



FEDERAL REGISTER

Vol. 76

Thursday,

No. 97

May 19, 2011

Part III

Department of Agriculture

Farm Service Agency

7 CFR Part 789

Agriculture Priorities and Allocations System; Proposed Rule

DEPARTMENT OF AGRICULTURE**Farm Service Agency****7 CFR Part 789**

RIN 0560-AH68

Agriculture Priorities and Allocations System**AGENCY:** Farm Service Agency, USDA.**ACTION:** Proposed rule.

SUMMARY: The Farm Service Agency (FSA) is establishing the regulation for the Agriculture Priorities and Allocations System (APAS). Food is a critical commodity essential to the national defense (including civil emergency preparedness and response). To avoid civilian hardship during national defense emergencies it may be necessary to regulate the production, processing, storage, and wholesale distribution of food. Through the APAS rule, the U.S. Department of Agriculture (USDA) will respond to requests to place priority ratings on contracts, or orders of agriculture commodities up through the wholesale levels for agriculture production and equipment, allocate resources, and handle food claims as specified in the Defense Production Act (DPA) of 1950, as amended, if the necessity arises. FSA needs to implement this rule to direct the agriculture commodities and resources to areas of hardship or potential hardship due to national emergencies. For example, APAS is designed to use the DPA authority to help ensure that food is available when and where it is needed most, such as after a hurricane or earthquake. In most cases, there is likely to be no economic impact in filling priority orders because it would generally just be changing the timing in which orders are completed.

DATES: We will consider comments that we receive by July 18, 2011.

ADDRESSES: We invite you to submit comments on this proposed rule and the information collection. In your comment, include the Regulation Identifier Number (RIN) and volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* USDA FSA, 1400 Independence Ave., SW., Mail Stop 0543, Washington, DC 20250-0543.

- *Hand Delivery or Courier:* Deliver comments to the above address.

Comments may be inspected at the mail address listed above between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this proposed rule is available through the FSA home page at <http://www.fsa.usda.gov/>.

FOR FURTHER INFORMATION CONTACT: Josh Bornstein, telephone (202) 690-4770. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, *etc.*) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:**Executive Summary**

APAS is a USDA program that supports not only national defense needs (such as for combat rations), but also emergency preparedness initiatives by addressing essential civilian needs (food and food resources) through the placing of priorities on contracts for items and services or allocate resources, as necessary. Although a specific disaster designation is not required, the ability to prioritize or allocate items or services can be triggered by a determination by the President or designated entities that this action is necessary and essential to promote national defense including the imminent need for emergency preparedness. Under DPA (50 U.S.C. App. 2061 to 2170, 2171, and 2172), the term “national defense” includes emergency preparedness, response, and critical infrastructure and key resources protection. Authority for priorities and allocations of contracts is specified in DPA and further defined in Executive Order 12919, “National Defense Industrial Resources Preparedness,” dated June 3, 1994.

History of DPA

DPA was enacted into law as a means to combat military and civilian hardships as a result of the Korean War and other Cold War events. Until recently, only the Department of Commerce (DOC) implemented regulations to use the authority under DPA. The Department of Defense and DOC have used DPA authority to timely procure military and construction items. Items not under Department of Defense and DOC jurisdiction were procured using DPA priority ratings only after entering into a memorandum of understanding (MOU) with the Department that had jurisdiction over those items. For example, USDA has had MOUs with DOC for items under USDA jurisdiction; as a result, enabling DOC to establish priority ratings for food and food resources. Recent events

such as acts of terrorism, hurricane disasters, and severe floods and droughts have increased the need for DPA priority ratings, requiring USDA to implement the APAS regulations to relieve DOC from the implementation responsibility for food and food resources and to directly assist other Departments in achieving national defense including emergency preparedness initiatives.

Jurisdiction

Title I of DPA and Executive Order 12919 authorize jurisdictional areas for each Department that is involved in national defense including emergency preparedness. USDA has jurisdiction for items that fall under the categories of:

- (1) Food;
- (2) Food resource facilities; and
- (3) Distribution of farm equipment and commercial fertilizer.

USDA cannot use its DPA authority for items or services not in its jurisdiction. Those persons¹ in need of items or services that do not fall under the jurisdiction of USDA will request priorities or allocations assistance from the applicable Department. USDA will direct the requesters to the appropriate Department if the request comes into USDA.

APAS Process

If a Federal, State, or local government agency or private industry has placed, or wishes to place, a contract for items or services that are necessary or appropriate for the promotion of national defense, the agencies or private industry can request authorization from USDA to place a priority rating on the contract for the items or services. This process will allow the contractor (department or person requesting the priority rating) with the means to meet the requirements of maintaining or restoring national defense operations. To request priority authorization, the contractor must submit form AD-2102 (Request for Special Priorities Assistance) and include a written justification for the need to use APAS to establish the priority rating. USDA would only use APAS when the items or services required cannot be obtained in a timely manner through normal market channels.

¹ The word “person” as used in this rule refers to the requester of the priority rating. A person is an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof, or any Federal agency.

Priorities

In the priorities component of APAS, certain contracts between the government and private parties, or contracts between private parties, would be given priority over other contracts to ensure timely delivery of items or services needed to support the national defense. Contracts for these items may already be in place, but may need to be amended (quantity and delivery dates), or new contracts may be required for immediate action as a means to support national defense requirements. Through APAS, USDA will work with the contracted vendor² to establish the new required priority.

Allocations

The second part of APAS is the allocations component. Allocation authority will only be used when there is an insufficient supply of an item or service to satisfy national defense supply requirements through the use of priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the retail market place. Allocation orders would be distributed equitably among the suppliers of the resource(s) being allocated and would not require any person to relinquish a disproportionate share of the civilian market. Under no circumstances would allocations be used to ration materials or services at the retail level. No department of the Federal government has used its allocation authority in more than 50 years.

APAS Programs Approved for Use by USDA

USDA has three approved programs for priorities and allocations support under section 202(c) of Executive Order 12919. Items or services that USDA may establish a priority rating for must fall under either of the following programs:

(1) Food and food resources (civilian): Programs involving food and food resources processing and storage in support of emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, 42 U.S.C. 5195–5197h).

(2) Agriculture and food critical infrastructure protection and restoration (civilian): Programs to protect or restore the agriculture and food system from terrorist attacks, major disasters, and other emergencies.

² The word "vendor" as used in this rule refers to the vendor, manufacturer, or supplier of the items or services. The person requesting an APAS priority rating has or will place a contract with the vendor for which the priority rating is requested.

(3) Military food rations: Programs to provide the Department of Defense with food resources for combat rations.

For all other requests for items under USDA's jurisdiction that are not covered by these three programs, USDA will request concurrence from the Secretary of Homeland Security before placing a priority rating on the items.

Acceptance and Rejection of a Rated Order

A contract on which a priority rating has been placed is called a "rated order." Rated orders require a supplier to fill the order before all other unrated orders. DPA provides liability protection to suppliers if they breach other unrated contracts in order to fill rated orders.

A vendor must accept a rated order and follow provisions contained in the priority rated contract if the vendor normally supplies the materials or services covered by the order. A vendor must not discriminate against rated orders in any manner such as charging higher prices or by imposing different terms and conditions than for comparable unrated orders. A person who was in receipt of a rated order and did not comply with the provisions of the contract is subject to penalties and fines.

If a vendor is unable to accept the rated order, they must immediately notify USDA and the requester (if a USDA agency is not the requester). A vendor must not accept a rated order for delivery on a specific date if they are unable to fill it by that date or if they are unable to fill it because they are in receipt of other rated orders. However, the vendor still must offer to accept the order on the earliest delivery date otherwise possible.

Appeals

Appeal rights are available to vendors seeking an adjustment to or exception from a rated order due to exceptional hardships or if such vendor believes that the order is contrary to the intent of DPA or other applicable statutes.

Responsibilities

APAS responsibilities have been delegated to FSA from the Secretary of Agriculture (the Secretary). The Emergency Preparedness Division (EPD) implements APAS for FSA. FSA's Deputy Administrator for Management is responsible for the initial determination of placing a priority rating on a contract. The FSA Administrator is responsible for resolving conflicts and hearing appeals on requests for an adjustment or exception.

Scope

APAS covers only those Government and public agencies that have national defense, or emergency preparedness, response, and recovery responsibilities. This environment strictly limits the participants eligible to request assistance through APAS. Also, the vendors that supply agriculture related items (food, food resources) and in the quantity that is expected to be requested is inherently limited in scope. Only a select few are able to produce or deliver the large quantities of items that will require priority rating requests through APAS. For example, for preparations in advance of Hurricane Ike hitting the Texas Coast in 2008, one Federal agency considered requesting 1 million meals-ready-to-eat. In this example, it is clear that there would be limited companies that would be able to quickly supply 1 million meals-ready-to-eat. This is a representative example of the type of needs for which a priority rating would be requested through APAS. As a result, this program has a very limited customer base of large manufacturers and suppliers as well as those Government and public agencies (for example, the Red Cross), having national defense, or emergency preparedness, response, and recovery responsibilities.

Government organizations will request priority ratings through APAS to ensure that they are able to obtain critical resources during or in anticipation of an emergency to lessen the effects of the hazard on civilian populations.

As an example of how DOC has needed to use DPAS, during the aftermath of Hurricane Katrina, after the request was endorsed by the Federal Emergency Management Agency (FEMA), DOC authorized a railroad to place a priority rated order with Company X for equipment to repair the damages to the railroad system supporting commodity movements in and around the New Orleans area. This rated order allowed the vendor responsible for repairing the railroad infrastructure around the New Orleans area to complete repairs in the fastest time possible. This allowed the response organizations to quickly receive items in bulk quantities needed to support the mass care and housing of those displaced by the hurricane and its aftermath. When the railroad placed the rated order for equipment, Company X was required to fill the railroad's order first, before any other orders, unless Company X had a legal basis for rejecting the rated order. In addition, all customers currently under contract

obligations from Company X would not have breach-of-contract cause of action against Company X if their orders could not be filled by the original agreed-to time due to unplanned delays due to filling the rated order.

DPA Priorities and Allocations Authority

Section 101 of the DPA of 1950 (50 U.S.C. App. 2071) establishes the broad authority for the President to require the acceptance and priority performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense. This is commonly referred to as “priorities and allocations” authority. Through Executive Order 12919 the President delegated the DPA section 101 priorities and allocations authority to the following agency heads:

- The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer.
- The Secretary of Energy with respect to all forms of energy.
- The Secretary of Health and Human Services with respect to health resources.
- The Secretary of Transportation with respect to all forms of civil transportation.
- The Secretary of Defense with respect to water resources.
- The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

Since the initial enactment, Congress has continued to reauthorize DPA. Most recently, on September 30, 2009, Congress enacted the Defense Production Act Reauthorization (DPAR) of 2009 (Pub. L. 111–67). A significant difference in this reauthorization was the requirement for Departments other than DOC to initiate rulemaking to implement their responsibilities under DPA. Specifically, section 101(d) of DPA (50 U.S.C. App. 2071(d)), as added by DPAR, directs the head of each Federal agency to issue final rules that establish standards and procedures to use the authority of section 101 to promote the national defense under both emergency and nonemergency conditions and, as appropriate and to the extent necessary, consult with the heads of other Federal agencies to develop a consistent and unified Federal Priorities and Allocations System (FPAS).

FEMA in the Department of Homeland Security (DHS) is responsible for coordinating priorities and allocations rulemaking efforts among the six Federal agencies that have been delegated DPA section 101 authority (referred to as “resource agencies”) to ensure consistency and uniformity of rule language and provisions across resource agency jurisdictions. Each of the six resource agencies is either revising existing priorities and allocations regulations to meet this statutory requirement or is in the process of developing and publishing its initial regulation. Together, the priorities and allocations system regulations of each resource agency will constitute FPAS.

USDA is working with FEMA and the other Departments to have common rules for the implementation of APAS and the other Departments’ regulations; that common rule language is the basis for this rule. DOC published proposed revisions to the DPAS regulations on June 7, 2010 (75 FR 32122–32140); Energy published the proposed rule for EPAS on July 16, 2010 (75 FR 41405–41421); and Transportation published the proposed rule for TPAS on February 15, 2011 (76 FR 8675–8699).

Within USDA, authority to administer APAS has been delegated to the FSA Administrator. FSA will manage APAS for all USDA.

This rule establishes APAS, one-part of the FPAS, to implement USDA’s administration of its delegated authority under DPA section 101 and other related statutes such as the priorities provisions of the Military Selective Service Act³ (50 U.S.C. App. 468) (see Executive Order 12742, “National Security Industrial Responsiveness,” dated Jan. 8, 1991). As explained in further detail below, APAS is consistent with the existing Defense Priorities and Allocations System (DPAS) (15 CFR part 700) implemented by DOC to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and unified FPAS.⁴

In other words, the APAS regulations are intended to be consistent with the DOC regulations through which DPAS has operated for approximately 25 years. The only intended differences are those that are unique to USDA’s requirements. Specific changes were made as needed

due to the focus on food and food resources versus construction materials and other related items or services and to specifically include emergency preparedness. For both of those, one specific change is in the timing allowed to accept or reject priority orders; a shorter time frame is required when dealing with food and food resources for civilian hardships due to emergencies. Therefore, instead of having 15 days, the APAS regulation allows for 6 to 12 hours.

APAS Description

APAS provides guidance and procedures for use of DPA priorities and allocations authority with respect to the resource areas delegated by the President to USDA as specified in Executive Order 12919: Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer. As specified in Executive Order 12919, section 202, priorities and allocations may be used only to support programs that have been determined in writing “as necessary or appropriate to promote the national defense” by:

(a) The Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

(b) The Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or

(c) The Secretary of Homeland Security, with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

Under DPA, the term “national defense” specifically includes emergency preparedness activities conducted pursuant to Title VI of the Stafford Act.⁵ The Stafford Act, in section 602(b) of Title VI, also cross-references DPA by stating that “[t]he terms ‘national defense’ and ‘defense,’ as used in [DPA], include emergency preparedness activities conducted pursuant to this title.” (See 42 U.S.C. 5195a(b).) Emergency preparedness activities include a broad range of measures to be taken in preparation for, during, and in response to natural

³ References to the Military Selective Service Act apply to those required deliveries to the Government exclusively for the use of the armed forces or for the use of the Atomic Energy Commission.

⁴ DPA regulations provided the starting point for development of the common rule language discussed above.

⁵ The term “national defense” is defined in section 702(14) of DPA as “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the [Stafford Act] and critical infrastructure protection and restoration.” See 50 U.S.C. App. 2152(14).

disasters or accidental or man-caused events (that is, hazards).⁶ For APAS, emergency preparedness is expected to be used most for:

- (1) Preparedness, including actions taken before an event occurs to lessen the severity of hardships to civilians,
- (2) Response, including actions taken immediately after the event happens, but before any recovery actions are taken, to relieve the effects on civilians; and
- (3) Recovery, including actions taken to restore critical infrastructure and key resources as close as can be to normal operations to approve priority ratings in cases of imminent hazard; response includes both the anticipation of the event and the immediate response to it.

USDA expects the requests for priority ratings will predominately be from Federal government agencies, and the few State and local governments with a responsibility in emergency preparedness. When the request is from a private entity, it is expected to be for the purpose of fulfilling a government contract.

As mentioned above, according to Executive Order 12919 the priorities and allocations authority of DPA may only be used by the Secretary of Agriculture to support programs that have been determined in writing as necessary or appropriate to promote the national defense. Therefore, to be ready to use the priorities and allocations authority for food and food resources, USDA has already coordinated with the Secretary of Homeland Security and the Secretary of Defense to approve programs that will cover everything for which we expect to need to provide priorities and allocations in the near future.

USDA has two programs that have been approved by the Secretary of Homeland Security for priorities and allocations support pursuant to section 202(c) of Executive Order 12919:

- (1) *Food and food resources (civilian)*: Programs involving food and food resources processing and storage in support of emergency preparedness activities conducted pursuant to Title VI of the Stafford Act. Such programs involve activities and measures designed or undertaken to prepare for or

minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions that would be created by the hazard, and to make emergency repairs to, or the emergency restoration of, vital utilities and food resource facilities destroyed or damaged by the hazard.

(2) *Agricultural and food critical infrastructure protection and restoration*: Programs to protect or restore the agriculture and food system from terrorist attacks, major disasters, and other emergencies. In Homeland Security Presidential Directive HSPD-9, "Defense of United States Agriculture and Food," dated January 30, 2004, such programs involve activities and measures to:

- Identify and prioritize critical infrastructure and key resources in the agriculture and food system for establishing protection requirements;
- Develop awareness and early warning capabilities to recognize threats;
- Mitigate vulnerabilities at critical production and processing nodes;
- Enhance screening procedures for domestic and imported products; and
- Enhance response and recovery procedures.

These programs support the national defense by providing for essential civilian needs to ensure a viable food and agriculture sector during an emergency preparedness event or a military conflict. Both programs involve emergency preparedness activities and the maintenance and restoration of the critical infrastructure and key resources.

USDA has one program, Food Resources (combat rations), that has been approved by the Secretary of Defense for priorities and allocations support under section 202(a) of Executive Order 12919. As mentioned above, prior to implementation of DPAR, USDA delegated implementation authority of the agricultural portion of DPA to DOC. DOC in turn delegated authority to the Department of Defense to administer a "priorities" program for combat rations to meet troop requirements. The combat rations program was established by an agreement between DOC and USDA, dated January 28, 1991, and approved by FEMA on February 1, 1991. USDA's current intention is to continue the policy established under DOC granting authority to the Department of Defense to administer the combat rations program.

The approved programs are listed in Schedule I of the APAS regulation (see Schedule I for a complete list of approved programs).

Before USDA can exercise its priorities or allocations authority for any requirements not covered under the approved programs, as specified in section 202 of Executive Order 12919, the Secretaries of Defense, Energy, or Homeland Security, as appropriate, would have to concur, in writing, with USDA that use of priorities or allocations authority by USDA would be necessary or appropriate to promote the national defense.

Commodities covered under the APAS regulation include those items required for production of agriculture commodities (including fertilizer, agriculture seed and livestock feed), raw and processed agriculture products for wholesale distribution, and agriculture production equipment.

Priorities and Allocations

APAS has two principal components: Priorities and allocations.

Priorities

In the "priorities" component of APAS, certain contracts between the government and private parties, or contracts between private parties, would be required to be given priority over other respective contracts to ensure timely delivery of an item needed for an "approved program." "Approved program" is defined in 7 CFR 789.8 to mean "a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with section 202 of Executive Order 12919." As stated above, certain USDA programs have been approved by the Secretary of Homeland Security and by the Secretary of Defense as necessary or appropriate to promote the national defense. Other programs could be approved in the future.

Priority Rating Authority

During a disaster event that impacts or threatens the national defense, Government and private agencies that have a role in emergency preparedness may require additional items or materials and delivery of these items in a short time span to meet the demands of emergency preparedness, response, and recovery efforts. Contracts for these items may already be in place, but may need to be altered (quantity and delivery dates) to meet national defense including emergency preparedness requirements. If no contract is in place to supply specific items at a specific time, a new contract may be required to obtain these items to meet emergency preparedness requirements. Specific

⁶The term "emergency preparedness" is defined in section 602(a) of the Stafford Act as "all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard." (See 42 U.S.C. 5195a(a).) Section 602(a) also provides a non-exhaustive list of specific measures that constitute emergency preparedness.

contracts for emergency preparedness items may require prioritization (ranked above non-essential contracts) to allow for timely delivery of specific materials to meet the requirements of national defense.

If a Government or private agency has placed, or wishes to place, a contract for an item that is necessary or appropriate for the promotion of national defense (including emergency preparedness activities under the Stafford Act or the protection or restoration of the agriculture and food system), the agency or private entity can request from USDA authorization to place a priority rating on the contract for the items to provide the contractor with the means to meet the requirements of maintaining or restoring national defense operations.

A contract on which a priority rating has been placed is called a "rated order." Rated orders require a vendor or supplier to fill the order before all other unrated orders. Procedures for the placement of rated orders and the effect of rated orders on unrated orders are specified in §§ 789.10 through 789.18 as described below.

In addition, APAS priority authority provided by USDA provides the vendor or supplier with legal protection from other customers without rated orders with respect to timeliness of filling their other unrated orders as specified § 789.70, "Protection Against Claims."

Example

If a Federal agency with emergency preparedness authorities placed an order with Company X for shelf stable meals in anticipation of or response to a hurricane, and Company X told the Federal agency that there were 19 other orders to be filled before the Federal agency's order, the Federal agency could request from USDA authority to place a priority rating on its order with Company X. USDA would then determine if the acquisition of shelf stable meals was necessary or appropriate to support emergency preparedness activities or promote the national defense. (Note: If USDA determines that the item would support a program that has not yet been approved by the Secretaries of Defense, Energy, or Homeland Security, as appropriate, in accordance with section 202 of Executive Order 12919, USDA could not authorize the contractor to place a priority rating on its contract unless USDA were to receive from the appropriate Secretary (Defense, Energy, or Homeland Security) a written determination that the particular program is necessary or appropriate to promote the national defense.) If so, USDA then would authorize the Federal

agency to place a priority rating on the order for the item(s). Company X would be required to meet the delivery requirements of the Federal agency's rated order, and modify production or delivery schedules of any of the other 19 unrated orders only when required delivery dates for the rated order cannot otherwise be met, unless Company X had a basis for rejecting the rated order as specified in § 789.13. Customers 1 through 19 on the list would not have a cause of action against Company X for not filling their orders by the original agreed-to time, as specified in § 789.70 if the rated order was the reason why they could not fulfill other orders by the agreed-upon time.

Use of Priority Ratings

If you (as a vendor) receive a rated order, you must give it preferential treatment as required by subpart C, §§ 789.10 through 789.18 (the sections of the regulations are discussed below). Generally, this means that you must accept and fill rated orders for items that you normally supply and consistent with regularly established terms of sale (see § 789.13(a)). Failure to comply with the provisions of the rated order may result in legal actions and fines against the recipient of the rated order. However, certain grounds for mandatory rejection or optional rejection of the rated order may apply (see § 789.13(b) and (c)). Rated orders must be accepted or rejected within specified time frames (see §§ 789.13(d) and 789.13(e)).

All rated orders must be scheduled in a manner and to the extent possible to ensure timely delivery by the required delivery date contained in each order (see § 789.14(a)).

The existence of previously accepted unrated orders or contracts or lower rated orders is not sufficient reason for rejecting a rated order. In fact, you (as a supplier or vendor) are required to displace or defer lower rated or unrated orders if they conflict with your performance against a higher rated order (see § 789.14(b)). When you receive multiple rated orders for specific goods or services and the orders have the same rating level, you must first place and fill those orders that you received first (see § 789.14(c)).

To ensure that contracts and orders for authorized programs are completed in a timely fashion, you (as a supplier or vendor) must place, as necessary, a priority rating on all the contracts and orders you issue with suppliers for items needed to fill rated orders you have received (see § 789.15). This requirement ensures that priority treatment will be afforded your orders by your suppliers and from vendor to

vendor throughout the supply chain. Other requirements apply to changes or cancellations of priority ratings and rated orders (see § 789.16) and use of rated orders for certain items (see § 789.17).

Finally, you may place a priority rating on your contracts or orders only if you are in receipt of a rated order or if you have been otherwise explicitly authorized to do so by USDA or a delegate agency (see § 789.18 for other limitations on placing rated orders).

Example

If a Federal agency with responsibilities in mass care and feeding during an emergency has a need for bread, and its current inventory is not sufficient to handle the short term needs of the dependents, nor would its existing contracts with vendors be sufficient to resupply its inventory in the timeframe that is required. The Federal agency requests from USDA authorization to place a priority rating on an order for the bread. USDA authorizes the Federal agency to place a priority rating on the order for the bread, and the agency places a priority rating on an order issued to Company Z, the manufacturer and supplier of the bread. Upon receipt of the rated order from the agency, Company Z must schedule operations to satisfy the delivery requirements of the rated order. Company Z must use the rated order received from the Federal agency to place priority ratings on contracts with other vendors that supply Company Z with items used to process the bread (ingredients, packaging materials), as necessary.

Although packaging materials would fall under the jurisdiction of DOC, USDA is working with DOC to establish a delegation of authority from DOC to USDA to assign priority ratings to orders for industrial resources falling within the priorities authority of DOC that are needed for use in USDA programs (see § 789.10). This would allow for a rated order placed using authorization from USDA to cross multiple jurisdictions and remain valid.

Allocations

An "allocation" is defined in § 789.8 as "the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense." As specified in the allocations component of the APAS regulation (see subpart E, §§ 789.30 through 789.37), USDA has the authority to allocate specified items to promote the national defense.

Allocation authority would be used only when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities (see § 789.30(a)). Under no circumstances would allocations be used to ration materials or services at the retail level (see § 789.30(a)). Allocation orders would be distributed equitably among the suppliers of the resource(s) being allocated and would not require any person to relinquish a disproportionate share of the civilian market (see § 789.30(b)).

Additionally, as specified in DPA § 101(b) and section 201(d) of Executive Order 12919, USDA may not use an allocation to control the general distribution of a material in the civilian market unless:

- The Secretary has made a written finding that such material is a scarce and critical material essential to the national defense and the requirements of the national defense for such material cannot otherwise be met without a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

- The Secretary has submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

- The President has approved the finding (see § 789.33).

DOC has extensive experience using its priorities authority (under their DPAS regulation), but has not used its allocation authority in more than 50 years. Much like DPAS, APAS is expected to primarily be used for prioritizing contracts and to a much lesser extent for making allocations. However, USDA is proposing to include allocations in the regulation to have the option ready, if needed. The proposed allocation standards and procedures provide strong assurance that allocations would only be used in situations where the circumstances justify such orders.

For example, dairy operations are brought to a standstill due to a detected presence of Foot and Mouth disease. The output of milk produced in the United States is curtailed by 80 percent as a result of reduced herd numbers in response to the outbreak. Prices for processed and unprocessed milk would skyrocket. USDA determines that allocating milk commodities to

processors or wholesalers is necessary to promote the national defense, namely, as an emergency response action under Title VI of the Stafford Act (which is an approved program by the Secretary of Homeland Security under section 202(c) of Executive Order 12919). Because allocating this commodity would involve controlling its general distribution in the market, USDA then makes the required finding as specified in DPA section 101(b) for allocating this food commodity and forwards that finding to the President through the National Security Advisor. After Presidential concurrence with the determination, per Executive Order 12919, USDA may allocate this commodity on a pre-determined basis to processors or wholesalers. The purpose of this allocation would be to control the distribution of milk to ensure civilian hardships are minimized. USDA would allocate existing and new milk sources to redistribute milk products in a way that ensures previously established priorities for this food product (for example, school food programs and nutritional programs for mothers and infant children to continue to provide some level of resources for those already enrolled in such programs) are met and would continue implementing allocation policies until USDA determines that this food source shortfall no longer meets the requirements for allocation programs.

Section by Section Discussion of Rule

As stated throughout this document, the APAS regulation was developed in consultation with the other relevant Federal departments and agencies. The majority of the regulation is based on the regulations DOC has used for DPAS for many years. Specific differences from DPAS are noted below in the relevant sections.

The purpose of the APAS regulation, as specified in § 789.1, "Purpose," states that the regulation provides guidance and procedures for use of the DPA priorities and allocations authorities delegated by the President to the Secretary of Agriculture as specified in Executive Order 12919 with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer.

Section 789.2, "Priorities and Allocations Authority," summarizes the delegations of priorities and allocations authority in Part II of Executive Order 12919. In addition to listing the delegations of authority to the six resource agencies (described above), § 789.2 clarifies that the delegated priorities and allocations authority may be used only to support programs that

have been determined in writing as necessary or appropriate to promote the national defense by the Secretary of Defense, Energy, or Homeland Security in their respective areas of jurisdiction.

Section 789.3, "Program Eligibility," lists the categories of programs eligible for priorities and allocations support, in accordance with the definition of "national defense" in DPA section 702. Programs approved and eligible for priorities and allocation support by USDA are contained in Schedule I. Other agencies with priorities and allocations authority list their programs eligible for priorities and allocation support in their respective regulations.

Section 789.8, "Definitions," defines terms used in the regulation. Most of the definitions are drawn from other sources, which are noted below, and used in each agency's priorities and allocations regulations for consistency across the agencies, while certain definitions are distinct to APAS, as follows:

- DPA section 702 (50 U.S.C. App. 2152)—"critical infrastructure;" "facilities;" "homeland security;" "materials;" "national defense;" and "services." The term "person" is drawn from DPA section 702, but is expanded to also include any Federal agency.

- Section 902 of Executive Order 12919—"civil transportation;" "energy;" "farm equipment;" "fertilizer;" "food resources;" "food resource facilities;" "health resources;" and "water resources."

- The current DPAS regulation (15 CFR part 700)—"allotment" (with technical modifications); "approved program" (with technical modifications); "construction;" "delegate agency" (with technical modifications); "directive;" "industrial resources;" "item;" "maintenance and repair and operating supplies or MRO;" "official action" (with technical modifications); "rated order" (with technical modifications); and "set-aside" (with technical modifications). The technical modifications to the definitions were those required to make them applicable for agriculture.

- Section 602 of the Stafford Act (42 U.S.C. 5195a)—"emergency preparedness" and "hazard."

The "allocation" and "allocation order" definitions are based on language in DPA section 101 that describes the allocation authority of the President. "Defense Production Act" means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 to 2170, 2171, and 2172). "Resource agency" means one of the six Federal departments that has been delegated DPA priorities and allocations authority under section 201 of Executive Order

12919. "Secretary" means the Secretary of Agriculture. "Stafford Act" means Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197h). The "feed" and "seed" definitions are consistent with other USDA regulations.

The "civil transportation" definition was only changed for plain language and as required for the Code of Federal Regulations references; there is no intended change from the meaning given in Section 902 of Executive Order 12919. The word "shall," which is not considered plain language was removed; specifically "shall not include" was changed to "does not include" and "shall include" was changed to "includes." In addition, the word "herein" was replaced with the phrase "in this part" to use the correct reference for text in the Code of Federal Regulations.

Section 789.10, "Delegations of Authority," describes the delegation of priorities and allocations authority from the President to the Secretary for all forms of food resources. USDA anticipates receiving a delegation of authority from DOC to assign priority ratings for materials, services, and facilities falling within the priorities authority of the DOC that are needed for use in approved programs for USDA; this means the extension of APAS priority ratings. USDA expects to include a reference to any such delegation from DOC in this section in the final rule in reserved paragraph (a). Within USDA, the authority to administer APAS has been delegated to the FSA Administrator. The FSA Administrator will coordinate APAS implementation and administration through the Director, USDA Office of Homeland Security and Emergency Coordination.

The provisions §§ 789.11 through 789.18 (subpart C) are in general continued from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FP AS as described in this section.

Section 789.11, "Priority Ratings," describes the: "DO" and "DX" rating symbols; program identification symbols; levels of priority ratings; priority ratings consist of a rating symbol and a program identification symbol; and directives that take precedence over priority ratings. Priority levels designate differences between orders based on national defense including emergency preparedness requirements. "DX" rated orders take precedence over "DO" rated orders and directives take precedence

over "DX" and "DO" rated orders. All rated orders will include a program identification symbol to indicate which approved program is being supported by the rated order. DX and DO symbols were created to differentiate between levels of requirements for items. If one person has a higher requirement for an item compared to another person in need of the same item, but both with emergency preparedness and response functions, USDA will place a DX rating symbol on the contract for the higher requirement item(s) and a DO rating symbol on all others, as applicable.

Section 789.12, "Elements of a Rated Order," describes the four elements that must be included in a contract or order to make it a "rated order." The four elements are: (1) A priority rating; (2) specific delivery date(s) for materials or services covered in the rated order; (3) the signature of an individual authorized to sign rated orders (the signature on the request to rate the order certifies that the rated order is authorized); and 4) a statement that describes what is required of the rated order recipient, in accordance with procedures provided in the rule. Section 789.12 includes a new provision (not in the current DPAS regulation), that requires an additional statement to be included in a rated order involving emergency preparedness and requiring quicker action by the recipient to accept or reject the order. In the current DPAS regulation, the recipient of a rated order must accept or reject the rated order within 15 working days for a "DO"-rated order or 10 working days for a "DX"-rated order. Agency-specific deadlines are incorporated into the regulations issued by each agency (see section 789.13(d)). While these deadlines are appropriate for orders under "normal" circumstances, they are too long for emergency conditions, when quick procurement actions may be needed to help save lives and to help protect or restore property (See § 789.13(e)).

Section 789.13, "Acceptance and Rejection of Rated Orders," specifies mandatory and optional conditions for acceptance or rejection of rated orders. In general, a person must accept a rated order if the person normally supplies the materials or services covered by the order. A person must reject an order if unable to fill the order by the specified delivery date(s) or if the order would interfere with delivery under another rated order with a comparable or higher priority rating. A person has the option of rejecting a rated order if any one of a number of other conditions exists. As noted above, the recipient of a rated order must either accept or reject the order by specified deadlines. These

deadlines are significantly shorter for orders that are identified in the orders as being placed for the purpose of emergency preparedness. Section 789.13 includes two new provisions that are not in the current DPAS regulation: (1) The shorter deadlines for orders supporting emergency preparedness activities; and (2) a provision that requires a person to reject an order if prohibited by Federal law from meeting the terms of the order. Due to the nature of short time response requirements after an emergency event, vendors have 6 to 12 hours to accept or reject a rated order. In the cases where persons (including Federal Departments) are not responding to an actual emergency, but are restocking inventories depleted from previous emergency response activities, vendors have up to 15 working days to accept or reject a rated order. As proposed, the recipient of a rated order must accept or reject the rated order within 15 working days for a "DO"-rated order or within either 6 hours, 12 hours, or 15 working days for a "DX"-rated order; USDA will specify the required timeframe on the rating authorization.

Section 789.14, "Preferential Scheduling," specifies: (1) When a recipient of a rated order must modify production or delivery schedules to satisfy the delivery requirements of a rated order; (2) the order of precedence for rated, unrated, and conflicting orders; and (3) the use of inventoried production items when needed to fill a rated order. A person must modify production or delivery schedules of other contracts to fulfill the requirements of the rated order if required delivery dates cannot be met under normal operating conditions. For conflicts over rated orders that have the same delivery dates, the person must give precedence to those orders that have the earliest receipt dates. If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order.

Section 789.15, "Extension of Priority Ratings," states that the recipient of a rated order must use the same rating symbols on rated orders as necessary with suppliers to obtain items or services needed to fill a rated order. For example, if you have a DX-P1 rated order for a food source (milk) and need to purchase packaging materials (milk cartons) from the packaging supplier, you must use a DX-P1 rated order to obtain the needed packaging materials

(milk cartons) required to fulfill the obligations of the rated contract.

Section 789.16, "Changes or Cancellations of Priority Ratings and Rated Orders," describes procedures that apply when a priority rating or the provisions of a rated order are changed or canceled. An official action of USDA or a written notification from the person who requested authorization for a rated order and placed it are the two ways changes or cancellations can be made to rated orders. When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing. If changes are made that make an unrated order a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the supplier is notified. If an amendment to a rated order significantly alters a supplier's original production or delivery schedule then it constitutes a new rated order as of the date of its receipt. The supplier must accept or reject the amended order as specified in § 789.13. Certain amendments do not constitute a new rated order, such as: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order that has a negligible impact upon deliveries; a minor variation in size or design; or a change that is agreed upon between the supplier and the customer. If the items or services are no longer needed to fill a rated order, the rated orders must be canceled.

Section 789.17, "Use of Rated Orders," requires that the recipient of a rated order: (1) Must use rated orders as necessary to obtain items and services needed to fulfill the order; (2) may use a rated order to replace inventoried items that were used to fulfill the order; (3) may combine orders with different priority ratings; and (4) may forgo use of a priority rating for orders below certain dollar thresholds.

Section 789.18, "Limitations on Placing Rated Orders," describes general and jurisdictional limitations on the use of rated orders. Rated orders may only be placed by persons with the proper authority for items and services that are needed to support approved programs and that are eligible for priority treatment. In general, the use of rated orders under each resource agency's rule is limited to resources within that agency's jurisdiction, as delegated under section 201 of Executive Order 12919. USDA anticipates receiving a delegation from DOC to authorize USDA certain authority to use DPAS for materials, services, and facilities falling within the

priorities and allocations jurisdiction of DOC.

Special Priorities Assistance

The provisions in §§ 789.20 through 789.24 (subpart D) are in general continued from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FPAS as described in this section.

Section 789.20, "General Provisions," also describes procedures to request assistance in resolving problems with an existing rated order or in dealing with procurement issues involving a program that is eligible for support using the priorities authority.

Section 789.21, "Requests for Priority Rating Authority," describes procedures to request rating authority under special circumstances, such as for: (1) Items and services not normally rated under the regulation and (2) use of rated orders for supplies needed to fulfill a rated prime contract that is anticipated but not yet received. If there are production or delivery problems, a person should immediately contact the FSA

Administrator for special priorities assistance (see §§ 789.20 through 789.24 and 789.73). If FSA is unable to resolve the problem, USDA may forward the request to another resource agency, as appropriate, for action. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment. To request special priorities assistance or priority rating authority, submit Form AD-2102 to FSA. Form AD-2102 and instruction are available from <http://forms.sc.egov.usda.gov/eForms/welcomeAction.do?Home> or by contacting the FSA Administrator.

Section 789.22, "Examples of Assistance," lists various uses for special priorities assistance, specifically:

- Difficulty in obtaining delivery against a rated order by the required delivery date;
- Cannot locate a supplier for an item or service needed to fill a rated order;
- Ensuring that rated orders receive preferential treatment by suppliers;
- Resolving production or delivery conflicts between various rated orders;
- Assisting in placing rated orders with suppliers;
- Verifying the urgency of rated orders; and

- Determining the validity of rated orders.

Section 789.23, "Criteria for Assistance," states that a request for special priorities assistance must establish that there is an urgent procurement need and that the applicant has made a reasonable effort to resolve the problem for which assistance is needed.

Section 789.24, "Instances Where Assistance May Not be Provided," states that special priorities assistance is provided at the discretion of USDA or a delegate agency and lists examples of when assistance may not be provided. Assistance must not be provided in situations in which a person is attempting to:

- Secure a price advantage;
- Obtain delivery prior to the time required to fill a rated order;
- Gain competitive advantage;
- Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or
- Overcome a supplier's regularly established terms of sale or conditions of doing business.

Allocation Actions

Section, 789.30, "Policy," states the policy of the Federal Government regarding use of the allocations authority, based on statutory language in DPA section 101 and its legislative history. USDA is only authorized to use the allocations authority when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities. The allocations authority may not be used to ration materials or services at the retail level. Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

Legislative history indicates that Congress was concerned that national defense requirements, during times of emergency, could consume much of the output of key industrial sectors and selected producers within some sectors. The allocations authority was viewed as a means to ensure an equitable distribution of national defense demand among potential suppliers to avoid disproportionate impacts on each supplier's share of the civilian market.

Congress prohibits the use of the allocation authority to ration at the retail level.

If it is determined that meeting defense needs could only be satisfied by a significant dislocation of consumer goods for household or personal use, use of the allocation authority first requires the DPA section 101(b) findings by the President. DPA section 101(b) states that the priorities and allocations authority will not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

Section 789.31, "General Procedures," states that USDA will develop a plan when planning to execute the allocations authority to address a supply problem within the USDA resource jurisdiction. The information that USDA will include in the plan is specified in § 789.31.

Section 789.32, "Precedence over Priority Rated Order," states that all allocation orders take precedence over unrelated rated orders or prioritization directives (see § 789.42 for a description of directives).

Section 789.33, "Controlling the General Distribution of a Material in the Civilian Market," provides procedures for the findings required by DPA section 101(b) and section 201(d) of Executive Order 12919. DPA section 101(b) requires Presidential findings. (See description of findings above in § 789.30.) Section 201(d) directs heads of resource agencies to make the findings required under DPA section 101(b) and to submit the findings for the President's approval through the Assistant to the President for National Security Affairs.

Section 789.34, "Types of Allocation Orders," identifies the three types of allocations orders: (1) Set-asides; (2) directives; and (3) allotments.

Section 789.35, "Elements of an Allocation Order," describes the elements of an allocation order. These elements are: (1) A detailed description of the required allocation action(s); (2) specific start and end calendar dates for each required allocation action; (3) the signature of the Secretary of Agriculture, certifying that the order is authorized under the APAS regulation and that the requirements are being followed; (4) a statement that the order is certified for

national defense use and that recipients are required to comply with the order; and (5) a copy of 7 CFR part 789.

Section 789.36, "Mandatory Acceptance of an Allocation Order," states that persons must: (1) Accept and comply with allocation orders; and (2) not discriminate against an allocation order in any manner (such as by charging higher prices). Persons are required to notify USDA immediately if unable to comply with an allocation order.

Section 789.37, "Changes or Cancellations of an Allocation Order," states that USDA may change or cancel the order by an official action.

Official Actions

The provisions in §§ 789.40 through 789.43 (subpart F) are in general continued from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FPAS as described in this section.

Section 789.40, "General Provisions," states that USDA may take specific official actions to implement the provisions of the APAS regulation and that the official actions may take the form of Rating Authorizations, Directives, and Letters of Understanding which are covered in the remaining sections of the subpart. Each is addressed below in this section.

Section 789.41, "Rating Authorizations," states that a rating authorization is an official action that grants specific priority-rating authority. A rating authorization permits a person to place a priority rating on an order for an item or service not normally ratable under APAS, or authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

Section 789.42, "Directives," specifies the order of preference for directives and rated orders. Specifically, a directive is an official action and a person must comply with a directive. In addition, § 789.42 specifies: (1) A priorities directive takes precedence over rated orders; and (2) an allocations directive takes precedence over a priorities directive.

Section 789.43, "Letters of Understanding," specifies that a letter of understanding is used to confirm production or shipping schedules that do not require modifications to other rated orders. A letter of understanding may not be used to alter scheduling between rated orders, authorize the use of priority ratings, impose restrictions under the APAS regulation, or take other official actions. A letter of understanding is an official action that

may be issued to reflect an agreement resolving a request for special priorities assistance.

Compliance

The provisions in §§ 789.50 through 789.55 (subpart G) are in general continued from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FPAS as described in this section.

Section 789.50, "General Provisions," states that: (1) USDA may take specific official actions to enforce or administer DPA, the APAS regulation, or an official action; (2) a person who places or receives a rated order or an allocations order must comply with the provisions of the APAS regulation; and (3) willful violation of Title I and section 705 of DPA, other related statutes, 7 CFR part 789, or an official action is a punishable criminal act.

Section 789.51, "Audits and Investigations," provides procedures for conducting audits and investigations to ensure that the provisions of DPA and other related statutes, the APAS regulation, and official actions have been properly followed.

Section 789.52, "Compulsory Process," specifies that a representative of USDA may seek compulsory process if a person refuses to permit a duly authorized representative of USDA to have access to any premises or source of information necessary to the administration or the enforcement of DPA and other applicable statutes, the APAS regulation, or an APAS official action.

Section 789.53, "Notification of Failure to Comply," states that USDA may inform a person in writing if USDA determines that the requirements of DPA and other related statutes, the APAS regulation, or an APAS official action were not complied with.

Section 789.54, "Violations, Penalties, and Remedies," describes penalties and related actions by the Federal Government for violations of the provisions of DPA, this APAS regulation, or an APAS official action.

Section 789.55, "Compliance Conflicts," states that a person must notify USDA immediately, if compliance with any provision of DPA and other applicable statutes, the APAS regulation, or an APAS official action would prevent a person from filling a rated order or from complying with another provision of the DPA and other related statutes, the APAS regulation, or an official action.

Adjustments, Exceptions, and Appeals

The provisions in §§ 789.60 through 789.61 (subpart H) are in general continued from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FPAS as described in this section.

Section 789.60, "Adjustments or Exceptions," provides procedures for a person to request an adjustment or exception to a provision of the APAS regulation or an official action. The request for adjustment or exception must be submitted to the Deputy Administrator for Management of USDA's Farm Service Agency. Decisions of the Deputy Administrator for Management may be appealed to the Administrator of the Farm Service Agency as specified in section 789.61.

Section 789.61, "Appeals," provides procedures for a person to appeal the denial of a request for an adjustment or exception to a provision of the APAS regulation or an APAS official action. In addition to current DPAS procedures, § 789.61 also includes an expedited procedure for dealing with a request involving a rated order placed for the purpose of emergency preparedness. Any person whose request for adjustment or exception has been denied by the FSA Deputy Administrator for Management as specified in § 789.60, may appeal to the FSA Administrator who will review and reconsider the denial. The person must submit their appeal in writing to the FSA Administrator. For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness, the appeal must be received by the FSA Administrator no later than 15 days after receipt of the written notice of denial; other appeals must be received no later than 45 days after receipt of a written notice of denial. To be accepted, the appeal must show good cause. The appeal must contain a complete statement of all the facts and circumstances related to the appealed action from and a full and precise statement of the reasons the decision should be modified or reversed. An appellant may also request, in writing, an opportunity for an informal hearing. The FSA Administrator may grant or deny the request for an informal hearing. When a hearing is granted, if the hearing officer decides that a printed transcript is necessary, the transcript expenses must be paid by the appellant. When determining an appeal, the FSA Administrator may consider all information submitted during the

appeal as well as any recommendations, reports, or other relevant information and documents available to USDA, or consult with any other person or group. The FSA Administrator will decide on the appeal within 5 days after receipt of the appeal, or within 1 day for appeals pertaining to emergency preparedness, and that decision will be the final administrative action. The Administrator will issue a written statement of the reasons for the decision to the appellant. Contract performance under the order may not be stayed pending resolution of the appeal. An appeal will not relieve any person from the obligation of complying with the provision of APAS or official action in question while the appeal is being considered unless such relief is granted in writing by the FSA Administrator.

Miscellaneous Provisions

The provisions in §§ 789.70 through 789.73 (subpart I) are in general from DPAS provisions to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and uniform FPAS as described in this section.

Section 789.70, "Protection Against Claims," states that a person will not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the APAS regulation, or an official action, notwithstanding that such provision or action may subsequently be declared invalid by judicial or other competent authority.

Section 789.71, "Records and Reports," requires that records regarding any transaction covered in the APAS regulation or an official action must be maintained for at least 3 years.

Section 789.72, "Applicability of this Part and Official Actions," states that the APAS regulation and all official actions, unless specifically stated otherwise, apply to transactions in any State, territory, or possession of the United States and the District of Columbia. Section 789.72 also provides that the APAS regulation and all official actions apply not only to deliveries to other persons but also to affiliates and subsidiaries of a person. In addition, § 789.72 specifies that APAS does not affect any administrative actions taken by USDA, or outstanding contracts or orders placed pursuant to any regulations, orders, schedules, or delegations of authority previously issued by USDA pursuant to its delegated authority under DPA.

Section 789.73 "Communications," explains that all communications concerning the APAS regulation,

including requests for copies of the regulation and explanatory information, requests for guidance or clarification, requests for adjustment or exception, and appeals of denials of requests are to be sent to the FSA Administrator and provides the mailing address and the e-mail address.

Executive Order 12866

The Office of Management and Budget (OMB) designated this rule as significant under Executive Order 12866, "Regulatory Planning and Review," and has reviewed this rule. A summary of the cost benefit analysis is provided below and is available from the contact information listed above.

Summary of Cost Benefit Analysis

DPAR requires the head of each Federal agency to which the President delegates authority to prioritize contracts and orders to meet the needs of national defense. In Executive Order 12919 the President delegated DPA authorities with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer to the Secretary of Agriculture. Under previous implementation of DPA, the Secretary of Agriculture delegated certain implementation authority to DOC. For current implementation of DPA, the Secretary of Agriculture has retained implementation authority and has assigned FSA as lead agency. To implement DPA, FSA is proposing the APAS regulation, which is modeled after DPAS.

Food is essential to national defense including civil emergency response. APAS is designed to use the DPA authority to help ensure that food is available when and where it is needed most, such as after a hurricane or earthquake. The authority under DPA extends beyond emergency conditions to also cover nonemergency conditions. Under DPA, USDA may develop plans and programs to expedite and expand the supply of critical resources from the private sector for the production, processing, storage, and distribution of agricultural commodities to promote national defense and to prevent civilian hardship in the food marketplace. In addition, DPA enables USDA to more effectively support domestic emergency preparedness, response, and recovery activities, critical infrastructure protection and restoration, and homeland security activities.

The impact of APAS on private companies receiving priority orders is expected to vary. In most cases, there is likely to be no economic impact in filling priority orders because it would

generally just be changing the timing in which orders are completed.

APAS is expected to primarily be used for prioritizing contracts and to a much lesser extent for making allocations. USDA does not expect any program outlays for APAS for prioritizing contracts and potentially making allocations. USDA will likely incur administrative expenses associated with assessing priorities and allocations requests and providing oversight for approved requests. The administrative expenses are expected to be marginal as APAS will presumably be administered using existing USDA personnel.

APAS is expected to have an overall positive impact on the U.S. public and industry by maintaining and restoring the production, processing, storage, and distribution of agricultural commodities during times of both emergency and nonemergency conditions to promote national defense and to prevent civilian hardship in the food marketplace. While USDA has not yet administered APAS under DPA authority, the continued use of DPAS by the Department of Defense proves the utility of a priorities and allocations system.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. FSA has determined that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities for the reasons explained below. Consequently, FSA has not prepared a regulatory flexibility analysis.

Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of \$33.5 million and a maximum of 1,500 employees (for some business categories, these numbers are lower). Due to the scope of this rule and for consistency with DPAS and other

FPAS regulations, these general size standards were used for this analysis. The range of small business size standards varies. For example, SBA classifies a small business for Food Manufacturing as one that has a maximum annual revenue of \$750,000 and for Crop or Animal Production a maximum of 500 employees. Due to the wide variety of businesses that could be involved in APAS, and that the potential impacts are expected to be minor, the more narrow categories were not used for this analysis. A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

This rule sets criteria under which USDA (or agencies to which USDA delegates authority) will authorize prioritization of certain orders or contracts as well as criteria under which USDA would issue orders allocating resources or production facilities. Because the rule affects commercial transactions, USDA believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. However, FSA has no basis on which to estimate the number of small businesses that are likely to be affected by this rule.

FSA believes that any impact that this rule might have on small businesses would be minor. The rule has two principle components: prioritization and allocation. Prioritization is the process that is, by far, more likely to be used. Under prioritization, USDA designates certain orders, which may be placed by Government or by private entities, and assigned under one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order. The recipient of a rated order with the higher priority rating must give that order priority over any rated orders with the lower priority rating and over unrated orders as necessary to meet the delivery requirements of each rated order. A recipient of a rated order may place two or more orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms

of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions or inactions made in compliance with the rule.

Although rated orders could require a firm to fill one order prior to filling another, they would not require a reduction in the total volume of orders nor would they require the recipient to reduce prices or provide rated orders with more favorable terms than a similar non-rated order. Under these circumstances, the economic effects on the rated order recipient of substituting one order for another are likely to be mutually offsetting, resulting in no net loss.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocation actions that FSA might take are set-asides, allocations directives, and allotments. Any allocations actions would be used only in extraordinary circumstances. As required by section 101(b) of DPA (50 U.S.C. App. 2071) and by Section 201(d) of Executive Order 12919, as amended, allocations may be implemented only if the Secretary of Agriculture made, and the President approved, a finding:

(1) That the material [or service] is a scarce and critical material [or service] essential to the national defense, and (2) that the requirements of the national defense for such material [or service] cannot otherwise be met without creating a significant dislocation of the normal distribution of such material [or service] in the civilian market to such a degree as to create appreciable hardship.

Any allocation actions would also have to comply with Section 701(e) of DPA (50 U.S.C. app. 2151(e)), which provides that small business concerns be accorded, to the extent practicable, a fair share of the material, including services, in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to emerging business concerns.

Although FSA cannot determine precisely the number of small entities that would be affected by this rule, FSA believes that the overall impact on such entities would not be significant. In most instances, rated contracts would be in addition to other (unrated) contracts and not reduce the total amount of business of the firm that receives a rated contract.

Because allocations can be imposed only after a determination by the President, and the fact that there have been no allocations actions under DPA authority in more than 50 years, allocations are expected to be a rare

occurrence. Therefore, estimating the impact of an allocation, should one occur, is difficult. However, FSA believes that the requirement for a Presidential determination and the provisions of section 701 of the DPA provide reasonable assurance that any impact on small business will not be significant.

Therefore, for the reasons set forth above, FSA certifies that this action would not have a significant impact on a substantial number of small entities.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The provisions of this rule are specifically related to acquisition and are considered solely administrative in nature. Therefore, FSA has determined that NEPA does not apply to this proposed rule and no environmental assessment or environmental impact statement will be prepared.

Executive Order 12372

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This rule neither provides Federal financial assistance or direct Federal development; it does not provide either grants or cooperative agreements. Therefore, this program is not subject to Executive Order 12372.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” This rule would not preempt State and or local laws, and regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought concerning the provisions of this rule, appeal provisions of 7 CFR parts 11 and 780 would need to be exhausted. This proposed rule would not preempt a State or Tribal government law, including any State or Tribal government liability law.

Executive Order 13132

This proposed rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This proposed rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The policies contained in this rule do not have Tribal implications that preempt Tribal law. FSA continues to consult with Tribal officials to have a meaningful consultation and collaboration on the development and strengthening of FSA regulations.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or Tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, FSA is seeking comments on Request for Special Priorities Assistance information collection activities for APAS. The information collection established by the regulation is necessary for the program applicant (person) to request prioritizing of a contract above all other contracts. Data required will include: name, location, contact information, items for which the applicant is requesting assistance on, quantity, and

delivery date. The estimated time for a person to complete and submit a request for a priority rating on a contract is 30 minutes. The intent of the priority rating is to obtain item(s) in support of national defense programs that they are not able to obtain in time through normal market channels.

Title: Request for Special Priorities Assistance for APAS.

OMB Control Number: 0560–New.

Type of Request: New Collection.

Abstract: APAS would efficiently place priority ratings on contracts or orders of agriculture commodities up through the wholesale levels, agriculture production equipment, allocate resources, and handle food claims within its authority as specified in the Defense Production Act (DPA) of 1950, as amended, when necessary. It was determined that food is a scarce and critical commodity essential to the national defense (including civil emergency preparedness and response). Unless its production, processing, storage, and wholesale distribution are regulated during times of emergencies, the national defense requirement for food and food production may not be met without creating hardship in the civilian marketplace. Applicants (Government agencies or private individuals with a role in emergency preparedness, response, and recovery functions) will request authorization from USDA to place a rating on a contract for items to support national defense activities. Priority rating request procedures and forms can be found on USDA’s Web site. Applicants must supply, at time of request, their name, location, contact information, items for which the applicant is requesting assistance on, quantity, and delivery date. Applicants can submit the request by mail or fax.

Estimated of Burden: Public reporting for this collection of information is estimated to average 30 minutes per response.

Type of Respondents: Individuals, businesses, and Agencies with responsibilities for emergency preparedness and response.

Estimated Number of Respondents: 100.

Estimated Number of Responses per Respondents: 0.95.

Estimated Total Number of Respondents: 95.

Estimate Total Annual Burden Hours on Respondents: 50 hours.

We are requesting comments on all aspects of this information collection to help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA,

including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

E-Government Act Compliance

FSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government Information and services, and for other purposes.

List of Subjects in 7 CFR Part 789

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, FSA proposes to add 7 CFR part 789 as follows:

PART 789—AGRICULTURE PRIORITIES AND ALLOCATIONS SYSTEM (APAS)

Subpart A—General

Sec.

- 789.1 Purpose.
789.2 Priorities and allocations authority.
789.3 Program eligibility.

Subpart B—Definitions

- 789.8 Definitions.

Subpart C—Placement of Rated Orders

- 789.10 Delegation of authority.
789.11 Priority ratings.
789.12 Elements of a rated order.
789.13 Acceptance and rejection of rated orders.
789.14 Preferential scheduling.
789.15 Extension of priority ratings.
789.16 Changes or cancellations of priority ratings and rated orders.
789.17 Use of rated orders.
789.18 Limitations on placing rated orders.

Subpart D—Special Priorities Assistance

- 789.20 General provisions.

- 789.21 Requests for priority rating authority.
789.22 Examples of assistance.
789.23 Criteria for assistance.
789.24 Instances where assistance must not be provided.

Subpart E—Allocation Actions

- 789.30 Policy.
789.31 General procedures.
789.32 Precedence over priority rated orders.
789.33 Controlling the general distribution of a material in the civilian market.
789.34 Types of allocation orders.
789.35 Elements of an allocation order.
789.36 Mandatory acceptance of allocation orders.
789.37 Changes or cancellations of allocation orders.

Subpart F—Official Actions

- 789.40 General provisions.
789.41 Rating authorizations.
789.42 Directives.
789.43 Letters of understanding.

Subpart G—Compliance

- 789.50 General provisions.
789.51 Audits and investigations.
789.52 Compulsory process.
789.53 Notification of failure to comply.
789.54 Violations, penalties, and remedies.
789.55 Compliance conflicts.

Subpart H—Adjustments, Exceptions, and Appeals

- 789.60 Adjustments or exceptions.
789.61 Appeals.

Subpart I—Miscellaneous Provisions

- 789.70 Protection against claims.
789.71 Records and reports.
789.72 Applicability of this part and official actions.
789.73 Communications.
Schedule I to Part 789—Approved Programs and Delegate Agencies

Authority: 50 U.S.C. App. 2061–2170, 2171, and 2172; 42 U.S.C. 5195–5197h.

Subpart A—General

§ 789.1 Purpose.

This part provides guidance and procedures for use of the Defense Production Act priorities and allocations authority by the United States Department of Agriculture (USDA) with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer in this part. (The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations that, as a whole, form the Federal Priorities and Allocations System. Guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to other types of resources are provided for: All forms of energy refer to the Department of Energy; all forms

of civil transportation refer to the Department of Transportation; for water resources refer to the Department of Defense; and for health resources refer to Health and Human Services; all other materials, services, and facilities, including construction materials in the Defense Priorities and Allocations System (DPAS) regulation in 15 CFR part 700.)

§ 789.2 Priorities and allocations authority.

(a) Section 201 of Executive Order 12919 delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to the following agencies. Essentially, this allows the following agencies to place priority on the performance of contracts for items and materials under their jurisdiction as required for national defense initiatives including emergency preparedness activities.

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202 of Executive Order 12919 specifies that the priorities and allocations authority may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense by:

(1) The Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

(2) The Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or

(3) The Secretary of Homeland Security with respect to essential civilian needs supporting national

defense, including civil defense and continuity of government and directly related activities.

§ 789.3 Program eligibility.

Certain programs that promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to Title VI of the Stafford Act and critical infrastructure protection and restoration.

Subpart B—Definitions

§ 789.8 Definitions.

As used in this part:

Allocation means the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allocation order means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

Allotment means an official action that specifies the maximum quantity for a specific use of a material, service, or facility authorized to promote the national defense.

Applicant means the person applying for assistance under APAS. (See definition of “person.”)

Approved program means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, as specified in section 202 of Executive Order 12919.

Civil transportation includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and, without limitation, related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. However, civil transportation does not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly. As applied in this part, civil transportation includes direction, control, and

coordination of civil transportation capacity regardless of ownership.

Construction means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products that are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

Critical infrastructure means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

Defense Production Act means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 to 2170, 2171, and 2172).

Delegate Agency means a government agency authorized by delegation from USDA to place priority ratings on contracts or orders needed to support approved programs.

Directive means an official action that requires a person to take or refrain from taking certain actions in accordance with the provisions.

Emergency preparedness means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions that would be created by the hazard, and to make emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Emergency preparedness includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities

for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

Energy means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquefaction and coal gasification), and atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

Facilities includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

Farm equipment means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

Feed is a nutritionally adequate manufactured food for animals (livestock and poultry raised for agriculture production) other than man; and by specific formula is compounded to be fed as the sole ration and is capable of maintaining life and promoting production without any additional substance being consumed except water.

Fertilizer means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

Food resources means all commodities and products, simple, mixed, or compound, or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products suitable for sale for human or animal consumption. Food resources also means all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

Food resource facilities means plants, machinery, vehicles (including on-farm), and other facilities required for

the production, processing, distribution, and storage (including cold storage) of food resources, livestock and poultry feed and seed, and for the domestic distribution of farm equipment and fertilizer (excluding transportation for that distribution).

Hazard means an emergency or disaster resulting from a natural disaster; or an accidental or man-caused event.

Health resources means materials, facilities, health supplies, and equipment (including pharmaceutical, blood collecting and dispensing supplies, biological, surgical textiles, and emergency surgical instruments and supplies) required to prevent the impairment of, improve, or restore the physical and mental health conditions of the population.

Homeland security includes efforts—

- (1) To prevent terrorist attacks within the United States;
- (2) To reduce the vulnerability of the United States to terrorism;
- (3) To minimize damage from a terrorist attack in the United States; and
- (4) To recover from a terrorist attack in the United States.

Industrial resources means all materials, services, and facilities, including construction materials, but not including: Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources.

Item means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

Letter of understanding means an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (USDA, the Department of Commerce (if applicable), a delegate agency (if applicable), the supplier, and the customer).

Maintenance and repair and operating supplies or MRO—

(1) *Maintenance* is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) *Repair* is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) *Operating supplies* are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable

tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals, and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items that are still in working condition with items of a new or different kind, quality, or design.

Materials includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

National defense means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of the Stafford Act and critical infrastructure protection and restoration.

Official action means an action taken by USDA or another resource agency under the authority of the Defense Production Act, Executive Order 12919, or this part. Such actions also include the issuance of rating authorizations, directives, set-asides, allotments, letters of understanding, demands for information, inspection authorizations, and administrative subpoenas.

Person includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof, or any Federal agency.

Rated order means a prime contract, a subcontract, or a purchase order in support of an approved program issued as specified in the provisions of this part. Persons may request an order (contract) be rated in response to a need that is defined in this part. However, an order does not become rated until the request is approved by USDA. USDA will assign a rating priority for each rating request approved that designates the priority of that order over other orders that have similar order specifics.

Resource agency means any agency that is delegated priorities and allocations authority as specified in § 789.2.

Secretary means the Secretary of Agriculture.

Seed is used with its commonly understood meaning and includes all seed grown for and customarily sold to users for planting for the production of agriculture crops.

Services includes any effort that is needed for or incidental to—

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

Set-aside means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

Stafford Act means Title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197h).

Water resources means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements.

Subpart C—Placement of Rated Orders

§ 789.10 Delegations of authority.

(a) [Reserved].

(b) Within USDA, authority to administer APAS has been delegated to the Administrator, Farm Service Agency, through the Under Secretary for Farm and Foreign Agricultural Services. (See §§ 2.16(a)(6); 2.42(a)(5) of this title.) The Farm Service Agency Administrator will coordinate APAS implementation and administration through the Director, USDA Office of Homeland Security and Emergency Coordination, as delegated by the Assistant Secretary for Administration. (See §§ 2.24(a)(8)(ii)(A) and 2.24(a)(8)(v); 2.95(b)(1)(i) and 2.95(b)(4) of this title.)

§ 789.11 Priority ratings.

(a) *Levels of priority.* Priority levels designate differences between orders based on national defense including emergency preparedness requirements.

(1) There are two levels of priority established by APAS, identified by the rating symbols “DO” and “DX.”

(2) All DO-rated orders have equal priority with each other and take

precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 789.14(c).)

(3) In addition, a directive regarding priority treatment for a given item issued by the resource agency with priorities jurisdiction for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For more information on Directives, see § 789.42.)

(b) *Program identification symbols.* Program identification symbols indicate which approved program is being supported by a rated order. The list of currently approved programs and their identification symbols are listed in Schedule I. For example, P1 identifies a program involving food and food resources processing and storage. Program identification symbols, in themselves, do not connote any priority. Additional programs may be approved under the procedures of Executive Order 12919 at any time.

(c) *Priority ratings.* A priority rating consists of the rating symbol DO or DX followed by the program identification symbol, such as P1 or P2. Thus, a contract for the supply of livestock feed will contain a DO-P1 or DX-P1 priority rating.

§ 789.12 Elements of a rated order.

(a) Each rated order must include:

(1) The appropriate priority rating (for example, DO-P1 for food and food resources processing and storage);

(2) A required delivery date or dates. The words “immediately” or “as soon as possible” do not constitute a delivery date. Some purchase orders, such as a “requirements contract basic ordering agreement,” “prime vendor contract,” or similar procurement document, bearing a priority rating may contain no specific delivery date or dates if it provides for the furnishing of items or services from time-to-time or within a stated period against specific purchase orders, such as calls, requisitions, and delivery orders. Specific purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(3) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part

and that the requirements of this part are being followed; and

(4) A statement requirement must be placed on the order as follows:

(i) A statement that reads:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Agriculture Priorities and Allocations System regulation in 7 CFR part 789.

(ii) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement specified in paragraph (a)(4)(i) of this section:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within six (6) hours after receipt of the order if the order is issued in response to a hazard that has occurred; or within the greater of twelve (12) hours or the time specified in the order, if the order is issued to prepare for an imminent hazard, in accordance with 7 CFR 789.13(e).

(b) [Reserved]

§ 789.13 Acceptance and rejection of rated orders.

(a) *Mandatory acceptance.* A person must accept a rated order if the person normally supplies the materials or services covered by the order in accordance with the following requirements:

(1) Except as otherwise specified in this section, a person must accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person will not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by USDA for a rated order involving food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer:

(1) A person must not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection in this section.

(2) A person must not accept a DO-rated order for delivery on a date that would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer

to accept the order based on the earliest delivery date otherwise possible.

(3) A person must not accept a DX-rated order for delivery on a date that would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders that can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(5) A person must reject the rated order if the person is prohibited by Federal law from meeting the terms of the order.

(c) *Optional rejection.* Unless otherwise directed by USDA for a rated order involving food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for 2 years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past 2 years;

(4) If the person placing the rated order, other than the Federal Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of USDA, issued under the authority of the Defense Production Act or another relevant statute.

(d) *Customer notification requirements.* A person in receipt of a rated order is required to provide to the customer placing the order written or electronic notification of acceptance or rejection of the order.

(1) Except as provided in paragraph (e) of this section, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO rated order and within ten (10) working days after receipt of a DX rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days.

(e) *Exception for emergency preparedness conditions.* If the rated order is placed for the purpose of emergency preparedness and includes the additional statement as specified in § 789.12(a)(4)(ii), a person must accept or reject a rated order and send the acceptance or rejection in writing or in an electronic format:

(1) Within 6 hours after receipt of the order if the order is issued in response to a hazard that has occurred; or

(2) Within the greater of 12 hours or the time specified in the order, if the order is issued to prepare for an imminent hazard.

§ 789.14 Preferential scheduling.

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any

additional preference to the DX-rated order.)

(c) For conflicting rated orders:

(1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person must give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person must give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts as specified in this section, the person should promptly seek special priorities assistance as provided in §§ 789.20 through 789.24. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as specified in §§ 789.20 through 789.24. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 789.13(d)(2).

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 789.17(b).

§ 789.15 Extension of priority ratings.

(a) A person must use rated orders as necessary with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by USDA. For example, if a person is in receipt of a DX-P1 rated order for a food resource (milk) and needs to purchase packaging materials (milk cartons) from the packaging supplier, that person must use a DX-P1 rated order to obtain the needed packaging materials (milk cartons).

(b) The priority rating must be included as necessary on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

§ 789.16 Changes or cancellations of priority ratings and rated orders.

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of USDA; or
(2) Written notification from the person who placed the rated order or from a delegate agency with resource jurisdiction.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule constitutes a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 789.13.

(d) The following amendments do not constitute a new rated order:

(1) A change in shipping destination;
(2) A reduction in the total amount of the order;

(3) An increase in the total amount of the order that has a negligible impact upon deliveries;

(4) A minor variation in size or design; or

(5) A change that is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

§ 789.17 Use of rated orders.

(a) A person must use rated orders as necessary to obtain:

(1) Items that will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating must not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol P4 must be used (that is DO-P4).

(c) A person may combine DX—and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol P4 (that is DO-P4 or DX-P4).

(d) For combining rated and unrated orders:

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 789.12, are included on the order with the statement required in § 789.12(a)(4)(i) modified to read:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Agriculture Priorities and Allocations System regulation in 7 CFR part 789 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 789.13 and give preferential treatment only to the rated quantities as required by this part. This part must not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception as specified in § 789.60.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c), if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than \$75,000 or one-half of the Simplified Acquisition Threshold (as established in

the Federal Acquisition Regulation (FAR) (see 48 CFR 2.101) or in other authorized acquisition regulatory or management systems) whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

§ 789.18 Limitations on placing rated orders.

(a) *General limitations.* Rated orders may only be placed by persons with the proper authority for items and services that are needed to support approved programs and that are eligible for priority treatment.

(1) A person must not place a DO—or DX-rated order unless authorized by USDA or the appropriate delegate agency to do so under this part.

(2) Rated orders must not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders must not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by USDA (see § 789.21(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by USDA or as otherwise permitted by this part;

(v) Any of the following items unless specific priority rating authority has been obtained from USDA, a delegate agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment. For information on requesting priority rating authority, see § 789.21; or

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) *Jurisdictional limitations.* Unless authorized by the resource agency with jurisdiction (see § 789.10), the provisions of this part are not applicable to the following resources:

(1) All forms of energy, including radioisotopes, stable isotopes, source

material, and special nuclear material produced in Government-owned plants or facilities operated by or for the Department of Energy (Resource agency with jurisdiction—Department of Energy);

(2) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(3) All forms of civil transportation (Resource agency with jurisdiction—Department of Transportation);

(4) Water resources (Resource agency with jurisdiction—Department of Defense, U.S. Army Corps of Engineers); and

(5) All other materials, services, and facilities, including construction materials (Resource agency with jurisdiction—Department of Commerce).

Subpart D—Special Priorities Assistance

§ 789.20 General provisions.

(a) APAS is designed to be largely self-executing. However, if production or delivery problems arise, a person should immediately contact the Farm Service Agency Administrator for special priorities assistance pursuant to §§ 789.20 through 789.24 and as directed by § 789.73. If the Farm Service Agency is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, USDA may forward the request to another resource agency, as appropriate, for action. Special priorities assistance is a service provided to alleviate problems.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form AD-2102 (OMB Control Number 0560-XXX) to the Farm Service Agency as provided in paragraph (a) of this section. Form AD-2102 may be obtained from USDA by downloading the form and instruction from <http://forms.sc.egov.usda.gov/eForms/welcomeAction.do?Home> or by contacting the Administrator of Farm Service Agency as specified in § 789.73. Either mail or fax the form to USDA, using the address or fax number shown on the form.

§ 789.21 Requests for priority rating authority.

(a) *Rating authority for items or services not normally rated.* If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) *Rating authority for production or construction equipment.* For a rated order for production or construction equipment not under the resource jurisdiction of USDA, follow the regulations in 15 CFR part 700.

(1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on Form BIS-999. Form BIS-999 may be obtained from USDA as specified in § 789.20(c) or from the Department of Commerce as specified in 15 CFR 700.81.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) For rating authority in advance of a rated prime contract:

(1) In certain cases and upon specific request, USDA, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from USDA or the appropriate delegate agency. The person assumes any business risk associated with the placing of a rated order if the order has to be cancelled in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from USDA and our use of that priority rating with our suppliers in no way commits USDA or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government will not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, USDA will consider, among other things, the following criteria:

- (i) The probability that the prime contract will be awarded;
- (ii) The impact of the resulting rated orders on suppliers and on other authorized programs;
- (iii) Whether the contractor is the sole source;
- (iv) Whether the item being produced has a long lead time; and
- (v) The time period for which the rating is being requested.

(4) USDA may require periodic reports on the use of the rating authority granted through paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person will promptly notify each supplier who has received any rated order related to the advanced rating authority that the priority rating on the order is cancelled.

§ 789.22 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations in which:

- (1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or
- (2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

- (1) Ensuring that rated orders receive preferential treatment by suppliers;
- (2) Resolving production or delivery conflicts between various rated orders;
- (3) Assisting in placing rated orders with suppliers;
- (4) Verifying the urgency of rated orders; and
- (5) Determining the validity of rated orders.

§ 789.23 Criteria for assistance.

(a) Requests for special priorities assistance should be timely (for example, the request has been submitted promptly and enough time exists for USDA or the delegate agency to meaningfully resolve the problem), and must establish that:

- (1) There is an urgent need for the item; and
 - (2) The applicant has made a reasonable effort to resolve the problem.
- (b) [Reserved]

§ 789.24 Instances in which assistance must not be provided.

(a) Special priorities assistance is provided at the discretion of USDA or the delegate agency when it is

determined that such assistance is warranted to meet the objectives of this part. Examples in which assistance must not be provided include situations in which a person is attempting to:

- (1) Secure a price advantage;
- (2) Obtain delivery prior to the time required to fill a rated order;
- (3) Gain competitive advantage;
- (4) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or
- (5) Overcome a supplier's regularly established terms of sale or conditions of doing business.

(b) [Reserved]

Subpart E—Allocation Actions**§ 789.30 Policy.**

(a) It is the policy of the Federal Government that the allocations authority under Title I of the Defense Production Act may:

- (1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and
- (2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

§ 789.31 General procedures.

(a) When the Department of Agriculture plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department will develop a plan that includes the following information:

(1) A copy of the written determination made in accordance with section 202 of Executive Order 12919, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(2) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(3) A statement of the specific objective(s) of the allocation action;

(4) A list of the materials, services, or facilities to be allocated;

(5) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

(6) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (for example, anticipated start and end dates);

(7) An evaluation of the impact of the proposed allocation action on the civilian market; and

(8) Proposed actions, if any, to mitigate disruptions to civilian market operations.

(b) [Reserved]

§ 789.32 Precedence over priority rated orders.

If a conflict occurs between an allocation order and an unrelated rated order or prioritization directive, the allocation order takes precedence.

§ 789.33 Controlling the general distribution of a material in the civilian market.

(a) No allocation by USDA may be used to control the general distribution of a material in the civilian market, unless the Secretary has:

(1) Made a written finding that—

(i) Such material is a scarce and critical material essential to the national defense; and

(ii) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(2) Submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

(3) The President has approved the finding.

(b) [Reserved]

§ 789.34 Types of allocation orders.

(a) The three types of allocation orders that may be used for allocation actions are:

(1) Set-asides;

(2) Directives; and

(3) Allotments.

(b) [Reserved]

§ 789.35 Elements of an allocation order.

(a) Each allocation order will include:

(1) A detailed description of the required allocation action(s);

(2) Specific start and end calendar dates for each required allocation action;

(3) The Secretary's written signature on a manually placed order, or the

digital signature or name on an electronically placed order, of the Secretary. The signature or use of the name certifies that the order is authorized as specified in this part and that the requirements of this part are being followed;

(4) A statement that reads: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of 7 CFR part 789;" and

(5) A current copy of the APAS regulation (7 CFR part 789).

(b) [Reserved]

§ 789.36 Mandatory acceptance of allocation orders.

(a) A person must accept every allocation order received that the person is capable of fulfilling, and must comply with such orders regardless of any rated order, from any delegate agency, that the person may be in receipt of or other commitments involving the resource(s) covered by the allocation order.

(b) A person must not discriminate against an allocation order in any manner such as by charging higher prices for resources covered by the order or by imposing terms and conditions for contracts and orders involving allocated resources(s) that differ from the person's terms and conditions for contracts and orders for the resource(s) prior to receiving the allocation order.

(c) If circumstances prevent a person from being able to accept an allocation order, the person must comply with the provisions specified in § 789.60 upon realization of the inability to accept the order.

§ 789.37 Changes or cancellations of allocation orders.

An allocation order may be changed or canceled by an official action of USDA.

Subpart F—Official Actions

§ 789.40 General provisions.

(a) USDA may take specific official actions to implement the provisions of this part.

(b) Several of these official actions (rating authorizations, directives, and letters of understanding) are discussed in this subpart. Other official actions that pertain to compliance (administrative subpoenas, demands for information, and inspection authorizations) are discussed in § 789.51(c).

§ 789.41 Rating authorizations.

(a) A rating authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 789.21.

§ 789.42 Directives.

(a) A directive is an official action that requires a person to take or refrain from taking certain actions in accordance with the provisions of the directive.

(b) A person must comply with each directive issued. However, a person may not use or extend a directive to obtain any items from a supplier, unless expressly authorized to do so in the directive.

(c) A priorities directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

(d) An allocations directive takes precedence over all priorities directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

§ 789.43 Letters of understanding.

(a) A letter of understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (USDA, the Department of Commerce (if applicable), a delegate agency (if applicable), the supplier, and the customer).

(b) A letter of understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this part, or to take other official actions. Rather, letters of understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

Subpart G—Compliance

§ 789.50 General provisions.

(a) USDA may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or an official action. Such actions include administrative subpoenas, demands for information, and inspection authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of Title I or section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of USDA, is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as specified in § 789.54.

§ 789.51 Audits and investigations.

(a) Audits and investigations are official examinations of books, records, documents, other writings, and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit, investigation, or other inquiry, USDA will:

(1) *Scope and purpose.* Define the scope and purpose in the official action given to the person under investigation; and

(2) *Information not available.* Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, USDA may issue the following documents that constitute official actions:

(1) *Administrative subpoenas.* An administrative subpoena requires a person to appear as a witness before an official designated by USDA to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An administrative subpoena may also require the production of books, papers, records, documents, and physical objects or property.

(2) *Demands for information.* A demand for information requires a person to furnish to a duly authorized representative of USDA any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) *Inspection authorizations.* An inspection authorization requires a person to permit a duly authorized representative of USDA to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including

electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and other related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the administrative subpoena or demand for information, a duly authorized official of USDA is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of USDA as to the content of the material.

(e) An administrative subpoena, demand for information, or inspection authorization will include the name, title, or official position of the person to be served, the evidence sought, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the administrative subpoena, demand for information, or inspection authorization will describe the requirements.

(f) Service of documents will be made in the following manner:

(1) *In person.* Service of a demand for information or inspection authorization will be made personally, or by certified mail-return receipt requested at the person's last known address. Service of an administrative subpoena will be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) *Other than to the named individual.* Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document will be mailed to the person named in the document.

(3) *Delivering individual and documentation.* Any individual 18 years of age or over may serve an administrative subpoena, demand for information, or inspection authorization. When personal service is made, the individual making the service must prepare an affidavit specifying the

manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure will be stated on the original document.

§ 789.52 Compulsory process.

(a) If a person refuses to permit a duly authorized representative of USDA to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, this part, or official actions, the USDA representative may seek compulsory process. Compulsory process is the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of USDA, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist that make such process desirable or necessary.

§ 789.53 Notification of failure to comply.

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, USDA may inform the person in writing when compliance with the requirements of the Defense Production Act and other applicable statutes, this part, or an official action was not met.

(b) In cases in which USDA determines that failure to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable statutes, this part, or an official action.

§ 789.54 Violations, penalties, and remedies.

(a) Willful violation of the Defense Production Act, the priorities provisions of the Military Selective Service Act (50 U.S.C. App. 468), this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the Defense Production Act is a \$10,000 fine, or 1 year in prison, or both. The maximum penalty provided by the

Military Selective Service Act is a \$50,000 fine, or 3 years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence, or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(3) No person will deliver any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify USDA that, in accordance with this provision, delivery has not been made.

§ 789.55 Compliance conflicts.

If compliance with any provision of the Defense Production Act and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable statutes, this part, or an official action, the person must immediately notify USDA for resolution of the conflict.

Subpart H—Adjustments, Exceptions, and Appeals

§ 789.60 Adjustments or exceptions.

(a) A person may submit a request to the Farm Service Agency Deputy Administrator for Management, as directed in § 789.73, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action is contrary to the intent of the Defense Production Act and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception will not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Farm Service Agency Deputy Administrator for Management.

(d) A decision of the Farm Service Agency Deputy Administrator for Management under this section may be appealed to the Farm Service Agency Administrator. (For information on the appeal procedure, see § 789.61.)

§ 789.61 Appeals.

(a) Any person whose request for adjustment or exception has been denied by the Farm Service Agency Deputy Administrator for Management as specified in § 789.60, may appeal to the Farm Service Agency Administrator who will review and reconsider the denial.

(b) A person must submit their appeal in writing to the Farm Service Agency Administrator as follows:

(1) Except as provided in paragraph (b)(2) of this section, an appeal must be received by the Farm Service Agency Administrator no later than 45 days after receipt of a written notice of denial from the Farm Service Agency Deputy Administrator for Management. After the 45-day period, an appeal may be accepted at the discretion of the Farm Service Agency Administrator if the person shows good cause.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness (see § 789.13(e)), an appeal must be received by the Farm Service Agency Administrator no later than 15 days after receipt of a written notice of denial from the Farm Service Agency Deputy Administrator for Management.

(c) Contract performance under the order may not be stayed pending resolution of the appeal.

(d) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the appealed action from and a full and precise statement of the reasons the decision should be modified or reversed.

(e) In addition to the written materials submitted in support of an appeal, an

appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Farm Service Agency Administrator.

(f) When a hearing is granted, the Farm Service Agency Administrator may designate an employee of the Farm Service Agency to conduct the hearing and to prepare a report. The hearing officer will determine all procedural questions and impose such time or other limitations deemed reasonable. If the hearing officer decides that a printed transcript is necessary, the transcript expenses must be paid by the appellant.

(g) When determining an appeal, the Farm Service Agency Administrator may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to USDA, or consult with any other person or group.

(h) The submission of an appeal under this section will not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Farm Service Agency Administrator.

(i) The decision of the Farm Service Agency Administrator will be made within 5 days after receipt of the appeal, or within 1 day for appeals pertaining to emergency preparedness, and will be the final administrative action. The Administrator will issue a written statement of the reasons for the decision to the appellant.

Subpart I—Miscellaneous Provisions

§ 789.70 Protection against claims.

A person will not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, even if such provision or action is subsequently declared invalid by judicial or other competent authority.

§ 789.71 Records and reports.

(a) Persons are required to make and preserve for at least 3 years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for

examination on demand by duly authorized representatives of USDA as provided in § 789.51.

(d) In addition, persons must develop, maintain, and submit any other records and reports to USDA that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by Executive Order 12919, provides that information obtained under that section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, will not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to USDA in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and will be handled in accordance with applicable Federal law.

§ 789.72 Applicability of this part and official actions.

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any State, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules will not be construed to affect any administrative actions taken by USDA, or any outstanding contracts or orders placed based on any of the regulations, orders, schedules, or delegations of authority previously issued by USDA based on authority granted to the President in the Defense Production Act. Such actions, contracts, or orders will continue in full force and effect under this part unless modified or terminated by proper authority.

§ 789.73 Communications.

Except as otherwise provided, all communications concerning this part, including requests for copies of this part and explanatory information, requests for guidance or clarification, and submission of appeals as specified in § 789.61 will be addressed to the Administrator, Farm Service Agency, Room 4752, Mail Stop 0512, USDA, 1400 Independence Ave., SW., Washington, DC 20250-0512 or e-mail: *FSA.EPD@wdc.usda.gov*. This address is also to be used for requests for adjustments or exceptions to the Farm Service Agency Deputy Administrator for Management as specified in § 789.60.

SCHEDULE I TO PART 789—APPROVED PROGRAMS AND DELEGATE AGENCIES

The programs listed in this schedule have been approved for priorities and allocation support under this part. They have equal preferential status. USDA has authorized the Delegate Agencies to use this part in support of those programs assigned to them, as indicated below.

Program identification symbol	Approved program	Authorized agency
Agriculture programs:		
P1	Food and food resources (civilian)	USDA.
P2	Agriculture and food critical infrastructure protection and restoration	USDA.
P3	Food resources (combat rations)	Department of Defense. ¹
P4	Certain combined orders (see 789.17)	USDA.

¹ Department of Defense includes: The Office of the Secretary of Defense, the Military Departments, the Joint Staff, the Combatant Commands, the Defense Agencies, the Defense Field Activities, all other organizational entities in the Department of Defense, and for purpose of this part, the Central Intelligence Agency, and the National Aeronautics and Space Administration as Associated Agencies.

Signed: May 12, 2011.

Bruce Nelson,

Acting Administrator, Farm Service Agency.

[FR Doc. 2011-12153 Filed 5-18-11; 8:45 am]

BILLING CODE 3410-05-P