

# Rules and Regulations

Federal Register

Vol. 62, No. 197

Friday, October 10, 1997

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 17

#### Regulations Governing the Financing of Commercial Sales of Agricultural Commodities

**AGENCY:** Commodity Credit Corporation.

**ACTION:** Final rule.

**SUMMARY:** This rule amends regulations applicable to the financing of the sale and exportation of agricultural commodities pursuant to title I of the Agricultural Trade Development and Assistance Act of 1954, as amended ("Pub. L. 480").

The amendment simplifies the purchasing procedures and shortens the regulations. The purpose of these changes is to keep the costs of the Pub. L. 480, title I program as low as possible, to reflect the provisions of the Federal Agricultural Improvement and Reform Act of 1996, and to reduce the public reporting burden.

Executive Order 12752 of February 25, 1991, establishes a program under title I of Pub. L. 480 to be implemented by the Secretary of Agriculture. In accordance with section 406(c) of Pub. L. 480, the funds, facilities, and authorities of the Commodity Credit Corporation are used to carry out this program.

**EFFECTIVE DATE:** This rule is effective November 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Connie B. Delaplane, Director, P.L. 480 Operations Division, Export Credits, Foreign Agricultural Service, Room 4549, South Building, Stop 1033, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, D.C. 20250-1033. Telephone: (202) 720-3664.

**SUPPLEMENTARY INFORMATION:** This final rule is issued in conformance with

Executive Order 12866. It has been determined significant for the purposes of E.O. 12866 and, therefore, has been reviewed by the Office of Management and Budget ("OMB").

#### Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act. The Vice President, Commodity Credit Corporation ("CCC"), who is the General Sales Manager, has certified that this rule will not have a significant economic impact on a substantial number of small entities. The final rule eliminates some existing program requirements which should make it easier for firms to participate, including small businesses. A copy of this final rule has been submitted to the General Counsel, Small Business Administration.

#### Executive Order 12372

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

#### Paperwork Reduction Act

In accordance with the provisions of the Paperwork Reduction Act of 1995, the Department submitted an updated information collection package to the Office of Management and Budget (OMB) under OMB control number 0551-0005, in conjunction with the publication of the proposed rule in the **Federal Register** (see "Background.") OMB has approved the estimated total burden of 455 hours through February 28, 2000. Copies of this information collection can be obtained from Valerie Countiss, the Agency Information Collection Coordinator, at (202) 720-6713.

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The final rule would have preemptive effect with respect to any state or local laws, regulations, or policies which conflict with such provisions or which otherwise impede their full implementation. The final rule would not have retroactive effect. The rule does not require that administrative

remedies be exhausted before suit may be filed.

#### Background

Title I of the Agricultural Trade Development and Assistance Act of 1954, as amended (Pub. L. 480) authorizes CCC to finance the sale and exportation of agricultural commodities on concessional credit terms. 7 U.S.C. 1701 *et seq.* On January 27, 1997, the Commodity Credit Corporation ("CCC") published a Proposed Rule (62 FR 3810) to amend the regulations governing the financing of the sale and exportation of agricultural commodities made available under title I, Pub. L. 480. The proposed rule was drafted after considering comments received in response to an Advance Notice of Proposed Rulemaking (60 FR 47495) published September 13, 1995. Most of the comments received supported the changes made by the proposed rule. The comments which raised questions are discussed below, except those comments that were outside the scope of the proposed rule. A copy of the "Benefit-Cost Assessment" prepared in connection with this final rule can be obtained from Connie B. Delaplane. See **For Further Information Contact.**

#### Discussion of Comments

##### *Purchase Authorizations*

After CCC and the participant have signed a title I agreement, CCC issues a purchase authorization ("PA") in response to a request from the participant. One comment asked that the importer or the shipping agent be permitted to request the PA. However, having the participant prepare the brief written request helps to insure that the participant also signs the PA when it is issued a few days later. By this signature the participant accepts the specific contracting and documentary requirements in the PA which govern CCC financing under the program. Because the participant must bear any costs which are not eligible for CCC financing, it is important that the participant be fully involved in both requesting and signing the PA. Since the requirement for requesting PA's appears in the title I agreement, there is no need also to include it in the regulations and this portion of the proposed rule will be adopted without change.

### Shipping Agents

The proposed rule would require an agent of the participant or importer (shipping agent) to provide complete information on the firm and its activities only once per fiscal year, instead of each time the firm is nominated by a participant. One commenter requested that we further change the procedure to adopt an "initial registration" of interested firms at the beginning of each fiscal year, similar to the determination of eligibility for commodity suppliers. The firm would not have to be nominated by a participant to be registered.

We do not believe that adopting this suggestion would further reduce the reporting burden on a shipping agent, or expedite the FAS review process. In fact, it would place a greater burden on firms which would submit information for such "initial registration," yet never be nominated as a shipping agent. Also, if FAS were to "register" any interested firm, regardless of whether a participant wished to employ the firm, FAS' workload would be increased. Finally, such "registration" could imply endorsement or approval by FAS, which could be misleading to participants. FAS does not investigate firms which wish to act as shipping agents; it simply accepts the nomination of an agent by the participant if the requirements of the regulations are met. The regulations implement the provisions of section 407(b)(4) of the Federal Agriculture Improvement and Reform Act of 1996 regarding conflicts of interest. Based on this evaluation, CCC will adopt the rule as proposed.

### Eligibility of Commodity Suppliers

The proposed rule would have permitted any supplier eligible under the GSM-102 or GSM-103 programs to participate in sales under title I. FAS would not have evaluated the firm's responsibility or its experience as an exporter of U.S. agricultural commodities. After reviewing the potential impact of this change on food aid recipients under the program, we have reinstated the requirement for a separate, but simplified, eligibility determination for title I suppliers. It is crucial for most food aid recipients that suppliers fulfill their contracts without problems or significant delay. Title I shipments are often a key part of the supply pipeline for recipients, which generally are not able to make a prompt commercial purchase should a supplier fail to perform. In addition, if a commodity supplier did not deliver the commodity, the recipient might also be required to pay the full shipping costs

to the contracted vessel ("deadfreight"). By retaining the requirement that FAS evaluate the export experience and financial responsibility of a prospective supplier, we will help protect participants against non-performance.

One comment noted that the IFB requirements for bid and performance bonds have "adequately guaranteed performance by suppliers in the past." It is true that recipients normally require commodity suppliers to submit a bid bond (generally 2% of the value of the offer) and to open a performance bond when they receive a contract. The performance bond is usually 5% of the value of the contract. These bonds provide some protection against an unreliable supplier, but would be insufficient to cover the full cost of "deadfreight," for example. Buyers, of course, have not relied solely on these bonds in the past; FAS has screened out firms which did not demonstrate export experience and financial responsibility. It is not practical for recipients to increase the amount of the bid and performance bonds to cover the maximum costs of a default by the supplier; such bonds would be more expensive for the suppliers, and would increase all commodity costs under the program.

Under Title I, recipients must buy either on the "lowest landed cost" basis (the lowest combination of commodity and freight offered) or on the basis of the lowest priced commodity offered. This helps insure that CCC funds provide as much tonnage as possible, and to give qualified commodity suppliers an equal opportunity to compete. Because of this program requirement, recipients may not simply select the supplier(s) with which they are familiar. It would be inefficient to require each recipient to evaluate the ability of potential U.S. suppliers to perform; some recipients would not be able to conduct such an analysis. Submitting information to each recipient would also increase the workload for suppliers wishing to participate in the program.

In order to reduce the reporting burden for suppliers, we have eliminated the requirement that prospective suppliers provide the name, address and chief executive officers for all branches, affiliates and subsidiaries, and that eligible suppliers keep this information current.

Although the final rule is not as beneficial to suppliers as the proposed rule, it does reduce the reporting burden for suppliers while maintaining an acceptable level of protection for the recipient. As a result, CCC has determined to adopt the provisions in

the final rule regarding eligibility of suppliers.

### Invitations for Bids

One comment asked that the Invitation for Bids ("IFB") specify how the buyer will pay the supplier whenever the buyer requests a supplier to bear a cost not eligible for CCC financing. Although § 17.5(e) provides that the contracts between commodity suppliers and buyers "\* \* \* should stipulate the responsibility of each party for payment of any costs not eligible for financing by CCC" we agree that this information should also be included in the IFB. Sections 17.5(c)(2) and 17.8(b)(1)(iv) have been amended to add this requirement for IFB's for commodity and for ocean transportation.

In this regard, it is important to note that some payments which had been permitted under the existing regulations, but which cannot now be financed by CCC, will be prohibited when this final rule becomes effective. This includes consular fees for legalization of documents, for example, and total brokerage commissions which exceed 2½ percent of the freight. We have added a new paragraph, § 17.6(c)(3), for improved clarity regarding total brokerage commissions. This paragraph is consistent with the regulations governing brokerage commissions for commodities shipped under section 416(b) of the Agricultural Act of 1949 and the Food for Progress Act of 1985 (7 CFR 1499.8(d)). The preamble to the proposed rule discussed the ceiling on brokerage commissions and requested suggestions for other ways to address the general issue of costs which are ineligible for CCC financing. Since no comments were submitted offering alternative procedures, the final rule retains the provisions in the proposed rule.

### Ocean Transportation

A comment asked that we delete the requirement that the vessel owner may claim detention when a required letter of credit is not available at loading (§ 17.8(k)(6)). The comment questioned the appropriateness of a claim for detention in this case since the freight could not be collected until after the vessel arrived at the first discharge port. However, it is very important to the program that the vessel owner have the letter of credit available before loading. This provides assurance of payment when the voyage is completed, reducing the owner's risk and thereby keeping freight costs as low as possible. The comment also noted that the requirement for detention

disadvantaged foreign flag vessels. The regulations apply to freight contracts for voyages for which CCC finances all or part of the costs, whether on U.S.-flag or non-U.S. flag vessels.

Another comment agreed with the proposed change (§ 17.8(b)(2)) which no longer prohibits clarification or submission of certain technical information after opening of ocean transportation offers; the author requested confirmation that this would not be a vehicle through which an offer could be made responsive after it had been submitted. As described in the preamble to the proposed rule, only freight offers which are responsive to the terms of the IFB as of the date and time for receipt of offers could be considered. No information or clarification submitted after that date and time could be used to make the offer responsive. The prohibition against negotiation also remains in the regulations. The change simply acknowledges that it is occasionally necessary to seek factual information after an offer has been submitted, such as the maximum tonnage which can be loaded at a certain port, given existing draft conditions and stowage factors for the commodity in question. Another comment requested that ocean freight be earned (and paid) when the vessel loads, stating that this is the commercial standard. The program operated in this manner before 1960, at which time CCC found it necessary to change freight procedures to protect its interest, so that freight was payable on the vessel's arrival at the first discharge port. An importing country had fixed a vessel which was abandoned by the owner before the vessel departed the load port, but after receipt of freight payment on loading, CCC incurred additional costs and freight charges to ship the cargo on another vessel.

More recent program experience still supports this position. Within the last ten years, several vessels carrying title I cargo sank en route to the discharge port. Under the final rule, the risk of non-performance of the voyage remains on the ocean carrier, subject to a determination of force majeure. The final rule does continue the policy of allowing a supplier to receive freight prior to arrival if the supplier posts acceptable security.

In general, requiring freight to be payable on discharge maximizes the incentive to the supplier of ocean transportation to complete the voyage as contracted. In order to maintain this protection for CCC, and for program recipients, the proposed rule has been adopted as proposed. The requirement

applies, of course, only when CCC finances any part of the ocean freight.

The same comment also requested that we change the method for settlement of demurrage and despatch at the load port. The current procedure was instituted in a final rule published December 7, 1995 (60 FR 62702). This rule provided that demurrage and despatch at load would be settled between the parties which controlled the loading (the supplier of ocean transportation and the commodity supplier.) This change was made to make the program operate closer to commercial practice than in the past, when CCC shared in despatch earnings. It also made title I more consistent with other food aid programs in this regard. Although it is true that no contract exists between the two suppliers, FAS has not heard of serious problems in arranging payment of demurrage and despatch on this basis. We have retained this provision in the final rule, but will review the issue if it appears appropriate based on further experience.

#### *Payment to Suppliers*

Most comments supported the proposal that CCC pay suppliers directly for all amounts which CCC finances, instead of requiring participants to open letters of credit covering these amounts. Two comments asked whether CCC would be able to pay as promptly as a bank does (generally, examining documents within two business days from presentation, with payment no later than one business day following the date documents are found in order.) Another comment asked whether the Uniform Customs and Practices for Documentary Credits ("UCP 500") would be the standard by which CCC would examine documents. CCC's examination of documents will be more extensive than that conducted by banks; it will not be based on UCP 500 but on the "post audit" process now performed by CCC on documents submitted to CCC by banks after they have made payment to suppliers. CCC staff will compare the documents to the documentary requirements in the PA and the IFB, and will check all calculations on the documents to ensure that no mathematical errors have been made. CCC will also review the documents received to ensure there are no discrepancies among the documents. As part of the direct payment process, CCC must also prepare and process the payment document, SF-1166, "Voucher and Schedule of Payments." The CCC review will replace CCC's existing "post audit" of documents and the banks' own review of documents. CCC expects to be able to pay suppliers within a

maximum of seven business days after receipt of all the required documents, if there are no discrepancies. CCC will not disburse any funds to the supplier until all documents are received, audited, and found to be in order.

Therefore, suppliers should take note that they are solely responsible for ensuring that all the proper documents are included in the package submitted to CCC for payment, and that they are completed correctly. This will help CCC pay the suppliers sooner. Section 17.9(a)(3) has been revised to contain a more detailed description of the examination of documents by CCC. In addition, a new § 17.9(a)(4) has been added to reflect the provisions of the Debt Collection Improvement Act of 1996, Pub. L. 104-134, which requires that CCC must issue all payments by electronic transfer. Suppliers must provide CCC with the necessary information to facilitate this procedure.

One comment said that the seller had no assurance of receiving payment without a letter of credit since CCC can alter or revoke the PA. However, § 17.3(d) states that, if the GSM were to "supplement, modify or revoke" a PA, CCC would " \* \* \* reimburse suppliers who would otherwise be entitled to be financed by CCC for costs which were incurred as a result of such action \* \* \* in connection with firm sales or shipping contracts \* \* \*." This long-standing provision remains in the regulations.

The comment added that the proposal overstated the benefits to recipients of the change to direct payment by CCC, in part because the banking fees were actually lower than estimated in the proposed rule. The fees charged by banks related to letters of credit are not public information, but the estimate in the proposed rule was based on comments from program participants, which have paid such fees. The issue is greater than the bank fees, however; participants face the very real potential for significant freight and commodity costs (detention and carrying charges) which are not financed by CCC. These costs must be paid by the participant when loading is delayed because operable letters of credit were not available. If a dispute arises, participants may also be responsible for legal costs.

Finally, this comment stated that banks may be reluctant to issue letters of credit for small amounts of freight not covered by CCC, or may increase their fees to cover costs for these low-revenue transactions. It is possible that some banks may forego this business, or increase their fees slightly, but we do

not anticipate that all banks will decline to participate.

We have evaluated these comments carefully. It is true that suppliers may not be paid by CCC quite as quickly as they were by banks under letters of credit, because of the more detailed document review conducted by CCC, and that this may lead some firms to increase commodity prices slightly under the program, to cover a few days of lost interest. To the extent this occurs, it would mean a very small reduction in the commodity tonnage which could be shipped within the fixed funding provided under a Pub. L. 480, title I agreement. However, we anticipate that the significant cost savings to recipients will clearly outweigh this disadvantage, and the other concerns discussed in this preamble. Recipients must pay bank charges for letters of credit and must pay suppliers if loading is delayed because the letter of credit is not available. (Commodity suppliers receive "carrying charges" in such cases, and suppliers of ocean transportation can collect "detention." One day of "detention" for a U.S.-flag vessel can cost the recipient as much as \$25,000.) As a result, the final rule retains the change to direct payment by CCC. However, we will carefully monitor the impact of this change and will review the decision based on a year's experience.

#### Documentation

A comment requested that weight certificates be issued only by the Federal Grain Inspection Service, USDA ("FGIS") or its cooperators. By law, FGIS must weigh certain commodities which are exported, such as wheat or corn. For other commodities, the program has, for many years, permitted private firms to provide weight certificates. Since including this option is consistent with commercial practice and it gives both buyer and seller more flexibility in contracting under title I, we have determined that the proposed rule will be adopted as published.

Another comment asked whether the "federal appeal inspection certificate" (§ 17.9(c)(5)) were still valid. We have revised this paragraph to reflect the current procedure when a certificate is issued representing an appeal inspection. The same comment noted that a phytosanitary certificate issued by USDA cannot show a number on its face, including the PA number. (§ 17.9(b) requires that the supplier arrange for the PA number to be put on required documents.) The comment explained that the PA number could be placed on a separate sheet of paper

which is stapled to the phytosanitary certificate. CCC will accept this procedure for the phytosanitary certificate, and the provision will be adopted as proposed.

#### List of Subjects in 7 CFR Part 17

Agricultural commodities, Exports, Finance, Maritime carriers.

Accordingly, part 17 of 7 CFR is revised to read as follows:

### PART 17—SALES OF AGRICULTURAL COMMODITIES MADE AVAILABLE UNDER TITLE I OF THE AGRICULTURAL TRADE DEVELOPMENT AND ASSISTANCE ACT OF 1954, AS AMENDED

Sec.

- 17.1 General.
- 17.2 Definition of terms.
- 17.3 Purchase authorizations.
- 17.4 Agents of the participant or importer.
- 17.5 Contracts between commodity suppliers and importers.
- 17.6 Discounts, fees, commissions and payments.
- 17.7 Notice of sale procedures.
- 17.8 Ocean transportation.
- 17.9 CCC payment to suppliers.
- 17.10 Refunds and insurance.
- 17.11 Recordkeeping and access to records.

**Authority:** 7 U.S.C. 1701–1704, 1731–1736b, 1736f, 5676; E.O. 12220, 45 FR 44245.

#### § 17.1 General.

(a) *What this part covers.* This part contains the regulations governing the financing of the sale and exportation of agricultural commodities by the Commodity Credit Corporation (CCC), through private trade channels to the maximum extent practicable, under the authority of title I of the Agricultural Trade Development and Assistance Act of 1954, as amended (hereinafter called "the Act").

(b) *Agricultural commodities agreements.* (1) Under the Act, the Government of the United States enters into Agricultural Commodities Agreements with governments of foreign countries or with private entities. These agreements cover financing of the sale and exportation of agricultural commodities, including certain ocean transportation costs.

(2) Agricultural Commodities Agreements may provide that a participant will repay CCC for the financing extended by CCC either in dollars or in local currencies.

(3) A private entity must maintain a bona fide business office in the United States and have a person, principal, or agent on whom service of judicial process may be had in the United States.

(c) *Purchase authorizations.* This part covers, among other things, the issuance by the General Sales Manager of

purchase authorizations which authorize the participant to:

- (1) Purchase agricultural commodities; and
- (2) Procure ocean transportation therefor.

(d) *Financing.* For amounts to be financed by CCC, CCC will pay the supplier of commodity or of ocean transportation in accordance with § 17.9(a)(3). The cost of ocean freight or ocean freight differential will be financed by CCC only when specifically provided for in the purchase authorization.

(e) *Where information is available.* General information about operations under this part is available from the Director, Pub. L. 480 Operations Division, Foreign Agricultural Service, USDA, Washington, D.C. 20250-1033. Information about financing operations under this part, including forms prescribed for use thereunder, is available from the Controller, Commodity Credit Corporation, USDA, 1400 Independence Avenue, SW, Washington, D.C. 20250-0581.

#### § 17.2 Definition of terms.

Terms used in the regulations in this part are defined or identified as follows, subject to amplification in subsequent sections:

*Affiliate and associated company*—any legal entity which owns or controls, or is owned or controlled by, another legal entity. For a corporation, ownership of the voting stock is the controlling criterion. A legal entity is considered to own or control a second legal entity if—

(1) The legal entity owns an interest of 50 percent or more in the second legal entity; or

(2) The legal entity and one or more other legal entities, in which it owns an interest of 50 percent or more, together own an interest of 50 percent or more in the second legal entity; or

(3) The legal entity owns an interest of 50 percent or more in another legal entity which in turn owns an interest of 50 percent or more in the second legal entity.

*CCC*—the Commodity Credit Corporation, USDA.

*Commodity*—an agricultural commodity produced in the United States, or product thereof produced in the United States, as specified in the applicable purchase authorization.

*Controller*—the Controller, Commodity Credit Corporation, or the Controller's designee.

*Copy*—a photocopy or other type of copy of an original document showing all data shown on the original, including signature or the name of the

person signing the original or, if the signature or name is not shown on the copy, a statement that the original was signed.

**Delivery**—the transfer to or for the account of an importer of custody and right of possession of the commodity at U.S. ports or Canadian transshipment points in accordance with the delivery terms of the contract and purchase authorization. For purposes of financing, delivery is deemed to occur as of the on-board date shown on the ocean bill of lading.

**Destination country**—the foreign country to which the commodity is exported.

**Director**—the Director, Pub. L. 480 Operations Division, Foreign Agricultural Service.

**Expediting services**—services provided to the vessel owner at the discharge port in order to facilitate the discharge and sailing of the vessel; this may include assisting with paperwork, obtaining permits and inspections, supervision and consultation.

**FAS**—the Foreign Agricultural Service, USDA.

**FSA**—the Farm Service Agency, USDA.

**FSA Office**—the office designated in the purchase authorization to administer this financing operation on behalf of CCC.

**Finance**—To expend CCC funds, whether or not the participant is required to repay the funds to CCC. For example, this part refers to CCC "financing" both the ocean freight differential, which the participant does not repay, and the commodity cost, which the participant does repay.

**Form CCC-106**—the form entitled "Advice of Vessel Approval."

**Form CCC-329**—the signed original of the form entitled "Supplier's Certificate."

**General Sales Manager and GSM**—the General Sales Manager, FAS, or the General Sales Manager's designee.

**Importer**—the person that contracts with the supplier for the importation of the commodity. The importer may be the participant or any person to which a participant has issued a subauthorization.

**Importing country**—any nation with which an agreement has been signed under the Act.

**Invitation for bids and IFB**—a publicly advertised request for offers.

**Legal entity** includes, but is not limited to, an individual (except that an individual and his or her spouse and their minor children are considered as one legal entity), partnership, association, company, corporation and trust.

**Letter of credit**—an irrevocable commercial letter of credit issued, confirmed, or advised by a banking institution in the United States and payable in U.S. dollars.

**Local currency**—the currency of the importing or destination country.

**Notice of arrival**—a written notice in accordance with § 17.8(g) stating that the vessel has arrived at the first port of discharge.

**Ocean bill of lading**—(1) *In the case of cargo carried on a vessel other than LASH barges:* An "on-board" bill of lading, or a bill of lading with an "on-board" endorsement, which is dated and signed or initialed on behalf of the carrier; or

(2) *In the case of cargo carried in a LASH barge:* (i) For the purpose of financing commodity price, an "on-board" bill of lading showing the date the commodity was loaded on board barges, which is dated and signed or initialed on behalf of the carrier, or a bill of lading or a LASH barge bill of lading with an "on-board barge" endorsement which is dated and signed or initialed on behalf of the carrier.

(ii) For the purpose of financing ocean freight or ocean freight differential, a bill of lading which is dated and signed or initialed on behalf of the carrier indicating that the barge containing the cargo was placed aboard the vessel named in the Form CCC-106 not later than eight running days after the last LASH barge loading date (contract layday) specified in the Form CCC-106. This may be either an "on board" bill of lading or a bill of lading or a LASH barge bill of lading with an "on-board ocean vessel" endorsement.

(3) Documentary requirements for a copy of an "ocean bill of lading" refer to a non-negotiable copy thereof.

**Ocean freight contract**—a charter party or liner booking note.

**Ocean transportation**—interchangeable with the term "ocean freight".

**Ocean transportation brokerage**—services provided by shipping agents related to their engagement to arrange ocean transportation and services provided by ships brokers related to their engagement to arrange employment of vessels.

**Ocean transportation-related services**—furnishing the following services: lightening, stevedoring, and bagging (whether these services are performed at load or discharge), and inland transportation, i.e., transportation from the discharge port to the designated inland point of entry in the destination country, if the discharge port is not located in the destination country.

**Participant**—the collective term used to denote the importing country or the private entity with which an agreement has been negotiated under the Act.

**Person**—an individual or other legal entity.

**Private entity**—the nongovernmental legal entity with which an agreement has been signed under the Act.

**Purchase authorization**—Form FAS-480, "Authorization to Purchase Agricultural Commodities," issued to a participant under this part.

**Purchasing agent**—any person engaged by a participant to procure agricultural commodities.

**Secretary**—the Secretary of Agriculture of the United States, or the Secretary's designee.

**Selling agent**—a representative for the supplier of the commodity, who is not employed by or otherwise connected with the importer or the participant.

**Shipping agent**—any person engaged by a participant to arrange ocean transportation.

**Ships broker**—any person engaged by a supplier of ocean transportation to arrange employment of vessels.

**Supplier**—any person who sells a commodity to an importer under the terms of a purchase authorization, or who sells ocean transportation to an importer or supplier of the commodity under the terms of a purchase authorization.

**USDA**—the U.S. Department of Agriculture.

**United States**—the 50 States, the District of Columbia, and Puerto Rico.

### § 17.3 Purchase authorizations.

(a) **Issuance.** After an agreement is signed, the GSM will issue a purchase authorization to the participant for each commodity included in the agreement.

(b) **Contents.** Each purchase authorization includes the following information:

(1) The commodity to be purchased and specifications, approximate quantity and maximum dollar amount authorized;

(2) Contracting requirements;

(3) The contracting period, during which suppliers and importers must enter into contracts; and the delivery period, during which the commodity must be delivered;

(4) The terms of delivery to the importer;

(5) Documentation required for CCC financing in addition to or in lieu of the documentation specified in § 17.9;

(6) Provisions relating to payment to CCC, if applicable;

(7) The address of the FSA office administering the financing operation on behalf of CCC;

(8) The method of financing provided under the Agricultural Commodities Agreement;

(9) Any provisions relating to financing by CCC in addition to or in lieu of those specified in this part;

(10) Authorization to procure ocean transportation, and provisions relating to the financing of ocean freight or ocean freight differential, as applicable;

(11) Any other provisions considered necessary by the General Sales Manager.

(c) *Applicability of this part.* In addition to the provisions of a particular purchase authorization, each purchase authorization, unless otherwise provided, is subject to the provisions of this part to the same extent as if the provisions were fully set forth in the purchase authorization.

(d) *Modification or revocation.* The General Sales Manager reserves the right at any time for any reason or cause whatsoever to supplement, modify or revoke any purchase authorization, including the termination of deliveries, if it is determined to be in the interest of the U.S. Government. CCC shall reimburse suppliers who would otherwise be entitled to be financed by CCC for costs which were incurred as a result of such action by the GSM in connection with firm sales or shipping contracts, and which were not otherwise recovered by the supplier after a reasonable effort to minimize such costs: *Provided, however,* That such reimbursement shall not be made to a supplier if the GSM determines that the GSM's action was taken because the supplier failed to comply with the requirements of the regulations in this part or the applicable purchase authorization; *Provided further,* That reimbursement to suppliers of ocean transportation shall not exceed the ocean freight differential when the purchase authorization provides only for financing the differential.

(e) *Subauthorizations.* The participant may issue subauthorizations to importers consistent with the terms of the applicable purchase authorization. The participant, in subauthorizing, shall specify to importers all the provisions of the applicable purchase authorization which apply to the subauthorization.

(f) *Cotton textiles.* (1) Except as provided in paragraph (f)(2) of this section, financing of textiles under this part is limited to cotton yarns and fabrics processed up to and including the dyed and printed state, and preshrinking. Any processing of such yarns and fabrics beyond this stage will be at the expense of the participant.

(2) Purchase authorizations may permit cotton textiles processed beyond the stage described in paragraph (f)(1) of

this section to be purchased, but the maximum financing by CCC is limited to the equivalent value of the cotton yarns and fabrics described in paragraph (f)(1) of this section, contained in the textiles, plus eligible ocean transportation costs.

(3) Financing is available only for textiles manufactured entirely of U.S. cotton in the United States.

#### § 17.4 Agents of the participant or importer.

(a) *General.* (1) A participant or importer is not required to use a purchasing agent or shipping agent, or employ the services of any other agent, broker, consultant, or other representative (hereafter "agent") in connection with arranging the purchase of agricultural commodities under title I of the Act and arranging ocean transportation for such commodities. However, if an agent is used, the participant shall submit a written nomination of the agent to the Deputy Administrator, Export Credits, FAS, along with a copy of the proposed agreement between the participant or importer and such agent. The written nomination shall also specify the period of time to be covered by the nomination. A person may not act as agent for a participant or importer unless the Deputy Administrator, Export Credits, FAS, has provided a written statement that the nomination is accepted in accordance with the provisions of this section.

(2) See § 17.6(c) regarding commissions, fees, or other compensation of any kind to agents of a participant or importer.

(3) A freight agent employed by the Agency for International Development under titles II and III is not eligible to act as an agent for the participant or importer during the period of such employment. A subcontractor of such freight agent is not eligible to act as an agent for the participant or importer during the period of its subcontract.

(b) *Affiliate defined.* For purposes of this section, the term affiliate has the meaning provided in § 17.2 and, in addition, persons will also be considered to be affiliates if any of the following conditions are met:

(1) There are any common officers or directors.

(2) There is any investment by eligible commodity suppliers, selling agents, or persons engaged in furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether or not any part of the

ocean transportation is financed by the U.S. Government, or by agents of such persons, or their officers or directors, in the agent of the participant or importer.

(3) There is any investment by the agent of the participant or importer, or its officers or directors, in approved commodity suppliers; selling agents; or persons engaged in furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether or not any part of the ocean transportation is financed by the U.S. Government, or in agents of such persons. These conditions include those cases in which investment has been concealed by the utilization of any scheme or device to circumvent the purposes of this section but does not include investment in any mutual fund.

(c) *Information to be furnished.* A person nominated to act as an agent of the participant or importer, and any independent contractor that may be hired by such person to perform functions of a shipping agent, shall furnish to the Deputy Administrator, Export Credits, FAS, the following information or documentation as may be applicable:

(1) The names of all incorporators;

(2) The names and titles of all officers and directors;

(3) The names of all affiliates, including the names and titles of all officers and directors of each affiliate, and a description of the type of business in which the affiliate is engaged;

(4) The names and proportionate share interest of all stockholders;

(5) If beneficial interest in stock is held by other than the named shareholders, the names of the holders of the beneficial interest and the proportionate share of each;

(6) The amount of the subscribed capital;

(7) For USDA acceptance of a nomination covering services provided during each U.S. fiscal year (October 11–September 30), a written statement signed by such person:

(i) Certifying that, during the U.S. fiscal year covered by USDA's acceptance of the nomination, the person has not engaged in, and will not engage in, supplying commodities under any title of the Act or the Food for Progress Act of 1985 or furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether any part of the ocean transportation is financed

by the U.S. Government; and that the person has not served and will not serve as an agent of firms engaged in providing such commodities, ocean transportation and ocean transportation-related services;

(ii) Certifying that, for ocean transportation brokerage services provided during the U.S. fiscal year covered by USDA's acceptance of the nomination, the person has not shared and will not share freight commissions with the participant, the importer, or any agent of the participant or the importer, whether CCC finances any part of the ocean freight. CCC will consider as sharing a commission a situation where the agent forgoes part or all of a commission and the supplier of ocean transportation pays a commission directly to the participant, the importer, or any other person on behalf of the participant or the importer; and

(iii) Undertaking that, during the U.S. fiscal year covered by USDA's acceptance of the nomination, affiliates of such person have not engaged in and will not engage in the activities or actions prohibited in this paragraph (c)(7).

(8) A certification that neither the person nor any affiliates has arranged to give or receive any payment, kickback, or illegal benefit in connection with the person's selection as agent of the participant or importer.

(d) *USDA acceptance.* (1) USDA will consider accepting the nomination of a person to act as an agent of the participant or importer when the documents required to be submitted by this section are received by the Deputy Administrator, Export Credits, FAS.

(2) USDA's acceptance of such nomination shall remain in effect for the period of time requested by the participant or such shorter period as the Deputy Administrator, Export Credits, FAS, may determine. USDA will withdraw such acceptance if the agent of the participant or importer, or any of the affiliates of such agent, violates the certifications or undertakings made pursuant to paragraphs (c) (7) and (8) of this section.

(3) A person is required to submit the information and documentation required by § 17.4(c) to support the person's first nomination to act as an agent of any participant or importer for each fiscal year. For subsequent nominations covering the same fiscal year, the person must provide a written certification that the information and documentation provided earlier are still accurate and complete, or must provide the details of any changes to previously submitted information.

(e) *Notification.* The Deputy Administrator, Export Credits, FAS, shall promptly notify persons nominated as agents of the participant or importer, of the determination or of the need for further inquiry, and shall provide a written response within 30 calendar days of receipt of all the required documents. If USDA will not accept the nomination, the notification shall state the reasons therefor. The determination of the Deputy Administrator, Export Credits, FAS, is effective immediately and continues in effect pending the result of any appeal to the General Sales Manager.

(f) *Non-acceptance or withdrawal.* (1) If USDA does not accept the nomination of a person, or if acceptance has been withdrawn pursuant to the provisions of this section, the person may, within 30 calendar days, present to the General Sales Manager, orally or in writing, any reasons as to why such action should not stand. Nothing in this paragraph shall be construed as to prohibit a person whose nomination has not been accepted or whose acceptance has been withdrawn by USDA from being nominated at a later time.

(2) If, in the procurement of commodities made available under title I, Pub. L. 480, a participant or importer uses an agent whose nomination has not been accepted in writing by the Deputy Administrator, Export Credits, FAS, USDA may withhold sales approval.

(3) If, in the shipping of commodities made available under title I, Pub. L. 480, a participant or importer uses an agent whose nomination has not been accepted in writing by the Deputy Administrator, Export Credits, FAS, USDA may withhold vessel approval or may deduct from the ocean freight differential to be paid, the amount of any commission to the agent in connection with the shipment.

(g) *No competitive advantage.* A shipping agent may not take any action which would give a competitive advantage to any supplier of commodities or ocean transportation. This includes, but is not limited to, providing advance notice of IFB's or amendments, or selectively enforcing IFB or contract requirements.

#### **§ 17.5 Contracts between commodity suppliers and importers.**

(a) *Commodity suppliers and selling agents.* (1) Commodity suppliers must be determined to be eligible under the Pub. L. 480, title I program in order for their contracts to be eligible for CCC financing. A prospective commodity supplier must be engaged in the business of selling agricultural commodities for export from the United

States. The commodity supplier must maintain a bona fide business office in the United States, and must have a person, principal or agent on whom service of judicial process may be had in the United States.

(2) Persons who wish to participate as commodity suppliers shall submit the following information to the Foreign Agricultural Service, Stop 1033, USDA, 1400 Independence Ave., SW, Washington, D.C. 20250-1033:

(i) A current financial statement of the prospective supplier, preferably an audited statement, as evidence of financial responsibility. Submission of a letter of reference from a bank is also encouraged.

(ii) A statement containing general background information about the firm, including the names and titles of the chief executive officers and a description of the firm's experience as an exporter of U.S. agricultural commodities. Copies of bills of lading supporting this statement are also requested.

(iii) Any other information requested relating to whether the prospective supplier is responsible and is able to perform its obligations under this part and the purchase authorization.

(3) If, at the time the commodity supplier reports the sale it is determined that an agent employed or engaged by a commodity supplier to obtain a contract is not a selling agent as defined in § 17.2, the sale will not be eligible for financing.

(b) *Eligibility for financing.* To be eligible for financing, commodity contracts must comply with the following requirements unless otherwise specified in the purchase authorization.

(1) Commodity contracts between suppliers and importers are considered to be conditioned on the approval by USDA of the contract price; conformance of the sale to the provisions of the purchase authorization; responsiveness of the offer to IFB terms; and compliance by the supplier and the selling agent, if any, with paragraph (a) of this section.

(2) Importers and suppliers must enter into contracts within the contracting period specified in the purchase authorization. The contracts must provide for deliveries to the importer in accordance with the delivery terms and during the delivery period specified in the purchase authorization, or any amendment or modification thereto.

(3) Contracts for a commodity, under a purchase authorization which limits delivery terms to f.o.b. or f.a.s., must be separate and apart from the contracts for ocean transportation of the commodity.

(4) The supplier's sales price may not exceed the prevailing range of export market prices as applied to the terms of sale at the time of sale, as determined by USDA. The "time of sale" is the date and time specified in the IFB for receipt of offers; or the date of the contract amendment if the amendment affects the sale price, as determined by USDA. The contract price may not be on a cost plus a percentage-of-cost basis.

(c) *Contracting procedures.* (1) *Purchasing—general*—(i) Importers must purchase commodities on the basis of IFB's.

(ii) The participant shall maintain a record of all offers received from suppliers until the expiration of three years after final payment under contracts awarded under the purchase authorization. The GSM may examine these records or request specific information in connection with the offers.

(2) *Invitations for bids.* The following conditions shall apply on all purchases of commodities on the basis of IFB's:

(i) The General Sales Manager must approve the terms of the IFB before it is issued by the importer.

(ii) The importer shall issue the IFB in the United States and shall open all offers in public in the United States at the time and place specified in the IFB.

(iii) The IFB must permit submission of offers from all suppliers who meet the requirements of this subpart.

(iv) The IFB may not preclude offers for shipment from any United States port(s) unless the purchase authorization provides for exportation only from certain ports.

(v) The IFB may not establish minimum quantities to be offered or which will be considered.

(vi) The IFB must stipulate the responsibility for each party for payment of any costs not eligible for financing by CCC.

(vii) The IFB must be in compliance with this part, the purchase authorization, and sound commercial standards.

(3) *Contract awards.* (i) The importer shall consider only offers which are responsive to the IFB and shall make awards either on the basis of the lowest commodity price(s) offered or on the basis of lowest landed cost. However, when vessels offered under the flag of the participant, the importing country or the destination country; or vessels controlled by the participant, the importing country or the destination country are to be used, the participant must purchase commodities for shipment on such vessels only on the basis of the lowest commodity price(s)

offered. This limitation may, however, be waived by the GSM:

(A) When the lowest commodity price(s) offered are in locations where vessels cannot reasonably be made available without a substantial increase in freight costs to the participant;

(B) For small quantities offered at additional loading points (in aggregate not more than 15 percent of the total tonnage offered by a vessel); or

(C) Where this limitation would conflict with the purposes of the program.

(ii) For purposes of this section, "lowest commodity price(s)" means the lowest commodity price(s) offered for loading onto the type of vessel (dry bulk carrier, tanker, etc.) to be utilized to carry the commodity purchased.

(iii) For purposes of this section, "lowest landed cost" means the combination of commodity price and ocean freight rate resulting in the lowest total cost to deliver the commodity to the importing country, considering the quantity which must be shipped on privately owned U.S.-flag commercial vessels, as determined by the Director. Lowest landed cost may be defined on either a foreign flag or U.S. flag basis. Awards may not be made on the lowest landed cost basis unless IFB's are issued for commodity and ocean freight so that all commodity and ocean freight offers are reviewed simultaneously.

(iv) Participants are encouraged to purchase commodities on the basis of lowest landed cost when U.S. flag vessels are to be used. If such commodity purchases are not made on the basis of lowest landed cost (U.S. flag), ocean freight differential payments will nonetheless be calculated on the rates of U.S. flag vessels which would represent the lowest landed cost.

(v) Announcement of awards shall be made in the United States. The importer shall promptly submit to the Director copies of all offers received with a copy of the IFB which was issued. No sale can be approved for financing until this information has been received by FAS. The decision of the GSM shall be final regarding the responsiveness of offers to IFB terms in the awarding of contracts.

(d) *Contract quantity eligible for financing.* The quantity eligible for financing in the contract between the supplier and the importer may not exceed that quantity approved by the Pub. L. 480 Operations Division, FAS, including any approved contract tolerance.

(e) *Contract disputes.* Contracts between suppliers and importers should stipulate the responsibility of each party for payment of any costs not eligible for financing by CCC. Questions as to

payment of ineligible costs should be resolved between the contracting parties.

(f) *Contract provisions.* Each contract entered into for financing under this part is deemed to include all terms and conditions required by the regulations in this part.

(g) *Export Trade Act (Webb-Pomerene Law).* A supplier who is a member of a Webb-Pomerene association and who enters into contracts with importers as a member of such an association shall so indicate in a statement on, or attached to, the copy of the supplier's detailed invoice referred to in § 17.9(c)(2).

#### § 17.6 Discounts, fees, commissions and payments.

For purposes of this section, the term "payment" means a commission, fee or other compensation of any kind. The term "other compensation of any kind" includes anything given in return for any consideration, services, or benefits received or to be received.

(a) *Discounts.* If a contract provides for one or more discounts (including but not limited to trade or quantity discounts and discounts for prompt payment) whether expressed as such or as "commissions" to the importer, CCC will only pay the invoice amount after the discount (supplier's contracted price less all discounts).

(b) *Selling agents.* (1) A supplier may not make a payment to a selling agent employed or engaged by the supplier to obtain a contract. This prohibition applies to any payment to a person who has acted as a selling agent to obtain a contract even though the payment may be for services performed that are not themselves services to obtain a contract.

(2) A person is deemed to act "to obtain a contract" if the person acts on behalf of a commodity supplier to:

(i) Influence a buyer to award a contract to the supplier;

(ii) Give the supplier a competitive advantage in relation to other potential suppliers; or

(iii) Influence CCC to approve a contract for financing under this part.

(3) CCC will not consider acts which are purely ministerial in nature and do not require the exercise of personal influence, judgment, or discretion (such as attending bid openings or presenting offers at bid openings), or services to implement a contract after it has been entered into by the parties (such as handling documentation problems or contract disputes), as acts to obtain a contract.

(c) *Other prohibitions.* (1) Suppliers of commodities or ocean transportation may not:



(i) Pay a commission to the participant or importer; to any agency, including an agency of the government of the importing country or the destination country; or to a corporation owned or controlled by the participant or the government of the importing country or the destination country.

(ii) Pay a commission to any affiliate of the participant, if the participant is a private entity;

(iii) Make any payment to an agent of the participant or importer, in the person's capacity as such agent, other than ocean transportation brokerage commissions.

(iv) Pay an address commission or payment.

(2) For ocean transportation, in addition to this paragraph, see also § 17.8(j).

(3) When any portion of the ocean freight is financed by CCC, total ocean transportation brokerage commissions earned on U.S. and non-U.S.-flag bookings by all parties arranging vessel fixtures shall not exceed 2½ percent of the total freight costs.

(4) If a payment is made in violation of this section, CCC may demand dollar refund of the entire amount financed by CCC under the contract.

#### § 17.7 Notice of sale procedures.

(a) *Telephonic notice of sale.* The supplier shall, immediately upon making a firm sale, telephone a notice of sale to Pub L. 480 Operations Division, FAS. A sale is considered firm when the supplier has been notified by the importer of an award, even though the contract is conditioned on approval by FAS (see § 17.5(b)(1).) If the supplier fails to furnish a notice of sale within 3 working days after the date of sale, CCC has the right to refuse to finance the sale.

(b) *Sale approval.* (1) Pub. L. 480 Operations Division will notify the supplier by telephone of approval of the notice of sale.

(2) The supplier will prepare Form FAS-359, "Declaration of Sale," and submit it to Pub. L. 480 Operations Division promptly as soon as FAS has provided the CCC Registration Number to the supplier. The supplier or the supplier's authorized representative must sign the form.

(3) Each Form FAS-359 shall cover only a single sale contract. If a sale is made under two or more purchase authorizations, the supplier will prepare separate forms for each purchase authorization.

(4) If any correction is needed to the Form FAS-359, the supplier must immediately notify FAS. If a contract is amended, the supplier should present

the original Form FAS-359 for payment along with a copy of the written USDA approval of the contract amendment.

(c) *Sale disapproval.* (1) Pub. L. 480 Operations Division, FAS, will notify the supplier by telephone when a sale is disapproved for financing. The related contract between the supplier and importer shall, for purposes of financing, be considered null and void.

(2) On receipt of a notice of disapproval, the supplier shall promptly notify the importer.

(d) *Contract delivery period.* Price approval is limited to exports made during the delivery period stated in the notice of sale or any contract amendment approved by the Pub. L. 480 Operations Division, FAS. If the supplier cannot complete delivery by the terminal delivery date of the contract delivery period, the supplier and the participant or importer shall submit a notice of contract amendment as provided in paragraph (e) of this section. If the supplier fails to comply, § 17.10(d) shall apply.

(e) *Contract amendments.* (1) The supplier and the participant or importer shall each submit a written notice of each contract amendment to the Director immediately after the amendment to the contract is made. This includes not only any change in the contract delivery period or any other terms and conditions of the contract as provided in the information given in the original notice of sale or any amendment thereto, but also any change in any other terms and conditions of the contract.

(2) The notice of contract amendment must contain the following:

(i) A request that USDA approve an amendment to the specifically identified sale contract between (the participant or importer) and (the commodity supplier).

(ii) A statement of what the amendment consists of (as, extension of delivery period through (date)) and a detailed explanation of the reasons for the amendment.

(iii) A statement that the contract amendment has been agreed to by both buyer and seller.

(3) Pub. Law 480 Operations Division, FAS, will notify the supplier as to whether the amendment is approved or disapproved.

(4) The supplier shall furnish a copy of the USDA approval of the amendment with other documentation submitted to obtain payment.

(5) If the supplier fails to furnish notice of a contract amendment to Pub. L. 480 Operations Division, FAS, within 3 working days after the date of such amendment, CCC has the right to refuse

to finance the sale or any portion of the sale.

(6) Any amendment must be consistent with the provisions of the purchase authorization and this part and must otherwise be acceptable to Pub. L. 480 Operations Division, FAS.

#### § 17.8 Ocean transportation.

(a) *General.* (1) This section applies to the financing of ocean freight or ocean freight differential. Ocean freight will be financed by CCC only to the extent specifically provided for in the purchase authorization. The purchase authorization may provide requirements in addition to or in lieu of those specified in this section.

(2) The supplier of ocean transportation must be engaged in the business of furnishing ocean transportation from the United States and must have a person, principal or agent, on whom service of judicial process may be had in the United States.

(3) The quantity of the commodity which must be shipped on privately owned U.S.-flag commercial vessels will be determined by the Director.

(4) The supplier of ocean transportation shall release copies of the ocean bills of lading to the supplier of the commodity promptly upon completion of loading of the vessel.

(5) When CCC finances any part of the ocean freight or the ocean freight differential, the participant must open an operable irrevocable letter of credit for the portion of the ocean freight not financed by CCC. All banking institution charges, such as commissions, expenses, etc., are for the account of the participant. The amount of the letter of credit shall be computed using the information provided in the Form CCC-106. The letter of credit shall provide for sight payment or acceptance of a draft, payable in U.S. dollars, on the basis of the quantities specified in the applicable ocean freight contract. If the supplier of ocean transportation accepts the commodity before receipt of an acceptable letter of credit from a bank, the supplier takes such action at its own risk. This action in itself does not affect eligibility for CCC financing.

(b) *Contracting procedures—(1) Invitations for Bids (IFB's)*—(i) Public freight "Invitations for Bids" are required in the solicitation of freight offers from all U.S. and non-U.S. flag vessels when CCC is financing any portion of the ocean freight.

(ii) For non-U.S. flag vessels when CCC is not financing any portion of the ocean freight, public freight IFB's are also required unless otherwise authorized by the Director, or unless the participant requires the use of vessels

under its flag, the flag of the destination country, or other non-U.S. flag vessels under its control. Vessels considered to be under the control of the participant or the destination country include vessels under time charters, bare boat charters, consecutive voyage charters, or other contractual arrangements for the carriage of commodities which provide guaranteed access to vessels.

(iii) Prior to release to the trade, all freight IFB's must be submitted to the Director for approval. Freight IFB's must be issued by means of Bridge News, New York, plus at least one other means of communication.

(iv) All freight IFB's must:

(A) Specify a closing time for the receipt of offers and state that late offers will not be considered;

(B) Provide that offers are required to have a canceling date no later than the last contract layday specified in the IFB;

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

(D) Stipulate the responsibility for each party for payment of any costs not eligible for financing by CCC (in the IFB or the pro forma charter party).

(2) *Competitive bidding.* When CCC is financing any portion of the freight, all offers shall be opened in public in the United States at the time and place specified in the IFB. Offers shall be opened prior to receipt of offers for the sale of commodities as the Director determines appropriate. Only offers which are responsive to the IFB may be considered, and no negotiation shall be permitted.

(3) *Records of offers.* Copies of all offers received must be promptly furnished to the Director, who may require the participant, or its shipping agent, to submit a written certification to the GSM that all offers received (with the times of receipt designated thereon) were transmitted to the Department. For purposes of this paragraph "time of receipt" shall be the time a hand-carried offer or a mailed offer was received at the designated location for presentation or, if transmitted electronically, the time the offer was received, as supported by evidence satisfactory to the Director.

(4) *Re-tenders.* The Director may permit or require a participant to refuse any and all bids, and in such case a participant may conduct a re-tender with the approval of the Director. The Director shall not approve or require freight re-tenders unless they will increase the likelihood of meeting U.S. flag cargo preference requirements, will permit the desired quantity to be shipped, will likely result in reduced CCC expenditures, or are otherwise

determined to be in the best interest of the program.

(c) *Request for vessel approval.* The pertinent terms of all proposed charters and all proposed liner bookings, regardless of whether any portion of ocean freight is financed by CCC, must be submitted to the Director for review and approval before fixture of the vessel. Tentative advance vessel approvals may be obtained by telephone provided Form CCC-105, "Ocean Shipment Data—Pub. L. 480 (Request for Vessel Approval)", is furnished promptly confirming the information supplied by telephone. The Form CCC-105 shall be submitted in duplicate to the Director.

(d) *Advice of vessel approval.* (1) USDA will give written approval of charters and liner bookings on Form CCC-106, "Advice of Vessel Approval." The Form CCC-106 will state whether CCC will finance any part of the ocean freight. For f.a.s. or f.o.b. shipments, CCC will issue a signed original of Form CCC-106 to the ocean carrier when CCC finances any part of the ocean freight. For c.& f. or c.i.f. shipments, CCC will issue Form CCC-106 to the supplier of commodity.

(2) If CCC agrees to finance any portion of the ocean freight, the participant or its agent shall forward a copy of the ocean freight contract immediately after execution to the Director for review and approval prior to issuance of Form CCC-106.

(3) CCC may also require the supplier of ocean transportation to submit copies of lightening, stevedoring, or bagging contracts for any voyage for which CCC finances ocean freight or ocean freight differential.

(e) *Special charter party provisions required when any part of ocean freight is financed by CCC.* This paragraph applies when CCC finances any part of the ocean freight for commodities booked on charter terms. In the event of any conflict between the provisions of the regulations in this part and the charter party or ocean bills of lading issued pursuant thereto, the provisions of the regulations in this part shall prevail. The charter party shall contain or, for the purpose of financing pursuant to the regulations in this part, be deemed to contain the following provisions:

(1) That if there is any failure on the part of the supplier of ocean transportation to perform the charter party after the vessel has tendered at the loading port, the charterer shall be entitled to incur all expenses which in the judgment of the General Sales Manager are required to enable the vessel to carry out her obligations under

the charter party including, but not limited to, expenses for lifting any liens asserted against the vessel.

(2) That, notwithstanding any prior assignments of freight made by the owner or operator, the expenses authorized in paragraph (e)(1) of this section may be deducted from the freight earned under the charter party.

(3) That ocean freight is earned and that 100% thereof is payable by the charterers when the vessel and cargo arrive at the first port of discharge, subject to paragraph (e)(4) of this section, and to the further condition that if a force majeure as described in paragraph (l)(1) of this section results in the loss of part of the vessel's cargo, 100% of the ocean freight is payable on the part so lost. This provision does not relieve the carrier of the obligation to carry to other points of discharge if so required by the charter party.

(4) That if a force majeure as described in paragraph (l)(1) of this section prevents the vessel's arrival at the first port of discharge, the freight shall be payable by the charterer at the time the General Sales Manager determines that such force majeure was the cause of nonarrival.

(5) That laydays are non-reversible.

(6) That in a dispute involving any rights and obligations of CCC, including rights and obligations as successor or assignee, which cannot be settled by agreement, the dispute shall not be subject to arbitration.

(f) *Special charter party information required when any part of ocean freight is financed by CCC.* When CCC finances any part of the ocean freight for commodities booked on charter terms, the charter party shall contain the following information:

(1) The name of each party participating in the ocean freight brokerage commission, if any, and the percentage thereof payable to each party;

(2) The name of the vessel and the name of the substitute vessel, if any.

(g) *Notice of arrival.* Each Form CCC-106 will indicate whether a notice of arrival is required. A notice of arrival, when required, must be furnished promptly by the participant or its designated agent or other source acceptable to CCC (excluding the carrier or its agent) and must include the name of the vessel, the purchase authorization number, the first port of discharge, and the date of arrival. The notice of arrival of the vessel also constitutes prima facie evidence of arrival of the cargo.

(h) *Foreign flag vessels.* The cost of ocean transportation will be financed by CCC on non-U.S. flag vessels only when, and to the extent, specifically provided

in the applicable purchase authorization.

(i) *U.S.-flag vessels.* When a commodity is required to be shipped on a privately owned U.S.-flag commercial vessel, Form CCC-106 will set forth:

(1) The rate of the ocean freight differential, if any, which the Director determines to exist between the prevailing foreign-flag vessel rate and the U.S.-flag vessel rate; and

(2) The approximate tonnage for which CCC will authorize reimbursement of ocean freight or ocean freight differential, as appropriate.

(j) *Items not eligible for financing by CCC.* The following costs will not be financed by CCC, either separately or as part of the commodity contract price:

(1) Loading, trimming, and other related shipping expenses unless included in the ocean freight rate;

(2) Discharge costs unless included in the ocean freight rate;

(3) The cost of "dead freight";

(4) Cargo dues and taxes assessed by the importing or recipient country;

(5) Surcharges assessed by steamship conferences or carriers, unless specifically authorized by the Director;

(6) General average contributions;

(7) Stevedoring overtime and vessel crew overtime;

(8) Ship's disbursements;

(9) Any payments prohibited in § 17.6 (b) and (c); and

(10) Detention.

(k) *General financing provisions.*

When any part of ocean freight will be financed either separately or as part of the commodity contract price, the following shall apply:

(1) Ocean freight contracts must show the ocean freight rate from one loading port to one discharge port, and may provide for an increase in rate for an additional port of loading or discharge, or other option. CCC, however, will finance initially the lowest such rate or OFD, as appropriate. Increased amounts due because of the exercise of such option will be financed only after receipt of an ocean bill of lading or other evidence showing that the option was exercised.

(2) In the case of transshipment to a foreign flag vessel, CCC will finance the ocean freight or OFD, as appropriate, only to the point of transshipment, at a rate determined by the GSM, and CCC will not finance any part of the ocean freight beyond the point of transshipment unless specifically approved by the GSM. If the commodity was transported from a U.S. port and was transshipped at another U.S. port, CCC will not finance, without prior approval of the GSM, any part of the ocean freight incurred before transshipment.

(3) The ocean freight rate eligible for CCC financing and the rate used for the U.S.-flag vessel in calculating ocean freight differential shall not exceed the following rates for the category of the vessel concerned:

(i) For commodities covered by published tariff rates—the published conference contract rate;

(ii) For other commodities—the market rate prevailing at the time of request for approval as determined by the Director, but in any event not in excess of rates charged other shippers (irrespective of booking dates) for like commodities on the voyage concerned.

(4) Payment will be made for ocean freight or OFD, as appropriate, from loading points to discharge points at rates approved by the Director on Form CCC-106 in conformity with paragraph (k)(3) of this section.

(5) Freight for a vessel designated on Form CCC-106 as a U.S. flag vessel shall not be eligible for financing unless such vessel complies with the provisions of Pub. L. 87-266.

(6) Ocean freight contracts must specify that the participant shall be liable for detention of the vessel for loading delays attributable solely to the decision of the supplier of ocean transportation not to commence loading because of the failure of the participant to establish an ocean freight letter of credit in accordance with paragraph (a)(5) of this section. However, ocean freight contracts may not contain a specified detention rate. The ocean transportation supplier shall be entitled to reimbursement for detention costs for all time so lost, for each calendar day or any part of the calendar day, including Saturdays, Sundays and holidays. The period of such delay shall not commence earlier than upon presentation of the vessel at the designated loading port within the laydays specified in the ocean freight contract, and upon notification of the vessel's readiness to load in accordance with the terms of the applicable ocean freight contract. The period of such delay shall end at the time that operable irrevocable letters of credit have been established for the applicable ocean freight or the time the vessel begins loading, whichever is earlier. Time calculated as detention shall not count as laytime. Reimbursement for such detention shall be payable no later than upon the vessel's arrival at the first port of discharge.

(l) *Force majeure.* (1) The GSM will waive the requirement for the notice of arrival required by Form CCC-106 by a written notice to the supplier of ocean transportation on the receipt of evidence satisfactory to the General Sales

Manager that the vessel is lost or unable to proceed to destination after completion of loading as a result of one or more of the following causes: Damage caused by perils of the sea or other waters; collisions; wrecks; stranding without the fault of the carrier; jettison; fire from any cause; Act of God; public enemies or pirates; arrest or restraint of princes, rulers or peoples without the fault of the supplier of ocean transportation; wars; public disorders; captures; or detention by public authority in the interest of public safety. The supplier may substitute such waiver for the notice of arrival.

(2) The determination of a force majeure by the GSM shall not relieve the participant from its obligation under the Agricultural Commodities Agreement to pay CCC, when due, the dollar amount of ocean freight, plus interest (exclusive of ocean freight differential), financed by CCC.

(m) *Demurrage/despatch.* CCC will not finance demurrage and CCC will not share in despatch earnings. Owners and commodity suppliers will settle laytime accounts at load port(s) and owners and charterers will settle laytime accounts at discharge port(s). Under no circumstances shall CCC be responsible for resolving disputes involving calculation of laytime or the payment of demurrage or despatch.

(n) *Ocean freight included in the commodity contract price.* For cost and freight or c.i.f. contracts the ocean freight, or the ocean freight differential, as appropriate, will be financed only to the extent specifically provided in the applicable purchase authorization.

(o) *Separate freight contracts.* Contracts for ocean transportation, under a purchase authorization which limits delivery terms to f.o.b. or f.a.s., must be separate and apart from the contracts for the commodity.

#### § 17.9 CCC payment to suppliers.

(a) *General.* (1) The supplier shall request payment from CCC for the amount of the commodity price or the ocean freight or ocean freight differential to be financed by CCC.

(2) The supplier shall support such a request for payment by presenting to CCC the documents required by this section, the purchase authorization, and the IFB, unless such documents were previously submitted to CCC. Such documents, however, need not be submitted when and to the extent that the Controller determines that the intended purpose of a document is served by documents otherwise available to or under the control of CCC or by alternate documents specified in such determination.

(3) CCC will examine each document to ascertain that it is in accordance with this part, the purchase authorization, and the IFB. CCC will audit all the required documents to ensure accuracy, completeness, and consistency. When CCC has determined that all required documents have been submitted and that the documents are acceptable for payment, CCC will pay the supplier for the commodity price or the ocean freight or ocean freight differential to be financed by CCC which is supported by the documents.

(4) CCC is required to issue all payments by electronic transfer. Each supplier submitting documents to CCC for payment must provide the name of the company, the bank ABA number to which payment is to be made, the account number for the company at the bank, the company's Taxpayer Identification Number, and the type of account being used.

(b) *General documentation requirements.* The supplier must put the appropriate purchase authorization number on all required documents which are prepared under the supplier's control, and should arrange for the appropriate purchase authorization number to be put on all other required documents at the time of their preparation.

(c) *Documents required for payment—commodity.* The general provisions relating to such documents are as follows. Additional requirements for payment to commodity suppliers for c.& f. or c.i.f. sales are contained in paragraph (c)(8) of this section.

(1) *Supplier's certificate.* A signed original of Form CCC-329 "Supplier's Certificate" from the commodity supplier covering the net invoice price for the commodity.

(2) *Supplier's detailed invoice.* Two copies of the supplier's detailed invoice showing quantity, description, contracted price, net total invoice price expressed in dollars, the amount for which financing is requested from CCC, the amount not eligible for financing by CCC, and basis of delivery of the commodity (e.g., f.o.b. vessel). In arriving at the net invoice price there shall be deducted:

(i) All discounts from the supplier's contracted price through payments, credits, or other allowances made or to be made to the importer, the importer's agent or consignee;

(ii) All purchasing agents' commissions;

(iii) All other amounts not eligible for financing.

(3) *Additional payment.* A request for an additional payment submitted for a transaction for which all or part of the

required documents have been previously submitted to CCC shall be supported by a Form CCC-329 "Supplier's Certificate" and the supplier's detailed invoice, covering the additional amount requested. The supplier's invoice must show the date, serial number and the amount of the original invoice and the basis for the additional amount claimed.

(4) *Weight certificate.* The weight certificate shall be issued by or on authority of a State or other governmental weighing department, Chamber of Commerce, Board of Trade, Grain Exchange, or other independent organization or firm providing public weighing services. Such organization or firm must have:

(i) Qualified, impartial, paid employees who are stationed at the port facility or, if authorized under the applicable purchase authorization, other facility where weights customarily are determined, one of whom performed the weighing covered by the certificate; or

(ii) Qualified, independent, impartial, supervised, weighmasters stationed at the port facility or, if authorized under the applicable purchase authorization, other facility where weights are customarily determined, one of whom supervised the employee of such a facility in the performance of the weighing covered by the certificate.

(5) *Federal appeal inspection.* The official certificate representing the results of an appeal inspection, when included in the documents presented for payment, shall supersede any other inspection certificate required by this part, the applicable purchase authorization, the IFB or the contract.

(6) *Form CCC-359.* (i) Form FAS-359, "Declaration of Sale," signed for the GSM, is the written document by which USDA notified the supplier that the sale was approved for financing. The supplier shall submit Form FAS-359 to CCC with the documents covering the first transaction under the contract. The unit price shown on the supplier's invoice must not exceed the approved unit price shown on the Form FAS-359.

(ii) For subsequent transactions under the same contract, the supplier shall certify on the CCC copy of the detailed invoice as follows:

I hereby certify that the applicable Form FAS-359 was submitted to CCC with documents covering Invoice No.

\_\_\_\_\_ dated \_\_\_\_\_ for \$\_\_\_\_\_.

(7) *Bill of lading.* Four copies of the ocean bill of lading.

(8) *C.&f. or c.i.f. sales.* In addition to the requirements of paragraph (c)(1) through (7) of this section, the following

requirements apply for c.& f. or c.i.f. sales:

(i) Signed original of Form CCC-106.

(ii) The supplier's detailed invoice shall show a computation of the dollar amount of ocean freight differential, whenever the Form CCC-106 provides for an ocean freight differential on a cost and freight or c.i.f. sale and authorizes financing of any portion of ocean freight by CCC. In arriving at the net invoice price the supplier shall deduct the ocean freight, or portion thereof which is not being financed by CCC.

(iii) One nonnegotiable copy of the insurance certificate or policy where the cost of insurance is included in the price of the commodity to be financed by CCC.

(iv) A request for an additional payment shall also include a statement signed by the ship's master or owner (or agent of either of them) showing exercise of the higher-rated option, if the payment is stated to be due because of the exercise of a higher-rated option provided in an ocean freight contract.

(d) *Documents required for payment—ocean freight financed separately from commodity price.*

(1) *Supplier's certificate.* A signed original of Form CCC-329, "Supplier's Certificate", executed by the carrier or its agent, covering the dollar cost of ocean freight or ocean freight differential.

(2) *Ocean bill of lading.* One copy of the ocean bill of lading and, if required by the related Form CCC-106, a notice of arrival at the first port of discharge of the vessel named in the Form CCC-106. In lieu of a notice of arrival the carrier may present a waiver of the notice of arrival signed by the GSM or Controller.

(3) *Invoice.* One copy of the carrier's invoice which shows the total freight costs, the amount not eligible for financing by CCC, and the amount for which payment is requested from CCC. If the invoice relates to a U.S.-flag vessel, such invoice shall contain the following typed or stamped certification, executed by the supplier:

The undersigned hereby certifies that the vessel named herein and for which ocean freight is claimed, qualifies as a privately owned U.S.-flag commercial vessel within the requirements of Pub. L. 87-266 and is an eligible U.S.-flag vessel for the purposes of Pub. L. 664, 83rd Congress.

(4) *Form CCC-106.* Signed original of Form CCC-106.

(5) *Ocean freight contract.* One copy of the ocean freight contract.

(6) *Higher rated option.* A request for payment of any amounts claimed because of the exercise of a higher rated option following payment of a lower rated option pursuant to § 17.8(k)(1)

shall be supported by the following documents:

(i) One copy of the carrier's invoice as described in paragraph (d)(3) of this section except for the certification required therein.

(ii) The Form CCC-329, "Supplier's Certificate", for the balance claimed.

(iii) A statement signed by the ship's master, owner, or owner's agent, and signed laytime statements or other written concurrence of charterer or the charterer's agent showing the exercise of the higher rated option.

(e) *Payment of freight by CCC prior to the vessel's arrival at the discharge port.*

(1) Upon request by the supplier, CCC may pay the ocean freight or ocean freight differential to be financed by CCC before the vessel arrives at the first port of discharge if the supplier furnishes CCC financial coverage in the form of an acceptable letter of credit from a U.S. bank.

(2) The amount of security required by CCC under paragraph (e)(1) of this section may be computed by multiplying the ocean freight rate or ocean freight differential rate financed by CCC as shown on the related Form CCC-106 times either:

(i) The tonnage shown on the related bill of lading, if the bill of lading is furnished to CCC; or

(ii) The tonnage stated in the ocean freight contract (without tolerance).

(3) On receipt of an acceptable letter of credit, the Controller will issue a waiver of the notice of arrival which is required under paragraph (d)(2) of this section.

(f) *Advice of amount financed.* CCC will forward advice of payment to the participant.

#### § 17.10 Refunds and insurance.

(a) *Participant—failure to comply.* The participant shall pay in U.S. dollars promptly to CCC on demand by the General Sales Manager the entire amount financed by CCC (or such lesser amount as the GSM may demand) whenever the GSM determines that the participant has failed to comply with any agreement or commitment made by the participant in connection with the transaction financed or with the applicable Agricultural Commodities Agreement between the U.S. and the participant.

(b) *Adjustment refunds.* All claims by importers for adjustment refunds arising out of terms of the contract or out of the normal customs of the trade, including arbitration and appeal awards,

allowances, and claims for overpayment of ocean transportation, if such refunds relate to amounts financed by CCC, shall be settled by payment in U.S. dollars and such payment shall be remitted by the supplier to CCC. The remittance shall be identified with the date and amount of the original payment and the applicable purchase authorization number.

(c) *Insurance on c.i.f. sales.* The provisions of this paragraph apply only to transactions under purchase authorizations that specifically authorize c.i.f. sales in which the cost of insurance is included in the net c.i.f. invoice price of the commodity financed. When the supplier furnishes insurance in favor of or for the account of the importer, the policies or certificates of insurance shall include a loss payable clause which provides that all claims shall be paid in U.S. dollars to the Controller. Such payments shall be accompanied by advice of the purchase authorization number, the names and addresses of the supplier and importer, the nature of the claim, the quantity of the commodity involved in the claim, the date of shipment, the bill of lading number, and the name of the vessel. CCC will credit the account of the participant or will refund local currency in accordance with paragraph (e) of this section.

(d) *Refund of ineligible amounts.* If a sale has been financed and CCC determines that the sales price exceeds the price permissible under § 17.5(b)(4), or that the sale is otherwise ineligible for financing, in whole or in part, the supplier shall refund in dollars such excess price or ineligible amount to CCC promptly on demand. If not promptly refunded, such amount may be set off by CCC against monies it owes to the supplier. The making of any such refund to CCC, or any such setoff by CCC shall not prejudice the right of the supplier to challenge such determination in a court action brought against CCC for recovery of the amount refunded or set off.

(e) *Refund of local currency or reduction of amount due.* Immediately after receipt by CCC of U.S. dollar payment from suppliers, or from or for the account of the participant under this section, CCC will provide for payment to the participant of the local currency equivalent of dollars received, if such local currency has been deposited for the particular transaction, or will credit the participant's account as follows:

(1) For payments under this section, except paragraph (a), the local currency refunded will be at the exchange rate agreed to by the Government of the United States and the participant in effect at the time the local currency is paid to or for the account of the importer, except that if there has been a change in the exchange system or structure of the importing country or the destination country, such payment shall be made at the agreed exchange rate which was in effect on the date of dollar disbursement for the transaction financed, and except further that local currency shall not be paid when the dollars are to be reauthorized for replacement of the commodity.

(2) For payment under paragraph (a) of this section, the local currency refunded will be at the agreed exchange rate in effect on the date of the dollar disbursement for the transaction financed: *Provided*, that local currency will not be refunded to the extent that deposits of such currency have been made available to the participant on a grant basis.

(3) For refunds received by CCC under long-term credit agreements the participant's account shall be credited with the dollar amount refunded or otherwise recovered, and the participant notified accordingly.

#### § 17.11 Recordkeeping and access to records.

Suppliers and agents of the participant or importer shall keep accurate books, records and accounts with respect to all contracts entered into hereunder, including those pertaining to ocean transportation-related services and records of all payments by suppliers to representatives of the importer or participant, if CCC finances any part of the ocean freight. Suppliers and agents shall permit authorized representatives of the U.S. Government to have access to their premises during regular hours to inspect, examine, audit and make copies of such books, records and accounts. Suppliers and agents shall retain such records until the expiration of three years after final payment under such contracts.

Signed at Washington, D.C. on July 14, 1997.

**Christopher E. Goldthwait,**

*General Sales Manager, Foreign Agricultural Service and Vice-President, Commodity Credit Corporation.*

[FR Doc. 97-26578 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-10-P