

**DEPARTMENT OF AGRICULTURE****Farm Service Agency**

**7 CFR Parts 735, 736, 737, 738, 739, 740, 741 and 742**

RIN 0560-AG45

**Implementation of the United States Warehouse Act**

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the regulations administering the United States Warehouse Act (USWA) to implement the provisions of the Grain Standards and Warehouse Improvement Act of 2000 (the 2000 Act). The 2000 Act amended the USWA in its entirety. The 2000 Act updates Federal warehouse licensing operations, authorizes electronic warehouse receipts (EWR) for all commodities, and authorizes the Secretary of Agriculture (Secretary) to establish regulations for voluntary systems for other electronic documents (OED) related to sales and transfers of agricultural products. The USWA is administered by the Farm Service Agency (FSA).

**EFFECTIVE DATE:** August 5, 2002.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Executive Order 12866**

This rule is issued in conformance with Executive Order 12866 and has been determined to be significant and has been reviewed by the Office of Management and Budget (OMB).

A Regulatory Impact Analysis (RIA) was prepared. The use of electronic systems will expedite and facilitate the timely receipt and acceptance of documents at export or cross-border points in trade of agriculture products. The cost to operate the USWA is paid for by users of the program. Therefore, governmental cost of implementing the 2000 Act for the current and future

fiscal years is budget neutral, meaning expenses must approximate equal collections. Using total grain movements as an example of a closed marketing system, and using knowledge garnered from cotton industry participants of existing electronic systems, FSA's analysis indicates a potential benefit of \$74 million available to the marketplace. While \$74 million is a relatively small amount in absolute terms for the multi-billion dollar grain industry, the industry operates on low margins, and the benefits are not insignificant.

Copies of the RIA are available upon request at the address shown above.

**Regulatory Flexibility Act**

FSA finds that the Regulatory Flexibility Act does not apply to this final rule because the rule does not have a significant economic impact on a substantial number of small entities.

**Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988. The provisions of this rule preempt State laws to the extent such laws are inconsistent with the provisions of this rule. Before any judicial action may be brought concerning the provisions of this rule, the Administrative remedies must be exhausted.

**Environmental Evaluation**

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

**Executive Order 12372**

The provisions and activities of this Act are not subject to the provisions of Executive Order 12372, which require 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).

**Unfunded Mandates Reform Act of 1995**

The provisions of Title II of the Unfunded Mandates Reform Act of 1995 are not applicable to this rule because the rule does not mandate expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of the threshold amount, \$100 million.

**Executive Order 12612**

It has been determined that this rule/activity does not have sufficient

Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this final rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

**Paperwork Reduction Act**

This final rule requires only minor changes to the information collection requirements that are currently approved by OMB under control number 0560-0120. A proposed rule containing an estimate of the information collection burden of these regulations was published on September 4, 2001, in the **Federal Register** [66 FR 46310] for public comment. FSA received comments concerning the use of acronyms to identify when an information block or data field is intentionally unused. FSA addresses this issue in the background of the final rule. A new request for approval of the information collections has been submitted to OMB.

**Background**

The 2000 Act, enacted on November 9, 2000, revises the USWA. The 2000 Act provides for licensing and inspection of warehouses used to store and handle agricultural products, issuance of warehouse receipts, including EWR's, for agricultural products, and for other purposes.

The USWA, originally enacted in 1916, authorized the Secretary to license warehouse operators who stored agricultural products and persons to sample, weigh, inspect and grade agricultural products. The USWA licensing program has always been voluntary and regulated licensees in order to protect depositors.

The 2000 Act includes several provisions that thoroughly modernize the program and reflect the current technology advancements within the agricultural marketing systems. The new provisions make U.S. agriculture more competitive in both domestic and foreign markets through efficiencies and cost savings provided by today's computer technology and information management systems. These new provisions include: (1) Extending the USWA's authority to all agricultural products, including a processed product of an agricultural commodity; (2) granting the Secretary the power to establish regulations governing one or more electronic systems under which EWR's or OED's related to the shipment, payment and financing of domestic and foreign agricultural products may be issued or transferred; (3) allowing

licensees or providers to provide a bond or other financial assurance as the Secretary determines appropriate; (4) allowing warehouse operators to allocate storage space to a depositor; (5) requiring warehouse operators to issue warehouse receipts only when requested by the depositor; and (6) allowing for arbitration.

The operation of the licensing program for warehouse operators, inspectors, samplers, classifiers, and weighers is not substantially changed by the final rule. The general licensing program requirements are furnished in subparts B and C, with the more specific requirements stated in the licensing agreements.

Section 3(h) of the 2000 Act allows the Secretary to issue regulations governing one or more electronic systems under which EWR's may be issued and transferred and OED's relating to the shipment, payment, and financing of the sale of agricultural products. Previously, EWR's were only authorized for cotton. The authority for electronic conveyance of other business documents (such as grade and weight certificates, phytosanitary certificates, bills of lading, export evidence certificates or letters of credit) is a new authority. The final rule provides for a system where FSA will establish regulatory guidelines for systems for the electronic conveyance of these and OED's that will allow their transfer from buyer to seller across state and international boundaries.

The structure will mirror the structure established for cotton EWR's consisting of independent providers who have signed an agreement with FSA. Section 735.300 provides the general warehouse requirements applicable to all warehouse receipts, whether paper or electronic, for any agricultural product. Requirements specific to EWR's are found in § 735.303.

The final rule establishes two provider agreements, one for EWRs and electronic USWA documents and one for OEDs. The EWR provider agreement for EWR's and electronic USWA documents will cover all approved agricultural products. Separate addenda will be developed to cover the commodity-specific EWR's. The second provider agreement will cover all OED's. Separate addenda may be developed for each specific document.

Section 11(e)(4) of the 2000 Act provides that "an electronic receipt issued or other electronic document transferred, in accordance with this Act shall not be denied legal effect, validity, or enforceability on the ground that the information is generated, sent, received, or stored by electronic or similar

means." Accordingly, this final rule sets forth in subpart E the manner in which FSA may approve a private person to establish a system that accomplishes these functions. Under the provider agreement for these functions, in addition to other activities, a party can take a paper document relating to the shipment, payment, and financing of the sale of an agricultural product to an approved provider and the provider may generate an identical electronic document for electronic transmission. This aspect of the USWA will allow parties to conduct all aspects of these agricultural transactions in an electronic manner, whereas currently, in many instances, necessary documents are in a paper format and must be physically delivered to another party.

The 2000 Act authorizes the Secretary to assess and collect fees from Federally-licensed warehouse operators, approved providers and other users of the USWA. The fees are intended to offset the cost of operating the revised USWA. The fee schedule is included as an addendum to the licensing and provider agreement and is available from the Deputy Administrator for Commodity Operations, in Washington, DC.

#### **Discussion of Public Comments and Changes from the Proposed Rule**

FSA published a proposed rule requesting public comments in the **Federal Register** on September 4, 2001 [66 FR 46310–46343], with a 30-day comment period.

FSA received a total of 83 comments from seven trade associations (representing the overall cotton industry, grain and feed industry, cotton warehousing, terminal grain merchants, community bankers, warehouse control officials, and fire protection), five cotton warehouse operators, two EWR providers, one grain warehouse operator, one e-commerce company, one electronic cotton marketing service company, one board of trade clearing corporation, one FSA warehouse examiner, and one FSA retiree.

Most of the comments received supported the changes proposed by FSA. Some comments and suggestions were of an administrative nature that do not impact the final rule and will be addressed in either FSA internal procedures or in the applicable licensing or provider agreements. And, while FSA did adopt some of the recommendations and understands the concerns and opinions expressed by the respondents, FSA did not adopt all of them. The final rule gives FSA necessary flexibility and is consistent with statutory requirements. Therefore,

in consideration of comments and suggestions received, FSA adopts the proposed rule as final, with the changes discussed below. Changes made in response to public comments are noted.

#### **Changes to Part 735 in General**

Three respondents requested that the language be more specific and found the term "program requirements" confusing. In response, FSA removed all references to "program" throughout the final rule and detailed the extent of authority in § 735.1, Applicability. The word "activities" was substituted for "program" throughout part 735. Also, in the interest of clarity, FSA replaced the term "approval" with the term "authority" throughout part 735. Also, all references to a "license" that referred to a piece of paper were changed to "certificate of license" in order to separate references to a paper document from the concept of an electronic "license." Similarly, all references to "authorization" that referred to a piece of paper were changed to "certificate of authorization" in order to separate the paper documents from the electronic "authorization."

#### **Changes to Specific Sections**

##### **Subpart A—General Provisions**

###### **Section 735.1 Applicability**

One comment was received addressing situations in which State agencies advise USWA-licensed warehouses that the warehouse operator "\*\*\*\* must obtain State weigher, grader and/or handler licenses" and suggested that FSA should "clarify that a Federal Service License precludes the need for State licensing in this area." In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 234–236 (1947) the U.S. Supreme Court found that the USWA preempted State law with respect to State laws when it was clear that Congress had intended to regulate the activities of USWA-licensed warehouses: "The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." Among other provisions of the USWA, section 3(g) provides that: "Subject to the other provisions of this Act, the Secretary may prescribe the duties of a warehouse operator operating a warehouse licensed under this Act with respect to the warehouse operator's care of and responsibility for agricultural products stored or handled by the warehouse operator." Accordingly, a USWA-licensed warehouse operator must meet the

conditions set forth in 7 CFR part 735 and the accompanying licensing agreements. Such a warehouse operator does not have to meet State imposed requirements relating to warehousing, grading, weighing, storing, merchandising or other similar activities otherwise applicable to State-licensed warehouses in order to operate a USWA-licensed facility.

But, to the extent a person engages in these types of activities and they do not relate to the activities of the USWA-licensed facility (for example, if a USWA-licensed warehouse is operated with respect to oilseeds in the western part of a State and a separate facility not covered by the USWA license is operated in the eastern part of a State with respect to dry edible beans) then the activities in the non-USWA licensed facility would be solely a matter of State jurisdiction. In order to provide greater clarity on this matter, the regulations, as opposed to the single agreement referenced by the respondent, is revised at 7 CFR 735.1 by adding a new subsection (c) to read as follows: "(c) Compliance with State laws relating to the warehousing, grading, weighing, storing, merchandising or other similar activities is not required with respect to activities engaged in by a warehouse operator in a warehouse subject to a license issued in accordance with this part."

### *Section 735.2 Administration*

Two respondents suggested that FSA provide advance notice of changes to the regulations to licensees and other affected persons. In consideration of the suggestions, FSA added paragraphs (c) and (d) describing methods for notifying licensees and authorized providers of changes to the various agreements.

### *Section 735.3 Definitions*

(1) FSA deleted the definition and use of "approval" in the final rule to prevent confusion with Commodity Credit Corporation and other USDA programs.

(2) A respondent expressed confusion about the definition of "central filing system," with respect to the contextual meaning of the terms "transparent" and "anonymous." FSA has revised the definition for clarity. The applicable licensing and provider agreements will be revised accordingly.

(3) A definition for the term "certificate" was added to clarify the definition of "license."

(4) In response to the suggestion of one respondent that FSA insert the term "XML" into the definition of "electronic document," the term "advanced communication methods" was inserted.

(5) At the suggestion of one respondent, FSA amended the definition of "other electronic documents" to exclude USWA electronic documents.

(6) A respondent suggested modifying the definition of "schedule of fees" to include those fees "FSA assesses for licensing and provider agreement services." In addition to adopting the suggestion, FSA added a new definition "schedule of charges" that refers to the rates of charges assessed by warehouse operators. This differentiates what warehouse operators or providers charge their customers from the fees assessed warehouse operators or providers by FSA.

(7) At the suggestion of one respondent, FSA added a definition of "USWA electronic document."

(8) At the suggestion of one respondent FSA inserted the phrase "for the purpose of interstate or foreign commerce" into the definition of "warehouse."

(9) A definition of the term "warehousing activities" was added to clarify the definitions of both "license" and the duties of warehouse operators.

(10) Definitions of the terms "examiner," "holder," "provider agreement" and "service license" were revised for clarity.

### *Section 735.4 Fees*

At the suggestion of one respondent and to conform to the language in the enabling legislation, FSA included a statement that the assessing of fees is intended to offset the costs of administering the USWA.

### *Section 735.6 Suspension, Revocation and Liquidation*

FSA expanded the section to include liquidation of stocks and to specify additional reasons for a suspension, revocation or liquidation and to further clarify FSA's jurisdiction in a suspension or revocation of a license or liquidation of stocks.

### *Section 735.8 Appeals*

FSA changed all references to deadlines for seeking review of actions from 21 business days to 28 calendar days in order to simplify business practices.

### *Section 735.9 Dispute Resolution and Arbitration of Private Parties*

A number of respondents objected to binding arbitration, which they interpreted as a requirement in the proposed rule. In response, FSA clarified the language to make it clear that arbitration is an acceptable but not a mandatory method of dispute

resolution and that FSA will provide no assistance or representation to any of the parties in such disputes.

### *Section 735.14(d) Bonding and Other Financial Assurance Requirements*

The term "approved" was changed to "accepted" to correct an operational error.

### *Subpart A—General Provisions—Comments Not Adopted*

(1) One respondent was concerned that FSA has had to resort to a single, broad set of regulations because of the labor- and resource-intensive process of amending regulations.

FSA has determined to remove the eight commodity-specific regulations and replace them with one general regulation. The final rule updates and modifies the regulatory language, merges all similar language from the specific commodity regulations and removes redundancies, but does not substantially change the program operations. The commodity-specific requirements have been moved to the applicable licensing or provider agreements.

As a result of the merger of all the specific-commodity warehouse regulations into one generic regulation, the cotton flow standard previously codified at 7 CFR 735.201, is not included in the final rule. The cotton flow standard has been included in the cotton licensing and EWR provider agreements.

(2) A suggestion that the term "agricultural product" be redefined to refer to "commodity" was not adopted because the term as used in this final rule was defined in the enabling legislation.

(3) A suggestion that FSA should not be in the business of regulating shipping orders because they are non-title documents and therefore, should not be part of this process was not adopted because the enabling legislation does not make a distinction between title and non-title documents. Further, FSA is not regulating shipping orders or similar documents. FSA is establishing the framework by which such documents may be electronically generated and transmitted by interested parties.

(4) A suggestion that FSA should use the National Fire Protection Association's published standards for the storage of records was not adopted because the publication had not received USDA clearance and approval.

### *Subpart B—Warehouse Licensing*

#### *Section 735.100 Application*

FSA reworded the required documentation for a corporation to

correct an error and to present the information in a more usable format.

#### *Section 735.106 Excess Storage and Transferring of Agricultural Products*

In response to a suggestion, FSA clarified the rule to specify DACO as the authority for allowing the transfer of stored agricultural products to another warehouse.

#### *Section 735.107 Warehouse Charges and Tariffs*

The schedule of charges and rates language was revised for clarity.

#### *Section 735.108 Inspections and Examinations of Warehouses*

(1) In response to several comments, the section was expanded to specify additional conditions in the examination of warehouses.

(2) In response to several comments about the nature of examinations, FSA added paragraphs (b), (c), (d) and (e) to further clarify the warehouse examination process.

#### *Section 735.110 Conditions for Delivery of Agricultural Products*

In response to several comments, FSA modified this section to clarify the timely cancellation of warehouse receipts.

#### *Subpart B—Warehouse Licensing—Comments Not Adopted*

One respondent commented that irrevocable letters of credit were expensive and often not issued for more than one year. FSA has chosen to offer this as one of several acceptable, but not mandatory, forms of financial assurance that warehouse operators may offer to FSA to meet their financial requirement.

#### *Subpart C—Inspectors, Samplers, Classifiers and Weighers—Comments Not Adopted*

One respondent interpreted § 735.200, Service licenses, to include a requirement for competency testing by warehouse operators of all service licensing applicants. FSA revised the language to conform to the enabling legislation.

#### *Subpart C—Inspectors, Samplers, Classifiers and Weighers—Changes Requested but Not Adopted*

One respondent commented that service licenses should not be a function of the USWA. FSA has determined that issuing service licenses for activities described in this subpart is an appropriate role for the Federal government. Accordingly, the requested change is not adopted.

#### *Subpart D—Warehouse Receipts*

##### *Section 735.300 Warehouse Receipt Requirements*

(1) In response to many questions and comments, FSA added instructions on filling blank areas in the required data fields of the warehouse receipt.

(2) Several respondents expressed concerns about the language concerning the issuance of warehouse receipts and the language required in the various data sections of the warehouse receipt. FSA revised the section to provide that those who are subject to this rule, are to refer to the applicable licensing or provider agreement for individual specifications of the required data required for warehouse receipts. FSA also expanded upon the language dealing with the issuance of duplicate warehouse receipts to make clear the prohibition on issuing duplicate warehouse receipts. The term “grade” replaces “quality” to agree with the enabling legislation.

##### *Section 735.302 Electronic Warehouse Receipts*

Several respondents expressed concerns regarding the differences between paper warehouse receipts and EWR's. FSA split this section into two sections, § 735.302, Paper warehouse receipts, and § 735.303, Electronic warehouse receipts, to clarify the distinction. A number of suggestions were considered and adopted in modifying and clarifying the language of the new sections. Also, FSA revised language now in the new § 735.303(b)(6) to correct an error concerning correcting information on EWR's.

#### *Subpart E—Electronic Providers—Comments Adopted*

##### *Section 735.401 Electronic Warehouse Receipt and USWA Electronic Document Providers*

(1) Several respondents expressed opinions concerning financial standards, required financial assurance instruments and insurance requirements. After careful consideration of the comments received FSA has determined to increase the net worth and the insurance requirement for providers of EWR's. The net worth requirement was increased from \$25,000 to \$100,000 and the insurance coverage required was increased to \$4 million. The specific requirements were moved from the regulations to the EWR provider agreement and addenda.

##### *Section 735.402 Providers of Other Electronic Documents*

(2) Several respondents expressed opinions concerning financial

standards, required financial assurance instruments and insurance requirements. After careful consideration of the comments received FSA has determined to move the specific requirements from the regulations to the OED provider agreement and addenda.

(3) Several respondents suggested that the “conflict of interest” statement set forth in the provider agreements also be included in the final rule. FSA concurs and has included the “conflict of interest” statement in paragraph (5) of the applicable sections in addition to the provider agreements.

(4) Two respondents expressed opinions concerning the use of documentation approved by FSA when applying for a provider agreement. FSA has specified the required documentation necessary when applying to be a provider of EWR's and USWA electronic documents or providers of OEDs.

(5) FSA revised the language in § 735.404, Schedule of charges and rates, to comply with the new definitions for the various schedules of fees.

#### *Subpart E—Electronic Providers—Comments Not Adopted*

(1) One respondent expressed concern that the USWA was involved with other than electronic title documents. The enabling legislation includes the authorization to utilize any electronic document relating to the sale and financing of agricultural products. Accordingly, FSA has determined to include all such documents specified in § 735.400, Administration.

(2) Several respondents wanted more flexibility for providers to change rates and charges more often than once a year. FSA has chosen to keep the limit at once a year to provide certainty to all users.

#### *Section 735.402 Providers of Other Electronic Documents*

(3) FSA received five comments with respect to the proposed requirement specified in § 735.402, Providers of other electronic documents, that an entity that desires to be approved by FSA as an approved provider of electronic documents have a minimum net worth of \$10 million. One respondent suggested a \$1 million requirement would allow for a larger number of firms to be approved to be such a provider. One respondent requested that FSA review the proposed level and “tie it more closely to the type of electronic document, and corresponding risks, that are to be undertaken by the system provider.”

One respondent stated that the level should be lowered to “\* \* \* levels shown in § 735.401(a). Alternatively, some maximum (not to exceed) amounts (these amounts should still be lower than the \$10 million and \$25 million) could be put in § 735.402(a) and the actual (even lower) amounts should be included in the Provider Agreement where the figures can be modified as justified over time.” Later, the same respondent noted that “\* \* \* The figure should be reduced perhaps to \$500,000 \* \* \*.” One respondent suggested that the level should be \$100,000 and disagreed with FSA’s rationale that the higher level was warranted due to the increased risks that these providers have as compared with a provider of only electronic warehouse receipts. The respondent suggested that if there was a concern about the potential risk that these providers may have, that the regulations should be revised to provide that such providers not be allowed to generate electronic documents from a paper document and that letters of credits not be included in the types of documents that such a provider could transmit. One respondent recommended a \$1 million without any further elaboration.

Another respondent agreed with FSA’s assessment that there were increased risks associated with being a provider for all electronic documents as compared with only those providers who issue an electronic warehouse receipt.

In proposing a minimum net worth requirement of \$10 million, FSA took into consideration the potential benefits that could be attained by allowing a provider of electronic documents to handle all types of documents relating to agricultural commodity transactions. FSA intends to implement sections 3(h) and 11(e) of the USWA, as it relates to those providers who intend to engage in transactions that are not limited to only electronic warehouse receipts, in a manner that encompasses as wide a range of transactions as possible. It is not FSA’s intention to exclude or exert economic hardship on current or future providers with these requirements. Nonetheless, the evolution of regulating OEDs and OED providers is new and untested, FSA wants to assure the public and users of these systems that FSA has properly protected them should a failure or loss occur. However, FSA will monitor and evaluate these requirements over the next year and make adjustments as warranted.

FSA does not believe that limiting the provider to handling only certain types of documents in order to lessen the liability potential of a provider is in the

best interests of those numerous entities that will utilize the system and also believes that such a restraint will diminish the ability of entities to reduce costs thus decreasing the competitive advantage of U.S. agricultural products sold in export markets. Excluding letters of credit and those documents referred to in the letter of credit, for example, would mean that there would be no savings in time for the completion of financial transactions involving virtually all export shipments since those financial institutions involved in the transaction would have to wait for physical delivery of some documents even though other documents had been transmitted electronically. Participants in the transaction may then have incurred increased borrowing costs and possibly increased berthing charges with respect to the vessel because the vessel would not be authorized to leave the port until the financial transaction had been completed.

In determining which entities FSA should approve to be responsible for handling these types of documents, FSA must analyze, at a minimum, the risks to participants and to the Federal government by looking at the volume of transactions that they will handle, the monetary value of individual transactions and the aggregate value of the transactions. The total value of agricultural production in the U.S. annually will exceed \$200 billion and the total value of U.S. agricultural exports annually will exceed \$50 billion. Individual export shipments of soybeans and rice, for example, can exceed \$10 million and individual shipments of value-added products can be well in excess of this amount. FSA anticipates that the total value of transactions that may flow through a provider at any one time may exceed \$100 million and, therefore, has determined that a provider should have a sufficient financial net worth in order to handle the liability that accompanies the handling of the transactions. For example, if the provider has erroneously entered data in the generation of an electronic document that relates to the purchase of an entire shipment of an exported agricultural commodity, FSA intends that the parties to the transaction will have adequate recourse against the provider for any damage that may result. Accordingly, FSA has determined that the minimum net worth requirement should be at least \$10 million and that the provider should maintain two insurance policies, one for errors and omissions and one for fraud and dishonesty. Each policy must have a minimum coverage of \$25 million.

These requirements are set forth in the OED provider agreement.

#### *Section 735.403 Audits*

(4) In response to several comments about limiting examinations to be at the provider’s invitation and convenience, FSA will not change the language in § 735.403, Audits, concerning the examination process because such changes would hinder the ability for FSA to conduct meaningful examinations.

#### *Section 735.405 Choice of Law*

(5) Three comments were received with respect to the proposed requirement that all disputes arising under the electronic document provider system, but not those systems dealing only with EWRs, would be resolved by using the laws of the State of New York. One respondent requested that “FSA should ensure the conflicting state law are not preempted.” One respondent expressed concern that “\* \* \* USDA is in no position to determine that the laws of one sovereign state are better than those of another.” Another respondent thought that the choice of New York “\* \* \* may be confusing to companies throughout the United States that are familiar with their own commercial laws.”

In proposing to use the law of one jurisdiction to resolve disputes arising under the electronic provider system, FSA is attempting to interject uniformity among the providers in terms of data required for entry into the system and in terms of dispute resolution. FSA is concerned that uncertainty in which laws will be applied in multi-State and multi-national transactions involving multi-million dollar transactions may diminish the viability of this system. Because when a person uses the FSA-approved system it is purely voluntary and there is no preemption of State law with respect to any transaction conducted in any other system established by a private or public entity, any party may avoid application of this requirement, and other requirements relating to their use of the FSA approved systems, by conducting their transactions as they currently do. If this provision were removed, conceivably a provider approved by FSA could mandate the use of a given State law for use in resolving claims and disputes arising as a result of the use of their system. In such a case, if there were several providers operating in several different States, different results could occur simply because of the selection of an applicable body of law by a provider. This problem would be made worse in

those transactions that initiate in one FSA-approved system and end in another FSA-approved system. However, the respondents expressed several opinions concerning the proposed requirement that all disputes arising under the other electronic document provider system would be resolved using the laws of the State of New York. Accordingly, to further evaluate these issues, FSA has determined to remove the proposed requirement as set forth in § 735.405.

#### **Final Rule**

#### **List of Subjects in 7 CFR Part 735**

Administrative practice and procedure, Agricultural commodities, Beans, Cotton, Cottonseed, Grain, Nuts, Sugar, Surety Bonds, Tobacco, Warehouses, Wool.

For the reasons stated in the preamble, FSA amends 7 CFR Chapter VII as follows:

### **PART 735—COTTON WAREHOUSES**

1. Part 735 is revised to read as follows:

### **PART 735—REGULATIONS FOR THE UNITED STATES WAREHOUSE ACT**

#### **Subpart A—General Provisions**

Sec.

- 735.1 Applicability.
- 735.2 Administration.
- 735.3 Definitions.
- 735.4 Fees.
- 735.5 Penalties.
- 735.6 Suspension, revocation and liquidation.
- 735.7 Return of suspended or revoked certificates of licensing or certificates of authorization.
- 735.8 Appeals.
- 735.9 Dispute resolution and arbitration of private parties.
- 735.10 Posting of certificates of licensing, certificates of authorization or other USWA documents.
- 735.11 Lost or destroyed certificates of licensing, authorization or agreements.
- 735.12 Safe keeping of records.
- 735.13 Information of violations.
- 735.14 Bonding and other financial assurance requirements.

#### **Subpart B—Warehouse Licensing**

- 735.100 Application.
- 735.101 Financial records and reporting requirements.
- 735.102 Financial assurance requirements.
- 735.103 Amendments to license.
- 735.104 Insurance requirements.
- 735.105 Care of agricultural products.
- 735.106 Excess storage and transferring of agricultural products.
- 735.107 Warehouse charges and tariffs.
- 735.108 Inspections and examinations of warehouses.
- 735.109 Disaster loss to be reported.

- 735.110 Conditions for delivery of agricultural products.
- 735.111 Fair treatment.
- 735.112 Terminal and futures contract markets

#### **Subpart C—Inspectors, Samplers, Classifiers, and Weighers**

- 735.200 Service licenses.
- 735.201 Agricultural product certificates; format.
- 735.202 Standards of grades for other agricultural products.

#### **Subpart D—Warehouse Receipts**

- 735.300 Warehouse receipt requirements.
- 735.301 Notification requirements.
- 735.302 Paper warehouse receipts.
- 735.303 Electronic warehouse receipts.

#### **Subpart E—Electronic Providers**

- 735.400 Administration.
- 735.401 Electronic warehouse receipt and USWA electronic document providers.
- 735.402 Providers of other electronic documents.
- 735.403 Audits.
- 735.404 Schedule of charges and rates.

**Authority:** 7 U.S.C. 241 *et seq.*

#### **Subpart A—General Provisions**

##### **§ 735.1 Applicability.**

(a) The regulations of this part set forth the terms and conditions under which the Secretary of Agriculture through the Farm Service Agency (FSA) will administer the United States Warehouse Act (USWA or the Act) and sets forth the standards and the terms and conditions a participant must meet for eligibility to act under the USWA. The extent the provisions of this part are more restrictive, or more lenient, with respect to the same activities governed by State law, the provisions of this part shall prevail.

(b) Additional terms and conditions may be set forth in applicable licensing agreements, provider agreements and other documents.

(c) Compliance with State laws relating to the warehousing, grading, weighing, storing, merchandising or other similar activities is not required with respect to activities engaged in by a warehouse operator in a warehouse subject to a license issued in accordance with this part.

##### **§ 735.2 Administration.**

(a) FSA will administer all provisions and activities regulated under the Act under the general direction and supervision of the FSA's Deputy Administrator, Commodity Operations (DACO), or a designee.

(b) DACO may waive or modify the licensing or authorization requirements or deadlines in cases where lateness or failure to meet such requirements does

not adversely affect the licensing or authorizations operated under the Act.

(c) DACO will provide affected licensees or authorized providers with changes to their licensing or provider agreements before the effective date.

(d) Licensing and authorization agreement updates will be available at:

- (1) DACO's USWA website, and
- (2) The following address: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW, Washington, DC 20250-0550.

##### **§ 735.3 Definitions.**

Words used in this part will be applicable to the activities authorized by this part and will be used in all aspects of administering the Act.

*Access* means the ability, when authorized, to read, change, and transfer warehouse receipts or other applicable document information retained in a central filing system.

*Agricultural product* means an agriculturally-produced product stored or handled for the purposes of interstate or foreign commerce, including a processed product of such agricultural product, as determined by DACO.

*Central filing system (CFS)* means an electronic system operated and maintained by a provider, as a disinterested third party, authorized by DACO where information relating to warehouse receipts, USWA documents and other electronic documents is recorded and maintained in a confidential and secure fashion independent of any outside influence or bias in action or appearance.

*Certificate* means a USWA document that bears specific assurances under the Act or warrants a person to operate or perform in a certain manner and sets forth specific responsibilities, rights, and privileges granted to the person under the Act.

*Control of the facility* means ultimate responsibility for the operation and integrity of a facility by ownership, lease, or operating agreement.

*Department* means the Department of Agriculture.

*Electronic document* means any document that is generated, sent, received, or stored by electronic, optical, or similar means, including, but not limited to, electronic data interchange, advanced communication methods, electronic mail, telegram, telex, or telecopy.

*Electronic warehouse receipt (EWR)* means a warehouse receipt that is authorized by DACO to be issued or transmitted under the Act in the form of an electronic document.

*Examiner* means an individual designated by DACO for the purpose of examining warehouses or for any other activities authorized under the Act.

*Financial assurance* means the surety or other financial obligation authorized by DACO that is a condition of receiving a license or authorization under the Act.

*Force majeure* means severe weather conditions, fire, explosion, flood, earthquake, insurrection, riot, strike, labor dispute, act of civil or military, non-availability of transportation facilities, or any other cause beyond the control of the warehouse operator or provider that renders performance impossible.

*Holder* means a person that has possession in fact or by operation of law of a warehouse receipt, USWA electronic document, or any electronic document.

*License* means a license issued under the Act by DACO.

*Licensing agreement* means the document and any amendment or addenda to such agreement executed by the warehouse operator and FSA specifying licensing terms and conditions specific to the warehouse operator and the agricultural product licensed to be stored.

*Non-storage agricultural product* means an agricultural product received temporarily into a warehouse for conditioning, transferring or assembling for shipment, or lots of an agricultural product moving through a warehouse for current merchandising or milling use, against which no warehouse receipts are issued and no storage charges assessed.

*Official Standards of the United States* means the standards of the quality or condition for an agricultural product, fixed and established under (7 U.S.C. 51) the United States Cotton Standards Act, (7 U.S.C. 71) the United States Grain Standards Act, (7 U.S.C. 1622) the Agricultural Marketing Act of 1946, or other applicable official United States Standards.

*Other electronic documents (OED)* means those electronic documents, other than an EWR or USWA electronic document, that may be issued or transferred, related to the shipment, payment or financing of agricultural products that DACO has authorized for inclusion in a provider's CFS.

*Person* means a person as set forth in 1 U.S.C. 1, a State; or a political subdivision of a State.

*Provider* means a person authorized by DACO, as a disinterested third party, which maintains one or more confidential and secure electronic systems independent of any outside

influence or bias in action or appearance.

*Provider agreement* means the document and any amendment or addenda to such agreement executed by the provider and FSA that sets forth the provider's responsibilities concerning the provider's operation or maintenance of a CFS.

*Receipt* means a warehouse receipt issued in accordance with the Act, including an electronic warehouse receipt.

*Schedule of charges* means the tariff or uniform rate or amount charged by an authorized person for specific services offered or rendered under the Act.

*Schedule of fees* means the fees charged and assessed by FSA for licensing, provider agreements or services furnished under the Act to help defray the costs of administering the Act, and as such are shown in a schedule of fees attached to the licensing or provider agreement.

*Service license* means the document and any amendment to such document, issued under the Act by DACO to individuals certified competent by the licensed warehouse operator to perform inspection, sampling, grading classifying, or weighing services according to established standards and procedures, set forth in § 735.202, at the specific warehouse license.

*Stored agricultural products* means all agricultural products received into, stored within, or delivered out of the warehouse that are not classified as a non-storage agricultural product under this part.

*User* means a person that uses a provider's CFS.

*USWA electronic document* means a USWA electronic document initiated by DACO to be issued, transferred or transmitted that is not identified as an EWR or OED in the appropriate licensing or provider agreement or as determined by DACO.

*Warehouse* means a structure or other authorized storage facility, as determined by DACO, in which any agricultural product may be stored or handled for the purpose of interstate or foreign commerce.

*Warehouse capacity* means the maximum quantity of an agricultural product that the warehouse will accommodate when stored in a manner customary to the warehouse as determined by DACO.

*Warehouse operator* means a person lawfully engaged in the business of storing or handling agricultural products.

*Warehousing activities and practices* means any legal, operational, managerial or financial duty that a

warehouse operator has regarding an agricultural product.

#### **§ 735.4 Fees.**

(a) FSA will assess persons covered by the Act fees to cover the costs of administering the Act.

(b) Warehouse operators, licensees, applicants, or providers must pay:

(1) An annual fee as provided in the applicable licensing or provider agreement; and

(2) Fees that FSA assesses for specific services, examinations and audits, or as provided in the applicable licensing or provider agreement.

(c) The schedule of fees showing the current fees or any annual fee changes will be provided as an addendum to the applicable licensing or provider agreement or/and:

(1) Will be available at DACO's USWA Web site, or

(2) May be requested at the following address: Deputy Administrator, Commodity Operations, Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, DC 20250-0550.

(d) At the sole discretion of DACO, these fees may be waived.

#### **§ 735.5 Penalties.**

If a person fails to comply with any requirement of the Act, the regulations set forth in this part or any applicable licensing or provider agreement, DACO may assess, after an opportunity for a hearing as provided in § 735.8, a civil penalty:

(a) Of not more than \$25,000 per violation, if an agricultural product is not involved in the violation; or

(b) Of not more than 100 percent of the value of the agricultural product, if an agricultural product is involved in the violation.

#### **§ 735.6 Suspension, revocation and liquidation.**

(a) DACO may, after an opportunity for a hearing as provided in § 735.8, suspend, revoke or liquidate any license or agreement issued under the Act, for any violation of or failure to comply with any provision of the Act, regulations or any applicable licensing or provider agreement.

(b) The reasons for a suspension, revocation or liquidation under this part include, but are not limited to:

(1) Failure to perform licensed or authorized services as provided in this part or in the applicable licensing or provider agreement;

(2) Failure to maintain minimum financial requirements as provided in the applicable licensing or provider agreement;

(3) Failure to submit a proper annual financial statement within the established time period as provided in the applicable licensing or provider agreement.

(4) Failure to maintain control of the warehouse or provider system.

(5) The warehouse operator or provider requests closure, cancellation or liquidation. and

(6) Commission of fraud against FSA, any depositor, EWR or OED holder or user, or any other function or operation under this part.

(c) FSA retains USWA's full authority over a warehouse operator or provider for one year after such license revocation or provider agreement termination or until satisfaction of any claims filed against such warehouse operator or provider are resolved, whichever is later.

(d) Upon DACO's determination that continued operation of a warehouse by a warehouse operator or an electronic provider system by a provider is likely to result in probable loss of assets to storage depositors, or loss of data integrity to EWR or OED holders and users. DACO may immediately suspend, close, or take control and begin an orderly liquidation of such warehouse inventory or provider system data as provided in this part or in the applicable licensing or provider agreement.

(e) Any disputes involving probable loss of assets to storage depositors, or loss of data integrity to EWR or OED holders and users will be determined by DACO for the benefit of the depositors, or EWR or OED holders and users and such determinations shall be final.

#### **§ 735.7 Return of suspended or revoked certificates of licensing or certificates of authorization.**

(a) When a license issued to a warehouse operator or service license ends or is suspended or revoked by DACO, such certificates of licensing and applicable licensing agreement and certificates of authorization must be immediately surrendered and returned to DACO.

(b) When an agreement with a provider ends or is suspended or revoked by DACO, such certificates of authorization and applicable provider agreement must be immediately surrendered to DACO.

#### **§ 735.8 Appeals.**

(a) Any person who is subject to an adverse determination made under the Act may appeal the determination by filing a written request with DACO at the following address: Deputy Administrator, Commodity Operations,

Farm Service Agency, United States Department of Agriculture, STOP 0550, 1400 Independence Avenue, SW., Washington, DC 20250-0550.

(b) Any person who believes that they have been adversely affected by a determination under this part must seek review by DACO within twenty-eight calendar days of such determination, unless provided with notice by DACO of a different deadline.

(c) The appeal process set forth in this part is applicable to all licensees and providers under any provision of the Act, regulations or any applicable licensing agreement as follows:

(1) DACO will notify the person in writing of the nature of the suspension, revocation or liquidation action;

(2) The person must notify DACO of any appeal of its action within twenty-eight calendar days;

(3) The appeal and request must state whether:

(i) A hearing is requested,

(ii) The person will appear in person at such hearing, or

(iii) Such hearing will be held by telephone;

(4) DACO will provide the person a written acknowledgment of their request to pursue an appeal;

(5) When a person requests an appeal and does not request a hearing DACO will allow that person:

(i) To submit in writing the reasons why they believe DACO's determination to be in error,

(ii) Twenty-eight calendar days from the receipt of the acknowledgment to file any statements and documents in support of their appeal, unless provided with notice by DACO of a different deadline, and

(iii) An additional fourteen calendar days to respond to any new issues raised by DACO in response to the person's initial submission, unless provided with notice by DACO of a different deadline;

(6) If the person requests to pursue an appeal and requests a hearing, DACO will:

(i) Notify the person of the date of the hearing,

(ii) Determine the location of the hearing, when the person asks to appear in person,

(iii) Notify the person of the location of the hearing,

(iv) Afford the person twenty-eight calendar days from the receipt of the notification of the scheduling of the hearing to submit any statements and documents in support of the appeal, unless provided with notice by DACO of a different deadline, and

(v) Allow the person an additional fourteen calendar days from the date of

the hearing to submit any additional material, unless provided with notice by DACO of a different deadline;

(7) Determinations of DACO will be final and no further appeal within USDA will be available except as may be specified in the final determination of DACO; and

(8) A person may not initiate an action in any court of competent jurisdiction concerning a determination made under the Act prior to the exhaustion of the appeal process set forth in this section.

#### **§ 735.9 Dispute resolution and arbitration of private parties.**

(a) A person may initiate legal action in any court of competent jurisdiction concerning a claim for noncompliance or an unresolved dispute with respect to activities authorized under the Act.

(b) Any claim for noncompliance or an unresolved dispute between a warehouse operator or provider and another party with respect to activities authorized under the Act may be resolved by the parties through mutually agreed-upon arbitration procedures or as may be prescribed in the applicable licensing or provider agreement. No arbitration determination or award will affect DACO's authority under the Act.

(c) In no case will USDA provide assistance or representation to parties involved in an arbitration proceeding arising with respect to activities authorized under the Act.

#### **§ 735.10 Posting of certificates of licensing, certificates of authorization or other USWA documents.**

(a) The warehouse operator must post, in a conspicuous place in the principal place where warehouse receipts are issued, any applicable certificate furnished by DACO that the warehouse operator is an authorized licensee under the Act.

(b) Immediately upon receipt of their certificate of service licensing or any modification or extension thereof under the Act, the licensee and warehouse operator must jointly post the same, and thereafter, except as otherwise provided in the regulations in this part or as prescribed in the applicable licensing agreement, keep such certificate of licensing conspicuously posted in the office where all or most of the services are done, or in such place as may be designated by DACO.

(c) The provider must post, in a conspicuous place in the principal place of business, any applicable certificate of authorization furnished by DACO that the provider is authorized to offer and provide specific services under the Act.

**§ 735.11 Lost or destroyed certificates of licensing, authorization or agreements.**

FSA will replace lost or destroyed certificates of licensing, certificate of authorization or applicable agreement upon satisfactory proof of loss or destruction. FSA will mark such certificates or agreements as duplicates.

**§ 735.12 Safe keeping of records.**

Each warehouse operator or provider must take necessary precautions to safeguard all records, either paper or electronic format, from destruction.

**§ 735.13 Information of violations.**

Every person licensed or authorized under the Act must immediately furnish DACO any information they may have indicating that any provision of the Act or the regulations in this part has been violated.

**§ 735.14 Bonding and other financial assurance requirements.**

(a) As a condition of receiving a license or authorization under the Act, the person applying for the license or authorization must execute and file with DACO a bond or provide such other financial assurance as DACO determines appropriate to secure the person's compliance with the Act.

(b) Such bond or assurance must be for a period of not less than one year and in such amount as required by DACO.

(c) Failure to provide for, or renew, a bond or a financial assurance instrument will result in the immediate and automatic revocation of the warehouse operator's license or provider's agreement.

(d) If DACO determines that a previously accepted bond or other financial assurance is insufficient, DACO may immediately suspend or revoke the license or authorization covered by the bond or other financial assurance if the person that filed the bond or other financial assurance does not provide such additional bond or other financial assurance as DACO determines appropriate.

(e) To qualify as a suitable bond or other financial assurance, the entity issuing the bond or other financial assurance must be subject to service of process in lawsuits or legal actions on the bond or other financial assurance in the State in which the warehouse is located.

**Subpart B—Warehouse Licensing****§ 735.100 Application.**

(a) An applicant for a license must submit to DACO information and documents determined by DACO to be sufficient to conclude that the applicant

can comply with the provisions of the Act. Such documents must include a current review or an audit-level financial statement prepared according to generally accepted accounting standards as defined by the American Institute of Certified Public Accountants. For any entity that is not an individual, a document that establishes proof of the existence of the entity, such as:

- (1) For a partnership, an executed partnership agreement; and
- (2) For a corporation:
  - (i) Articles of incorporation certified by the Secretary of State of the applicable State of incorporation;
  - (ii) Bylaws; and
  - (iii) Permits to do business; and
- (3) For a limited partnership, an executed limited partnership agreement; and

- (4) For a limited liability company:
  - (i) Articles of organization or similar documents; and
  - (ii) Operating agreement or similar agreement.

(b) The warehouse facilities of an operator licensed under the Act must, as determined by DACO, be:

(1) Physically and operationally suitable for proper storage of the applicable agricultural product or agricultural products specified in the license;

(2) Operated according to generally accepted warehousing activities and practices in the industry for the applicable agricultural product or agricultural products stored in the facility; and

(3) Subject to the warehouse operator's control of the facility including all contiguous storage space with respect to such facilities.

(c) As specified in individual licensing agreements, a warehouse operator must:

- (1) Meet the basic financial requirements determined by DACO; and
- (2) Meet the net worth requirements determined by DACO;

(d) In order to obtain a license, the warehouse operator must correct any exceptions made by the warehouse examiner at the time of the original warehouse examination.

(e) DACO may issue a license for the storage of two or more agricultural products in a single warehouse as provided in the applicable licensing agreements. The amount of the bond or financial assurance, net worth, and inspection and license fees will be determined by DACO in accordance with the licensing agreements applicable to the specific agricultural product, based upon the warehouses' total capacity for storing such product, that would require:

(1) The largest bond or financial assurance;

(2) The greatest amount of net worth; and

(3) The greatest amount of fees.

**§ 735.101 Financial records and reporting requirements.**

(a) Warehouse operators must maintain complete, accurate, and current financial records that must be available to DACO for review or audit at DACO's request as may be prescribed in the applicable licensing agreement.

(b) Warehouse operators must, annually, present a financial statement as may be prescribed in the applicable licensing agreement to DACO.

**§ 735.102 Financial assurance requirements.**

(a) Warehouse operators must file with DACO financial assurances approved by DACO consisting of:

- (1) A warehouse operator's bond; or
- (2) Obligations that are unconditionally guaranteed as to both interest and principal by the United States, in a sum equal at their par value to the amount of the bond otherwise required to be furnished, together with an irrevocable power of attorney authorizing DACO to collect, sell, assign and transfer such obligations in case of any default in the performance of any of the conditions required in the licensing agreement; or

(3) An irrevocable letter of credit issued in the favor of DACO with a term of not less than two years; or

(4) A certificate of participation in, and coverage by, an indemnity or insurance fund as approved by DACO, established and maintained by a State, backed by the full faith and credit of the applicable State, which guarantees depositors of the licensed warehouse full indemnification for the breach of any obligation of the licensed warehouse operator under the terms of the Act. If a warehouse operator files a bond or financial assurance in the form of a certification of participation in an indemnity or insurance fund, the certification may only be used to satisfy any deficiencies in assets above the minimum net worth requirement as prescribed in the applicable licensing agreement. A certificate of participation and coverage in this fund must be furnished to DACO annually; or

(5) Other alternative instruments and forms of financial assurance approved by DACO as may be prescribed in the applicable licensing agreement.

(b) The warehouse operator may not withdraw obligations required under this section until one year after license termination or until satisfaction of any

claims against the obligations, whichever is later.

#### **§ 735.103 Amendments to license.**

FSA will issue an amended license upon:

(a) Receipt of forms prescribed and furnished by DACO outlining the requested changes to the license;

(b) Payment of applicable licensing and examination fees;

(c) Receipt of bonding or other financial assurance if required in the applicable licensing agreement; and

(d) Receipt of a report on the examination of the proposed facilities pending inclusion or exclusion, if determined necessary by DACO.

#### **§ 735.104 Insurance requirements.**

Each warehouse operator must comply fully with the terms of insurance policies or contracts covering their licensed warehouse and all products stored therein, and must not commit any acts, nor permit others to do anything, that might impair or invalidate such insurance.

#### **§ 735.105 Care of agricultural products.**

Each warehouse operator must at all times, including during any period of suspension of their license, exercise such care in regard to stored and non-storage agricultural products in their custody as required in the applicable licensing agreement.

#### **§ 735.106 Excess storage and transferring of agricultural products.**

(a) If at any time a warehouse operator stores an agricultural product in a warehouse subject to a license issued under the Act in excess of the warehouse capacity for which it is licensed, such warehouse operator must immediately notify DACO of such excess storage and the reason for the storage.

(b) A warehouse operator who desires to transfer stored agricultural products to another warehouse may do so either by physical movement, by other methods as may be provided in the applicable licensing agreement, or as authorized by DACO.

#### **§ 735.107 Warehouse charges and tariffs.**

(a) A warehouse operator must not make any unreasonable or exorbitant charge for services rendered.

(b) A warehouse operator must follow the terms and conditions for each new or revised warehouse tariff or schedule of charges and rates as prescribed in the applicable licensing agreement.

#### **§ 735.108 Inspections and examinations of warehouses.**

(a) Warehouse operators must permit any agent of the Department to enter

and inspect or examine, on any business day during the usual hours of business, any licensed warehouse, the offices of the warehouse operator, the books, records, papers, and accounts.

(b) Routine and special inspections and examinations will be unannounced.

(c) Warehouse operators must provide safe access to all storage facilities.

(d) Warehouse operators must inform any agent of the Department, upon arrival, of any hazard.

(e) Agents of the Department must accomplish inspections and examinations of warehouses in a manner that is efficient and cost-effective without jeopardizing any inspection and examination integrity.

#### **§ 735.109 Disaster loss to be reported.**

If at any time a disaster or loss occurs at or within any licensed warehouse, the warehouse operator must report immediately the occurrence of the disaster or loss and the extent of damage, to DACO.

#### **§ 735.110 Conditions for delivery of agricultural products.**

(a) In the absence of a lawful excuse, a warehouse operator will, without unnecessary delay, deliver the agricultural product stored or handled in the warehouse on a demand made by:

(1) The holder of the warehouse receipt for the agricultural product; or

(2) The person that deposited the agricultural product, if no warehouse receipt has been issued.

(b) Prior to delivery of the agricultural product, payment of the accrued charges associated with the storage or handling of the agricultural product, including satisfaction of the warehouse operator's lien, must be made if requested by the warehouse operator.

(c) When the holder of a warehouse receipt requests delivery of an agricultural product covered by the warehouse receipt, the holder must surrender the warehouse receipt to the warehouse operator before obtaining the agricultural product.

(d) A warehouse operator must cancel each warehouse receipt surrendered to the warehouse operator upon the delivery of the agricultural product for which the warehouse receipt was issued and in accordance with the applicable licensing agreement.

(e) For the purpose of this part, unless prevented from doing so by force majeure, a warehouse operator will deliver or ship such agricultural products stored or handled in their warehouse as prescribed in the applicable licensing agreement.

#### **§ 735.111 Fair treatment.**

(a) Contingent upon the capacity of a warehouse, a warehouse operator will deal in a fair and reasonable manner with persons storing, or seeking to store, an agricultural product in the warehouse if the agricultural product is:

(1) Of the kind, type, and quality customarily stored or handled in the area in which the warehouse is located;

(2) Tendered to the warehouse operator in a suitable condition for warehousing; and

(3) Tendered in a manner that is consistent with the ordinary and usual course of business.

(b) Nothing in this section will prohibit a warehouse operator from entering into an agreement with a depositor of an agricultural product to allocate available storage space.

#### **§ 735.112 Terminal and futures contract markets.**

(a) DACO may issue service licenses to weigh-masters or their deputies to perform services relating to warehouse receipts that are deliverable in satisfaction of futures contracts in such contract markets or as may be prescribed in any applicable licensing agreement.

(b) DACO may authorize a registrar of warehouse receipts issued for an agricultural product in a warehouse licensed under the Act that operates in any terminal market or in any futures contract market the official designated by officials of the State in which such market is located if such individual is not:

(1) An owner or employee of the licensed warehouse;

(2) The owner of, or an employee of the owner of, such agricultural product deposited in any such licensed warehouse; or

(3) As may be prescribed in any applicable licensing or provider agreement.

#### **Subpart C—Inspectors, Samplers, Classifiers, and Weighers**

##### **§ 735.200 Service licenses.**

(a) FSA may issue to a person a license for:

(1) Inspection of any agricultural product stored or handled in a warehouse subject to the Act;

(2) Sampling of such an agricultural product;

(3) Classification of such an agricultural product according to condition, grade, or other class and certify the condition, grade, or other class of the agricultural product;

(4) Weighing of such an agricultural product and certify the weight of the agricultural product; or

(5) Performing two or more services specified in paragraphs (a)(1), (a)(2), (a)(3) or (a)(4) of this section.

(b) Each person seeking a license to perform activities described in this section must submit an application on forms furnished by DACO that contain, at a minimum, the following information:

(1) The name, location and license number of the warehouses where the applicant would perform such activities;

(2) A statement from the warehouse operator that the applicant is competent and authorized to perform such activities at specific locations; and

(3) Evidence that the applicant is competent to inspect, sample, classify, according to grade or weigh the agricultural product.

(c) The warehouse operator will promptly notify DACO in writing of any changes with respect to persons authorized to perform such activities at the licensed warehouse.

#### **§ 735.201 Agricultural product certificates; format.**

Each inspection, grade, class, weight or combination certificate issued under the Act by a licensee to perform such services must be:

(a) In a format prescribed by DACO;

(b) Issued and maintained in a consecutive order; and

(c) As prescribed in the applicable licensing or provider agreement and authorized by DACO.

#### **§ 735.202 Standards of grades for other agricultural products.**

Official Standards of the United States for any kind, class or grade of an agricultural product to be inspected must be used if such standards exist. Until Official Standards of the United States are fixed and established for the kind of agricultural product to be inspected, the kind, class and grade of the agricultural product must be stated, subject to the approval of DACO. If such standards do not exist for such an agricultural product, the following will be used:

(a) State standards established in the State in which the warehouse is located;

(b) In the absence of any State standards, in accordance with the standards, if any, adopted by the local board of trade, chamber of commerce, or by the agricultural product trade generally in the locality in which the warehouse is located, or

(c) In the absence of the standards set forth in paragraphs (a) and (b) of this section, in accordance with any standards approved for the purpose by DACO.

### **Subpart D—Warehouse Receipts**

#### **§ 735.300 Warehouse receipt requirements.**

(a) Warehouse receipts may be:

(1) Negotiable or non-negotiable;

(2) For a single unit, multiple units, identity preserved or commingled lot; and

(3) In a paper or electronic format that, besides complying with the requirements of the Act, must be in a format as prescribed in the applicable licensing or provider agreement and authorized by DACO.

(b) The warehouse operator must:

(1) At the request of a depositor of an agricultural product stored or handled in a warehouse licensed under the Act, issue a warehouse receipt to the depositor;

(2) Not issue a warehouse receipt for an agricultural product unless the agricultural product is actually stored in their warehouse at the time of issuance;

(3) Not issue a warehouse receipt until the quality, condition and weight of such an agricultural product is ascertained by a licensed inspector and weigher;

(4) Not directly or indirectly compel or attempt to compel the depositor to request the issuance of a warehouse receipt omitting the statement of quality or condition;

(5) Not issue an additional warehouse receipt under the Act for a specific identity-preserved or commingled agricultural product lot (or any portion thereof) if another warehouse receipt representing the same specific identity-preserved or commingled lot of the agricultural product is outstanding. No two warehouse receipts issued by a warehouse operator may have the same warehouse receipt number or represent the same agricultural product lot;

(6) When issuing a warehouse receipt and purposefully omitting any information, note the blank to show such intent;

(7) Not deliver any portion of an agricultural product for which they have issued a negotiable warehouse receipt until the warehouse receipt has been surrendered to them and canceled as prescribed in the applicable licensing agreement;

(8) Not deliver more than 90% of the received quantity of an agricultural product for which they have issued a non-negotiable warehouse receipt until such warehouse receipt has been surrendered or the depositor or the depositor's agent has provided a written order for the agricultural product and the warehouse receipt surrendered upon final delivery; and

(9) Deliver, upon proper presentation of a warehouse receipt for any

agricultural product, and payment or tender of all advances and charges, to the depositor or lawful holder of such warehouse receipt the agricultural product of such identity, quantity, grade and condition as set forth in such warehouse receipt.

(c) In the case of a lost or destroyed warehouse receipt, a new warehouse receipt upon the same terms, subject to the same conditions, and bearing on its face the number and the date of the original warehouse receipt may be issued.

#### **§ 735.301 Notification requirements.**

Warehouse operators must file with DACO the name and genuine signature of each person authorized to sign warehouse receipts for the licensed warehouse operator, and will promptly notify DACO of any changes with respect to persons authorized to sign.

#### **§ 735.302 Paper warehouse receipts.**

Paper warehouse receipts must be issued as follows:

(a) On distinctive paper specified by DACO;

(b) Printed by a printer authorized by DACO; and

(c) Issued, identified and maintained in a consecutive order.

#### **§ 735.303 Electronic warehouse receipts.**

(a) Warehouse operators issuing EWR under the Act may issue EWR's for the agricultural product stored in their warehouse. Warehouse operators issuing EWR's under the Act must:

(1) Only issue EWR's through one FSA-authorized provider annually;

(2) Inform DACO of the identity of their provider, when they are a first time user of EWR's, 60 calendar days in advance of issuing an EWR through that provider. DACO may waive or modify this 60-day requirement as set forth in § 735.2(b);

(3) Before issuing an EWR, request and receive from FSA a range of consecutive warehouse receipt numbers that the warehouse will use consecutively for issuing their EWR's;

(4) When using an authorized provider, issue and cancel all warehouse receipts as EWR's;

(5) Cancel an EWR only when they are the holder of the warehouse receipt;

(6) Be the holder of an EWR to correct information contained within any required data field;

(7) Receive written authorization from FSA at least 30 calendar days before changing providers. Upon authorization, they may request their current provider to transfer their EWR data from its Central Filing System (CFS) to the CFS of the authorized provider whom they select; and

(8) Notify all holders of EWR's by inclusion in the CFS at least 30 calendar days before changing providers, unless otherwise required or allowed by FSA.

(b) An EWR establishes the same rights and obligations with respect to an agricultural product as a paper warehouse receipt and possesses the following attributes:

(1) The holder of an EWR will be entitled to the same rights and privileges as the holder of a paper warehouse receipt.

(2) Only the current holder of the EWR may transfer the EWR to a new holder.

(3) The identity of the holder must be confidential and included as information for every EWR.

(4) Only one person may be designated as the holder of an EWR at any one time.

(5) A warehouse operator may not issue an EWR on a specific identity-preserved or commingled lot of agricultural product or any portion thereof while another valid warehouse receipt representing the same specific identity-preserved or commingled lot of agricultural product remains not canceled. No two warehouse receipts issued by a warehouse operator may have the same warehouse receipt number or represent the same agricultural product lot.

(6) An EWR may only be issued to replace a paper warehouse receipt if requested by the current holder of the paper warehouse receipt.

(7) Holders and warehouse operators may authorize any other user of their provider or the provider itself to act on their behalf with respect to their activities with this provider. This authorization must be in writing, and acknowledged and retained by the warehouse operator and provider.

(c) A warehouse operator not licensed under the Act may, at the option of the warehouse operator, issue EWRs in accordance with this subpart, except this option does not apply to a warehouse operator that is licensed under State law to store agricultural products in a warehouse if the warehouse operator elects to issue an EWR under State law.

## **Subpart E—Electronic Providers**

### **§ 735.400 Administration.**

This subpart sets forth the regulations under which DACO may authorize one or more electronic systems under which:

(a) Electronic documents relating to the shipment, payment, and financing of the sale of agricultural products may be issued or transferred; or

(b) Electronic receipts may be issued and transferred.

### **§ 735.401 Electronic warehouse receipt and USWA electronic document providers.**

(a) To establish a USWA-authorized system to issue and transfer EWR's and USWA electronic documents, each applicant must submit to DACO information and documents determined by DACO to be sufficient to determine that the applicant can comply with the provisions of the Act. Each provider operating pursuant to this section must meet the following requirements:

(1) Have and maintain a net worth as specified in the applicable provider agreement;

(2) Maintain two insurance policies; one for "errors and omissions" and another for "fraud and dishonesty." Each policy's minimum coverage and maximum deductible amounts and applicability of other forms of financial assurances as set forth in § 735.14 will be prescribed in the applicable provider agreement. Each policy must contain a clause requiring written notification to FSA 30 days prior to cancellation or as prescribed by FSA;

(3) Submit a current review or an audit level financial statement prepared according to generally accepted accounting standards as defined by the American Institute of Certified Public Accountants;

(4) For any entity that is not an individual, a document that establishes proof of the existence, such as:

(i) For a partnership, an executed partnership agreement; and

(ii) For a corporation:

(A) Articles of incorporation certified by the Secretary of State of the applicable State of incorporation;

(B) Bylaws; and

(C) Permits to do business; and

(iii) For a limited partnership, an executed limited partnership agreement; and

(iv) For a limited liability company:

(A) Articles of organization or similar documents; and

(B) Operating agreement or similar agreement.

(5) Meet any additional financial requirements as set forth in the applicable provider agreement;

(6) Pay user fees annually to FSA, as set and announced annually by FSA prior to April 1 of each calendar year; and

(7) Operate a CFS as a neutral third party in a confidential and secure fashion independent of any outside influence or bias in action or appearance.

(b) The provider agreement will contain, but not be limited to, these basic elements:

(1) Scope of authority;

(2) Minimum document and warehouse receipt requirements;

(3) Liability;

(4) Transfer of records protocol;

(5) Records;

(6) Conflict of interest requirements;

(7) USDA common electronic information requirements;

(8) Financial requirements

(9) Terms of insurance policies or assurances;

(10) Provider's integrity statement;

(11) Security audits; and

(12) Submission, authorization, approval, use and retention of documents.

(c) DACO may suspend or terminate a provider's agreement for cause at any time.

(1) Hearings and appeals will be conducted in accordance with procedures as set forth in §§ 735.6 and 735.8.

(2) Suspended or terminated providers may not execute any function pertaining to USDA, USWA documents, or USWA or State EWR's during the pendency of any appeal or subsequent to this appeal if the appeal is denied, except as authorized by DACO.

(3) The provider or DACO may terminate the provider agreement without cause solely by giving the other party written notice 60 calendar days prior to termination.

(d) Each provider agreement will be automatically renewed annually on April 30th as long as the provider complies with the terms contained in the provider agreement, the regulations in this subpart, and the Act.

### **§ 735.402 Providers of other electronic documents.**

(a) To establish a USWA-authorized system to issue and transfer OED, each applicant must submit to DACO information and documents determined by DACO to be sufficient to determine that the applicant can comply with the provisions of the Act. Each provider operating pursuant to this section must meet the following requirements:

(1) Have and maintain a net worth as specified in the applicable provider agreement;

(2) Maintain two insurance policies; one for 'errors and omissions' and another for 'fraud and dishonesty'. Each policy's minimum coverage and maximum deductible amounts and applicability of other forms of financial assurances as set forth in § 735.14 will be prescribed in the applicable provider agreement. Each policy must contain a clause requiring written notification to FSA 30 days prior to cancellation or as prescribed by FSA;

(3) Submit a current review or an audit level financial statement prepared according to generally accepted accounting standards as defined by the American Institute of Certified Public Accountants;

(4) For any entity that is not an individual, a document that establishes proof of the existence, such as:

(i) For a partnership, an executed partnership agreement; and

(ii) For a corporation:

(A) Articles of incorporation certified by the Secretary of State of the applicable State of incorporation;

(B) Bylaws; and

(C) Permits to do business; and

(iii) For a limited partnership, an executed limited partnership agreement; and

(iv) For a limited liability company:

(A) Articles of organization or similar documents; and

(B) Operating agreement or similar agreement.

(5) Meet any additional financial requirements as set forth in the applicable provider agreement;

(6) Pay user fees annually to FSA, as set and announced annually by FSA prior to April 1 of each calendar year; and

(7) Operate a CFS as a neutral third party in a confidential and secure fashion independent of any outside influence or bias in action or appearance.

(b) The provider agreement will contain, but not be limited to, these basic elements:

(1) Scope of authority;

(2) Minimum document and warehouse receipt requirements;

(3) Liability;

(4) Transfer of records protocol;

(5) Records;

(6) Conflict of interest requirements;

(7) USDA common electronic information requirements;

(8) Financial requirements;

(9) Terms of insurance policies or assurances;

(10) Provider's integrity statement;

(11) Security audits; and

(12) Submission, authorization, approval, use and retention of documents.

(c) DACO may suspend or terminate a provider's agreement for cause at any time.

(1) Hearings and appeals will be conducted in accordance with procedures as set forth in §§ 735.6 and 735.8.

(2) Suspended or terminated providers may not execute any function pertaining to USDA, USWA documents, USWA or State EWR's or OED's during the pendency of any appeal or subsequent to this appeal if the appeal is denied, except as authorized by DACO.

(d) Each provider agreement will be automatically renewed annually on April 30th as long as the provider complies with the terms contained in the provider agreement, the regulations in this subpart, and the Act.

(e) In addition to audits prescribed in this section the provider must submit a copy of any audit, examination or investigative report prepared by any Federal regulatory agency with respect to the provider including agencies such as, but not limited to, the Comptroller of the Currency, Department of the Treasury, the Federal Trade Commission, and the Commodity Futures Trading Commission.

#### **§ 735.403 Audits.**

(a) No later than 120 calendar days following the end of the provider's fiscal

year, the provider authorized under §§ 735.401 and 735.402 must submit to FSA an annual audit level financial statement and an electronic data processing audit that meets the minimum requirements as provided in the applicable provider agreement. The electronic data processing audit will be used by DACO to evaluate current computer operations, security, disaster recovery capabilities of the system, and compatibility with other systems authorized by DACO.

(b) Each provider will grant the Department unlimited, free access at any time to all records under the provider's control relating to activities conducted under this part and as specified in the applicable provider agreement.

#### **§ 735.404 Schedule of charges and rates.**

(a) A provider authorized under §§ 735.401 or 735.402 must furnish FSA with copies of its current schedule of charges and rates for all services as they become effective.

(b) Charges and rates assessed any user by the provider must be in effect for a minimum period of one year.

(c) Providers must furnish FSA and all users a 60-calendar day advance notice of their intent to change any charges and rates.

#### **PARTS 736 THROUGH 742 [Removed]**

2. Parts 736 through 742 are removed and reserved.

Signed at Washington, DC, on July 29, 2002.

**James R. Little,**

*Administrator, Farm Service Agency.*

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