrower and delivered.

§ 230.05 Non-impairment of the Guarantee.

The full faith and credit of the United States of America is pledged to the performance of this Guarantee. The Guarantee shall be unconditional, and shall not be affected or impaired by:

(a) Any defect in the authorization, execution, delivery or enforceability of any agreement or other document executed by a Noteholder, USAID, the Fiscal Agent or the Borrower in connection with the transactions contemplated by this Guarantee or

(b) The suspension or termination of the program pursuant to which USAID is authorized to guarantee the Eligible Notes. This non-impairment of the guarantee provision shall not, however, be operative with respect to any loss arising out of fraud or misrepresentation for which the claiming Noteholder is responsible or of which it had knowledge at the time it became a Noteholder.

§ 230.06 Transferability of Guarantee; Note Register.

A Noteholder may assign, transfer or pledge an Eligible Note to any Person. Any such assignment, transfer or pledge shall be effective on the date that the name of the new Noteholder is entered on the Note Register required to be maintained by the Fiscal Agent pursuant to the Fiscal Agency Agreement. USAID shall be entitled to treat the Persons in whose names the Eligible Notes are registered as the owners thereof for all purposes of this Guarantee and USAID shall not be affected by notice to the contrary.

§ 230.07 Fiscal Agent obligations.

Failure of the Fiscal Agent to perform any of its obligations pursuant to the Fiscal Agency Agreement shall not impair any Noteholder's rights under this Guarantee, but may be the subject of action for damages against the Fiscal Agent by USAID as a result of such failure or neglect. A Noteholder may appoint the Fiscal Agent to make demand for payment on its behalf under this Guarantee.

§ 230.08 Event of Default; Application for Compensation; payment.

At any time after an Event of Default, as this term is defined in an Eligible Note, any Noteholder hereunder, or the Fiscal Agent on behalf of a Noteholder hereunder, may file with USAID an Application for Compensation in the form provided in Appendix A to this part. USAID shall pay or cause to be paid to any such Applicant any compensation specified in such Application for Compensation that is due to the Applicant pursuant to the Guarantee as a Loss of Investment not later than three (3) Business Days after the Date of Application. In the event that USAID receives any other notice of an Event of Default, USAID may pay any compensation that is due to any Noteholder pursuant to a Guarantee, whether or not such Noteholder has filed with USAID an Application for Compensation in respect of such amount.

§ 230.09 No acceleration of Eligible Notes.

Eligible Notes shall not be subject to acceleration, in whole or in part, by USAID, the Noteholder or any other party. USAID shall not have the right to pay any amounts in respect of the Eligible Notes other than in accordance with the original payment terms of such Eligible Notes.

§ 230.10 Payment to USAID of excess amounts received by a Noteholder.

If a Noteholder shall, as a result of USAID paying compensation under this Guarantee, receive an excess payment, it shall refund the excess to USAID.

§ 230.11 Subrogation of USAID.

In the event of payment by USAID to a Noteholder under this Guarantee, USAID shall be subrogated to the extent of such payment to all of the rights of such Noteholder against the Borrower under the related Note.

§ 230.12 Prosecution of claims.

After payment by USAID to an Applicant hereunder, USAID shall have exclusive power to prosecute all claims related to rights to receive payments under the Eligible Notes to which it is thereby subrogated. If a Noteholder continues to have an interest in the outstanding Eligible Notes, such a Noteholder and USAID shall consult with each other with respect to their respective interests in such Eligible Notes and the manner of and responsibility for prosecuting claims.

§ 230.13 Change in agreements.

No Noteholder will consent to any change or waiver of any provision of any document contemplated by this Guarantee without the prior written consent of USAID.

§ 230.14 Arbitration.

Any controversy or claim between USAID and any noteholder arising out of this Guarantee shall be settled by arbitration to be held in Washington, DC in accordance with the then prevailing rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

§ 230.15 Notice.

Any communication to USAID pursuant to this Guarantee shall be in writing in the English language, shall refer to the Israel Loan Guarantee Number inscribed on the Eligible Note and shall be complete on the day it shall be actually received by USAID at the Office of Development Credit, Bureau for Economic Growth, Agriculture and Trade, United States Agency for International Development, Washington, DC 20523–0030. Other addresses may be substituted for the above upon the giving of notice of such substitution to each Noteholder by first class mail at the address set forth in the Note Register.

§ 230.16 Governing law.

This Guarantee shall be governed by and construed in accordance with the laws of the United States of America governing contracts and commercial transactions of the United States Government.

APPENDIX A TO PART 230—APPLICATION FOR COMPENSATION

United States Agency for International Development

Washington, DC 20523

Ref: Guarantee dated as of _____, 19__:

Gentlemen:

You are hereby advised that payment of $____ (consisting of $____ of principal, $____ of interest and $____ in Further Guaranteed Payments, as defined in § 230.02(f) of the Standard Terms and Conditions of the above-mentioned Guarantee) was due on _____, 20__, on $____ principal amount of Notes held by the undersigned of the Government of Israel, on behalf of the State of Israel (the ''Borrower''). Of such amount $____ was not received on such date and has not been received by the undersigned at the date hereof. In accordance with the terms and provisions of the above-mentioned Guarantee, the undersigned hereby applies, under § 230.08 of said Guarantee, for payment of $____, representing $____, the Principal Amount of the presently outstanding Note(s) of the Borrower held by the undersigned that was due and payable on _____ and that remains unpaid, and $____, the Interest Amount on such Note(s) that was due and payable by the Borrower on_____ and that remains unpaid,

and $____ in Further Guaranteed Payments,[1] plus accrued and unpaid interest thereon from the date of default with respect to such payments to and including the date payment in full is made by you pursuant to said Guarantee, at the rate of __% per annum, being the rate for such interest accrual specified in such Note. Such payment is to be made at [state payment instructions of Noteholder].

All capitalized terms herein that are not otherwise defined shall have the meanings assigned to such terms in the Standard Terms and Conditions of the above-mentioned Guarantee.

[Name of Applicant]

By: _____

Name:
Title:
Dated:

[1] In the event the Application for Compensation relates to Further Guaranteed Payments, such Application must also contain a statement of the nature and circumstances of the related loss.

PARTS 231–299 [RESERVED]